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The Political Economy of International Sales Law

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods, or CISG, purports to harmonize the law that applies to international sales contracts. In this paper, we argue that the effort to create uniform international sales law (ISL) fails to supply contracting parties with the default terms they prefer, thus violating the normative criterion that justifies the law-making process for commercial actors in the first instance. Our argument rests on three claims. First, we contend that the process by which uniform ISL is drafted will dictate the form that many provisions take. Second, we contend that the legal form dictated by the drafting process has significant substantive consequences, particularly for the policy objectives of uniform ISL. Third, we predict that in order to achieve uniform ISL that is widely adopted, those involved in the drafting process will systematically promulgate many vague standards that contracting parties would not choose for themselves. These defaults cannot be justified as the inevitable cost of achieving an optimal level of uniformity. If the products of a uniform ISL are default terms that parties do not want, then the underlying justification for the law-making function – reduction of contracting costs – vanishes.

We find significant correspondence between our predictions about the drafting of uniform international sales law and the CISG. The CISG was drafted by parties whose objectives did not necessarily coincide with those of the commercial actors whose conduct the treaty was intended to regulate. The result is a variety of vague standards and compromises that appear inconsistent with commercial interests. We conclude by suggesting that commercial actors involved in international sales would prefer to choose governing law from among legal regimes that compete to supply parties with more desirable substantive terms.
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The dramatic growth of international trade has generated corresponding calls for an increase in uniform sales law to govern these transactions.[1] The implicit assumption underlying these efforts is that the lack of uniformity will increase the costs of writing contracts for parties to international sales transactions. They will have to bargain over the legal regime (and the default terms) that will govern their transaction, and the regime that is ultimately selected will be relatively unfamiliar to at least one of them. Uniform international sales law (ISL) purports to cure this situation by creating a legal regime with which commercial parties in different jurisdictions will be familiar and will accept without significant additional negotiation.

Our particular focus in this article is the United Nations Convention on Contracts for the International Sale of Goods (CISG), the primary treaty that governs the international exchange of goods by contract. To the extent that adoption is a measure of success, the CISG has become the most successful of efforts to create uniform commercial law. As of this writing, the CISG has been adopted by 65 states. They include most of the major trading nations, although the United Kingdom and Japan are not parties.

In theory, a uniform sales law confers significant benefits on parties, at least to the extent that it embodies in its default rules the solutions to contracting problems that parties would otherwise choose. This claim follows from the fact that all sales contracts are inevitably incomplete. Contracting costs are finite while states of the world (and possibly partners) are infinite. As a consequence, sales contracts contain gaps. Either they fail to address a particular contingency or they provide the same obligations for contingencies that the parties would prefer to treat differently. Sales law rules are intended to fill many of those gaps; each rule becomes a default term in the contracts that the rule regulates. Sales law default rules thus are public goods.[2] To serve this function appropriately, however, the default must specify the contract term that the broadest number of affected parties would choose for themselves. Otherwise, the process of creating sales law defaults would generate unnecessary costs. The public would bear the law creation costs of drafting defaults that few parties would choose, and the individual parties to sales transactions would incur the additional costs of opting out of the disfavored defaults. This suggests a normative criterion by which to evaluate the substantive terms of any uniform ISL: The default terms in an ISL will be socially optimal precisely and only because they do for the parties what the parties cannot as easily do for themselves.

In this article, we argue that the effort to create uniform ISL has predictably failed to supply contracting parties with the default terms they prefer, thus violating the normative criterion that justifies the law-making process in the first instance. Our argument rests on three claims. First, we contend that the process by which uniform law is drafted will dictate the form that many provisions take. Second, we contend that the legal form dictated by the drafting process has significant substantive consequences, particularly for the policy

[1] See, e.g. Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L. J. 265, 266–67 (1984).

[2] For an explanation and justification of the public goods justification for contract law, see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Intereractions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 276, 278 (1985).

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