Barry Nicholas

I am most honoured to contribute, albeit briefly and doing something which has already been done much better by many others before now, to a memorial to Barry, with whom I first came in contact in 1953. He was what I would regard as the ideal Oxford don in the arts faculty context: principally a careful teacher who influenced many, but at the same time a respected scholar and writer, who moved from tutor to professor, and also willingly and effectively took his share of the administration that comes the way of academics, ending up as a head of house. My admiration becomes stronger as I look back. As Sir Guenter Treitel has said, "It would be impossible to imagine law in postwar Oxford without Barry Nicholas."

I have been asked to cover two aspects of his career: his influence on the teaching of law in Oxford in the late 50s and 60s, and his contribution to commercial law in the UNCITRAL sales convention of 1980 , usually known nowadays as CISG, which is widely adopted elsewhere but has not taken root in this country.

To start with the first, Barry was the All Souls Reader in Roman Law from 1948. As such he had in effect a responsibility for making the subject successful and palatable to students in the 50s and 60s. It probably never became either for most of them, but that it had an acceptable role

was largely Barry'work. David Daube succeeded Jolowicz in 1955 and give lively and learned introductory lectures which were very successful with first year undergraduates until they came to consider later what the exam might ask them. What the lectures did not do so well was prepare them for the Roman Law papers as prescribed in the Examination Statutes . To provide the framework for that had been, and remained, the backroom job of Barry.

In the Final Honour School at the time, there were two Roman Law papers, Roman Law I on contract, mostly the contract of sale as covered in Digest 18.1, with comparison with English law such as appeared in de Zulueta's book of 1944, *The Roman Law of Sale*. This was compulsory. The second, which was not, was Roman Law II, on Delict, involving in particular Digest 9.2 on the lex Aquilia, taking in comparison with the English law of negligence – the field of Lawson's excellent book of 1950, *Negligence in the Civil Law.*

For most candidates, unable or unwilling to use Latin or learn what could not always be represented as law relevant in the 20th century, these subjects were not popular A problem was that, as will of course be known, Justinian's Digest is composed of extracts from earlier material, but arranged in a way that does not appear to implement any obvious system. For both subjects Barry produced reading lists which took topics and sub-topics within the subject and set out what looked at first glance like a whole lot of figures: these were

groups of the relevant texts on each topic -of which, broken up in this way, there were in the end actually not that many. By this means the Roman law subjects became rational to the student. He had produced such lists for both Roman Law I and Roman Law II, and in the BCL for Condictio (which arrived in parts, as he said "hot off the press", at classes I attended in 1957). He had done the same for Ownership and Possession.

Professor Brian Simpson used to say that the late 50s and 60s would be regarded in the next history of the Oxford law faculty as "The Age of the Reading Lists". (According to Lawson's history of 1968 the previous period was "The Age of the Tutors.") What Brian said was true: in the 50s law tutors began to produce lists of required reading rather than leave candidates to find things out from themselves (the old method). This was so especially in Magdalen (under the influence of John Morris) , Univ. (Tony Guest) and Brasenose (Barry). Other colleges, but for quite a time not all, had them too: those who were left to fend for themselves (like me) used to get lists from people in colleges that had them – sometimes indeed undergraduates obtained several and compared them. (However, copying was not that easy till Xerox became efficient in the late 50s :until then the copy sometimes came out of the machine in flames.) Against this background Barry's method, especially for those fortunate enough to be in Brasenose, supported by his lectures, was the crucial part of the faculty's instruction.

I would like to add finally that Barry's approach was influential in fostering an attitude to law among many pupils. I would like to be counted in this group myself (I had tutorials with Barry for the BCL): but the distinguished example is Peter Birks, whose inaugural lecture (which I attended but of which I have not been able to find a text), showed, as he always acknowledged, strong influence from Barry's teaching. This was true of many of us at the time but Peter made more of it.

To go on to his contribution to commercial law, when the Principal asked me to take this in I have to say I was surprised, because I did not think of Barry as a commercial lawyer. But then I remembered that over 10 years or so, between 1968 and 1978, he attended meetings in Vienna of the UNCITRAL Working Party on a Convention on the International Sale of Goods. This was intended to produce something superseding the Uniform Law on International Sales (ULIS) of 1967, a very unsatisfactory production ignored in this country as the "dreaded ULIS". The Convention was adopted in 1980 and is nowadays usually referred to as "CISG" (Convention on International Sale of Goods).

Many of the major figures involved in the project are now dead so one does not, or at any rate I do not, know how prominent Barry's role was. But my impression from talking to participants some years ago was that he was very well regarded. I assume that this will have been because with his

Roman and comparative background he was well able to understand the approach of civilian lawyers, who will have been in the majority, and some of whom, for example the Hungarian Eorsi, were very clever indeed. Perhaps a weakness may have been that he was not fully at ease with the powerful mass of English law on large scale international sales, often of commodities. But it is likely that this meant that he was not likely merely to say, as some English lawyers might have done, "This is simply not how we do it"; and also one has to remember that the Convention is not confined to the sort of large scale sales, often involving sea carriage, litigated in London, but covers a much wider range.

The sort of influence he is likely to have had is shown in papers he published in two collections of essays on the Convention, edited by Galston and Smit and by Bianca and Bonell. Some of these have the look of being derived from papers he may have written for meetings. One (in Galston/Smit) concerns impracticability and impossibility, and is paralleled by an article of 1979 in the American Journal of Comparative Law on Force Majeure and Frustration. These are obviously topics where legal systems may reach different results, or reach similar results from different presuppositions. A point he makes several times is that differences may arise from the use of different starting points: as to these three topics it may make a difference whether one starts from the idea that in the absence of other indications contractual liability is strict, or from the idea that

it is based on fault except in particular cases. In Bianca/Bonell there are four comments on the topic of Risk, being comments on Articles 66, 67,68 and 69. Typically, they take a comparative approach and investigate the merits of different ways of dealing with the technical problems. From the English point of view the discussion of risk to goods in transit is not entirely satisfactory because it does not go to the cases and solutions which a common lawyer would want to use: but again the outlook of the Convention is more general than a common law textbook on international sales might need to deploy. Overall my assumption is that Barry was a patient and skilled commentator who must have been respected because he understood the reasons for the likely approach, or approaches, of civil lawyers and was willing to engage in careful comparative analysis.

In the result however it can be said that CISG is very much a civil law production, though no doubt the civil lawyers thought they had made concessions (for example, relegating good faith to a matter of interpretation, a technique used subsequently in other Conventions) So a lot of it looks unfamiliar to common lawyers: and the common law instinctive (in most but not all areas) preference for dealing with a breach of contract by allowing the innocent party to withdraw from it rather than submit to attempts to put things right gets less of a look-in than it might. But as I say , what I call the common law approach is based on a particular

type of case, and anyway is not so clear as I have just represented it.

In 1989 Barry wrote, at my instigation an excellent article in the LQR which is I think is still the best starting point for a common lawyer wanting to understand the Convention. Soon after this the late Lord Hobhouse wrote a note in the LQR doubting the need for a Convention and recommending the use of a well-developed legal system (in his case of course English law). I would doubt if Lord Hobhouse's article had much effect except to strengthen the faithful. But it is certainly true that there has been little interest in CISG in this country to date. In 1993 Barry gave a lecture in Professor Bonell's series at La Sapienza in Rome , referring to "a case of splendid isolation", suggesting, in a typically moderate way, that it was time for the UK to ratify the Convention. The main reason was not necessarily a belief in the text itself, but the view that if the United Kingdom did not get involved in the Convention its interpretation would take place in other countries and this would lead to results that could be undesirable for common lawyers. The role of good faith was something he particularly mentioned: he pointed out that whatever the wording, the emphasis was moving from mere interpretation to substantive use of the doctrine. My own impression is that there is now so much case law on the Convention, especially in Germany, that it may be difficult to intervene with other ideas. The Convention was adopted in the United States, Canada, Australia, New Zealand and

Singapore: but my impression of the limited case law there is that the Convention is not always understood and for that reason regularly excluded.

Overall there can be no doubt that Barry's work on this Convention was a significant contribution to international commercial law, and should it become fashionable to consider adopting the Convention , his LQR article would still be an obvious starting point for a common lawyer.