

TRADERS, LAWYERS AND THE RULE OF LAW

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Courtesy of my four-year old niece Camilla, I can tell you that Dora the Explorer is an adorable cartoon character whose likeness has been pasted on children's lunchboxes, pajamas, and birthday party decorations. More menacingly, an action figure produced in China is also adorned with her face – unfortunately applied with lead paint.

This story is terrifying. Toddlers put everything in their mouths – let alone cute dolls. Like those cats and dogs that consumed the tainted pet food and the Panamanians who brushed their teeth with toothpaste laced with diethylene glycol, American children are at real risk of being poisoned. Fortunately the toy company and retailers have worked effectively to recall the dolls in question, along with millions of other toys that may pose serious health threats.

But there is also good news. Effective legal systems are containing the damage that Dora inflicted on global trade and the economies that rely on it (which is to say, almost everyone). Since 1988, the UN Convention on the International Sale of Goods (the “CISG”) has provided a global sales law that governs disputes between buyers and sellers. Because the China and the US are parties to the CISG, American toy companies are assured that their claims for damages against Chinese manufacturers can be governed by a fair body of law. The CISG provides traders with much of what they are looking for in a legal system:

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Traders naturally have high expectations for the rule of law insofar as it regulates their commerce. They expect to enjoy: right to contract; knowable rules governing contracts (including knowing what the rules are generally, applicability of those rules to their trade across borders, cultures, legal systems, and ease of knowing them because they reflect one clearly articulated set of rules is preferable, they are slow to change but they do change as necessary to respond to changed circumstances, and that they include mechanisms for clarifying ambiguity). Traders further expect relative inviolability of contracts and dispute mechanisms that are understandable, reliable, and transparent. Finally, they expect enforcement that is reliable, efficient, and relatively quick.

Over the past fifteen years, Pace Law School's Institute of International Commercial Law has collected arbitral and judicial opinions interpreting the CISG. At this point, we have assembled over 2,000 cases from countries representing three-quarters of the world's trade in goods. By collecting, analyzing and translating these cases, we have learned many lessons about the state of trade and the law that regulates it. Most notably, while China is not generally known for its exemplary adherence to international standards for the rule of law, it is the world's leading jurisdiction in terms of open availability of arbitral awards applying the CISG. Apparently, it is enabling companies in China to meet the needs of their non-Chinese counter-parties. The China International Economic and Trade Arbitration Commission (CIETAC) is the source of this data. No other arbitral institute in the world has made freely and openly available to the world trade community a comparable volume of awards on uniform international sales law.

CIETAC has released to us the texts of hundreds of arbitral decisions on the CISG. We are meticulously translating them into English. Approximately a third of

these cases involve U.S. firms trading with China. Admittedly, we cannot look into the hearts of the arbitrators, and we do not know how these particular opinions were selected for release. But we can examine the text of their opinions. They provide real cause for optimism. They appear to be balanced opinions with arbitrators ruling on awards in what appears to be a fair and impartial manner. To date, we have translated over 240 of the awards. You can see them for yourself at <http://cisgw3.law.pace.edu/cisg/text/CIETAC-awards.html> and learn the countries and products involved, the amounts of money sought and awarded, and to read the awards themselves. Judge for yourself the degree to which these proceedings adhere to fundamental principles of the rule of law. In the meantime, we will be translating more cases to share a larger and more meaningful sampling of the manner in which international sales disputes are being resolved in China.

This weekend, Pace is teaming up with Wuhan University and the UN Commission on International Trade Law for this conference on the CISG to celebrate this insight into adherence to the rule of law in business transactions with China. Leading arbitrators and academics from around the world are examining the manner in which international sales law is being applied in China. The People's Republic contains approximately a fifth of the world's population. Last year it became the largest exporter. And its economy continues to grow at approximately 10 percent each year. Because it is a peer competitor on many fronts, China's course along the rule of law path is of vital interest to Americans and Europeans.

We must, therefore, take note of its development of viable institutions for resolving trade disputes effectively and peaceably. The choice of lawyers and scholars to

come to Wuhan actually contributes to the progress of the rule of law in China. By our presence, we acknowledge and seek to clarify a critical element in China's rule of law.

The global economy is a marketplace of ideas, aspirations, and services but predominantly of goods. If this is true, then traders play the dominant role in shaping the reality of globalization. Ironically, however, the practices of traders have traditionally received less careful examination by scholars than those of political leaders who serve them.

The relationships between traders, lawyers and the rule of law are complex. Rather than drawing firm conclusions, I can only make a few observations about this complex inter-relationship and some of the trends I see. What are the elements of the rule of law that an orderly trade regime could hope to bolster?

- A transparent set of laws that is knowable and that can change in an orderly way in response to the changing needs of society. The CISG certainly provides this element – at least where and as applicable.
- The right to hold real and moveable property subject to taxes and regulatory takings. The CISG facilitates the movement of property and its sales.
- The right to equal treatment (regardless of status) and due process before the law. Opinions such as those in the Steel Flanges case provide evidence of equal treatment with its thoughtful and detailed analysis of the claims between Chinese and a US parties.
- An impartial, transparent, efficient system of adjudication. From what we can tell about the CIETAC tribunals, there is a great deal of impartiality. New York University Professor Jerome Cohen and others have argued about the

transparency, but with CIETAC's continuing work to release decisions, and the Tang Houhzi translation program, we are seeing ever greater levels of transparency.

When such issues have involved Chinese products, how have the issues been handled when they have been the subject of CIETAC arbitration proceedings? For interesting insights, the Flanges cases of 29 March 1999 and 30 March 1999 appear most illuminating. Full-text translations of these cases are presented at:

- <<http://cisgw3.law.pace.edu/cases/990329c1.html>> [examining CISG provisions: Articles 4, 11, 12, 35, 36, 38, 39, 40, 73, 75, 77, 78, 80]; and
- <http://cisgw3.law.pace.edu/cases/990330c2.html>> [examining CISG provisions: Articles 4, 9, 29, 35, 36, 39, 40, 60, 74, 80].

This question what such meticulous opinions portend for the future. The most interesting trillion dollar question is “to what extent does such a contracting regime designed for traders raise expectations and eventually improve the reality of the rule of law in other sectors?”

I for one am cautiously optimistic about the role that commercial arbitration can play in fostering a more wide-spread system of the rule of law. And in the meantime, the Pace Institute of International Commercial Law will be working to ensure that when I buy a Dora doll for Camilla's fifth birthday, I won't have to bring it to a lab before wrapping it.