PERSPECTIVES

ALEJANDRO M. GARRO*

Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods**

The United Nations Convention on Contracts for the International Sales of Goods (Convention) is the product of more than two generations of international negotiations.[1] Beginning in 1968, the task of unifying the law of international

*Alejandro M. Garro, Lecturer in Law, Columbia University. This paper was submitted to the 81st Annual Meeting of the American Association of Law Libraries, June 26–29, 1988.

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1. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. *See* Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Law*, 27 INT'L & COMP. L.Q. 413 (1978). After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods (ULIS) and the other on the formation of contracts for the international sale of goods (ULF); July 1, 1964, 834 U.N.T.S. 107, 169, 3 I.L.M. 854 (1964). Both conventions went into effect in 1972 by the minimal ratification of five states. As of January 1, 1988, Belgium, Gambia, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom are parties to these conventions. The United States joined the conference at the last minute, when it was too late to accomplish major changes. Accordingly, the United States saw no reason to adopt a convention in which it had no hand in establishing. *See* Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?*, 2 NW. J. INT'L L. & BUS. 129 (1980); Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the Sale of Goods*, 18 INT'L LAW. 29, 30 (1984). Neither ULIS nor ULF gained acceptance within the socialist and developing countries because on the whole these countries were not represented at the Hague Diplomatic Conference. Twenty-two of the twenty-seven original signatories of the 1964 Uniform Laws were European. A few years later, the much more widely represented forum of UNCITRAL removed the political objection leveled against uniform laws and conventions produced by regional institutions such as the Hague Diplomatic Conference. For a

sales was taken over by the United Nations Conference on International Trade Law (UNCITRAL), whose broad membership includes countries of different legal traditions and socio-economic conditions.[2] The final text of the Convention was finally approved at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.[3]

Sixty-two nations were represented at the Vienna Conference. Roughly speaking, twenty-two from the "Western developed" part of the world, eleven from "socialist regimes," and twenty-nine from "Third World" countries.[4] This broad representation is reflected in the text of the Convention, which is the product of hard-fought compromises. After sketching the background and present status of the Convention, this article approaches the Convention from the comparative perspective given by those compromises.

Twenty-one countries had signed the Convention by its deadline, September 30, 1981.[5] As of December 31, 1988, seventeen nations had ratified it. The

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history of the Convention, see *United Nations Conference on Contracts for the International Sale of Goods* at 3–5, U.N. Doc. A/Conf. 97/19, U.N. Sales No. E.82.V.5 (1981) [hereinafter *Conference on Contracts*]; Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.01 (N. Galston & H. Smit eds. 1984) [hereinafter Winship, *The Scope of the Vienna Convention*].

2. UNCITRAL was established by G. A. Res. 2205 (XXI), 21 U.N. GAOR, Supp. (No. 16) 99, U.N. Doc. A/6316 (1966) *reprinted in* 1 Y.B. INT'L TRADE L. COMM'N 65, U.N. Doc. A/CN.9/SER.A/1970. Initially, UNCITRAL focused on ULIS to determine whether changes in the existing text might make it more acceptable to the legal and economic systems of various countries. By UNCITRAL's second session in 1969, however, it was apparent that ULIS would not be accepted without extensive alteration. A fourteen-member working group was established to begin drafting a new text (Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom, and the United States). The Group was later enlarged to fifteen and three replacements were made, allowing for the participation of Austria, Czechoslovakia, the Philippines, and Sierra Leone. *See* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 54 n.9 (1982). The working group met once a year over the next nine years. After almost a decade of study, the working group produced a Draft Convention on the International Sales of Goods in 1976 and a Draft Convention on Formation of the Sales Contract in 1977. In 1978, the full Commission reviewed the drafts and combined them into a single Draft Convention which was submitted to the 1980 diplomatic conference in Vienna. The text of the 1978 Draft Convention with a Commentary appears in *Conference on Contracts, supra* note 1, at 5, *reprinted in* 18 I.L.M. 639 (1979). *See* Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979).

3. *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, with Annex, United Nations Convention on Contracts for the International Sale of Goods, *reprinted in* 19 I.L.M. 668 (1980) [hereinafter Convention]. The final text and conference proceedings are published in *Conference on Contracts, supra* note 1, and may be purchased from United Nations Publications, Room GA–32, United Nations, New York, N.Y. 10017. The Convention Conference was convened by General Assembly Resolution 33/93, G.A. Res. 93, 33 U.N. GAOR Supp. (No. 45) at 217, U.N. Doc. A/33/45 (1978).

4. *See* Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 346 (1983).

5. The signatory countries are Austria, Chile, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, France, the German Democratic Republic, Ghana, Hungary, Italy, Lesotho,

Convention entered into force on January 1, 1988, in eleven countries: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. In December 1987 four other countries became Contracting States: Austria, Finland, Mexico, and Sweden. The Convention entered into force with respect to these countries on January 1, 1989, and also entered into force in Australia on April 1, 1989.[6] Norway acceded to the Convention on July 28, 1988, and other countries are presently considering ratification or accession.[7]

I now turn briefly to the participation of the United States in the drafting and adoption of the Convention.[8] Delegates from the United States participated actively in the discussions of the Convention.[9] They voted in favor of the final text at the Vienna Conference, and subsequently recommended to the Secretary of State that the United States become a party to the Convention. The United States signed the Convention on August 31, 1981. On September 21, 1983, the President of the United States asked for the advice and consent of the

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the Netherlands, Norway, People's Republic of China, Poland, Singapore, Sweden, the United States, Venezuela, and Yugoslavia. By signing the Convention, these countries undertook an implicit obligation to seek ratification in accordance with their domestic constitutional procedures. Countries which did not sign by the September 30, 1981, deadline may accede to the Convention at any time. Convention, *supra* note 3, art. 91(3).

6. Art. 99 (1) of the Convention, *supra* note 3, provides that the Convention will enter into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. . . ." According to art. 100, the Convention governs offers made and contracts concluded after it becomes effective in a country. According to art. 99(2), the Convention will enter into force as to any country which becomes a Contracting State "on the first day of the month following the expiration of twelve months after the date [the country notifies the U.N. Secretary General that it has acceded]." Current information about the status of the Convention may be obtained from the Treaty Section of the Office of Legal Affairs, United Nations, New York, N.Y. 10017, Telephone: (212) 963–3918 and from the UNCITRAL Secretariat, P. O. Box 500, Vienna International Center, A-1400 Vienna, Austria, Telex: 135612; Telephone: (43) (1) 2631–4060; Telefax: (43) (1) 232156.

7. In June 1988, Professor Winship listed the following countries as considering ratification or accession to the Convention: Czechoslovakia, Denmark, Federal Republic of Germany, German Democratic Republic, Netherlands, Poland, Spain, and Switzerland. Winship, *The International Law of Contract: The United Nations Convention on Contracts for the International Sale of Goods*, unpublished manuscript submitted to the American Association of Law Libraries 1988 Annual Meeting, June 27, 1988 (on file with the author).

8. For a comprehensive discussion of the ratification process in the United States, see Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707 (1986). *See also* Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1987).

9. The United States delegates to the Vienna conference were John O. Honnold, E. Allan Farnsworth, and Peter H. Pfund. They were briefed by the Secretary of State's Advisory Committee on Private International Law, composed of representatives of major legal organizations such as the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The State Department also appointed a special study group with members knowledgeable in the legal and business problems of international trade. *See* Winship, *Export-Import Sales Under the 1980 United Nations Sales Convention*, 8 HASTINGS INT'L & COMP. L. REV. 197, 200 (1985) [hereinafter Winship, *Export-Import Sales*].

Senate to the ratification of the Convention.[10] Unanimous ratification by that body followed in October 1986.[11] On December 11, 1986, officials from the mission to the United Nations of the United States deposited the instrument of ratification at United Nations Headquarters in New York.[12]

A summary view of the sphere of application of the Convention is now in order. The provisions of the Convention govern the formation of international sales contracts and the rights and obligations of the buyers and sellers arising from such contracts.[13] At the time of ratification a State may declare that it will join the convention only in part. A State may refuse to be bound either by Part II, on the formation of contracts, or by Part III, on the rights and obligations of the parties.[14] Only Part I, regarding the sphere of application and other general

10. President's Message to the Senate Transmitting the Convention, 19 WEEKLY COMP. PRES. DOC. 1290 (Sept. 21, 1983). S. TREATY DOC. No. 9, 98th Cong., 1st Sess. (1983) *reprinted in* 22 I.L.M. 1368 (1983); *International Sale of Goods: Hearings on Treaty Doc. No. 9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. (1984) [hereinafter *Hearings on Treaty Doc. No. 9*].

11. *Senate Committee on Foreign Relations Report*, EXEC. REP'T 20, 99th Cong., 2d Sess. (1986); 132 CONG. REC. S15767-8, 15773-4 (daily ed. Oct. 9, 1986).

12. U.N. Dep't of Public Information, Press Release I/T/3849, December 11, 1986. *See* Pfund, *International Unification of Private Law: A Report on U.S. Participation—1986–87*, 21 INT'L LAW. 1245, 1247 (1987). For the U.N.-certified official English text of the Convention, see the annex to the notice of the State Department in 52 Fed.Reg. 6262–80 (1987).

13. The formation provisions appear in Part II of the Convention, *supra* note 3 (arts. 14–24), while the substantive provisions appear in Part III (arts. 25–88). Part I (arts. 1–13) defines the Convention's sphere of application and sets out rules of interpretation applicable to both subsequent parts. Part IV (arts. 89–101) refers to the implementation of the Convention. For short informative articles on the Convention, see Griffin & Calabrese, *New Rules for International Contracts*, 74 A.B.A.J. 68 (1988); Rendell, *International Sales Convention on the Horizon*, INT'L FIN. L. REV., Feb. 1988, at 27; Winship, *International Sales Contracts Under the 1980 Vienna Convention*, 17 U.C.C.L.J. 55 (1984) [hereinafter Winship, *Sales Contracts*]; Winship, *New Rules for International Sales*, 68 A.B.A.J. 1230 (1982) [hereinafter Winship, *New Rules*]. *See also* the summary published by UNCITRAL, Note by the Secretariat, A/CN.9/307. For more extensive discussion, see C. BIANCA & M. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987) [hereinafter COMMENTARY]; THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS (R. Kathrein & D. Magraw eds. 1987); GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION (W. Hancock ed. 1987); J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982) [hereinafter J. HONNOLD, UNIFORM LAW]; INTERNATIONAL SALES, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (N. Galston & H. Smit eds. 1984) [hereinafter INTERNATIONAL SALES]; INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES (P. Sarcevic & P. Volken eds. 1986) [hereinafter DUBROVNIK LECTURES]; P. SCHLECHTRIEM, UNIFORM SALES LAW: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1986) [hereinafter UNIFORM SALES LAW]. For a bibliography on foreign language materials, see M. WILL, INTERNATIONALE BIBLIOGRAPHIE ZUM UN-KAUFRECHT (1987).

14. Convention, *supra* note 3, art. 92. Article 90 provides that the Convention does not prevail over "any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention." Similarly, art. 94 authorizes states with "closely related legal rules on matters governed by the Convention" to declare that the Convention will not apply to sales contracts between enterprises with their places of business in these countries. *See* Ziegel, *Canada and the 1980 International Sales Convention*, 12 CAN. BUS. L.J. 366 (1987) (suggesting that the United States and Canada should consider making such a declaration).

provisions, and Part IV, the final provisions on ratification and related matters, are mandatory.[15]

An array of exclusions and exceptions based upon the nature of the transaction,[16] the purpose of the sale,[17] and the nature of the goods[18] limit the scope of the Convention. In particular, the Convention is not concerned with the validity of the contract,[19] the effect the contract may have on the title to the goods sold,[20] or the liability of the seller for death or personal injury caused by the goods to any person.[21]

The Convention applies to contracts of sale of goods between parties whose places of business are in different states and either both of those States has become a party to the Convention (hereinafter referred to as a Contracting State) or the rules of private international law of a Contracting State lead to the

15. A contracting state with two or more territorial units may declare that only one or more of these units has joined the Convention. Convention, art. 93, *supra* note 3. Moreover, two or more contracting states may declare that the Convention does not apply to contracts between parties who have their places of business in those states. *Id.*, art. 94. A final article provides that a member state may denounce the Convention or part of it simply by giving formal notification to the United Nations. *Id.*, art. 101. On the various ratifications choices available to contracting states, see Winship, *The Scope of the Vienna Convention*, *supra* note 1, at 1–1, 1–39 to 1–48.

16. For example, art. 3 of the Convention, *supra* note 3, specifically excludes contracts of services from the Convention. Under the Convention, contracts of sale are distinguished from contracts for services in two respects. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services, the Convention does not apply. Sales by auction and execution are also excluded from the Convention.

17. Most notable among the exclusions is that of sales of goods for personal, family, or household use.

18. Stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity are not considered "goods." In many countries the sale of some or all of such *res* is governed by special rules reflecting their special nature.

19. The Convention does not define the term "validity," but most commentators agree that its common core includes issues regarding fraud (*dol*), duress, unconscionability, legal capacity of the parties to enter into a contract, and error. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 96–98; Schlechtriem, UNIFORM SALES LAW, *supra* note 13, at 32; *see also* Comment, *Disclaimer of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863, 871–74 (1985) (arguing that the definition of "validity" should be found in the domestic law of the appropriate jurisdiction under private international law); Heiz, *Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law*, 20 VAND. J. TRANS. L. 639 (1987) (arguing that the Convention rather than domestic law should define the meaning of the term "validity"). Professor Winship suggests that issues related to the validity of contracts may provide an easy door for escape from the Convention. *See* Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 635–39 (1988) [hereinafter Winship, *Commentary*].

20. The transfer of ownership over the thing sold is generally viewed as the basic purpose of a contract of sale. *See, e.g.*, ITALIAN CIVIL CODE art. 1470; FRENCH CIVIL CODE art. 1583; SWISS CODE OF OBLIGATIONS art. 184. However, there is such diversity of rules in municipal law on this point that unification was considered to be impossible. *See* Khoo, *Article 3*, in COMMENTARY, *supra* note 13, at 46.

21. Convention, *supra* note 3, arts. 4–5.

application of the law of another Contracting State.[22] Thus, each Contracting State will have two sets of rules for sales: a domestic law of sales of general application and a set of rules applicable to a particular subgroup of sales—international sales.

Absent a choice-of-law provision in an international sales contract, the parties cannot be certain which law a national tribunal will apply to resolve any dispute arising from the contract. Under the regime of the Convention, a Contracting State's Court will not have to apply the foreign sales law indicated by the choice-of-law rules. Instead, a Contracting State's Court will apply the Convention pursuant to the terms of article 1, unless the parties to the contract have agreed to exclude some or all of the Convention's rules.[23] If the forum does not belong to a Contracting State, or the requirements of article 1(1)(a) of the Convention have not been met, or the issue to be decided is not covered by, or is expressly excluded from the scope of application of the Convention, then the case will be decided under the forum's choice-of-law rules.[24]

22. Art. 1(1)(b) of the Convention, *id.*, states that the Convention will also apply if the rules of private international law (i.e., choice-of-law) lead to application of the law of a Contracting State. The United States and the People's Republic of China have availed themselves of the authorization granted by art. 95 of the Convention to declare that it will not be bound by paragraph (1)(b) of art. 1. *See* Gabor, *Stepchild of the New "Lex Mercatoria": Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 539 (1988) [hereinafter Gabor, *Stepchild*] (stating that it was the "unsettled and unpredictable status of private international law [which] prompted this limitation").

23. Convention, *supra* note 3, art. 6. According to art. 1(1) of the Convention, a Contracting State's court will apply the Convention to a contract for the international sale of goods *unless* the parties affirmatively "opt out" to avoid some or all of the Convention's rules. For a discussion of the methods to exclude the application of the Convention, see Winship, *The Scope of the Vienna Convention*, *supra* note 1, at 1–1, 1–32.

24. Of the several alternatives to facilitate the determination of the applicable law to international sales, two in particular have been considered. The first solution, envisioned by adoption of the Convention, is to have a uniform sales law in force in all countries. The second solution urges all countries to agree on uniform choice-of-law rules rather than uniform substantive rules. If the second solution is universally adopted, every forum would apply the same country's sales law whenever two or more substantive laws may be applied to the case in point. But conflict-of-law rules on sales are not uniform throughout the world, thus creating a legal uncertainty not totally excluded by the Convention. In 1955, the Hague Conference on Private International Law (a private international law organization not to be confused with the 1964 Conference held at the Hague which adopted ULF and ULIS) prepared a Convention on the Law Applicable to International Sales of Goods, 510 U.N.T.S. 149 (1964). This convention came into force in 1964 and was adopted by the following countries: Belgium, Denmark, Finland, France, Italy, Nigeria, Norway, Sweden, and Switzerland. The convention was not well received in the United States and failed to gain the acceptance of developing countries. *See* Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449 (1965). In 1980, the Hague Conference appointed a Special Commission to prepare a revision of the convention to be submitted to a Special Session of the Conference in October, 1985. The Hague Conference adopted a revised uniform choice-of-law treaty for international sales at this extraordinary session. *See* Hague Conference on Private International Law Draft, Convention on the Law Applicable to Contracts for the International Sale of Goods, Oct. 30, 1985, 24 I.L.M. 1573 (1985) [hereinafter Hague Conflicts Convention]. The Hague Conflict Convention was a joint project of the Hague Conference and UNCITRAL aimed at broadening the base of participating countries. The Hague Conflict Convention may become relevant inasmuch as

The delegates of the sixty-two participating nations did not adopt the final text of the Convention by some magical consensual process.[25] This is not surprising, because adoption of the whole text of the Convention by consensus would have been impossible in view of the wide differences held by those who participated in the negotiations. After thirty years of hard technical negotiations, the fact that the delegates were able to agree on a uniform law that displaces familiar national concepts and policies can only be explained as a compromise.[26] Naturally,

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gaps in the U.N. Convention for the International Sale of Goods which cannot be filled by the Convention's general principles are to be filled by reference to the national law which would be applicable by virtue of the forum's choice-of-law rules. *See generally* Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law*, 7 NW. J. INT'L L. & BUS. 696 (1986); Gabor *Stepchild*, *supra* note 22, at 538 (recommending that either Congress or the Permanent Editorial Board of the U.C.C. consider the Hague Conflict Convention as a model for the enactment in the United States of uniform rules for the international choice of law); Mebroukine, *Quelques remarques à propos de la Convention de La Haye de 1986 sur la loi applicable aux contracts de vente internationale de marchandises*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES, No. 1, 1988, at 45–71; Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, 51 RABELS ZEITSCHRIFT 60 (1987).

25. UNCITRAL has thirty-six rotating members allocated among the regions of the world (Africa sends nine representatives, Asia seven, Eastern Europe five, Latin America six, and Western Europe, Australia, Canada and the United States are jointly permitted nine). The full commission meets once a year for sessions of two to four weeks in New York or Vienna. Its Secretariat is a full-time body composed of an international team of professionals (mostly lawyers) with offices in Vienna. The Secretariat chairs and prepares the annual meetings in close cooperation with the full commission and working groups, as well as with other interested parties. For drafting technical studies UNCITRAL depends on working groups. Each group attempts to reflect cross sections of the commission's worldwide representation. The decisions as to what to include in the official text are taken by the Commission. UNCITRAL's decisions take the form of recommendations and reports to the Secretary General of the United Nations, or, as in the case of the adoption of the Convention, to a diplomatic conference called by a General Assembly. *See* Farnsworth, *UNCITRAL: Why? What? How? When?*, 20 AM. J. COMP. L. 314 (1972); Herrman, *The Contribution of UNCITRAL to the Development of International Trade Law*, in TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 35 (N. Horn & C. Schmitthoff eds. 1982); Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 208 (1979); Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C.J. INT'L & COM. REG. 109, 113–14 (1988) [hereinafter Zwart, *The New International Law of Sales*]. The Chairman of UNCITRAL recalled at its first session that the Commission had agreed that its decisions should, as far as possible, be reached by consensus. He also stated that it was only in the absence of consensus that decisions should be taken by a vote, as provided for in the rules of procedure relating to the procedure of Committees of the General Assembly. Professor Honnold reports that, as of 1979, UNCITRAL had yet to take a formal vote or adopt its own procedural rules, noting that "the procedures bear a striking resemblance to those of a Quaker meeting." Honnold, *supra*, at 210. Professor Rosett strongly criticizes UNCITRAL's decision-making structure, stating that the Commission "has a rather obscure structure and uncertain decisional authority," because it possesses authority to make decisions only by reports and recommendations to other U.N. organs. Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 272, 295–96 (1984).

26. Rosett, *supra* note 25, at 296; *see also* Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1986 (1984) [hereinafter Note, *Unification and Certainty*], defining compromise as "merely the technical formulation of a text whose meaning may be malleable" and consensus as "a more basic agreement—on either a universally accepted practice or norm or on a principal" . . . (footnote omitted).

because many of the articles of the Convention reflect a compromise, they fail to reflect the individual preferences of the delegates and to live up to the expectations of all participating countries.

Part I of this article discusses the need, difficulties, and willingness of securing widespread acceptance of some of the crucial provisions of the Convention. It also discusses the strategy of compromise followed at the Vienna Conference in order to achieve a meaningful unification of the law governing international sale of goods. Part II examines some of the compromises reached by the drafters, emphasizing the technical and cultural obstacles faced in connection with several issues presented by the law of sales. The vigorous debate that characterized the formulation of those provisions, and the ambiguous and at times illusory compromises ultimately reached by the drafters, provide valuable insights into the unification process. The compromises also reveal the conceptual gaps existing between civil law and common law legal traditions and the tensions on matters of legislative policy between developed/developing nations and capitalist/socialist economies. To attempt to interpret the Convention without reference to the struggle for compromise would oversimplify the problems posed by its application.[27]

I. Need, Difficulty and Willingness to Compromise

The disparity of economic, political, and legal structure of the countries represented at the Vienna Conference suggests the difficulty of achieving legal uniformity. It also suggests the inevitability of compromises in order to integrate different concepts and ideas into an independent, workable, and meaningful system of regulating international sales. This need for compromises is unprecedented in the history of the international unification of private law.

Before the Second World War, the civil law approach was largely predominant in the various draft rules on international sales.[28] Thus, an agreement on a uniform sales law at the 1964 Hague Conference was not so difficult to achieve among industrial, capitalistic, essentially liberal European countries, in light of the congruity of their economic, cultural, and political situations. By the time UNCITRAL assumed the dominant role in the unification project during the late 1960's, however, the contrast between common law/civil law, capitalist/socialist, and industrial/underdeveloped systems became the focal point of the debates. Therefore, the text of ULIS and ULF adopted at the 1964 Hague Conference,

27. *See* I D. O'CONNELL, INTERNATIONAL LAW 26 (2d ed. 1970) (suggesting the need to examine the vital political interests at stake in the formulation of compromises in order to solve the many problems of treaty-application).

28. For helpful insights into the legislative history of the Convention, stressing the practical utility of drawing comparisons between the Convention text and the 1964 uniform sales laws, see Winship, *Commentary*, *supra* note 19, at 624.

almost entirely dominated by Western Europe, necessitated fewer compromises than the text of the Convention adopted at the 1980 Vienna Conference.[29]

The attempt to develop a compromise among radically different legal cultures has inherent difficulties. Understandably, most delegates wanted the Convention to embody as much as possible of their own national legal rules, either because of the assumption that what is familiar is probably better than what is strange, or as a result of the more pragmatic consideration that in international trade law the law of one's own country gives those familiar with it substantial "know-how" advantages.[30] As stated by Professor Eörsi, the search for a compromise is often complicated by "a tacit endeavor to find a 'compromise' that favors one's own system,"[31] and some rules of the Convention reflect the inability of the participants to the Vienna Conference to reach meaningful compromises.

Willingness to compromise, of course, is not found in equal measure in everyone. Each country's bargaining position in the world of international trade is likely to determine the strategy of compromise to be followed by its delegates. On the one hand, countries that conduct an extensive international trade have less incentive to compromise than others, partly because their multinational corporations can persuade their less powerful business partners to accept their terms,[32] and partly because those corporations, while not completely insulated from poor legal advice, are in a better position to retain well-informed counsel that can cope with the intricacies of foreign law.[33] Countries from the "periphery" of world trade are likely to feel driven into a corner, newcomers to the legal arena of international business transactions that may prove even less willing, or perhaps less able, to compromise.[34] Nevertheless, all business partners bear the risk of

29. At the 1964 Hague Conference, which adopted ULIS and ULF, twenty-eight countries took part: twenty-two European or other developed Western countries, three Socialist, and three developing countries. At the 1980 Vienna Conference, sixty-two countries took part: twenty-two European and other developed Western states, eleven Socialist, eleven Central and South-American, seven African and eleven Asian countries. *See* Eörsi, *supra* note 4, at 333, 346; *see also* Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619, 636 (1984) [hereinafter Note, *Trade Usages*].

30. Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 315 (1979).

31. *Id.*

32. *See* Feltham, *The United Nations Convention on Contracts for the International Sales of Goods*, 1981 J. BUS. L. 346, 361. Feltham, an English delegate to the Vienna conference, suggests that the Convention may not be an improvement for the individual interests of merchants from developed countries, who may be in a bargaining position strong enough to be able to impose over the other party the application of a sophisticated law of commercial transactions.

33. It is therefore reasonable to assume that divergent national interpretations of the Convention may affect more severely those least able to foresee and afford their impact. Big multinational corporations are more likely to benefit from the advice of excellent legal counsel and avoid unpleasant surprises by "opting out" of the Convention or remaining under the Convention under a favorable forum. *See International Sale of Goods: Hearing on Treaty Doc. 9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 837 (1984), at 63, 68 (joint statements by Honnold, Kaskell, & Joelson).

34. Eörsi, *supra* note 4, at 345.

being subjected to a completely unknown legal system, so it was in the political interest of all the States that participated at the Vienna Conference to act tolerantly and seek meaningful compromises.[35]

Compromises can be grouped in many ways. Professor Eörsi describes four different types of compromises, classified in accordance with their nature: (1) those that are clear and recognizable; (2) those that are detectable only by initiates with access to Conference documents; (3) those entered with mental reservations on each side, each side keeping its own view of what was agreed; and (4) those masking continuing disagreement and hence merely illusory.[36] In order to reach valuable insights as to the conceptual gaps and tensions of legislative policy confronted by the drafter of the Convention, compromises can also be classified according to the different perspectives given by the legal tradition, economic system, and stage of socio-economic development. At the risk of oversimplification, compromises may also be roughly grouped along the conflict lines of the civil and common law tradition, socialist and western legal systems, and industrialized and developing countries.[37] These conflict lines are drawn only for the purpose of facilitating the analysis of the interests at stake that sought recognition in the formulation of the compromises. Many times, delegates from the developing nations of Latin America sided with their civil law brethren from the Western European industrialized countries on various technical issues. Also the delegates of some ex-British colonies with developing economies sided in many instances with their common law brethren from the United States, Great Britain, and other developed economies of the Commonwealth.[38]

II. The Hard Task of Reconciliation: Some Representative Issues

A. Civil Law—Common Law

Despite differences of general approach and style between the Convention and the Uniform Commercial Code, common law lawyers should have little difficulty working with the Convention.[39] Although before the Second World War the civil

35. *Id.*

36. *Id.* at 346, 353–56; *see also* Note, *Unification and Certainty*, *supra* note 26, at 1988–89 (footnotes omitted) ("The negotiators often declined to reconcile conflicts over fundamental principles. Instead, they sought to compromise on linguistic formulations amenable to all points of view—formulations that consequently lack any determinate meaning. These compromises appeared in several forms: a principal rule with exceptions, a rule accommodating many types of doctrines, or a rule consisting of conflicting or at least unresolved subparts.")

37. *See* Farnsworth, *Developing International Trade Law*, 9 Calif. W. Int'l L.J. 461, 463 (1979) ("UNCITRAL operates, and this is not unusual in the United Nations, in blocks. That is, there are groups of countries from Africa, Asia, Latin America, Eastern Europe, and Western Europe—which includes the United States and Australia—which work together as blocks.").

38. Eörsi, *supra*, note 4, at 349.

39. Winship, *Export-Import Sales*, *supra* note 9, at 206; *see also* Winship, *Formation of International Sales Contracts Under the 1980 Convention*, 17 Int'l Law. 1 (1983) [hereinafter Winship, *Formation*].

law approach was strongly predominant in the various drafts on international sales, the common law approach gathered momentum within the Working Group of UNCITRAL.[40] This is shown, for example, by the rejection of the traditional dichotomy between commercial and noncommercial sales found in many civil law countries. Yet for a common law lawyer the style of many of the rules of the convention may appear too brief and general, in contrast with the more detailed and convoluted drafting style prevalent in the Uniform Commercial Code and the Restatement of Contracts.[41] Paradoxically, for a civil law lawyer the language of the Convention is not typical of the concise style of draftsmanship of the French-inspired civil codes.[42] These divergent impressions confirm that the Convention reflects more a blending of the two legal traditions rather than the prevalence of one over the other.[43]

In preparing uniform rules for the contract of international sales, most debates between delegates from civil and common law jurisdictions were waged over differences in legal technique rather than economic or political issues. The Convention's compromises to accommodate the conceptual gap between the two major legal traditions were not surrounded by the level of political intensity common to other more pressing, and controversial, international topics. Some of the issues that appeared as stumbling blocks in preparing uniform rules were the following: (a) Whether a countervalue should be required for the enforcement of an agreement modifying or terminating a contract; (b) whether an offer should become effective at the time of the offeree's dispatch of the acceptance or at the time the acceptance reaches the offeror; (c) whether an offer stating a fixed period of time for acceptance should be considered irrevocable; and (d) whether the primary remedy for breach of a contract of sale should be specific enforcement or substitutional relief.

1. *Role of Consideration*

The Convention does not mention the doctrine of consideration. This omission is deprived of any significance because (1) a sale is an onerous transaction, where "consideration" is supplied by the exchange of promises to deliver and to pay; and (2) a challenge to the enforceability of a promise for lack of consideration is

40. Eörsi, *supra* note 30, at 315 (indicating that the prevalence of the common law approach is also noticeable in the development of UNIDROIT'S drafts relating to commercial representation and commission agency).

41. Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State, stated at the congressional hearings that "the Convention is generally consistent with the approach and outlook of UCC, which it resembles more than the law of any other country." *Hearings on Treaty Doc. No. 9, supra* note 10, at 2.

42. *See* Ghestin, *Les obligations du vendeur selon la Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES, No. 1, at 5, 6 (1988) [hereinafter Ghestin, *Les obligations du vendeur*].

43. *See* Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 1 INT'L TAX & BUS. LAW. 79, 81 (1984) (United States influence in the drafting of the Convention effected a change in the civil law bias on the law of international sales, thus resulting in a blending of common and civil law systems).

an issue of "validity" dehors the scope of application of the Convention, hence remitted, under conflict rules, to the applicable national law.[44] It could be argued that the doctrine of "consideration" is neglected by article 29(1), providing that the mere agreement of the parties suffices to modify or terminate a contract. At common law, when an agreement to modify a contract merely increases or reduces the obligations of one of the parties, the agreement may be unenforceable since it is not supported by "consideration"—i.e., by an act or promise given in exchange for the new promise.[45] Civil law systems impose no comparable restriction, hence delegates from civil law countries did not object to article 29(1). Nor did the common law delegates object, because common law restrictions on the parties' ability to adapt their transaction to new circumstances had already generated pressure for modifications of the traditional common law rule.[46]

2. *Perfection of Sale Contracts*

A classic instance of theoretical conflict between common law and civil law approaches is found in the area of formation of contracts. The classic civil law approach is that an acceptance is not effective, hence the contract is not perfected, until it reaches the offeror,[47] thus placing the risk of transmission of a written offer on the offeree. Because the offeree was the party that selected the medium of communicating the acceptance, the offeree is considered in the best position to insure against possible delays and hazards. The common law takes the opposite view, according to which a contract is completed when the offeree dispatches the acceptance.[48] Accordingly, the risk of delay or loss of the acceptance rests on the offeror, provided the offeree dispatched the acceptance by a medium expressly or impliedly authorized by the offeror.[49]

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44. Convention *supra* note 3, art. 4(a). For comments on the Convention and the doctrine of consideration, see Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 REV. GH. L. 50, 59 (1979); Eörsi, *supra* note 30, at 316; Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL'S Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L L. & COM. REG. 63, 78–79.

45. J. HONNOLD, UNIFORM LAW, *supra* note 13, at 229.

46. The Uniform Commercial Code (UCC) upholds contract modifications without consideration. *See* U.C.C. § 2–209(1) (1977) (a modification needs no consideration to be binding). *See generally* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 202.

47. *See, e.g.*, GERMAN CIVIL CODE art. 130; SWISS FEDERAL CODE OF OBLIGATIONS art. 5; *see also* MEXICAN CIVIL CODE FOR THE FEDERAL DISTRICT art. 1807; VENEZUELAN CIVIL CODE art. 1137.

48. At common law, the so-called "mailbox rule," which makes a written acceptance effective upon dispatch, dates back to the beginning of the 19th century. *See* Adams v. Lindsell, 1 Barn & Ald. 681 (K.B. 1818). In this case, the offeror misdirected the offer, thus delaying the offeree's acceptance. After dispatch of the acceptance, but before its receipt, the offeror had sold the goods to a third party. Upon a claim for damages, the court ruled for the offeree because the mishap occurred as a result of the offeror's neglect.

49. *See* Rosett, *supra* note 25, at 283 (noting that the so-called "mailbox rule" raises the issue of consideration and the traditional Anglo-American notion that contracts are bargains, according to which a contract is perfected by the delivery of the bargained for equivalent of the promise).

This difference of approach proved to be of minor practical consequence. According to article 18(2) of the Convention, an offer is effective when it reaches the offeror.[50] However, article 16(1) of the Convention provides for the most important consequence of the common law "mail-box rule," that is, an offer may not be revoked if the revocation reaches the offeree after it has dispatched an acceptance.[51] Thus, while receipt is crucial for the effectiveness of the offer, dispatch remains the standard to determine the timeliness of its revocation. Moreover, in one important situation the Convention does not follow the receipt theory. According to article 18(3), the acceptance is effective at the moment the offeree indicates assent by performing an act, "such as one relating to the dispatch of the goods or payment of the price." Therefore, although the Convention adopts the receipt theory for the most part, a closer look at the practical consequences of the provisions on the formation of contract reveals a well-balanced compromise between civil law and common law principles.

3. *Irrevocability of an Offer with a Fixed Time for Acceptance*

Most civil law systems operate under the assumption that when one makes an offer, the offeror impliedly gives the offeree a reasonable time to consider it and respond. Accordingly, in most civil law systems offers are presumed to be irrevocable for a reasonable time unless otherwise indicated by the offeror.[52] In contrast, the common law approach has been to grant the offeror the freedom to abandon the deal until the formation process of the contract is quite advanced.[53] This is the general approach taken by the Convention in article 16(1), which sets forth the common law presumption of revocability.[54]

Having made a concession by agreeing on the general principle of revocability, delegates from civil law countries urged their common law counterparts to agree that where a businessman states in his offer a particular period during which the offer is to remain open, the offeror should be held accountable during that period of time. Thus, article 16(2) of the Convention carves out two important

50. The offer, the withdrawal of an offer, the revocation of an offer, and the acceptance by declaration all become effective only when they reach the other party, Convention, *supra* note 3, arts. 15, 18 22–23. Art. 24 makes clear when a declaration must be presumed to have reached the addressee. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 186–87.

51. For a comprehensive discussion of the Convention's provisions on formation of contracts, providing examples of their practical consequences, *see* Winship, *Formation*, *supra* note 39, at 14.

52. *See, e.g.*, GERMAN CIVIL CODE art. 147; SWISS CODE OF OBLIGATIONS art. 5 (offer irrevocable during the time the offeror may reasonably expect to receive an answer); *see also* MEXICAN CIVIL CODE FOR THE FEDERAL DISTRICT art. 1806; VENEZUELAN CIVIL CODE art. 1137.

53. *See* E. FARNSWORTH, CONTRACTS § 3.17, at 148–51 (1982); RESTATEMENT (SECOND) OF CONTRACTS § 42, at 113–15 (1979) [hereinafter RESTATEMENT CONTRACTS]. The offeror's freedom to revoke an offer enjoyed at common law has been limited by open-ended doctrines such as promissory estoppel. *See e.g.*, U.C.C. § 2–205 (1977); N.Y. GEN. OBLIG. LAW § 5–1109.

54. Convention, *supra* note 3, art. 16(1): "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance."

restrictions to the general principle of revocability. First, it provides that an offer is irrevocable "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable." Second, offers on which the offeree has acted in reliance are also irrevocable.[55]

The first exception from the general rule of revocability provoked extended discussions at the 1978 session of UNCITRAL. One delegation from a common law jurisdiction urged that when the offer states a fixed period for acceptance, businessmen of common law countries would interpret this to mean not only that the offer would terminate at the end of this period, but also that during this period the offer was revocable at any time.[56] This observation is consistent with traditional common law principles, according to which an offer may be revoked until it is accepted unless the offeree has paid consideration. Article 2 of the Uniform Commercial Code distinguishes between a firm offer, which cannot be revoked, and a merely open offer, which lapses at the end of the stated time but can be revoked at any time.[57] This distinction has not been adopted in most civil law countries, where every "open offer" is a "firm offer" simply because it expressly states that it is irrevocable or implicitly indicates so by stating a fixed period for acceptance. When a delegation from a civil law jurisdiction answered that such a peculiar reading of an open offer would be inconsistent with the plain meaning of article 16(2)(a), another delegate from a common law country replied that in the relations between the businessmen of two common law States, the meaning they give to their own contract must be respected.[58]

The language adopted in article 16(2)(a) is described in the summary of UNCITRAL deliberations as a compromise, but its drafting history indicates that at least two interpretations of this provision are possible. For a civil law lawyer it is obvious that if a fixed time for acceptance of the offer is stated, as provided

55. *Id.* art. 16(2). *See generally* Winship, *Formation*, *supra* note 39, at 7.

56. *See* Eörsi, *supra* note 30, at 321 (citing U.N. Doc. A/CN.9/XI. CRP. 18, add. 9, para. 5).

57. Section 2–205 of the UCC provides:

> 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.

58. Eörsi, *supra* note 30, at 321; Eörsi, *supra* note 4, at 354; *see also* Date-Bah, *supra* note 44, at 58:

> At the Plenipotentiary Conference, some of the common law delegations suggested that in a transaction between traders from common law countries in which the offeror fixed a time for lapse of the offer and was so understood by the offeree not to have made an irrevocable offer, this would be a situation where the stating in an offer of a fixed time for its acceptance could not be interpreted by a reasonable court to mean that the offer was irrevocable. This result could easily be reached by a common law court; but it is to be doubted whether a civil law court would come to this conclusion.

under article 16(2)(a), this indicates that the offer is irrevocable until the expiration of the stated period, though not thereafter. For a common law lawyer, the time fixed for acceptance only means that an answer has to be given within this period; more precise language would be necessary to make the offer irrevocable.[59]

Therefore, the compromise solution of article 16(2)(a) does not bridge the gap between common law and civil law conceptions on the irrevocability of offers that state a fixed time for acceptance; the compromise only covers it up.[60] The offer is not likely to be treated as irrevocable when a trader in one common law country states a fixed time for acceptance to a trader in another common law country,[61] but it will be deemed irrevocable if the parties are from civil law countries.[62] Should each party belong to a different legal tradition, then the irrevocability of the offer must be ascertained under a closer analysis of the language of the parties' communications and the volitional contest in which they were made.[63] Obviously article 16(2)(a) is not likely to help the parties in

59. The different viewpoints on this provision are summarized in *Report of the United Nations Commission on International Trade Laws on the work of its eleventh session (New York 30 May—16 June 1973)*, [1978], 9 UNCITRAL Y.B. 41 U.N. DOC. A/CN. 9/SER.A/(1978):

> § 135. In support of this proposal [the compromise text ultimately adopted in art. 16(2)(a)], it was stated that the principal test to determine that an offer could not be revoked was whether the offer indicated that it was irrevocable. Whether the offer was irrevocable could be determined by the fact that it stated a fixed time for acceptance or otherwise. However, the mere fact of stating a time for acceptance would not automatically lead to the result that the offer was irrevocable if, under the circumstances of the case, such a result was not intended. In particular, it was said, where a merchant from one common law country made an offer to a merchant from another common law country, the fixing of a time for acceptance without more would not indicate that the offer was irrevocable.

§ 136. However, there was considerable support for the view that the interpretation placed on the words of the text by its proposers was unjustified. It was considered that this text clearly adopted the rule that, if the offer stated a fixed time for acceptance, it automatically was irrevocable.

§ 137. The Commission decided to accept the wording of the compromise proposal. . . .

60. Eörsi, *supra* note 4, at 355.

61. The parties' communications, of course, must be examined in light of their course of dealing and usage of trade. Convention, *supra* note 3, arts. 8, 9. Moreover, under art. 16(2)(b), the offer will be deemed irrevocable if the offeree reasonably believed the offer was irrevocable and acted in reliance on this belief. Winship, *Formation*, *supra* note 39, at 8–9. *See also* Eörsi, *supra* note 4, at 356 (stating that subparagraphs (a) and (b) of art. 16(2) are not two different cases of irrevocability, but (a) expresses "continentally" when the common law "reliance doctrine" incorporated in (b) may come into action).

62. *See* Feltham, *supra* note 32, at 352.

63. *See generally* Winship, *Formation*, *supra* note 39, at 8 (furnishing an example where the offeror used the word "*lapse*" while fixing a time for acceptance, thus inferring that the offeror did not intend to make an irrevocable offer because the word "lapse" at common law merely refers to an "open" offer and not to one intended to be irrevocable). *But see* Eörsi, *supra* note 30, at 321 (indicating that an offer which states the time for acceptance must be deemed irrevocable regardless of the parties' subjective intent, because art. 7 of the Convention requires that it be interpreted with due regard to "the need to promote uniformity").

a specific situation by indicating when it is too late to withdraw from an offer, for which reason this compromise has been strongly criticized.[64] This is a clear example of a "compromise" entered into with mental reservations on each side, each one keeping its own view on what was agreed.

4. *Specific Performance*

The disparity between civil law and common law traditional perceptions to the law of sales was particularly evident in the field of remedies.[65] Two remedies uncharacteristic of the common law found their place in the Convention with little opposition from common law delegates. First, the Convention allows either buyer or seller, on delay of the other, to "fix an additional period of time of reasonable length of performance of the [other] of his obligations.[66] Failure of the other to meet such a reasonable deadline is then grounds for termination.[67] Second, the Convention allows the buyer unilaterally to reduce the price of nonconforming goods to the degree of the deficiency.[68]

The Convention's provisions more startling to the common law lawyer's traditional perception of remedies are those concerning specific performance. Article 46 confers on the buyer the right to demand specific performance of the seller's obligations to deliver the goods and the documents and transfer ownership over the goods. Article 62 entitles the seller to require the buyer to pay the price and take delivery or perform his other obligations. The right to demand specific performance is not conditional on the inadequacy of damages. Thus, in theory, the Convention assumes that specific performance will be more

64. Rosett, *supra* note 25, at 291–92 (pointing out that "identification of the moment in the course of negotiation at which it is too late to turn back produces the most significant variations in attitudes toward formation"). Rosett adds, *id.* at 292:

> The question of intention and of indications of intention raises the whole problem of cultural expectations about which no worldwide agreement exists. As a result, the provisions of the Convention defining an offer and its revocability are unclear. This indefiniteness is not due solely to the lack of clarity or conflicting nature of the terms of the Convention, but to the fact that different parties continue to entertain conflicting understandings of what the terms mean.

65. *See generally* Gonzalez, *supra* note 43, at 79; Stern, *A Practitioner's Guide to the United Nations Convention for the International Sale of Goods*, 16 N.Y.U. J. INT'L L. & POL'Y 81 (1983).

66. Convention, *supra* note 3, art. 47 (buyer may fix an additional period of time of reasonable length for the seller to deliver) and art. 63 (seller may extend the time for the buyer to pay the price or take delivery).

67. Convention, *supra* note 3, art. 49(1)(b) (for buyer); art. 64(1)(b) (for seller). If buyer or seller fails to comply within this additional period, the other may withdraw from the contract without regard to whether the breach is fundamental. Without such an extra time, a party may withdraw only for "fundamental breach," a concept which is defined in art. 25 of the Convention.

68. Convention, *supra* note 3, art. 50. Under Roman law a seller was only liable for damages if he was guilty of fault or fraud, which could not be imputed to the seller for delivering nonconforming goods. To prevent the seller's unjust enrichment, Roman law developed the action for the reduction of price (*quanti minoris*). Under similar circumstances, the buyer's remedies at common law are limited to damages. *See generally* Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 225, 272, 275 (1979).

readily available than substitutional relief.[69] This is consistent with the traditional preference of civil law systems for specific relief[70] and with the economic needs of countries with planned economies that lack markets for substitute transactions.[71] For largely historical reasons, the right to obtain specific performance is uncongenial to common law lawyers,[72] who sought a compromise solution satisfactory to their legal tradition and alleged economic needs.[73]

By way of compromise, article 28 provides that neither the buyer nor the seller are entitled to specific performance unless the court would do so under the law of the forum in respect of similar contracts of sale not governed by the Convention. This provision ensures that common law courts will not have to abandon their traditional position at the cost of uniformity, although it would not, of course, protect a party from a common law country against the granting of specific performance by a court in a civil law country. Because the draftsmen of the Convention were unable to agree on a uniform substantive rule, an action for

69. Arts. 46 and 62 of the Convention, *supra* note 3, expressly limit the right to specific performance to cases of fundamental breach, or where the aggrieved party has resorted to an inconsistent alternative remedy (e.g., if the buyer has "reduced the price" under art. 50 or has declared the contract avoided under art. 49). *See* Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, at 617-24 (1988) [hereinafter Kastely, *The Right to Require Performance*] (suggesting that art. 7 implicitly requires that the right to performance be exercised in good faith); Ullen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 390-93 (1984) [hereinafter Ullen, *The Efficiency of Specific Performance*] (noting that art. 77, interpreted as a general duty to mitigate damages, imposes an additional limitation on the right to performance).

70. *See generally* Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959); Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 233 (1955); Treitel, *Specific Performance in the Sale of Goods*, 1966 BUS. L. 211. It should be noted, however, that the rules on specific performance differ widely even among civil law jurisdictions. *See generally* Treitel, *Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)*, in VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 16, § 12 (1976); G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 43-75 (1988).

71. *See generally* I. SZASZ, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES 167 (2d ed. 1985); Comment, *The Convention on Contracts for the International Sale of Goods and the General Conditions for the Sale of Goods*, 12 GA. J. INT'L & COMP. L. 451, 457 (1982).

72. *See generally* E. FARNSWORTH, CONTRACTS 829-30 (1982); Farnsworth, *Damages and Specific Relief*, 27 AMER. J. COMP. L. 247, 250-51 (1979). Although the contemporary advantage of substitutional relief has been placed on "fundamental notions of economics" rather than history, not all economists agree that specific performance involves the inefficient use of economic resources. *See* Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Ullen, *The Efficiency of Specific Performance*, *supra* note 69, at 341; *see also* Kastely, *The Right to Require Performance*, *supra* note 69, at 629 ("[T]he most persuasive conclusion is that specific performance may be the most efficient remedy, even where alternative goods are available to the buyer."). *But see* Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in INTERNATIONAL SALES, *supra* note 13, § 9.03, at 9-10 ("To a common law mind it may seem puzzling that civilians are still so attached to a remedy that is inefficient economically, at any rate in those cases where damage would adequately compensate the buyer").

73. Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 249 (1979) (characterizing the language of art. 26 of the 1978 UNCITRAL Draft as a "sham compromise" and asking for the adoption of art. VII of ULIS, which was later carried forward in art. 28 of the Convention).

specific performance will depend on the vagaries of the forum's law.[74] This was a clear compromise impairing the unification of law,[75] although not recognizable as a compromise by a simple reading of the general provisions on the seller's and buyer's remedies.

B. EAST—WEST

The approach of socialist legal systems towards the law of sales reflects the requirements of a planned, state-operated economy. Accordingly, the socialist view gives priority to security of contract and foreseeability over other values.[76] In contrast, Western legal systems prefer flexible standards that would allow the parties to adjust the contract without judicial interference.[77] Since trade law among COMECON countries inter se is unified,[78] however, most socialist

74. Professor Honnold notes that the availability of specific performance is mostly academic in international sales transactions, since practical businessmen are unlikely to spend time and money in expensive transnational litigation to enforce international sales contracts. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 24; *see also* Winship, *Export-Import Sales*, *supra* note 9, at 209; Reinhart, *Development of a Law for the International Sale of Goods*, 14 CUMB. L. REV. 89, 98–99 (1984). However, the uncertainty regarding the right to specific performance caused by art. 28 may result in unfairness in those cases where the aggrieved party would prefer full performance. *See* Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 615 (1988) [hereinafter Kastely, *Unification and Community*] ("[S]ince Article 28 makes the availability of specific performance dependent on the law of the forum, parties will be encouraged to forum-shop for a national court system that will or will not grant specific performance."); Kastely, *The Right to Require Performance*, *supra* note 69, at 627 ("Because parties at the time of a breach will not know whether the right to performance will eventually be enforced, it will be very difficult for them to evaluate and to settle informally their mutual rights and obligations.").

75. *See* Kastely, *The Right to Require Performance*, *supra* note 69, 627–37 (arguing that none of the reasons given by the delegates from the United States and the United Kingdom in favor of allowing their courts to apply domestic law regarding the remedy of specific performance justifies the abandonment of the Convention's goal of uniformity); Kastely, *Unification and Community*, *supra* note 74, at 615 (pointing out that the compromise forced by some common law countries "tends to portray the member states as petty, nationalistic, and capable of wielding inequitable influence."); *see also* Drobnig, *General Principles of Contract Law*, in DUBROVNIK LECTURES, *supra* note 13, at 305, 319–22.

76. Eörsi, *supra* note 4, at 342; Rosett, *supra* note 25, at 285 ("the representatives of centrally planned, authoritarian economies [are not] likely to place great value on private autonomy, the right of parties to opt out of legal regimes by contract, or opportunities for informal, unwritten contracts"). The substantial difference between the Convention and the uniform law among several socialist states is discussed in Comment, *The Convention on Contracts for the International Sale of Goods and the General Conditions for the Sale of Goods*, 12 GA. J. INT'L & COMP. L. 451 (1982).

77. Eörsi, *supra* note 4, at 343 ("Not that Western lawyers would deliberately seek practical vagueness rather than security; what they prefer is practical Western flexibility to socialist rigidity, with its bureaucratic means and methods"). Professor Eörsi notes that it does not make sense, from a legal standpoint, to regard one approach as better than the other, since rules of law are determined by the economic models that lie behind them.

78. The Council for Mutual Economic Assistance (COMECON) was formed in 1949 as the east bloc counterpart to the Western European countries which became united under the Marshall plan. Its members consist of the Soviet Union and its Eastern European satellite states, plus Albania, Mongolia, Cuba, and Vietnam. Standardization of contract terms within the Soviet block was

countries were willing to adjust to Western practice insofar as their trade with Western countries.[79] The confrontation between Socialist and Western legal systems centered on four issues: (a) Whether the written form should be compulsory for the enforcement of a contract for the sale of goods; (b) whether a contract should come into being if the terms of the acceptance differ from the offer; (c) whether a contract should come into being if neither the price nor the way of quoting it is fixed in the contract and (d) whether contracts should be not only performed and enforced but also formed in good faith.

1. *Writing Requirement*

Most Western legal systems have abandoned the requirement of a writing for the sale of movable property. Because most delegates felt that writing requirements interfere with the necessary speed of commercial transactions, article 11 of the Convention states that a contract of sale need not be in writing and may be proved by any means, including witnesses. Because many socialist legal systems require a writing for a binding contract, however, article 96 permits States that require contracts of sale to be evidenced by a writing to declare article 11 inapplicable.[80] By availing itself of this "statute of frauds" reservation, a Contracting State will apply ordinary choice of law rules to determine whether a writing is necessary.[81] This was a clear-cut compromise taking the form of a declaration allowed by the Final Provisions of the Convention.[82]

established in 1958 with the adoption of the "COMECON General Conditions." *See generally* T. HOYA, EAST-WEST TRADE. COMECON LAW. AMERICAN-SOVIET TRADE 4 (1984).

79. COMECON expressed general support for the Convention in March of 1983. *See Vienna Convention for Sale of Goods Gets Strong Backing*, 19 INT'L TRADE REP. (BNA), No. 17, at 728 (Aug. 16, 1983). The delegates of most of the COMECON countries represented in Vienna were generally satisfied with the text of the Convention. The COMECON countries do not need the Convention for their mutual relations, but the Convention bears interest to them as an instrument of unification of sales law which may facilitate transactions with their main non-COMECON trading partners. *See* Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, in LA VENDITA INTERNATIONALE. LA CONVENZIONE DI VIENNA DELL' 11 APRILE 1980 at 40, 46 (A. Giuffrè ed. 1981) [hereinafter LA VENDITA INTERNATIONALE].

80. The representative of the Soviet Union argued in particular that the preservation of domestic law requiring written documentation in international sales contracts was critical to protect established practices within the Soviet government for the approval and completion of foreign trade agreements. *See Analysis of Replies and Comments by Governments on Hague Conventions of 1964: Report of the Secretary-General*, U.N. Doc. A/CN.9/31, *reprinted in* [1970] 1 Y.B. U.N. COMM'N ON INT'L TRADE L. 159, 170; *see also* J. HONNOLD, UNIFORM LAW, *supra* note 13, § 128.

81. The law of the declaring state does not automatically supersede the law of the nondeclaring state, but the parties to an international sales contract cannot agree to be bound by an oral modification if any party has its principal place of business in a Contracting State that has preserved its own statute of frauds under art. 96. *See* Convention, *supra* note 3, art. 12.

82. It has been reported that the Soviet representatives were more interested in the reservation as to the written requirement than the delegates from other socialist countries. The United States supported some deference to national law on the requirement for of a writing, apparently for the purpose of reaching a compromise with the Union of Soviet Socialist Republics on the limitations on specific performance finally embodied in art. 28 of the Convention. *See Report of Secretary-General: Analysis of Comments by Governments and International Organizations on Draft Convention on*

2. *Binding Effect of an Acceptance that "Deviates" from the Offer*

Mismatches between the terms of offer and acceptance are resolved differently by the legal systems. Not surprisingly, opinions diverged widely over this issue. Most delegates, including those from socialist countries, thought that an acceptance must be in complete agreement with the offer, so that the contract cannot come into being if the terms of the acceptance differ from those of the offer.[83] Because the common law and the Uniform Commercial Code have retreated from this "mirror-image" rule, delegates from common law countries were of the opinion that contemporary practices require that a contract be concluded unless the acceptance "materially" alters the terms of the offer.[84]

Attempting to bridge the gap between these two perspectives, article 19(1) of the Convention opens with the classic general rule that if the purported acceptance makes any addition or modification to the offer, the "acceptance" will operate as a rejection and counter offer. As a compromise solution, article 19(2) lays down an important exception to this general principle. Where exchanged forms do not match, a contract is nonetheless concluded if the alterations do not "materially alter" the terms of the offer, unless the offeror prevents the formation of the contract by objecting. Because many thought that the words "materially alter" were too vague, a third paragraph was added to article 19, introducing a very narrow definition of "materiality."[85] Thus, the continued life of the contract is preserved in spite of a minor mismatch. This was a fair compromise between the strict socialist view that an acceptance that deviates from the offer amounts to a rejection, and the more flexible view of

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International Sale of Goods as Adopted by the Working Group on International Sale of Goods, U.N. Doc. A/CN.9/126, *reprinted in* [1977] 8 Y.B. U.N. COMM'N ON INT'L TRADE L. 142, 150; *see also* Maskow, *supra* note 79, at 53 (noting that in the German Democratic Republic the written requirement is prescribed only for plant contracts and contracts on mercantile agency, and for certain clauses and declarations); Kastely, *Unification and Community*, *supra* note 74, at 616, n. 187; Eörsi, *General Principles*, INTERNATIONAL SALES, *supra* note 13, at 2–32.

83. Eörsi, *supra* note 4, at 342.

84. UCC § 2–207(2)(b) (an additional term in the acceptance becomes part of the contract between merchants unless it materially alters the offer). *See also* RESTATEMENT CONTRACTS, *supra* note 42, § 69 (1979) (where the acceptance is not conditional, the acceptance is effective and the additional or different terms are to be construed as proposals for modification of the contract). *See generally* Honnold, *The New Uniform Law for International Sales and the U.C.C.: A Comparison*, 18 INT'L LAW. 21, 26 (1984); Comment, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and Battle of Forms*, 21 COLUM. J. TRANSNAT'L L. 529 (1983); Comment, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107 (1984).

85. Under Convention, *supra* note 3, art. 19(3), terms relating to price, payment, quality, place and time of delivery, extent of one party's liability, and settlement of disputes, are all deemed material. Only minor variations, such as changing designation of the vessel, or packaging of the goods are nonmaterial. *See* Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES, *supra* note 13, § 3–04, at 3–16.

Western countries that considers the contract as concluded if the acceptance contains minor additions or limitations.

3. *Open Price Terms*

Socialist countries objected to the conclusion of contracts with open price terms, because the parties are expected to conform their contracts to a predetermined macroeconomic governmental plan.[86] This view makes sense in a planned economy, in which contracts with open price terms are a nullity from the perspective of the superintending state planning agency. Also in some civil law systems contracts of sale with open price terms are viewed with hostility, particularly when the unilateral fixing of the price works to the disadvantage of the weaker party.[87] It was also argued at the Vienna Conference that contracts with open price terms do not serve the interests of the developing countries as a result of the unfavorable terms of trade for raw materials, in contrast with the ever-increasing price of manufactured goods.[88] In contrast, the policy prevailing in the United States on this matter encourages the conclusion of sales contracts for long-term supplies, leaving the price and quantity of goods open to be adjusted in light of sellers' output and buyers' requirements.[89]

In order for a proposal to enter into a contract of sale to be deemed "sufficiently definite," article 14(1) of the Convention (under the formation

86. Rosett, *supra* note 25, at 289.

87. *See* Rosett, *supra* note 25, at 289 n. 80; UNIFORM SALES LAW, *supra* note 13, at 51 n.166, referring to judgments of the French Court of Cassation in which open-price contracts have been invalidated. Under French law a contract of sale where the indication as to the price is not definite is null and void. *See* FRENCH CIVIL CODE arts. 1129, 1583, 1591. *See generally* B. STARCK, DROIT CIVIL, OBLIGATIONS § 1399 (1973), referring to the case law of the French Court of Cassation on this matter; Corbisier, *La détermination du prix dans les contrats commerciaux portant vente de marchandises, Réflexions comparatives*, 4 REVUE INTERNATIONALE DE DROIT COMPARE 767, 826–29 (1988) (discussing the issue of price certainty from a comparative perspective and under the Convention).

88. *See* Date-Bah, *The Convention on the International Sale of Goods from the Perspective of the Developing Countries*, in LA VENDITA INTERNAZIONALE, *supra* note 79, at 28:

> If a contract can be formed without an agreement on price, this would create the danger of buyers being landed, after vague negotiations, with sales contracts whose contract prices would be imposed by the courts: many such courts would be in the developed countries and could impose unreasonably high prices for manufactured goods. Such contract prices would tend to be the sellers' prices and, as is well-known, while the prices of the raw materials exported by the developing countries are generally fixed in the commodity markets of the developed world, the prices of manufactured goods are usually determined by the manufacturers themselves.

89. Although open-price contracts were subject to attack at common law, U.C.C. §§ 2–305, 2–306 explicitly authorizes contracts with open price terms as well as output and requirement contracts. U.C.C. § 2–305 provides: "The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if nothing is said as to price. . . ." *See* Rosett, *supra* note 25, at 288 n. 79; Farnsworth, *supra* note 85, § 3.04, at 3–8; *see also* U.C.C. § 2–204 (3): "Even though one or more of the terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

section) requires the offeror to fix the price, expressly or implicitly. The United States delegation was unsuccessful in attempting to change this language in favor of "open price" offers.[90] An uneasy compromise was finally reached, not by amending article 14(1) but by inserting a new provision in article 55 (under the section dealing with the obligations of the buyer).[91] This provision seems to say the opposite of what is stated in article 14(1), for it implies that a contract may be "validly concluded" even though it "does not expressly or implicitly fix or make provision for determining the price."[92]

American legal scholars who participated in the diplomatic negotiations disagree about the interpretation of article 55. On the one hand, Professor Honnold believes that a contract with an unstated price may be validly concluded.[93] On the other hand, Professor Farnsworth thinks that article 55 is an empty set since it applies, according to its opening clause, only in cases "where a contract has been validly concluded," and if there is no reference to the price there can be no offer, hence no valid contract could have been concluded.[94] I am in favor of Honnold's opinion for two reasons. The first one is that in a codified set of rules such as the Convention, every effort should be made to construe seemingly incompatible provisions in order to make sense out of them. The other reason is that it is conceivable and even plausible to reconcile their meaning. Whereas article 14(1) requires that the price be at least "implicitly" fixed,

90. *See* Farnsworth, *supra* note 85, § 3.04, at 3–8. Article 14(1) of the Convention, *supra* note 3, had already been approved when art. 55 was discussed, and the former provision could only be modified by a qualified majority, which could not be raised. *See* Ghestin, *Les obligations du vendeur*, *supra* note 42, at 6.

91. Convention, *supra* note 3, art. 55, provides:

> 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.

92. The adoption of art. 55 eventually responded to the desire of the Scandinavian countries to accept Part I of the Convention without Part II, and to have a provision in Part II in case the price has not been determined. 1 U.N. OFFICIAL RECORDS, *supra* note 24, at 45. *See* UNIFORM SALES LAW, *supra* note 13, at 51; Eörsi, *Article 55*, in COMMENTARY, *supra* note 13, at 407; *see also* Rosett, *supra* note 25, at 289 ("The language of this article [55] appears directly keyed to article 14(1) and seems to undercut the earlier provision").

93. J. HONNOLD, UNIFORM LAW, *supra* note 13, at 163–64 (arguing that failure to state a fixed price does not contravene the requirement of definiteness in art. 14).

94. Farnsworth, *supra* note 85, § 3.04, at 3–9; *see also* Rowe, *U.N. Convention on International Sales Law*, INT'L FIN. L. REV., July 1983, at 20, 21; Rosett, *supra* note 25, at 289 n.81; Eörsi, *Article 14*, in COMMENTARY, *supra* note 13, at 144 ("As there is no offer without an indication of the price, a contract without such an indication seems to be a manifest contradiction."). *See also* Date-Bah, *The Perspective of the Developing Countries*, *supra* note 88, at 28. Professor Date-Bah recalls that several delegations sought unsuccessfully to delete the second sentence of art. 14 (1), so that an offer could be held sufficiently definite even if it did not expressly or impliedly fix the price or make provision for determining the price. Date-Bah concludes that the implication to be drawn by the interpreter from the motion's defeat is that there can be no valid "open price" contract under the text of art. 14 (1), as it now stands.

article 55 indicates that a contract with an open price is actually a contract with an "implicit" price fixed by operation of law, i.e., the price "generally charged at the time of the conclusion of the contract."[95] In a period of rapid price fluctuation, however, it is to be expected that if a controversy under the Convention arises in the courts of a country that is not receptive to open price contracts, the wording of article 14(1) and a narrow construction of article 55 may lead to the nullity of the contract.[96]

4. *Good Faith*

It is widely acknowledged that "good faith" has multiple connotations within a single domestic legal system and various meanings in different legal systems,[97] so it was feared that there could be no general agreement on what "good faith" might mean in international transactions.[98] The requirement of "good faith" turns up not only in the civil codes of civil law systems but also in statutory and case-law of common law systems. Under the Uniform Commercial Code, good faith is only required in the performance and enforcement of contracts,[99] whereas in many civil law systems the principle as such is expressly stated with respect not only to

95. Some commentators attempt to reconcile arts. 14 (1) and 55 of the Convention, *supra* note 3, on the ground that the former provision is concerned with offers and the latter 55 with contracts. According to this view, once a contract is concluded, the offer becomes irrelevant and the conclusion of the contract in itself proves that the offer was sufficiently definite, irrespective of whether a provision was made for determining the price. The conclusion of these authors is that art. 55 has precedence over art. 14 (1). Eörsi, *Article 55*, in COMMENTARY, *supra* note 13, at 407 ("An approach which concentrates on the offer is no longer appropriate after the contract has been concluded."); UNIFORM SALES LAW, *supra* note 13, at 51, 80. *Contra*, Ghestin, *Les obligations du vendeur*, *supra* note 42, at 6 ("A priori, la question de validité étant préalable à celle de l'exécution, l'article 14 devrait prévaloir sur l'article 55, qui suppose d'ailleurs expressément que la vent ait été 'valablement conclue'. Mais la Convention de Vienne refuse expressément de régler les questions de validité.").

96. *See* Farnsworth, *supra* note 85, § 3.04, at 3–9; *see also* Tallon, *The Buyer's Obligations under the Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES, *supra* note 13, § 7–03, at 7–9; Niggemann, *Les obligations de l'acheteur sous la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, 1 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 27, 33 (1988) [hereinafter Niggemann, *Les obligations de l'acheteur*].

97. *See* Rosett, *supra* note 25, at 290, who characterizes the wide connotation of the principle of good faith thus:

> At the very least, good faith is an interpretative tool that precludes a party from unduly rigorous insistence on the right to terminate after a minor deviation in performance by the other. Viewed somewhat more expansively, it imports affirmative obligations on the parties to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances. It precludes a perfect tender approach to interpretation of the seller's obligations of delivery and does not treat minor deviations by either side as an event that terminates the contract.

In continental and socialist systems, the concept may have broader connotations. In particular, the notion of good faith is not limited to the performance of completed agreements, but extends to the process of formation (footnote omitted).

98. Eörsi, *supra* note 4, at 349 ("[I]t was widely thought that the rule was vague, or at least would remain vague for a long time and, because of the laconic language [of the Convention], would never become unambiguous.").

99. U.C.C. § 1–203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement"). *See also* RESTATEMENT CONTRACTS, *supra* note 53 § 231.

performance of obligations, but also to pre-contractual bargaining, the formation and interpretation of contracts.[100] Not surprisingly, the inclusion in the Convention of a provision creating an obligation of good faith was the occasion for extensive and at times obscure disputes not only between socialist and capitalistic representatives, but also between common law and civil law delegates and even among representatives who shared a common cultural and legal background. Opinions on the role to be played by good faith ranged from the idea that it should be viewed as an obligation present at all stages of the contracting process to the view that good faith should not be explicitly mentioned in any provision.

As early as the Hague Diplomatic Conference in 1964, explicit reference to good faith as a general principle was opposed by the French delegate. Professor Tunc asserted that the principle of good faith might lead to divergent and even arbitrary interpretations by national courts, and thus would impair uniformity.[101] At the 8th session of the UNCITRAL Working Group, the Hungarian delegate proposed the insertion of a "good-faith clause" directing the parties to act in good faith in the formation of international sales contracts.[102] Some delegates opposed the insertion of the "good faith" provision on grounds that it was vague and unnecessary.[103] Especially unacceptable to the common law delegates was that the principle of good faith should also cover the formation of contracts.[104]

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100. ITALIAN CIVIL CODE arts. 1137, 1366, 1375; GERMAN CIVIL CODE arts. 157, 242; ARGENTINE CIVIL CODE art. 1198 (*as amended by* Law No. 17711 of 1968).

101. 1 THE HAGUE RECORDS AND DOCUMENTS OF THE DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS 100 (April 2–25, 1964), cited by Eörsi, *supra* note 4, at 348. As recalled by Eörsi, the ULF requires good faith in the setting of revocation of an offer. Art. 5(2) of the ULF provides that an offer "can be revoked unless the revocation is not made in good faith or in conformity with fair dealing." Eörsi, *supra* note 30, at 314 n.13.

102. The Hungarian proposal read: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith." *Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, § 70, U.N. Doc. A/CN.9/142 (1977), *reprinted in* [1978] Y.B. U.N. COMM'N ON INT'L TRADE L. 61, 66.

103. Proponents of the "good faith" principle replied that such general clauses were of necessity vague and yet were indispensable in modern law. They added that, in most cases, one knew what conduct was inconsistent with good faith, and that if the experience with such rule in a domestic setting had shown that even vague provisions may be clarified by judicial development, a similar development could be expected at the international level. In reply, the opposition noted that judicial development at the international level, by a variety of forums, was incomparably more difficult than within the framework of a single national jurisdiction. A third group of delegates thought that the duty to act in good faith went without saying, hence it was unnecessary to include it. A fourth group suggested that a duty of good faith made no sense unless accompanied by sanctions for breach of the duty. *See Report of the Secretary-General: Analytical Compilation of Comments by Governments and International Organizations on the Draft Convention on the Formation of Contracts for the International Sale of Goods as Adopted by the Working Group on the International Sale of Goods*, §§ 64–79, U.N. Doc. A/CN.9/146 and addenda 1–4 (19878), *reprinted in* [1978] 9 Y.B. U.N. COMM'N ON INT'L TRADE L. 127, 132–33. *See also* Eörsi, *supra* note 30, at 314; Winship, *Commentary*, *supra* note 19, at 631–32.

104. *See* E. FARNSWORTH, PROBLEMS OF THE UNIFICATION OF SALES LAW FROM THE STANDPOINT OF THE COMMON LAW COUNTRIES 20 (noting the hesitations of common-law lawyers to derive too much out of

The principle of good faith gained acceptance in the text of the Draft Convention and even survived the 9th session of UNCITRAL,[105] but a counterattack was launched at the 10th session in 1978.[106]

In view of these sharply divided opinions, a compromise was finally reached in article 7(1) providing that the Convention must be interpreted taking into account the "observance of good faith in international trade."[107] By relegating the relevance of good faith to the interpretation of the Convention, a hard-won settlement was reached between those who would have preferred a provision imposing directly on the parties the duty to act in good faith during the formation, performance, and termination of the contract of sale, and those who were opposed to any explicit reference to the principle of good faith. This peculiar compromise, actually burying the principle of good faith, has been characterized as "uneasy,"[108] "strange,"[109] and as a "statesmanlike compromise."[110] Almost

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the principle of good faith). *Report submitted to the Colloquium on Problems of the Unification of International Sales Law* held in Postdam-Babelsberg, August 21–24, 1979, sponsored by the International Association of Legal Science (IALS).

105. Art. 5 of the UNCITRAL Working Group's 1977 Draft Convention provided: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith." The delegate from the Federal Republic of Germany thought that the appearance of the principle of good faith in the UNCITRAL draft was a clear step forward. Huber, *Der Uncitral-Entwurf eines Ubereinkommens uber internationale Warenkaufverage*, 43 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ] 413, 430 (1979).

106. The motion to introduce the principle of good faith in the formation of contracts was approved by a slight majority of the Working Group, but it was rejected (again by a slight majority) by UNCITRAL. *See* Eörsi, *supra* note 30, at 314. After extensive debate UNCITRAL decided to refer the provision to a small working group to draft a compromise. *Report of the United Nations Commission on International Trade Law on the Work of Its Eleventh Session*, 32 U.N. GAOR Supp. Annex I (No. 17) §§ 42–60, U.N. Doc. A/33/17 (1978), *reprinted in* [1978] 9 *Y.B. U.N. COMM'N ON INT'L TRADE L.* 11, 35-36; J. HONNOLD, UNIFORM LAW, *supra* note 13, at 123–24; Winship, *Commentary*, *supra* note 19, at 631–32.

107. Convention, *supra* note 3, art. 7(1), second paragraph ("In the interpretation of this Convention regard is to be had . . . to the need to promote . . . the observance of good faith in international trade"). Professor Eörsi reports that at the 1980 Vienna Conference the principle of good faith was subject to a "restricted counterattack" by the delegates from Norway, Italy, and the Republic of Korea. They proposed that the principle of good faith should be moved from interpretation of the Convention to interpretation of the contract. The motion was not carried. Italy proposed unsuccessfully the introduction of a separate article providing that "[i]n the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith and international cooperation." *Report of the First Committee*, U.N. Doc. A/CONF.97/11 (1980), *reprinted in* OFFICIAL RECORDS, *supra* note 24, at 82, 87; *see also* Eörsi, *supra* note 4, at 348–49; Winship, *Commentary*, *supra* note 19, at 632.

108. *See* Bonell, *Methodology in Applying Uniform Law for International Sales Under the U.N. Convention (Wien 1980)*, in ITALIAN NATIONAL REPORTS TO THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 43, 62 (1986).

109. Eörsi, *supra* note 4, at 348–349 ("The result was strange but gained for the principle of good faith a foothold in an international convention for unification of law. It is hoped that this meager result represents a modest start.").

110. Farnsworth, *Problems of Unification of Sales Law from the Standpoint of the Common Law Countries*, in 2 PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW 19 (1980).

everybody disagrees as to the impact, if any, that the principle of good faith may have on the behavior of the parties to an international contract for the sale of goods.[111]

C. North—South

Opponents of the Convention in the United States have pointed out that in many instances during the negotiations developed countries were held hostage by the more numerous delegates from Third World countries in order to force compromise solutions. They also expressed some alarm at the prospect that in the future industrialized countries would have to seek the agreement of developing and socialist countries to proposed modifications to the Convention.[112] A more balanced view of the Convention indicates that the coalition formed at times by delegates from developing and socialist countries was helpful to counterweight the powerful influence of industrialized nations.[113] Moreover, since the basis for reaching decisions is the principle of consensus, and UNCITRAL's working groups represent, at least to some degree, all of the competing interests in the Commission, it is unlikely that any modification to the Convention would pass without the consent of some of the twenty-two Western industrialized countries represented at the Vienna Conference.[114]

According to Professor Eörsi, the so-called "North-South" debate was characterized by "(a) the economic fact that developing countries mainly export

111. Professor Farnsworth is of the opinion that references to good faith in art. 7(1) are "seemingly harmless words." *See* Farnsworth, *The Convention on the International Sale of Goods from the Perspective of the Common Law Countries*, in La Vendita Internazionale, *supra* note 79, at 3, 18; *see also* Winship, *Sales Contracts*, *supra* note 13, at 67; Winship, *Commentary*, *supra* note 9, at 631 (arguing that the drafting history of art. 7 clearly supports a limited reading of the role of good faith). Professor Bonell, in contrast, thinks that good faith "may even impose on the parties additional obligations of a positive character." Bonell, *Methodology in Applying Uniform Law*, *supra note 108, at 63; Bonell, Article 7*, in Commentary, *supra* note 13, § 2.4.1, at 85. *Accord* J. Honnold, Uniform Law, *supra* note 13, at § 94; Uniform Sales Law, *supra* note 13, at 39; Eörsi, *supra* note 30, at 314–15; Kasteley, *Unification and Community*, *supra* note 74, at 597–98. *See also* Eörsi, *General Provisions*, in International Sales, *supra* note 13, § 2.03, at 2–9 (hoping that "the good faith clause may play an active role in spite of its location in the Convention.").

112. *See Hearings on Treaty Doc. No. 9*, *supra* note 9, at 39 (statement of Frank A. Orban III) "Common sense indicates that developed countries will discover the technical anomalies first and will be the parties seeking amendments from the Third World and socialist bloc states." *See also* R. Brooks, Why Congress Should Be Wary of the U.N. Convention on the International Sale of Goods 4–5 (Heritage Foundation Background No. 361, June 15, 1984) (cited by 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, 276 n.62 (1986) (modification of the Convention "would probably require that the industrialized countries ask significant concessions from the radicalized Group of 77 of the less-developed countries and from the Communist bloc, who undoubtedly would expect a significant *quid pro quo*").

113. *See* Ghestin, *Les obligations du vendeur*, *supra* note 42, at 6.

114. It is unfortunate, however, that UNCITRAL failed to provide for some formal mechanism for amendment of the Convention. *See* Rosett, *Critical Reflections*, *supra* note 25, at 294; Winship, *The Scope of the Vienna Convention*, in International Sales, *supra* note 13, at 1–1, 1–49.

raw materials and agricultural products and import technology and finished goods, (b) the underdeveloped technological condition of their markets; and (c) their frequently justified mistrust of developed industrial states."[115] Some of the issues discussed along the north-south conflict lines[116] were the following: (a) When should buyers give written and specific notice of nonconformity of the delivered goods and what are the consequences of failing to provide that notice; (b) under what circumstances should a party be allowed to suspend its performance; (c) whether the passing of risk of goods sold in transit should be fixed at the time of handing the goods over to the carrier or at the time of the conclusion of the contract; and (d) the role of trade usages in international sales.

1. *Buyer's Notification of Nonconformity*

Although there are both buyers and sellers in developed and developing countries, buyers in developing countries tend, by and large, to import technically complex machinery whose defects may not be readily ascertainable. Professor Date-Bah, an active participant in the negotiations on behalf of Ghana, articulated the concern of many developing countries with the imposition of strict notification requirements on account of nonconformity of the goods. He explained that his country has numerous important tradesmen who are illiterate, and that it often becomes necessary to call in foreign experts in order to carry out tests on imported, complicated machinery. Not infrequently, delivered goods remain in the port of arrival for more than two years and delivery to their final destination is frequently delayed.[117] This is why the representatives of some developing countries were wary about the consequences of their failure to notify the seller as to the nonconformity of the goods in a timely fashion and why they argued so strenuously against a strict requirement of notification of defects.

One of the longest and most dramatic debates at the UNCITRAL round of negotiations on international sales concerned the procedure to follow in cases of

115. Eörsi, *supra* note 4, at 350; *see also* Rosett, *supra* note 25, at 285, pointing out the impact of those policy differences on the rules on performance on breach of contract, stating: Attitudes toward performance and rules governing breach also will differ significantly depending on whether one comes from an industrialized society with balanced number of buyers and sellers of finished goods or from a have-not economy which must buy most manufactured and complex goods from outsiders who are believed to be selling shoddy goods, whose flaws become apparent only long after delivery, to unsophisticated buyers.

116. It should be noted at the outset that the confrontation between developed and developing countries is simply a rough generalization, because at times, on this issue as well as in others, representatives of developed countries sided with the opinion of the representatives of developing countries, and vice versa. *See* Farnsworth, *Developing International Trade Law*, 9 CALIF. W. INT'L L. J. 460, 465 (1979) ("[W]hile there are differences between the common law and civil law countries among the developed nations, it has been somewhat surprising to me that the developing nations are primarily 'developing' and only very secondarily by tradition divided into common law or civil law.").

117. Report of Professor Date-Bah at the August 1979 Postdam colloquium of the International Association of Legal Science on the Convention, cited by Eörsi, *supra* note 4, at 350 n.58 and accompanying text.

nonconformity.[118] The most controversial issues centered around the period of time within which the buyer is required to discover a nonconformity, the nature and timing of the buyer's obligation to give notice of nonconformity, and the consequences for the buyer's failure to give said notice. Those issues created a division between the delegates from the industrialized and developing countries.

Article 38(1) of the Convention requires the buyer to "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances." This language seems to acknowledge that the shortest applicable period to inspect complex machinery received by a buyer in an isolated town of a developing country may be different from the shortest applicable period to inspect other types of goods by a sophisticated buyer in a big industrial city.[119] In order to preserve buyer's remedies for nonconformity, article 39(1) requires him to give notice to the seller, "specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."[120] Thus, articles 38 and 39 work in tandem to require buyers to examine the

118. *See* Eörsi, *supra* note 4, at 350–52 (recalling that the debate on arts. 39, 40, and 44 of the Convention (arts. 37–38 of the Draft Convention of 1977) lasted for three days and covered a very wide range of issues). "Eight modifying texts were presented and no less than 111 interventions were made at sessions 16, 17, and 21." *Id.* at 350; *see also* Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1983 127, 134 (M. Landwehr ed. 1983); Patterson, *supra* note 112.

119. Instead of speaking of the shortest practicable period under the circumstances, art. 38 of ULIS requires the buyer to examine the goods "promptly." Referring to this provision of ULIS, Professor Date-Bah states that

> promptitude is too exacting a standard for the usual pace of things in third world countries. Apart from the slower pace of life, there is the problem that the examination of technologically sophisticated goods may not be capable of being done promptly at particular destinations because of the absence locally of people with the requisite skills to carry out such examination.

Date-Bah, *supra* note 88, at 29. He illustrates this point by offering the example of a buyer in a developing country who must rely upon the opinion of a foreign expert to examine a computer with complex technological features. He argues that even though the computer's defects may be readily discovered upon examination by one familiar with the equipment, a considerable amount of time may have to elapse before an expert can be found and flown in to inspect the computer. Date-Bah persuasively argues that "such inspection by imported personnel may not be achieved within a 'prompt' period of time, as required by art. 38 of ULIS." *Id.* at 30. Accordingly, Date-Bah considers that the formula adopted in the Convention is more realistic, for it speaks of examination "within as short a period as is praticable in the circumstances." Convention, *supra* note 3, art. 38(1). He then concludes: "[Q]uite often the shortest practicable period in Accra will differ markedly from the shortest applicable period in New York or Genoa. The fact that sufficient relativity is built into the present formula makes it more satisfactory and acceptable to countries of different social and economic systems." Date-Bah, *supra* note 73, at 29. *See also* Patterson, *supra* note 112, at 300 n.169 (observing that to determine the timeliness of any notice by applying a standard appropriate in a country where such expertise is readily available would entail the application of commercial standards of a developed country, not the "practicability" standard adopted in art. 38(1) of the Convention).

120. Whereas the first section of art. 39 is concerned with the failure to notify the seller of a defect which was discovered or should have been discovered, the second section deals with the situation where the defect could not have been discovered because it was latent, hence there was no breach of

goods within the shortest practicable period and to give notice to the seller within a reasonable time after the buyer discovered or "ought to have discovered" a nonconformity.[121] The buyer's failure to give adequate and timely notice results in the loss of remedies for nonconformity.

The delegate from Ghana sought unsuccessfully to introduce an amendment that would have eliminated the provision requiring notice within a reasonable time and the sanction for the buyer's failure to give notice.[122] However, the basic objection from other developing countries did not go so far. Their main point of contention was that the sanction for failure to notify, i.e., buyer's loss of the right to rely on nonconformity of the goods, was too harsh.[123] A second proposal introduced by the representative of Ghana was to retain the requirement of notice within a reasonable time, but softening the sanction for failing to comply by equating such failure with a failure to mitigate loss, thereby reducing the amount of damages recoverable from the seller rather than precluding recovery altogether. This proposal met with wider acceptance but was unable to muster sufficient support for its adoption.[124] This precipitated a crisis at the Conference, because some delegates feared that the failure to give some deference to the objections over notification of defects might result in the developing nations refusing to ratify the Convention.[125] Obviously, the issue attracted sufficient attention to force the delegates to search for a compromise solution between the views of the representatives of some industrialized countries, who were convinced that eliminating all of the buyer's rights to recover would effectively ensure strict compliance with the notice requirements, and those espoused by some representatives of developing countries, who would have been satisfied

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duty to notify of the nonconformity. Art. 39 also establishes a two-year cut-off period, so that the buyer cannot complain if the latent defect manifests itself after two years.

121. *See* Date-Bah *supra* note 88, at 30, noting that in order to ascertain when a buyer "ought to have discovered a lack of conformity" under art. 39(1), the interpreter must first determine the shortest applicable period within which the buyer could have examined the goods under art. 38(1).

122. *Summary Records of the Sixteenth Meeting of the First Committee*, U.N. Doc. A/Conf.97/C.1/Sr. 16, § 32 (1980), *reprinted in Conference on Contracts*, *supra* note 1; *see* Patterson, *supra* note 112, at 289–90.

123. Eörsi, *supra* note 4, at 350; Farnsworth, *supra* note 118, at 134.

124. The representatives of Kenya, Pakistan, China, Nigeria, the United Kingdom, Mexico, Singapore, and Libya argued for Date-Bah's proposal. The representatives of the Netherlands, Korea, Switzerland, Sweden, Bulgaria, Denmark, Austria, Australia, Japan, Belgium, the Federal Republic of Germany, and Spain opposed it. For a well-documented account of the debates, see Patterson, *supra* note 112, at 290.

125. The Asian-African Legal Consultative Committee considered the Ghanaian proposal of crucial importance for their continued support of the Convention. *See* Kastely, *Unification and Community*, *supra* note 74, at 619 (referring to the efforts of Mr. Hjerner, the Swedish delegate, to find a compromise solution which would be satisfactory for the delegations from developing countries). *See also* Patterson, *supra* note 112, at 292 n.128 (quoting Mr. Sevon, the Finnish delegate, cautioning the other delegates that unless a compromise solution was found, UNCITRAL might "regret having adopted a stand which would prevent some states from acceding to the Convention"). A joint proposal was submitted by delegates from Sweden, Finland, Ghana, Nigeria, and Pakistan that eventually became arts. 39 and 44 of the Convention. Kastely, *Id.*

with a rule that required notice but objected to the loss of all of the buyer's remedies as a result of failure to provide timely notification.[126]

This compromise retained the general requirement of notice within a reasonable time and the total bar of claims as the result of failure to give timely notification. After a flurry of debate, however, the delegates adopted article 44, which allows a buyer to deduct the value of the defect from the price despite the lack of timely notice, if he has "a reasonable excuse" for his failure to give the notice required under article 38(1). Thus, according to article 44, if the buyer has a "reasonable excuse" for not complying with the notice requirement, the sanction for untimely or inadequate notice is limited to whatever damages the seller would suffer as a result of the buyer's noncompliance.[127]

Professor Schlechtriem has criticized the compromise reached in article 44 for its lack of clarity as to what constitutes a "reasonable excuse."[128] In

126. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 261; Date-Bah, *supra* note 94, at 30; Eörsi, *supra* note 4, at 350–51; Farnsworth, *supra* note 118, at 134–35.

127. Article 44 also represents a compromise as to the maximum period within which the buyer may assert a claim for latent or hidden defects. The sponsors of the amendment introduced in art. 44 agreed to accept the text of art. 39(2), whereby the buyer's claims are precluded after two years from the date on which the goods were actually handed over to the buyer. When some delegates proposed a longer limitation period, the representative from Austria explained that in his country the buyer had only eight days to give notice of nonconformity, and that, therefore, it was already a compromise on his part to accept the two years. *See* Eörsi, *supra* note 4, at 350. Professor Date-Bah is of the opinion that this two year cut-off period is too short to take care of sales of complicated machinery in which latent defects may show up well after two years. Accordingly, he recommends those buyers either obtain a guarantee which will override the two-year limitation period or simply "derogate from the rule laid down in Art. 39(2)." Date-Bah, *supra* note 79, at 33. Professor Farnsworth recommends sellers to do likewise, but in order to *reduce* the two-year period. *See* Farnsworth, *supra* note 118, at 135.

128. Schlechtriem, *Recent Developments in International Law*, 18 ISRAEL L. REV. 309, 325 (1983). Professor Date-Bah easily visualizes a "reasonable excuse" in cases of complex machinery where the person who examines the goods is not an expert. *See also* Date-Bah, *supra* note 79, at 32, where he furnishes the following example of "reasonable excuse." A schoolmaster examines a new copying machine, finds that it does not work but is unable to specify the nature of the nonconformity. Should the schoolmaster hire an expert in order to identify the defect? Professor Date-Bah does not think so, for it would be too onerous. Thus, he concludes:

> The seller is the one in breach and it should be good enough that he is told that his goods are defective. It should be his responsibility to detect the specific nature of the lack of conformity. Assuming that, in the stated hypothetical, the headmaster's notice failing to specify the cause of the nonfunctioning of the Xerox machine is held by a court to be insufficient notice under art. 39(1), it is considered that art. 44 should be used to provide the headmaster with a defense. In other words, the headmaster should be regarded as having a "reasonable excuse for his failure to give the required notice," because he could not reasonably have been expected to know or ascertain the exact cause why the machine would not work.

Honnold agrees with Date-Bah in that the difficulty of making a specification of nonconformity could constitute a reasonable excuse under art. 44 of the Convention. J. HONNOLD, UNIFORM LAW, *supra* note 13, at 261. While discussing art. 39 of the Draft ULIS, providing for the buyer's obligation to specify the nature of the lack of conformity as required by art. 39(1) of the Convention, Professor Honnold, who was a member of the U.S. delegation to the Hague Conference, suggested that the buyer should not be required to state the exact nature of any lack of conformity and that the rules relating to the content of the notice should not be "too strict." This suggestion did not prevail, however. *See* 1

contrast, Professor Date-Bah finds that article 44 is most useful in order to avoid an unfair total loss of buyers' remedies whenever an examination of the goods has been done within a reasonable period of time that cannot strictly qualify as "short."[129] In view of the uncertainties raised by this uneasy compromise, Professor Farnsworth recommends sellers to vary by agreement the Convention's provision on notice of nonconformity.[130] Although this is one of those compromises that can be properly characterized as "uneasy," it embodies a fair accommodation of the competing interests of buyers and sellers of complex machinery. It retains the core requirement of timely notice and the penalty of absolute bar to recovery, yet it acknowledges the possibility of a "reasonable excuse" justifying the failure. The extent to which this delicate balance can be maintained in practice will depend on how broadly or narrowly courts will interpret the expression "reasonable excuse."[131]

2. *Suspension of Performance*

Article 62 of the Draft Convention provided for a party's right to suspend performance when he had "good grounds to conclude" that the other party would not perform a substantial part of his obligations. A long debate followed on the test to be adopted for determining when the right to suspend performance was justified. Some delegates from developing countries were fearful of abuses of the power to suspend performance. They thought that a party's feeling of

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DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, THE HAGUE, 2–25 APRIL 1964, at 72 (Ministry of Justice of the Netherlands ed. 1966), *cited in* Patterson, *supra* note 112, at 286 n.103.

129. Professor Date-Bah foresees the advantages of a provision such as art. 44 in case of a world shortage of experts of certain machinery, preventing a buyer from undertaking a thorough examination of the machinery within a year of its delivery. Under those circumstances, the buyer's obligation under art. 38(1) would have been breached, because notice of nonconformity could not have been given within a reasonable time after the nonconformity "ought to have been discovered" pursuant to art. 39(1). A liberal construction of the examination provisions of art. 38 may lead a court to conclude that in this particular case a delay of a year was the shortest "practicable in the circumstances." Yet the seller may make the strong case that a delay of one year for examining the goods cannot be properly called "short." Arguably, art. 44 would preclude a total loss of remedies for buyers on account of a "reasonable excuse" for their failure to examine the goods within a "short" period and to send the required notice. Date-Bah, *supra* note 88, at 31–32.

130. Farnsworth, *supra* note 118, at 135.

131. *See* Kastely, *Unification and Community*, *supra* note 74, at 619 (noting that the compromise also provides an economic disincentive to use the "reasonable excuse" device by denying recovery for lost profits even if a legitimate excuse is found); *see also* J. HONNOLD, UNIFORM LAW, *supra* note 13, at 278–84; Patterson, *supra* note 112, at 302:

> [I]f some national courts base their interpretations of terms and their analyses of elements on parochial principles rather than on the compromise, then other national courts may make "retaliatory" interpretations, parties may begin selective use of the "opt-out" provision, and the goal of unification will remain as elusive as ever.

Patterson concludes a comprehensive discussion of this topic with an optimistic note, observing that "[c]ourts in West Germany, applying article 39 of ULIS, and courts in the United States, applying section 2-607(3)(a) of the U.C.C., have demonstrated the flexibility that the art. 44 compromise requires." *Id.* (footnotes omitted).

insecurity about the other party's willingness or ability to perform was too subjective. Accordingly, they pleaded for limiting suspension of performance to situations where difficulties arose beyond doubt, e.g., where the other party went bankrupt. Delegates from Western, developed countries, in contrast, wanted to decrease the risk of performance and advocated that the probability of troubles should suffice.[132] A long debate over this issue resulted, again, in a compromise. The wording of article 62 of the Draft Convention was changed when this provision was finally incorporated into article 71 of the Convention. According to article 71, a party may suspend performance if "it becomes apparent" that the other might not perform, for example, due to an impending insolvency or based upon performance to date.[133]

Professor Date-Bah fears that the right to suspend performance under article 71 may be used against the weaker party "not on the basis of facts, but on the basis of mere appearances."[134] Although a party intending to suspend performance must give notice to the other in order to permit him to provide adequate assurance of performance, such assurance may significantly increase the cost of trading for those who can hardly afford it.[135] In spite of its shortcomings,

132. Eörsi, *supra* note 4, at 351 (noting that the debate over this issue lasted four sessions); *see also* Ziegel, *supra* note 72, at 9–34 ("The drafting history of the art. [art. 71] is a good example of how the Vienna Conference intermittently became bogged down in what must seem to an outside observer to have been a minor issue.")

133. Article 71 (3) of the Convention, *supra* note 3, provides that the party suspending performance must immediately give notice of the suspension to the other party, who may restore performance by giving "adequate assurance of his performance" to the other party. Article 71 does not specify, however, the consequences of the other party's failure to provide adequate assurance. In contrast, under § 2–609(4) of the U.C.C., a party's failure to provide adequate assurance entitles the other party to treat the contract as repudiated after thirty days have elapsed. Professor Honnold believes that under the Convention failure to provide adequate assurance of performance also entitles the other party to invoke the provisions on anticipatory repudiation in art. 72(1). *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, § 394. But Professor Ziegel rightly notes that anticipatory repudiation only comes into play when "it is clear" that one of the parties will commit a fundamental breach of the contract, and a party's failure to provide adequate assurance "is surely not unequivocal evidence of his unwillingness to perform, particularly when he may question the validity of the requesting party's feeling of insecurity to begin with." Ziegel, *supra* note 72, at 9–35. Professor Date-Bah agrees with Ziegel's opinion in that anticipatory breach under art. 72(1) "requires proof by the person seeking to avoid the contract of facts from which a conclusion can logically and rationally be reached by induction that the other party is likely to commit a fundamental breach. Mere appearances are not good enough." Date-Bah, *supra* note 88, at 34.

134. Date-Bah, *supra* note 88, at 34 ("appearances can be very deceptive and to give the right to one party to suspend performance of his obligations . . . is tantamount to imperilling the contract rights of smaller and financially weaker business units which may not exude quite the same air of financial reliability as the bigger units").

135. Date-Bah, *supra* note 88, at 34–35:

> Providing such an assurance will often involve bank services produced at a fee. The cumulative effect of suspensions by several sellers may in fact therefore represent such an increased cost of trading for the financially weaker buyer as to drive it under. Thus the exercise of art. 71 by several of a buyer's sellers may constitute a self-fulfilling prophecy, since by their joint action they may succeed in bankrupting a marginally solvent buyer. Thus a buyer who in fact is solvent but appears to several of his buyers

however, it is clear that under article 71 the suspending party cannot invoke the suspension right on mere hunches on the probability of nonperformance. Not being restricted to the bankruptcy of the other party, the test for suspension is not entirely objective, but it is a great deal less subjective than in article 62 of the Draft Convention and the Uniform Commercial Code.[136]

3. *Passing of Risk of Goods Sold in Transit*

Another sensitive issue between developing and industrialized countries concerned the passing of the risk of loss under a contract of sale concluded while the goods are in transit. Article 80 of the Draft Convention stated that the time of passing of the risk is the time of handing the goods over to the carrier. The delegate of Pakistan insisted that relating the passing of risk retroactively to the dispatch of the goods might disadvantage developing countries, which generally dispatch bulk commodities to be sold in transit. With the support from the delegate from Ghana, Pakistan proposed an amendment to make risk pass at the time of contracting.[137] This proposal was opposed by the delegate from Sweden, who argued that concerns for the eventual damage suffered by the seller was unwarranted, since goods sold in transit are generally insured. The Finnish, Japanese, and Norwegian delegates also opposed the amendment suggested by Pakistan, contending that it would be extremely difficult to establish whether the damage occurred before or after the sale. After several discussions, a compromise came into being. The first sentence of article 68 contains the Pakistani proposal, establishing as a general principle that the risk passes at the time of conclusion of the contract. But this is followed by an exception, the applicability of which is not easy to ascertain: the risk passes retroactively from the moment the goods are handed over to the carrier "if the circumstances so indicate."[138]

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to be insolvent can be rendered insolvent through the action permitted by art. 71 to his sellers, unless he is operating with a large margin of solvency. This loads the dice against small business units which trade internationally.

136. The standard for invoking the suspension right under the Convention is more subjective than under German and English law, whose touchstone is, respectively, a "significant deterioration [in the financial position]" and "insolvency." *See* GERMAN CIVIL CODE art. 321; Sale of Goods Act, art. 41(1)(c) (United Kingdom). The Convention's test is not broader than the one provided by § 2–609(1) of the U.C.C., which merely requires reasonable grounds for "insecurity" to trigger the creditor's right to suspend performance. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at § 389; Ziegel, *supra* note 72, at 9–35; Zwart, *The New International Law of Sales*, *supra* note 25, at 120 ("Thus, suspension cannot be made on mere hunches, but requires a high degree of probability of nonperformance.").

137. Eörsi, *supra* note 4, at 352.

138. Article 68 of the Convention, *supra* note 3, reads:

> The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that

As in all compromises, each party gave concessions to the others. But this type of compromise fails to provide guidelines for a national court to choose between the main rule embodied in the first sentence of article 68 or the exception to the rule embodied in the second sentence. Neither is the applicability of the exception limited to those cases in which the time when the goods were damaged cannot be proved.[139] Perhaps the issue is merely academic, because nothoughtful buyer who purchases goods in transit will fail to require the inclusion of a contractual clause dealing with the passage of risk.[140] Nevertheless, by masking an irreconcilable position behind an illusory compromise, article 68 of the Convention fails to provide a workable rule to fill the gap left by the parties.

4. *Role of Trade Usages*

The scope and application of trade usage in contract interpretation turned into an issue with political overtones that sharply divided the UNCITRAL delegates.[141] This controversy confronted the views of representatives from socialist and developing countries with those from Western, developed countries.[142] Aside from the need of planned economies for security and foreseeability in contractual relationships,[143] the main reason why many devel-

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the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

139. Eörsi, *supra* note 4, at 352. While placing on the buyer the consequences of any inadequacy in the insurance, the passing of risk at the time the goods are handed over to the carrier obviates any difficulties of proof and has the advantage that only the buyer must pursue claims arising from damage occurring while the goods are in transit. *See* Nicholas, *Article 68*, in COMMENTARY, *supra* note 13, at 498, (noting that the principal difficulty with art. 68 lies in the meaning of "if the circumstances so indicate").

140. *See* Honnold, *Risk of Loss*, in INTERNATIONAL SALES, *supra* note 12, at 8–1, 8–14 (1984) (observing that the risk provisions of the U.C.C. fail to address the sale of goods in transit).

141. *See* J. HONNOLD, UNIFORM LAW, *supra* note 13, at §§ 112–122; Eörsi, *supra* note 4, at 341; Note, *Trade Usages*, *supra* note 28, 636–37 (1984) (quoting Lebedev, a Soviet delegate to the Vienna Conference, who observed that the provision on trade usages was one of the most fiercely-debated issues during the preparatory discussions); *see also* Note, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 541 (1986) [hereinafter Note, *Will a Homeward Trend Emerge?*].

142. *See* Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 465–66 (1979):

> Viewed in the context of the United Nations, [trade usage] become[s] political. Generally, developed nations like usages. Most usages seem to be made in London, whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neo-colonialist. They cannot understand why the usages of, let us say, the cocoa trade should be made in London.

See also Rosett, *supra* note 25, at 285, who frames the controversy on deeper ideological grounds:

> Some legal regimes are quite content with the past and look to tradition as a fountain of accumulated wisdom. For most Americans, community practice as embodied in common law is a source of just expectations about the future behavior of others. In contrast, those regimes that perceive their society as shackled by the remnants of an unjust past which must be smashed by a revolutionary process of renovation are not likely to be sympathetic to perpetuating past behavior by enshrining it as binding rules.

143. Because the socialist view gives priority to the security of the contract and foreseeability, it is not surprising that prime reliance is placed on the express agreement of the parties and written rules

oping and socialist countries are suspicious of the impact of trade usages in the international sphere is based on the fact that those usages were settled primarily by industrialized nations and are likely to reflect the interest of such countries.[144] In contrast, developed countries like the United States and Great Britain place prime emphasis on regularly observed trade usages, which are said to increase mercantile flexibility, and, thereby, economic efficiency.[145] The Uniform Commercial Code's liberal approach to trade usage naturally prompted the U.S. delegation to press for wide acceptance of usage of trade in the interpretation of contracts for the international sale of goods.[146]

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over the more flexible and uncertain outcome provided by trade usages. *See* Farnsworth, *supra* note 142, at 465.

> [U]sages are looked on with perhaps even more suspicion by the Eastern European countries, because the Eastern Europeans, being even more bureaucratic in outlook than our multinationals, like to have everything in their files. There is nothing more distressing to a bureaucrat than the thought that some Englishman or Ghanian is going to appear and claim that there is a usage that he does not have in his files.

144. *See Summary Records of the Meetings of the First Committee*, (6th meeting), U.N. Doc. A/Conf.97/C.1/SR., *reprinted in* OFFICIAL RECORDS, *supra* note 24, at 263 (reporting the statements made by Mr. Kopac, delegate from Czechoslovakia: ". . . [B]uyers and sellers from some countries, particularly those from developing countries, had not participated in the establishment of usages and would yet be bound by them, even if those usages were contrary to the Convention"). Date-Bah, *supra* note 88, at 27; Note, *Will a Homeward Trend Emerge?*, *supra* note 141, at 553; Note, *Trade Usages*, *supra* note 29, at 641, quoting the Yugoslavian and Soviet delegates to the Vienna Conference, who respectively stated that trade usage has "been formed by a restricted group of countries . . . whose position did not express world wide opinion" and that "[u]sages [are] often devices established by monopolies and it would hence be wrong to recognize their priority over the law." *See also* Khan, *Unification of the Law of International Sale of Goods—Issues and Importance*, in LAW OF INTERNATIONAL TRADE TRANSACTIONS 39, 50–53 (R. Khan ed. 1973). It is noteworthy that not all developing nations took a negative approach to trade usage. Noticeably, the Mexican perspective was similar to the United States' perspective. Note, *Trade Usages*, *supra* note 29, at 638 n.188.

145. Usage as a tool to fill in the gaps and to interpret the terminology in the parties' agreement is essential in international commercial transactions, where the need for speed means that the parties are likely to bargain as little as possible and are likely to address in detail every possible problem related to the contract. In this connection, Honnold observes:

> The world's commerce embraces an almost infinite variety of goods and transactions; a law cannot embody the special patterns that now are current, let alone those that will develop in the future. Many of these patterns will be reflected in the contract, but there are practical limitations on the ability of the parties to envisage and answer every possible question. Many transactions must be handled quickly and informally. Even where there is time to prepare detailed documents, an attempt to anticipate and solve all conceivable problems may generate disagreements and prevent the making of a contract; and the most basic patterns may not be mentioned because, for experienced parties, "they go without saying."

J. HONNOLD, UNIFORM LAW, *supra* note 13, § 251; *see also* Note, *Will a Homeward Trend Emerge?*, *supra* note 141, at 550.

146. The drafters of the U.C.C. incorporated a vast array of trade usage and courses of dealing into every contract governed by the Code. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 98–104 (2d ed. 1980). Section 1–205(2) of the U.C.C. defines trade usage as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Contracting parties are free to vary their contract terms from the standard trade usage and course of dealing, but they must do so expressly in the contract. Thus, U.C.C. §

The articulated view of the socialist countries on matters of usage was that usages can only be applied if the parties explicitly agreed to them in the contract and they do not violate statutory provisions.[147] The Western view favored the application of usages even if the parties agreed to their application only impliedly, and if reasonable-thinking parties who are in the position of the contracting parties consider them as being applicable.[148] With these opposite views on the conference table, it was clear that the issue had to be settled through a compromise.

Article 9(1) incorporates explicit agreements on usages and the trade practices that the parties have established between themselves. Article 9(2) states when trade usages are deemed to have been implicitly incorporated into the agreement, that is, (a) when the parties have either subjective (the parties "knew" in fact) or objective (the parties "ought to have known") knowledge of the usage, and (b) when the usage is widely known to, and regularly observed by, those in the trade.[149] The Commentary to this provision permits a finding of objective knowledge upon the proof of regular observance in the particular trade.[150] The

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2–202, comment 2 states that "[u]nless carefully negated [trade usages] have become an element of the meaning of the words used." The parties do not have to be aware of the trade usage. Section 1–205(3) provides that "any usage of trade in the vocation or trade in which they are engaged or of which they *are or should be aware* [may] give particular meaning to and supplement or qualify terms of an agreement." (Emphasis added.) *See* Note, *Trade Usages*, *supra* note 29, at 639 ("[I]f the contract called for the seller to deliver chickens and trade usage defines 'chickens' as 'young chickens,' the usage would be admitted into evidence [under the U.C.C.] if the seller delivered old chickens").

147. *But see* Maskow, *supra* note 79, at 58 ("Socialist law in general is rather reluctant in respect of usages, but in international trade they are accepted to a higher degree than in domestic matters.").

148. Eörsi, *supra* note 4, at 342.

149. The Convention, *supra* note 3, art. 9 refers to usages "in international trade . . . regularly observed by parties to contracts of the type involved in the particular trade concerned." Therefore, the particular usage must be confined to a certain product, region, or set of trading partners. *See* Dore & Franco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 58 (1982). As to the degree of "internationality" of the usage, Professor Honnold comments:

> Must the usage be "international"? This question can lead to confusion, but the Convention clarifies the issue. Under Article 9(2) the usage must be one which "in international trade is widely *known to*, and regularly *observed by* parties to" such transactions. A usage that is of local origin (the local practices for packing copra or jute, or the delivery dates imposed by arctic climate) may be applicable if it is "widely known to, and regularly observed by," parties to international transactions involving these situations.

J. HONNOLD, UNIFORM LAW, *supra* note 13, § 121 (emphasis in original).

150. The trade usage provision appeared as art. 8 of the 1978 Draft Convention and later became art. 9 of the Convention. Comment 4 to art. 8 of the 1978 Draft Convention reads:

> The determining factor whether a particular usage is to be considered as having been impliedly made applicable to a given contract will often be whether it was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." In such a case it may be held that the parties "ought to have known" of the usage.

Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law Together with a Commentary Prepared by the

requirement that the usage be "widely known," however, seems to indicate that it should be accepted by socialist, developing, and developed market economy countries.[151]

Whereas most delegates agreed that usage explicitly incorporated into the contract binds the parties, the more difficult issues are raised by usage not explicitly mentioned in the contract. Article 9 makes clear that usages to which the parties have impliedly agreed are binding on them, thus adopting the Western view that usages may be used as gap-fillers even if the parties failed to agree on them in the contract.[152] Article 9, however, fails to specify whether usages supersede conflicting provisions of the Convention.[153] This omission is probably due to objections from delegates of socialist countries, who insisted that usages should not override statutory provisions to the contrary.[154] Thus, the final version of article 9 evolved as both a partial answer to the objections raised by the delegates from socialist countries and as a compromise with them.[155] However, the commentary to the Draft Convention and the principle of party autonomy embodied in article 6 indicates that a usage that has been

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Secretariat, U.N. Doc. A/Conf. 97/5/1979 [hereinafter *Text of Draft Convention*]. While the Commentary to the 1978 Draft Convention and the Convention does not enjoy the persuasive force of the official comments to the U.C.C., it still may serve as a useful tool for its interpretation. *See* Note, *Trade Usages*, *supra* note 29, at 636 n.104.

151. See Maskow, *supra* note 79, at 58–59; Kasteley, *Unification and Community*, *supra* note 74, at 613 ("[A]rticle 9 should be interpreted to allow discussion of whether newcomers and others who lack experience or sophistication in international trade 'ought to have known' of its usages").

152. The U.S. Department of State noted with approval that both the U.C.C. and the Convention give effect to regularly observed trade usages, incorporate actual or implied knowledge of a usage, and allow recognition of usages in a particular trade. *Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods* (1980), in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, TREATY DOC. NO. 9, 98th Cong., 1st Sess. 4, 5 (1983).

153. Under art. 9(3) of ULIS, *supra* note 1, it was clear that usages derogate from the relevant provision of ULIS. Also in contrast with art. 9 of the Convention, *supra* note 3, art. 9(3) of ULIS made clear that a usage is admissible to interpret the meaning of terms used in the contract. *See Text of Draft Convention*, *supra* note 150, comment 6 to art. 8 (noting that the Draft Convention "does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade and for which the parties have given no interpretation"). It has been persuasively argued, however, that usages may be used to interpret contract terms pursuant to art. 8(3) of the Convention, *supra* note 3 which states that "[i]n determining the intent of a party . . . due consideration is to be given to . . . usages . . .". *See Trade Usages*, *supra* note 29, at 659.

154. *See* Eörsi, *supra* note 4, at 342. The delegate from Czechoslovakia proposed an amendment to art. 9(2) adding at the end of that paragraph the words "provided the usage is not contrary to this Convention." The amendment was supported by several socialist states. Nevertheless, the Mexican delegate argued successfully that:

> Any specific usage known to the parties should override the Convention because, if the parties decided to conform to a usage, it was because it responded to their needs with respect to a given contract. The problem was slightly more delicate when the usage was not known, but the solution should be the same because knowledge and consequently agreement by the parties with regard to that usage was presumed.

See Text of Draft Convention, *supra* note 150, at 263–64.

155. *See* Kasteley, *Unification and Community*, *supra* note 74, at 610.

expressly or impliedly accepted by the parties supersedes a conflicting provision of the Convention.[156]

III. Conclusion

The lengthy period of negotiations and endless deliberations on the draft text of the Convention demonstrates the great difficulty of reaching consensus and of obtaining amendments and clarifications. This is not surprising, because the representatives in charge of drafting a uniform law of sales were confronted with the task of reconciling different legal traditions that, conceptually, are worlds apart in many areas of contract law. The drafters also confronted widely different approaches to international business transactions from countries with free-market oriented economies and those with centrally planned economies, as well as different policy approaches between developing and industrialized nations.[157]

According to some commentators, the Convention has failed to achieve any meaningful consensus on the law of international sales. In a thought-provoking essay, an American legal scholar has questioned the Convention's usefulness as a vehicle for unification due to its frequent uneasy compromises that avoid difficult questions by failing to deal with them and its consequent deference to domestic law.[158] In contrast, Professor John Honnold, who participated actively in the negotiations, prefers to describe the Convention as "a triumph of cooperative international work,"[159] and a prominent legal comparativist who describes himself as a "tolerant participating 'accomplice' who is ready to

156. *See Text Draft of the Convention, supra* note 150, comment 5 to art. 8:

> Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy. Therefore, the provision in ULIS art. 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary. (Footnote omitted).

See also Trade Usages, supra note 29, at 661, stating that the rule that usages supersede contrary provisions of the Convention is implied by the text of art. 6 which permits the parties to contractually derogate from or vary the effect of any of the Convention's provisions.

157. *See* Kastely, *Unification and Community, supra* note 74, at 603 ("UNCITRAL includes representatives of thirty-eight nations, some of which are separated by deep conflict and suspicion. Understandably, these divisions occasionally surfaced and representatives occasionally responded by calling for formal and limited rules that could be mechanically applied").

158. Professor Rosett states that the rules of the Convention are not "in any significant respect superior" to the legal framework established by art. 2 of the U.C.C., and that the false compromises reached at the Vienna Conference "undermine the substantive unification of law and submerge the conflict enough to hinder easy correction." Rosett, *supra* note 25, at 282, 286, 304. For a condensed version of Professor Rosett's article, see Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984). For another pessimistic view of the Convention's chances of achieving any significant level of uniformity in the international community, see Note, *Unification and Certainty, supra* note 26, at 1999. A similar assessment of the Convention is given by John Feltham, who was the British delegate of the Vienna Conference. Feltham, *supra* note 32, at 346.

159. Statement of Professor John Honnold, *Hearings on Treaty Doc. No. 9, supra* note 10, at 19.

accept the inevitable," is of the opinion that the Convention's accomplishments outweigh its flaws.[160]

Admittedly, the Convention is the result of a compromise rather than a consensus, and not all of the compromises reached at the Vienna Conference can be categorized as "workable." But it is not true that the aim of UNCITRAL was to reach a final text at all costs. Rather, pursuant to the objectives of the United Nations, the work of UNCITRAL and its ad hoc working groups appointed by the leading committee may be more accurately characterized as a search for compromises in order to reach workable rules. Whenever a workable compromise could not be reached, the drafters of the Convention chose a contradictory technical formulation based on the lowest common denominator.[161]

A fair assessment of the Convention must start by acknowledging that the significant structural differences among the nations represented at UNCITRAL made it extremely difficult to achieve meaningful compromises, and that the outcome of many of those is simply not to resolve the problem they purport to address. This is of course disadvantageous for the cause of unification. But those illusory compromises were sometimes necessary in order for the conference to continue its work to completion.[162] Other compromises are clear-cut and provide meaningful guidance to the parties. If the need for compromises in every effort at the level of international legislative unification is readily accepted, then the gaps and shortcomings of the Convention that resulted from those compromises demand our understanding and, at least up to a certain point, our satisfaction.[163]

160. Eörsi, *supra* note 4, at 356.

161. Eörsi, *supra* note 30, at 315 (1979). *See* Speidel, Book Review, 5 Nw. J. Int'l L. & Bus. 432, 438 (1983) (reviewing J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (1982), suggesting that the Convention was produced more from a "compromise among competing legal traditions" than an assessment of the "needs and practices of international trade"); *See also* Rosett, *supra* note 25, at 286 ("The aim of the [UNCITRAL] Working Groups over the years was to find the right combination of words that would not be too offensive to any participant in the negotiations."); Ghestin, *Les obligations du vendeur, supra* note 42, at 6 ("Lorsqu'un compromis n'a pu être réalisé, les rédacteurs de la Convention n'ont pas hésité à admettre une véritable contradiction à l'intérieur même de celleci.").

162. Eörsi, *supra* note 4, at 346, who speaks figuratively of "saving the bulk of the cargo by throwing only a small part of it overboard." *Contra* Rosett, *supra* note 25, who states that in the context of the Convention "the false appearance of agreement is especially serious because of the rigid position the Convention takes toward further legal growth. With the potential for clarification and growth blocked, these false compromises undermine substantive unification of law and submerge the conflict enough to hinder easy correction."

163. *See* Zwart, *The New International Law of Sales, supra* note 25, at 127 ("Whatever the trials and tribulations during gestation, the world generally has received the Convention favorably and is slowly understanding its meaning. With growing knowledge of the Convention, its acceptance is becoming more widespread."); Hellner, *The U.N. Convention on International Sales of Goods—An Outsider's View*, in Ius Inter Nationes 71 (S. Riesenfeld ed. 1983) (Commemorative Edition) (concluding that even with its shortcomings, the Convention will provide a basis for unification of the law of international commerce). *See also* Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980*, 115 Journal de Droit International (Clunet) 311, 366 (1988); Niggemann, *Les obligations de l'acheteur, supra* note 96, at 43; Uniform Sales Law, *supra* note 13, at 115 ("While various provisions of the Uniform Law for

The final judgment on the acceptability of an international convention involves something else than weighing its possible virtues against its failures. The Convention should be primarily judged by whether it improves the present situation with regard to the realization of the elusive goal of unification.[164] Recognizing its shortcomings, the question is whether a limited Convention is still preferable to no Convention. Viewed in this light, the Convention represents an improvement over the uncertainties of a foreign law that must be identified, understood, and proven in court. The extent of signatures, ratification, and accessions to the Convention from countries of the most varied economic, political, and legal backgrounds must be taken into account to ascertain whether the Convention actually achieved a fair balance of the vital interests at stake. UNCITRAL's success in adopting a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on January 1, 1988, included countries from every geographical region, every stage of economic development, and every major legal, social, and economic system.

Any overall favorable judgment on the Convention should not exaggerate its actual accomplishments. I do not believe that the legal experts representing the sixty-two countries that met in Vienna envisioned perfect unification, a goal as elusive as it is impossible, as attested by the United States' experience with unification at a municipal level.[165] Its main purpose is to serve as a cornerstone to legal harmonization in the long run, rather than to achieve perfect unity of international sales by legislative fiat.[166] To this day, the Convention represents the most broad-based attempt to reach that goal and as such holds the greatest potential for success—in itself a worthy achievement.

International Sales may give rise to criticism, on the whole, it is a modern law that will serve its practical purpose").

164. *See* Date-Bah, *supra* note 88, at 37 ("Such a multilateral convention cannot be ideal for any particular group of states. What is important is whether a reasonable balance has been struck."). *See also* Winship, *New Rules for International Sales*, *supra* note 13, at 1234 ("[n]o legal text is perfect. . . . All we can ask is that a text be an improvement on the present state of the law."); Note, *Will a Homeward Trend Emerge?*, *supra* note 141, at 541, 544; Winship, *The Scope of the Vienna Convention*, *supra* note 1, § 1.04, at 1–50 (stating that the Convention is modest in scope, "[b]ut if traders cannot agree on the applicable law, the Convention will be a readily available compromise which is an improvement on the uncertainty of conflict-of-laws rules and the difficulty of proving foreign law").

165. Whether the U.C.C. has ever achieved "true" and "complete" unification is a matter of considerable debate. While areas of disunity in commercial law remain, most commentators would agree that today's U.S. commercial law is "more uniform, more certain, more precise and more sensible" than in the 1930s. *See* J. WHITE & R. SUMMERS, *supra* note 125, at 20–21.

166. *See* Kastely, *Unification and Community*, *supra* note 74, 574, 577 (arguing that one of the main objectives of the Convention is to promote international harmony by creating "a rhetorical community in which its readers first assent to the language and values of the text itself, and then use the language and values to inform their relations with one another").

Whether national courts will pay proper heed to the Convention's future growth, hence promoting uniformity in its application, remains to be seen.[167] Only the future will tell whether the spirit of compromise in which many of the rules were drafted will fulfill the wish expressed in the Preamble to the Convention: "to promote the long-term goal of a coherent and sensible world legal order for international trade."

167. The effort to insure uniform interpretation of the Convention is an on-going process in which scholars and international organizations seek ways to promote discussion and deliberation. The uniform application of international agreements, with a focus upon the U.N. Convention on Contracts for the International Sale of Goods, was a topic at the Twelfth Congress of the International Academy of Comparative Law, held in Sydney and Melbourne, Australia, August 18–26, 1986. In his report, Professor Honnold warned that "the objectives of [the Convention] can be undermined by different national approaches to interpreting and applying the uniform international rules." J. HONNOLD, METHODOLOGY TO ACHIEVE UNIFORMITY IN APPLYING INTERNATIONAL AGREEMENT, EXAMINED IN THE SETTING OF THE UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 U.N. CONVENTION 2 (1986) (general report for Topic 1C submitted to the Twelfth Congress of the International Academy of Comparative Law) (cited by Patterson, *supra* note 112, at 278 n.68). The report summarized fifteen national reports containing, inter alia, information on the extent to which courts in the respective countries made use of international case law, scholarly writing, and legislative history. *See* Sevón, *Method of Unification of Law for the International Sale of Goods*, in THE FINNISH NATIONAL REPORTS TO THE TWELFTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 11 (1986) (ed. by Kaarina Buure-Hagglund); Sutton, *Methodology in Applying Uniform Law for International Sales (Under the U.N. Convention) (Vienna 1980)* in LAW AND AUSTRALIAN LEGAL THINKING IN THE 1980's, A COLLECTION OF AUSTRALIAN CONTRIBUTIONS TO THE 12TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 91 (1986) (ed. by E.S. Tay); Bonell, *Methodology in Applying Uniform Law for International Sales Under the U.N. Convention (Wien 1980)* in ITALIAN NATIONAL REPORTS TO THE XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 43 (1986).