APOLOGIA FOR A FOOTNOTE

Shael Herman*

I trust that I may open this essay in memory of Ferd Stone on an autobiographical note. From our late teacher and colleague I learned an important lesson: Do not despair over your differences either with others or from them, or become embarrassed over the seeming oddness of your legal culture. In Ferd's view, the discovery of differences was a challenge to be welcomed cheerfully for the sheer intellectual stimulation inherent in the exercise. Differences were to be celebrated, not suppressed.

Ferd, by virtue of his training in the United States and at Oxford, was chronologically an Anglo-American lawyer before he was a civilian. His formal training had equipped him admirably for his long and distinguished career at Tulane Law School. He did not care that Louisiana law was the obligatory footnote in every United States hornbook on torts and contracts; no embarrassment lay in the fact that any recital of a generally accepted legal proposition was routinely accompanied by a footnote that qualified the rule with a locution such as "Except in Louisiana", or in a more scholarly vein, "Louisiana, as the only civil law jurisdiction in the United States, has not adopted this rule." Little did we know that our brethren in other states would soon replace these gentle barbs with a much less scholarly, even Philistine attack: "What the hell goes on in your state anyway? When are you going to join the Union?" Never mind. Ferd's motto was "vive la difference." Embrace your legal bilingualism and celebrate your ambiguity. Do not apologize for these gifts or regret them. Do not look back.

So much for the theme of the footnote in my title. Why an "apologia"? Here "apologia" is used in the classical literary sense intended by the English cleric, John Cardinal Newman, in his autobiographical defense, *Apologia Pro Vita Sua*.[1] In the spirit of Newman's work, this tribute to Ferd Stone is intended as a reasoned account of ourselves in the comparative enterprise that Ferd Stone nurtured, not an excuse for prodigality or errant ways. Inevitably every account has its proverbial bottom line. The bottom line of this *apologia* is that code readers, comparative lawyers, and lovers of

---

* Professor, Tulane Law School. Grateful acknowledgment for his helpful comments on an earlier draft is made to Dr. Bernhard Schloh, Professor of the Free University of Brussels and Legal Adviser to the Council of the European Communities.

1. JOHN HENRY NEWMAN, APOLOGIA PRO VITA SUA (1864).

Roman legal culture alike will soon reap the benefits of their investment of intellectual energy in the civilian enterprise.

To support this claim, I have marshalled evidence from current developments in transnational commercial law. Exploring those developments, however, calls for a glance backward at the commercial law we have already learned. As students, first we studied contracts, then the Uniform Sales Act and even the English Sale of Goods Act. Later we explored the mysteries of the Uniform Commercial Code, the Carriage of Goods by Sea Act, and, of course, the Louisiana Civil Code. A virtue of the first five subjects was that at least they were in English. By contrast, the beloved Civil Code always had an exotic way of coining a phrase. The Civil Code substituted "conventions" for "contracts"; it urged a seller who had sold an "immovable" (n.b.: not real estate) too cheaply to sue for *lésion outre moitié;*[2] a buyer who wished to complain to his seller of a defect in an item sought redhibition,[3] a uniquely Roman remedy, convertible even on the eve of trial into another Roman remedy, *quanti-minoris*[4] or reduction of the price. No common law defects in contract formation for our civil code; when a plaintiff sued to annul a conventional obligation, he alleged a vice of consent;[5] if he succeeded in his plea, he had a claim for unjustified enrichment or enrichment without cause;[6] if you studied the law of quasi-contract with Ferd Stone, he introduced you to the mysteries of *causa*[7] and the revered *actio de in rem verso*. Ferd did not merely speak that Latin phrase; he intoned it like an English chancellor from the epoch when such personages were both bishops and lawyers. For a moment I imagined Ferd in mitre and chasuble, turning the Latin phrase with a flourish, and a sacramental wave of the hand. Ferd's civilian vocabulary, though pronounced with a British accent, was "Romanized Franglais," not English.

After a time I ceased worrying about whether classmates from Phoenix and Mobile overheard me as I pored over my books and

---

2. Louisiana Civil Code articles 2589-2600. For helpful background on lesion in its original form, *laesio enormis*, see MOYLE, THE CONTRACT OF SALE IN THE CIVIL LAW, 180-188 (1892) [hereinafter cited as MOYLE]. Background on *lésion outre moitié* in its French guise appears in Herman, *The Uses and Abuses of Roman Law Texts*, 29 AM. J. COMP. L. 671, 683-686 (1981).

3. Louisiana Civil Code articles 2520-2548. Helpful background on redhibition under Roman law appears in MOYLE, pp. 200-210.

4. Louisiana Civil Code articles 2541-2544.

5. Louisiana Civil Code articles 1948-1965.

6. Louisiana Civil Code articles 2292-2314. On unjust enrichment generally, see J. DAWSON, UNJUST ENRICHMENT (1951).

7. Louisiana Civil Code articles 1966-1970. The doctrine of cause is treated in Herman III, pp. 717 *et seq*; cited hereafter in note 19.

mouthed these Romanized incantations like a catechism. I accepted the Civil Code as it was and stopped defending its differences, its odd speech, and its conceptual furniture. In retrospect I realize no defense was warranted: Ferd knew that a defense would have been futile or beside the point.

* * *

The world on the eve of the next millenium differs dramatically from the world that Ferd Stone knew at his peak. In the aftermath of World War II, the Korean conflict, Vietnam, and the Persian Gulf, the United States has become economically dependent on other nations as never before in this century. Europe is healthier and better unified than ever; the conflagration of fifty years ago is a distant memory. In the global village, no nation's law applies automatically to a wide range of transactions. As a result of the financial interdependence of nations, transnational commercial and civil matters increasingly rely on international conventions. At last count, the United States Senate, for the 1991 session, has docketed six such conventions for active consideration, advice and consent.[8] In a sense, these conventions are multinational codes for commercial traders, not foreign ministries. A commercial lawyer schooled in civil code reading can open an international convention and read its provisions purposively and organically. A civilian would describe the method as reading *in pari materia*. Even without any case law to guide him, a civilian can labor over an international convention, test its structure, scrutinize its articles in bright intellectual light, and coax meaning from it by hermeneutical techniques familiar to us from study of the Civil Code.[9]

---

8. According to an agenda summary of the Secretary of State's advisory committee on private international law, the following conventions have been endorsed by the advisory committee and should be transmitted to the Senate for advice and consent: UN Convention on the Limitation Period in the International Sale of Goods; Hague Convention on the Law Applicable to Trusts; UNIDROIT Convention on International Factorings; UNIDROIT Convention on International Financial Leasing; UN Convention on International Bills of Exchange and International Promissory Notes. In addition to the above Conventions, a UNIDROIT Convention providing a uniform law on the form of an international will is before the Senate Foreign Relations Committee for advice and consent. The Inter-American Convention on International Commercial Arbitration has received Senatorial advice and consent and awaits implementing legislation. I wish to thank Professor Helen Hartnell for making available to me the agenda summary on the above Conventions. The agenda summary is on file in the author's office.

9. On methods of interpreting civil codes and common law statutes see, Herman, *Quot Judices Tot Sententiae: A Study of the English Reaction to Continental Interpretive Techniques*, 1 LEGAL STUDIES 165 (1981) [hereinafter, Herman I]; Herman & Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and*

This sense of navigating securely in waters where I have never been characterizes my experience reading with students the Convention on International Sale of Goods (hereafter "Convention")[10] drafted under the auspices of UNCITRAL, the United Nations Conference on International Trade Law.[11] Attended by representatives of sixty-two nations, a diplomatic conference in Vienna approved the Convention in 1980. Common lawyers, civil lawyers, socialist lawyers and lawyers of every other stripe had their say in the drafting process. Who won? Everybody. A leader of the United States delegation, Professor John Honnold of the University of Pennsylvania, described the drafting sessions in glowing terms as comparative law in action; it was on-the-job training.[12] To date, over twenty nations including France, Italy, and the United States have ratified the Convention.

For each Contracting State, the Convention divides sales into two categories, domestic and international. The distinction between the categories is made on palpable objective criteria.[13] Thanks to their

---

Policy Considerations, 54 TUL. L. REV. 987, 1022-1041 (1980) [hereinafter Herman & Hoskins]; Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982) [hereinafter Herman II].

10. The Convention has already produced a rich scholarly literature. *See, e.g.*, INTERNATIONAL SALES: *The United Nations Convention on Contracts for the International Sale of Goods*, (ed. N. M. Galston & H. Smith, 1984), and citations therein [hereinafter cited as INTERNATIONAL SALES]. P. Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods*, Volume/Band 9 of LAW, ECONOMICS, INTERNATIONAL TRADE (ed. P. Doralt & H. Haschek, 1986) [hereinafter cited as Schlechtriem]. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982), and citations therein [hereinafter cited as HONNOLD].

11. The structure and function of UNCITRAL are discussed in K. Sono, *The Role of UNCITRAL*, in INTERNATIONAL SALES, 4-1.

12. Professor Honnold was exuberant about the opportunity for the comparative law exchange. "The preparation of uniform law for international trade is comparative law in action -- in its most fascinating and productive dimensions. Which approach has proved its worth in practice? Can ingredients of differing legal traditions and commercial practice, in happy cohabitation, engender a new legal creation that is clearer and fairer?" Honnold, "The United Nations Commission on International Trade Law: Mission and Methods," 27 AM. J. COMP. L. 201-202 (1979).

13. Article 1 of the Convention provides:

> (1) This Convention applies to contracts of 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.

training, civilians will recognize almost intuitively many of the issues elaborated in the Convention. The experience is like hearing for the first time in years a haunting melody from your childhood in a different key, or at a different tempo from those recollected. The Civil Code has been the libretto and the score for study of the Convention. The transference of analytical techniques from the Civil Code to the Convention occurs almost instantaneously. Louisiana jurisprudence has foreshadowed many issues that confronted the drafters of the Convention.

I have already mentioned one such issue: the proper interpretive techniques for construing and understanding the Convention. To achieve maximum coverage of diverse fact situations arising in many different nations, the Convention articles must be read analogically, not restrictively. Keeping always in view the Convention's general purposes, one must read it like a Civil Code, not a common law statute in derogation of case law. Article 7 of the Convention makes this point eloquently:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, the conformity with the law applicable by virtue of the rules of private international law.

Like any good code, the Convention systematically approaches a range of problems associated with its subject. The drafters have made a sustained effort to assure that the provisions interlock and that the Convention, chapter by chapter, uses terminology consistently. Like Civil Code provisions, the particular articles are polished in lapidary fashion. The Convention's major parts are more than vaguely

---

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

reminiscent of typical titles in a Romanesque civil code. They are entitled respectively "Sphere of Application and General Provisions"; "Formation of the Contract"; "Sale of Goods"; and "Final Provisions." Predictably the bulkiest of the four parts, Part III, is entitled "Sale of Goods." The chapter breakdown of this Part, reproduced in the margin of this essay[14] is indicative of the Convention's structure. In the tradition of systematic codification, each heading of the Convention collects provisions on a main theme that normally arises in a sale transaction. These headings include obligations of the seller, those of the buyer, passing of risk, and provisions common to the obligations of the seller and of the buyer.

Like seed husks, the chapter headings open to expose the Convention's essential spirit. In a crucial way, this Convention is methodologically civilian, for its drafters have presupposed that the contract of sale is an archetype that naturally occurs in human affairs and whose elements are susceptible of generalization, in time and space, despite individual differences among merchants, lines of commerce, and national practices. The approach of the Convention is diametrically opposed to the traditional common law view that history is too recalcitrant and human conduct too eccentric to justify setting forth many general rules in advance of the particular occurrence at issue; better to resolve the problem *solvitur ambulando*. Many years ago, Ferd Stone eloquently captured this distinction between the world views of civilians and common lawyers:

> One might say that the world is divided into two manners of men; the man who says, "I have in my pocket a blueprint plan of the universe, complete and written down; whenever I meet a new problem or have an old one I have only to consult my plan and, by simple logic, deduce the appropriate answer." Of such men are good civil lawyers made. And the man who says, "I don't have a preconceived plan for the universe

---

Palpable, objective criteria do not magically absolve us from the need for analysis and interpretation. *See* Winship, *The Scope of the Vienna Convention on International Sales Contracts* in INTERNATIONAL SALES, 1-1.

14. Part III consists of Chapter I: General Provisions; Chapter II (Obligations of the Seller) is subdivided into Section I: Delivery of the Goods and Handing Over of Documents; Section II: Conformity of the Goods and Third-Party Claims; Section III: Remedies for Breach of Contract by the Seller; Chapter III (Obligations of the Buyer) is subdivided into Section I: Payment of the Price; Section II: Taking Delivery; Section III: Remedies for Breach of Contract by the Buyer; Chapter IV: Passing of Risk; Chapter V (Provisions Common to the Obligations of the Seller and of the Buyer) is subdivided into Section I: Anticipatory Breach and Installment Contracts;

> all written down and I can't anticipate all the problems of the world. I'll meet them as they come, one by one, bringing to bear upon them my experience and common sense, and I'll not lay down any general rule, but answer only the problem before me." Such men make good common lawyers. From these different positions certain conclusions seem possible. First, the man who lives by the preconceived plan will find his stability, his security in the written word - the code = the statute - and will say that the general principles set forth therein survive even erroneous application, while the man who declares that he has no preconceived plan, but only individual solutions to particular problems is apt to find his stability, his security in the individual instances and their conscientious repetition in experience.[15]

This passage is characteristic of Ferd Stone's intellectual method: both the common law and civilian outlooks are stated boldly and extremely, essentially for the sake of putting in sharp relief the contrasting self perceptions of the common lawyer and the civilian. While neither view is stated with a hint of apology (in the ordinary sense), both are in the nature of *apologias* in the literary sense. Most characteristically, Ferd makes no effort to proclaim one world view superior to the other. For as Ferd knew, these two contrasting views on the human capacity to navigate in history probably co-exist in all of us. For the sake of uniformity, the Convention's drafters depended more on the perspective of the civilian than on that of the traditional common lawyer. The Convention drafters, as civilian as they might sometimes seem in their drafting exercise, could turn into common lawyers getting down to cases when the cases finally came their way.

Getting Down to Cases: Certainty of Price

As I shall now suggest, substantive issues addressed by the Convention are *déjà vu* for us as civil code readers. Louisiana jurisprudence, consistent with French law, follows the precept that a

---

Section II: Damages; Section III: Interest; Section IV: Exemptions; Section V: Effects of Avoidance; Section VI: Preservation of the Goods.

15. F.F. Stone, "A Primer on Codification," 29 TUL. L. REV.303 (1955). More background on the legislative management of recalcitrant historical facts appears in S. Herman, D. Combe, T. Carbonneau, *The Louisiana Civil Code: A Humanistic Appraisal* 7-8 (1981) (available in pamphlet from the author); S. Herman, *The Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 TUL. L. REV. 380 (1979).

fixed price is essential for a sale. Every sales student quickly learns the litany of Louisiana Civil Code article 2439, the first substantive rule in the title on sale:

> The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price and the consent.

This provision, copied from French Civil Code article 1582, echoes a Roman maxim: *Sine pretio nulla venditio est* (Without a price there is no sale). This maxim reflects the Roman law's deeply rooted preference for a recital of the sale price *in pecunia numerata* (in current money).[16]

The civilians' insistence upon a fixed price has merit; common sense tells us that the parties' precise specification of price and object can discourage half-baked, ill-considered arrangements. Courts, though hesitant to make contracts for the parties, will interpret them if the parties provide adequate data for the task. Precision as to the object and price in a sale enables the court to diagnose how the deal went wrong. Sometimes, at the execution of the contract, the parties, unable to stipulate a price, instead designate appraisers to set the price; but if the appraisers disagree, a court will not substitute its judgment on value for the one the appraisers could not reach. The sale, under Louisiana law, will be fatally flawed.[17]

---

16. J.B. MOYLE, 66 *et seq.* The Roman requirement of a certain price is deeply rooted in bedrock. According to Moyle, "the Roman law knows nothing of a 'reasonable price which it is presumed the parties intended if they did not explicitly agree as to what was to be paid. Consequently, contracts of sale of a kind with which we are so familiar, as where one goes to a shop and gets goods on credit without asking the price...are in the Civil Law not contracts of sale at all but innominate. MOYLE, 69. For the relationship between the Roman rule on certainty of price and modern regulation of the issue, see B. Nicholas, *Certainty of Price*, COMPARATIVE AND PRIVATE INTERNATIONAL LAW, Essays in Honor of John Henry Merryman on his Seventieth Birthday 247 (ed. D. Clark; 1990).

17. Louisiana Civil Code article 2465, a duplication of French Civil Code article 1592, provides that the parties can authorize arbitrators to set a price; but if they fail to set it, then there is no sale. A celebrated judicial construction of article 2465 appeared in Louis Werner Sawmill Company v. O'Shee, 111 La. 817, 35 So. 919 (1904). For other problems associated with an uncertain price in Louisiana sale law, see Herman & Rix, *General and Particular: Tangents Between the Revised Law of Obligations and the Unrevised Special Contracts*, 30 LOY. L. REV. 833, 835-843 (1984) [hereinafter cited as Herman & Rix].

If the vendor and purchaser agree that the market on a given date is to fix the price for a commodity, and if for some reason, that market designation fails, then there is no sale.[18] Whether there is no contract at all is a separate issue. Occasionally, a court upholds a contract flawed as a sale because so little of it remains executory or because it has gone on for a very long time; but here the court will likely designate the agreement "innominate," a polite shorthand term for the court's view that the parties agreement has passed judicial muster, but just barely.[19] No self-respecting attorney who drafts a contract of sale draws much consolation from a judicial finding that the contract, though valid, is innominate. The essential lesson of the jurisprudence is that Louisiana law detests open price terms as nature abhors a vacuum.

Suitably chastened by the Louisiana judiciary's inflexible insistence on a determinate price in a sale, Louisiana lawyers strive to make the price clear in their agreements. Despite vigorous urging by some of our brethren from other states whom I mentioned earlier, Louisiana jurisprudence teaches us to steer clear of the venerated principle of the open price term embodied in Uniform Commerical Code (U.C.C.) Section 2-305:

> (1) The parties, if they so intend, can conclude a contract for sale though the price is not settled. In such a case, the price is a reasonable price at the time for delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

To complete this illustration of the way that our civilian heritage can reward us in our reading of the Convention, let us add to U.C.C. Section 2-305 and the Louisiana jurisprudence on certainty of price two

---

18. *See, e.g.*, Landeche Bros. Co. v. New Orleans Coffee Co., 173 La. 701, 138 So. 513 (1931), cited in Herman & Rix, p. 838-839.

19. Judicial discomfort with innominate contracts is discussed in Herman, *Detrimental Reliance in Louisiana Law--Past, Present, and Future(?): The Code Drafter's Perspective*, 58 TUL. L. REV. 707, 727-732 (1984) [hereinafter cited as Herman III]. For a fascinating decision in which the Louisiana Supreme Court justices threw up their collective hands in dismay and upheld a contract because of its extraordinary longevity, despite their inability to categorize the agreement at issue, see Armour v. Shongaloo Lodge No. 352 Free and Accepted Masons, 330 So.2d 341 (La. App. 2d Cir. 1976) *rev'd* 342 So.2d 600 (La. 1977) (*per curiam*). Herman III collects a number of puzzling cases concerning unclassifiable agreements that barely passed muster.

provisions from the Convention. Here is article 14, from the Convention's title on formation of the contract:

> (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Now here is article 55 of the Convention's title on payment of the price:

> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

As every comparative lawyer knows, one tends to see solutions in terms of one's own experience. Because there is nothing sacrosanct in United States law about the stipulation of a fixed price in a sale, a devotee of the Uniform Commercial Code might find it easy to harmonize articles 14 and 55 of the Convention. In spirit, article 55 matches U.C.C. Section 2-305 closely enough to warrant the conclusion that the Convention has sanctified an open price term in a sale. Perhaps the devotee would stumble momentarily over one apparent difference between article 55 of the Convention and U.C.C. Section 2-305; Section 2-305, unlike article 55 of the Convention, requires a finding that the parties overtly intended a contract without a price stipulation before the court can call in aid of the contract the rule of construction in U.C.C. Section 2-305.

Unlike American lawyers for whom an open price term presents no *crise de conscience*, some European civilians have viewed with skepticism the practical function of article 55, and the prospect of its

reconciliation with article 14.[20] These civilians argue that articles 14 and 55 are radically disjunctive; under article 14, a proposal is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Article 55 seems to speak another language and to operate on different assumptions. Unlike article 14, article 55 presupposes that a sale can be validly concluded even if an indispensable element in confecting the sale, the offer, does not expressly or implicitly fix or make provision for determining the price. To allay concerns over the incompatibility of the principles embodied in articles 14 and 55, a commentary on the text of the 1978 Draft Convention has concluded that the predecessor article of current article 55 would be effective only when: a) one of the parties has his place of business in a Contracting State which has ratified the Convention as to Part III (Sales of goods) but not as to Part II (Formation of the Contract) and b)the law of that state provides that a contract may be validly concluded without a price stipulation.[21]

Ever the resourceful negotiator, Professor Honnold approached the perceived incompatibility of articles 14 and 55 from another angle by suggesting that the parties ought always to be presumed to have contracted with reference to a normal price. In response to arguments that minimize the disjunction between the two articles, Professor Denis Tallon of the University of Paris has suggested that the two articles are fundamentally irreconcilable. For Tallon, Professor Honnold's view would tear the heart out of article 14, which assumes an express stipulation of price as an indispensable ingredient in a valid offer.[22] Any good lawyer, so goes Tallon's argument, knows one must read the whole article, not select the fragments that fit one's theory. In Tallon's view the argument of the UNCITRAL Commentary could almost annihilate article 55 of the Convention since the conditions for its application would seldom be met.[23]

According to Tallon, French jurisprudence has rejected the idea that a contract of sale may be validly concluded with neither a definite price, nor a foolproof mechanism for setting the price. To support his criticism, Tallon detailed two recent series of French cases. The first

---

20. Tallon, *The Buyer's Obligations Under the Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES, 7-10, 7-11. [hereinafter cited as Tallon].

21. *Id.*

22. "This technique smacks of the current practice of implied terms so often used in this period of pure voluntarism, often condemned in a more enlightened age. Graver still, part of article 14 becomes meaningless; even if no reference is made as to price, a proposal is still a valid offer presumably made at a normal price. This, of course, is clearly opposed to the intent of the drafters. *Tallon* at 7-11.

23. *Id.*

series concerned a so-called "beer clause" in a widely used beer supply agreement. Under such a supply agreement, much like a tied-tavern arrangement in the United Kingdom, a brewery advances funds to a public house. In exchange for the loan the public house promises to purchase all the beer it needs from the lender brewery at the price usually charged for similar goods, i.e., under a formula like that of article 55. In 1978, the French Cour de Cassation avoided a beer clause under French Civil Code article 1129, which required that an amount, if uncertain, had at least to be determinable.[24] Readers familiar with the Louisiana Civil Code will recognize an application of this principle of French law in Louisiana Civil Code article 1973: "The object of a contract must be determined at least as to its kind. The quantity of a contractual object may be undetermined, provided it is determinable."

A second series of French cases annulled another common commercial agreement with an open price term. In this species of agreement, a car purchaser signs an order form that stipulates only a tentative price and contemplates that the actual price will be a specified price on a published price list in effect on the date of delivery of the car. According to French jurisprudence, the sale does not bind the buyer until he accepts the actual price, and he is under no obligation to agree to that price. These French decisions led Professor Tallon to observe that "municipal courts may circumvent article 55 by holding invalid for reasons of public policy a sale with an indefinite price."[25] When a dispute arises under articles 14 and 55 of the Convention, the experience of both France and Louisiana will repay attentive study by courts and litigants. Our common experience with issues associated with certainty of price will surely make us listen sympathetically to their pleas.

Getting Down to Other Cases: Cause and Consideration

Our law school courses contrasted the doctrines of common law consideration and civilian cause.[26] Consideration was the objective manifestation of the parties' subjective will; the manifestation could be packaged as a bargained-for exchange, or the promisee's material and detrimental reliance incurred on the faith of the contract. By contrast, civilian cause was the subjective reason why one obligated himself; by focussing upon the psychological element as much as the empirical data, the doctrine of cause directed the court to inquire into the parties' subjective purpose in the transaction. The Convention's drafters,

24. Tallon, 7-11, 12.
25. Tallon, 7-12, 13.

disclosing their pragmatic streak, shortcircuited demands for express inclusion in the Convention of both cause and consideration. In my view, the omission was wise; the terms would have contributed to ideological factionalism and practical confusion in a notoriously complicated and theoretical area. The drafters were fortified in their policy choice by the fact that a sale is an onerous transaction (notice the civilian term) in which both cause and consideration are embodied in the exchange of the seller's promise to deliver and to warrant the goods for the buyer's promise to pay the agreed price.[27]

Hallmarks of their respective traditions, consideration and cause doctrines intrude everywhere and unexpectedly. Though the drafters avoided explicit inclusion in the Convention of the terms "cause" and "consideration", certain aspects of the Convention, such as contractual modifications and revocability of offers, called for further deliberation about the utility of the doctrines.

Contractual Modifications: A Causal Analysis

For a valid contractual modification, American law has traditionally insisted on consideration on the theory that the parties, driven by selfish motives, could not give up certain rights against each other and agree *gratis* to change their original deal. The civilian delegates among the Convention's drafters did not insist on this doctrinal (not to mention doctrinaire) theory. Their position followed the traditional view that a contractual modification without consideration is nonetheless valid if the cause or purpose of the modification is valid and there is no vice of consent. Implicitly assuming the correctness of this last statement, article 29 of the Convention provides that the parties' mere agreement suffices to modify or to terminate the original agreement. Finding that the UCC had abandoned a strict requirement of consideration for contractual modification,[28] Anglo-Americans who were committed to the no-

---

26. For background on the contrast, see generally Herman III.

27. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAWYER 443, 453-454 (1989).

28. U.C.C. § 2-209 provides:

> (1) An agreement modifying a contract within this article needs no consideration to be binding.
>
> (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

modification-without-consideration rule acquiesced in the policy choice underlying article 29. Their acquiescence did not signify their complete abandonment of the consideration doctrine or the triumph of the doctrine of cause.

Revocability of Offers

The Convention's treatment of revocable offers reflects the practical utility of both cause and consideration as concepts, not terms of art, and further illustrates the pragmatism of the drafters' working methods. Without labelling any provision as a "cause" article or "consideration" article the drafters sought to fit these doctrines comfortably into areas of the Convention where they belonged. As a result, the doctrines now serve useful purposes with minimal ideological strife.

According to a venerable common law rule, an offer unsupported by consideration, is in principle revocable.[29] For merchants, UCC Section 2-205 qualifies this traditional American rule:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

On the revocability of offers, Louisiana law, like that of other traditional civilian jurisdictions,[30] provides that the offeror, even without consideration, impliedly gives the offeree a reasonable time to

---

(3) The requirements of the statute of frauds section of this article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

29. *See generally* A. Farnsworth, Contracts § 3, 17 at 148-51 (1982).

consider and to respond to the offer. As Louisiana Civil Code article 1931 puts the issue, "a revocable offer expires if not accepted within a reasonable time." Unlike traditional United States law, Louisiana law presupposes that the offer is irrevocable for a reasonable time unless the offeror states otherwise.

Article 16 of the Convention, subject to important qualifications, adopted the Anglo American principle of revocability: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." Once the drafters reached consensus on the general principle of revocability of offers, delegates from civil law countries went on the offensive; they argued that an offeror, though not bound for a reasonable period, should at least be held to his promise, even without consideration, when he has stipulated that the offer is to be open for a specified period. This argument ended in qualification of the principle of revocability in article 16(2).[31] Under article 16(2), an offeror who specifies a period of irrevocability is deemed to have made a firm offer even if he has not satisfied the UCC's more stringent requirements for a firm offer. The doctrine of detrimental reliance inspired a further qualification on the principle of revocability in article 16(2); according to the last subsection of that article, when the offeree has acted in reliance on the offer, the offer becomes irrevocable. Article 16(2) does not define the meaning of "acted" nor does it say that the reliance must be reasonable and material, two criteria with which we are familiar thanks to the American Restatement of Contracts Sec. 90. The rich and varied American experience with the doctrines of detrimental reliance and promissory estoppel has led me to conclude tentatively that the criteria of reasonable and material reliance applicable under article 16(2) will likely develop along lines already familiar to us from American jurisprudence.[32]

---

30. *E.g.*, BGB article 147; Mexican C.C. article 1806; Swiss C.O. article 5.

31. Article 16(2) of the Convention provides:

> "However 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."

32. For helpful background on the evolution of detrimental reliance, see generally Herman III. The classical American formulation of detrimental reliance appears in the Restatement of Contracts § 90:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Final Cases: Remedies; Quanti Minoris

Let us conclude this homage to Ferd Stone with a few remarks on remedies. The Convention has borrowed some remedies directly from civilian systems; other forms of relief blend civilian and common law approaches. Returning for a moment to a term I used earlier, the Convention borrows directly from civil law the buyer's remedy of *quanti minoris*,[33] or price reduction for a deficiency in goods. The reduction is calculated as follows:

> Art. 50. If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

The precise function of the remedy in a dispute under article 50 is beyond the scope of this paper. Suffice it to say that article 50 consists of relief inspired by Roman law, not generally known in American law. Surely when the time arrives to put this remedy into action, we shall be rummaging through Roman and civilian sources for guidance about its correct application.[34]

Putting in Default

Another typical remedial institution, familiar to all Louisiana lawyers, is a version of a putting in default: a proces verbal or notice served by an aggrieved party on a defaulter to make it clear that his nonperformance is intolerable. Based on the German *Nachtfrist* device,[35] article 47 of the Convention provides:

---

33. For helpful background on the form and function of this remedy at Roman law, see generally Moyle, Contract of Sale in the Civil Law, 210-211. The *actio quanti minoris*, also called *actio aestimatoria*, allowed the purchaser either to seek rescission of the sale or to sue the seller for return of the part of the purchase price proportionate to the defects that had appeared.

34. Consider, for example, this question. According to the Digest, the purchaser could bring the *actio quanti minoris* a second or even a third time as new and distinct defects were disclosed. Among the issues that article 50 leaves open is whether a buyer may repeatedly reduce the price as new defects appear.

35. According to BGB article 326, when one party defaults, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after expiration of the period. If performance is

> The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract.

It may be instructive to compare article 47 of the Convention with a strikingly similar provision of the Louisiana Civil Code:

> Article 2015. *Dissolution after notice to perform.* Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances. The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

Derived from Louisiana practice and jurisprudence, the device of dissolution after notice to perform was codified only in 1985. Louisiana lawyers have had brief experience with article 2015. The second sentence of Louisiana Civil Code article 2015 would presumably have the same effect as the second sentence of article 47 of the Convention. A buyer who has granted his seller a reasonable time to perform in accordance with article 2015 of the Louisiana Civil Code would not resort hastily to any remedy for breach, in accordance with article 47.

Specific Performance

Let us pause finally over specific performance, a remedy that has generated consternation and confusion in Louisiana jurisprudence

---

not rendered seasonably, then the notifying party may withdraw from the contract. Unlike the Louisiana Civil Code, the U.C.C. does not expressly establish a *Nachfrist* notice with the allowance of extra time, though Llewellyn and his colleagues would surelly have known of this German institution. The comments to U.C.C. 2-309, although they do not require the use of such notices, recommend them to add stability to the parties' business relationship. On Professor Llewellyn's own learning in German law, see generally Herman II.

and in United States case law generally.[36] The scope and form of the remedy of specific performance also provoked debate among the Convention's drafters and the growing community of international scholars who have commented on the Convention. For both sellers and buyers, the Convention authorizes specific performance as a powerful ordinary remedy without regard to adequacy of damages or the alleged economic inefficiency of the remedy. In the drafting sessions, arguments pro and con over the appropriate scope of specific performance in the Convention split along ideological lines. In response to the civilian refrain, *pacta sunt servanda* ("contracts are binding"), American lawyers suggested that an aggrieved party should overcome the problem of default through the market mechanism; if the aggrieved party, after mitigating his damages in the open market, turns out to have suffered a real loss, then he may seek monetary relief from the breaching party. On a first look at the Convention, the civilian viewpoint captured in *pacta sunt servanda* seems to have triumphed. For the aggrieved seller, article 62 of the Convention provides:

> The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 46 provides the buyer's corresponding enforcement remedy:

> The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

Commenting on prior drafts of articles 46 and 62, Professor Alan Farnsworth of Columbia Law School lamented the Convention drafters' stress upon specific performance.[37] The drafters responded to Farnsworth's criticism by engineering an escape route for

---

36. On the newly codified remedy of specific performance in Louisiana, see generally Herman & Rix, pp. 863-867. On specific performance generally, see Treitel, *Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)*, VII INT'L ENCY. COMP. LAW, Chap. 16.

37. Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. LAW 247 (1979). *See also*, J. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, INTERNATIONAL SALES 9-10. As Ziegel notes, "to a common law mind it may seem puzzling that civilians are so attached to a remedy that is inefficient economically, at any rate in those cases where damages would adequately compensate the buyer." *Id.* Ziegel's next comment hints at the ideological issues associated with certain relief, a point we have already noted in connection with cause and consideration: "I am not sure the civilians are as strongly committed to it as we think--it may be more a case of unwillingness to renounce a long familiar remedy simply because it is uncongenial to common lawyers. In any event, the common law is less than consistent in its own position." *Id.*

contracting parties whose municipal law did not envision specific performance as an ordinary remedy. The escape route appears in article 28 of the Convention:

> If . . . one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this convention.

Article 28 does not shield a United States seller or buyer from an order of specific performance in a tribunal whose municipal law considers specific performance a matter of right. But the article surely would shield such parties if the litigation were instituted in a United States court other than one in Louisiana. Louisiana is excepted from this generalization because under Louisiana law, unlike the laws of her sister states, the obligee in principle has a right to specific performance, not simply a privilege to appeal to a court's discretion for the specific relief. Louisiana's preference for specific performance is codified in Louisiana Civil Code article 1986:

> Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages if the obligee so demands.

Even Louisiana partisans of specific performance would concede that specific enforcement is sometimes heavy-handed and unwarranted, not to mention economically inefficient. Accordingly, Louisiana Civil Code article 1986 ends with the following qualification upon the seemingly unlimited right to specific performance:

> If specific performance is impracticable, the court may allow damages to the obligee. Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

For the real limitations on the right to specific relief, we need not search far. In many instances and surely for sales of fungible commodities, Louisiana Civil Code article 2002 effectively limits the aggrieved seller's or buyer's right to specific relief, via a specific directive on mitigation of damages. That article provides:

> An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts,

> the obligor may demand that the damages be accordingly reduced.

Presumably, once a party has mitigated damages by cover or resale, he no longer stands ready to perform even if he has obtained an order of enforcement. As a demand for performance is in the nature of injunctive relief, an additional brake upon a zealous party who rushes to judgment for specific performance is article 3601 of the Louisiana Code of Civil Procedure. That article remained untouched even after modernization of Louisiana's substantive contract law.

Article 3601 still provides the traditional Anglo-American criterion for injunctive relief: "An injunction shall issue in cases where irreparable injury, loss or damage may otherwise result to the applicant." A bystander might conclude that Louisiana Code of Civil Procedure article 3601 eviscerates the remedy of specific performance embodied in article 1986. While that view would be an overreaction, Louisiana trial judges surely take seriously the discretion accorded them by standards for injunctive relief, and an appellate court's reversal of a trial court's discretionary grant or denial of the order would be a *rara avis*.

The eventual success of Louisiana legislative efforts to strengthen the remedy of specific performance will depend upon judicial willingness to grant injunctive relief when the aggrieved party desires such relief and it would be valuable to him, even though he cannot demonstrate that he would suffer irreparably if he does not receive it. One wonders whether a tribunal in a jurisdiction where specific relief is normal, if asked to issue an order of specific relief under the Convention, would do it enthusiastically, even when the aggrieved party had a reasonable opportunity to mitigate losses. We may confidently predict that an American court, if asked for such an order under article 28 of the Convention, would resist the demand, despite the idealism that resonates in *pacta sunt servanda*. Surely if a claimant knew that an American court would set a high bond as a precondition for the injunctive order, he could be persuaded to forego a plea for specific performance, to mitigate his losses in the market, and to seek damages only after mitigation. In such a case, the aggrieved party's interest might be served better by paying his money not to the court registry but to a substitute seller in mitigation of his damages. He could thereafter send the breaching party the bill for the damages if any damages had resulted.

Conclusion

As any good advocate knows, once a point has been made to the jury, there is no need to multiply examples *ad nauseam*. Better to sum up the argument and to finish the account while the audience is still listening. This piece has had three interrelated aims: First, to portray Ferd Stone, complete with virtues and foibles, as a three dimensional human being who cared deeply for and about students, friends, and colleagues; second, to sketch Ferd's scholarly perspective and to demonstrate its continuing vitality for those who followed him; and third, to suggest a way to vindicate our choice, in Robert Frost's immortal phrase of "a road less travelled by that has made all the difference" in our lives and careers.[38]

I concede the tone of this little essay in memory of Ferd Stone has been consciously celebratory, not funereal. Remembering Ferd Stone as a witty and urbane gentleman, ever the wisecracker, it would be pointless to plunge into depression at his loss. Of course we mourn his passing, but we also cherish his intellectual legacy. Though a childless bachelor, Ferd had counted his students, colleagues, and friends as spiritual kin and offspring. For all of them he was an unexcelled ambassador of both good will and intellectual stimulation. Ferd's death has once more brought us together in this volume decades after Ferd in life, as teacher, friend and ambassador to all of us, had originally brought us together. Hence the theme and tone of this little piece--a pep talk, celebration and cerebration in equal parts, an apologia perhaps, but surely no apology.

Magister et Frater, ave atque vale.

---

38. It is no coincidence that my colleague, Vernon Palmer, also found inspiration for his contribution to this volume in Frost's image. I suggest that Ferd Stone, by celebrating differences, taught us to enjoy the rewards of the "road less travelled by." It is fitting that Vernon and I have both associated Ferd's inspiration with Frost's image.