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## Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods

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### I. INTRODUCTION

On September 21, 1983, President Ronald Reagan asked for the advice and consent of the Senate to the ratification of the United Nations Convention on Contracts for the International Sale of Goods (Convention).<sup>1</sup> The Convention contains a comprehensive set of rules governing the formation, performance, and remedies for failure of contracts for the sale of goods within its jurisdictional scope. To put it in familiar terms, the Convention contains the functional equivalent of Article 2 of the Uniform Commercial Code (UCC), to be applied worldwide to sales between persons with places of business in different nations. Where it applies, the Convention will displace local and national rules.<sup>2</sup> The Convention reserves an uncertain number of issues for national law, and in addition seeks to preserve the private autonomy of contracting parties and permits them to exclude by agreement the application of the Convention or any of its provisions.<sup>3</sup>

The Convention is the product of more than two generations of international negotiation, which has produced a document unanimously approved by delegations representing sixty-two national legal systems at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.<sup>4</sup> This must be seen as a

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1. 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 cited as Convention]. See *President's Message to the Senate Transmitting the Convention*, 19 WEEKLY COMP. PRES. DOC. 1290 (Sept. 21, 1983) [hereinafter cited as *President's Message*].

2. A number of transactions are excluded from articles 2-5 of the Convention, for example, consumer sales and claims of personal injury. Article 28 limits the remedy of specific performance to those cases in which it is available under domestic law. Under article 12 contracting states that require contracts to be in writing may insist on enforcing their domestic law. Article 92 permits contracting states to exclude, at the time of accession, part II of the Convention, dealing with formation of the contract, or part III of the Convention, dealing with performance and remedies. The application of the Convention is limited in important but uncertain ways by provisions of article 4 restricting the Convention's application to the "obligations of the seller and the buyer arising from such a contract." This would appear to exclude the interests of third parties in the transaction. Article 4 also declares that the Convention is "not concerned with . . . the validity of the contract or of any of its provisions or of any usage." The term "validity" is of uncertain scope, but would appear to encompass much of what in American law is included under the rubrics of illegality, fraud, duress, unconscionability, and mistake, as well as the mandatory provisions of law that limit the parties' power to set their own rules by exercise of private autonomy. A final example of the preservation of domestic law is contained in article 35, dealing with conformity of goods, which to an indeterminate extent appears to incorporate the expectations of fitness and merchantability found in domestic law. See J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* §§ 256-266 (1982).

3. Article 6 of the Convention provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Convention, *supra* note 1, art. 6.

4. Official Records of the United Nations Conference on Contracts for the International Sale of Goods, art. 6, Mar. 10, 1980, U.N. Doc. A/Conf. 97/19.

monumental achievement of the United Nations Conference on International Trade Law (UNCITRAL), under whose auspices it was drafted. Since its adoption the Convention also has received the approval of groups of lawyers all over the world, including the American Bar Association.<sup>5</sup> Little opposition has arisen to its ratification by the United States, and from all indications the reaction in other nations also has been very positive.<sup>6</sup>

Harmonization of the law of sales for the whole world is attractive, in large part because of compelling economic and political realities. The pressures that over the past generation have produced harmonization and unification of commercial law in the United States, Scandinavia, and Europe,<sup>7</sup> as well as an impressive collection of specialized international legal regimes,<sup>8</sup> call for a more global and comprehensive response. Commercial law has deep roots in international regimes.<sup>9</sup> Innovations in transportation, communications, and technology have contributed over the past century to a large measure of legal order supporting worldwide commerce.<sup>10</sup> A very

5. At its August 1981 meeting the House of Delegates of the ABA recommended that the United States sign and ratify the Convention. 1981 SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 25.

6. In October 1983 the Secretary of UNCITRAL reported that the Convention had already been ratified by six states: Argentina, Egypt, France, Hungary, Lesotho, and Syria. Among the bodies around the world that are reported to have urged its adoption are the Council of Mutual Economic Assistance (CMEA), the Asia-African Consultative Committee, LAWASIA, and the International Chamber of Commerce. K. Sono, Remarks at the International Conference on the United Nations Convention on Contracts for the International Sale of Goods 6-7 (Parker School of Foreign and Comparative Law, Columbia University, Oct. 21, 1983) [hereinafter cited as 1983 Parker School Conference]. The proceedings of the conference are to be published.

7. The Uniform Commercial Code and the Scandinavian Sale of Goods Act provide models for regional harmonization. The major harmonization of laws of the members of the European Economic Community under articles 100 and 220 of the Treaty of Rome are described in 3 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 3-469 to -517 (1976 & Supp. 1982) and 5 H. SMIT & P. HERZOG, *supra*, at 6-135 to -158.

8. For more than half a century the carriage of goods by sea has been governed throughout the world by the Hague Rules, a convention adopted by at least 85 nations and incorporated in the laws of the United States as the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1976 & Supp. V 1981). World practice on letters of credit is heavily influenced by the Uniform Customs and Practice for Documentary Credits promulgated by the International Chamber of Commerce that is effectively universal law by its incorporation in most bank letter of credit contracts. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 290, *UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS* (1974). The legal relationships between air carriers and both passengers and cargo consignors is governed by the Warsaw Convention (*opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11), while services performed by individuals other than the contracting air carrier are governed by the Guadalajara Convention (*opened for signature* Sept. 18, 1961, 500 U.N.T.S. 31). The carriage of goods by road carriers throughout Europe is governed in most nations, including several Eastern European socialist states, by the Convention on the Contract for the International Carriage of Goods by Road (*opened for signature* May 19, 1956, 399 U.N.T.S. 189). Contracts for particular transactions are harmonized by model and standard form agreements drafted by national and regional trade associations, industry groups, and the United Nations Economic Commission for Europe. Large international construction contracts are heavily influenced by *Conditions of Contract (International) for Works of Civil Engineering Construction* (Fédération Internationale des Ingénieurs-Conseils) (3d. ed. 1977), otherwise known as the FIDIC Contract, which has been approved by professional organizations in 73 nations. See generally C. SCHMITTHOFF, *EXPORT TRADE* chs. 3 & 27 (7th ed. 1980); Sand, *The International Unification of Air Law*, 30 *LAW & CONTEMP. PROBS.* 400 (1965); Yiannopoulos, *The Unification of Private Maritime Law by International Conventions*, 30 *LAW & CONTEMP. PROBS.* 370 (1965).

9. G. GILMORE & C. BLACK, JR., *THE LAW OF ADMIRALTY* 1-11 (2d ed. 1975). See Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *LAW & CONTEMP. PROBS.* 354 (1965); Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 *HARV. INT'L L.J.* 221 (1978); Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?*, 3 *BROOKLYN J. INT'L L.* 210 (1977).

10. See David, *The International Unification of Private Law*, 2 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 209-12 (1972); Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" with Comments*, 30 *LAW & CONTEMP. PROBS.* 291 (1965) [hereinafter cited as Nadelmann, *Hague Conference*]; Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 *U. PA. L. REV.* 323 (1954) [hereinafter cited as Nadelmann, *Ignored State Interests*]; Rabel, *A Draft of an International Law of Sales*, 5 *U. CHI. L. REV.* 543 (1938).

significant part of most nations' gross domestic product results from international transactions.<sup>11</sup> The interdependent structure of the world economy suggests that a harmonious, if not unified, set of legal rules should govern transactions all over the world. Unification of the law also makes a positive political statement, giving concrete form to hopes for one peaceful family of nations living under a compatible legal order.<sup>12</sup>

Despite the lofty goals of the project, the impressive talent of the drafters, the long period of gestation, and the universal acclaim with which the Convention has been met, a number of significant questions have been largely unaddressed in discussion of the Convention thus far. This Article will suggest that these matters should be evaluated carefully before the United States ratifies the Convention. In addition to making some specific critical comments on the Convention, this Article will suggest that the basic strategy of attempting to create one exclusive and comprehensive statement of world contract law is ill-conceived. World law harmonization and world law codification are not identical, and the goal of harmonizing the legal treatment of common transactions throughout the world may not be advanced best by the adoption of the Convention in its present form. These reservations do not extend to other projects undertaken by UNCITRAL or to other efforts at law harmonization among nations. In the decade and a half since it was established, UNCITRAL has made remarkable progress and produced admirable harmonization in the rules governing recognition of arbitration procedures and awards, model contracts for large-scale industrial projects, and financial transfers.<sup>13</sup>

At the outset, it is important to review briefly the history of the Convention. During the half century of the Convention's gestation the world, the nature of trade, and the relationships among the world's legal cultures have changed so radically that the goals of the Convention have been transformed, perhaps contributing to its crucial weakness. In short, this project may have made sense in the Eurocentric environment of 1928, but it no longer does. More importantly, this Article will suggest that the perspective of harmonization based on a unified and exclusive statement of conceptual norms is not likely to serve the legal needs of the future.

The present Convention is a direct result of a project begun at the Sixth Session of the Hague Conference on Private International Law in 1928.<sup>14</sup> All of the initial participants were industrialized, capitalist, Western European governments, and the draft that emerged in the mid-1930s was specific to their legal culture. The project was swallowed by the turmoil that led to World War II. When the project was

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11. See generally R. COOPER, *THE ECONOMICS OF INTERDEPENDENCE* (1980).

12. The author's experience with the Convention illustrates these attractions. As a teacher of both contract law and international business transactions, the author was aware of the draft Convention, but became familiar with the provisions of the Convention in detail only during the spring of 1983, when he was privileged to offer a short course on contract and commercial law to students at the law department of Zhongshang University, Guangzhou, People's Republic of China. Since China and the United States are both signatories, the Convention seemed a particularly appropriate vehicle for instruction. The use of a common text reduced political and cultural sensitivities to foreign and capitalistic law. It was a heady experience studying law with students from a very different legal, political, and social background on the basis of a mutually acceptable statement of rules that were not just those of China or America but of the world.

13. UNCITRAL's first decade was celebrated by a symposium containing articles that fully describe its work. *Unification of International Trade Law: UNCITRAL's First Decade*, 27 AM. J. COMP. L. 201 (1979).

14. The history is traced in Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 302-03 (1959), and Nadelmann, *Ignored State Interests*, *supra* note 10.

resumed in the early 1950s, the number of participants had grown to twenty. Japan was represented, and the United States and several Latin-American countries sent observers.<sup>15</sup> This phase of the effort produced two conventions, the Uniform Law on International Sale of Goods (ULIS)<sup>16</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF),<sup>17</sup> which have been adopted by several countries, predominantly in Western Europe.<sup>18</sup> Beginning in 1968, the task of unification was taken over by UNCITRAL, and the number of participants grew to sixty-two. The broader membership now includes states with socialist, centrally planned economies, as well as capitalistic, free market economies; representatives of less developed nations from the "southern" half of the world participate alongside representatives of the industrialized "North."

This brief history suggests the difficulty of the task and the inevitability of textual problems. The Convention of necessity is a compromise between the long held doctrinal tenets of the common-law system and the civil-law systems; between individualistic, capitalistic systems and collectivistic, socialistic systems; between developed, industrial societies and underdeveloped societies seeking a new international economic order. American experience with national harmonization of contract and commercial law through the American Law Institute's Restatements and the UCC, as well as European experience with a generation of harmonization of national economic law under the aegis of the European Economic Community (EEC), all show how perilous this process can be, even among contiguous nations and states with common cultural and economic experiences and circumstances. The central aim of this Article is, however, not to demonstrate flaws in the drafting of the Convention, but to consider three general issues presented by the Convention and the method of accession proposed by the Administration.

#### A. *Legal Harmonization Through Unification of the Law Governing International Transactions as a Value and as a Strategy*

The Convention does not seek to harmonize the national commercial laws of signatory nations. Instead, it tries to isolate from the body of commercial law a special subset, the international sale, and create a unified set of rules for that group of transactions. This creates harmony at one level but new problems at another. Only if it is feasible in practice to cordon off the area of international sales from other commercial transactions will it be worthwhile to unify the rules without regard to the

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15. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, 4 UNIFICATION OF LAW 31 (1953-1955); Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952).

16. Convention Relating to a Uniform Law on the International Sale of Goods, *opened for signature* July 1, 1964, 834 U.N.T.S. 107, with Annex, Uniform Law on the International Sale of Goods, *reprinted in* 13 AM. J. COMP. L. 453 (1964) and 3 I.L.M. 855 (1964) [hereinafter cited as ULIS].

17. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, *opened for signature* July 1, 1964, 834 U.N.T.S. 169, with Annex, Uniform Law on the Formation of Contracts for the International Sale of Goods, *reprinted in* 13 AM. J. COMP. L. 472 (1964) and 3 I.L.M. 864 (1964) [hereinafter cited as ULF].

18. As of 1977, ULIS had been adopted by eight nations, Belgium, the Federal Republic of Germany, the United Kingdom, Gambia, Israel, Italy, the Netherlands, and San Marino, while ULF had been adopted by the same nations, with the exception of Israel. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 224 n.7 (1979).

effect on transactions that will continue to be governed by domestic law. Yet experience with both ULIS and with the Convention make it obvious that the distinction between domestic and international transactions is significantly flawed. The very interconnectedness of domestic and international economies that motivates the effort to harmonize contract law demonstrates that the international transaction often is neither functionally nor definitionally distinct from other sales.

Experience with an unsatisfactory ULIS definition of transactions that are international and therefore within the scope of the law's application caused the drafters of the new Convention to strike out in a different direction. The Convention's jurisdictional articles do not use the word "international," but rather define the coverage of the Convention in terms of the place of business of the parties to the sales transaction. Two identical transactions will be governed by different sets of legal rules, with different allocations of common business risks, even though they involve identical goods, parties of the same nationality, and identical places of formation, shipment, and performance. Part II of this Article will suggest, as the supporters of the Convention concede, that the concept of principal place of business carries with it substantial factual and definitional uncertainties, the resolution of which are likely not to be known by the parties at the time of contract formation. In a number of common business situations, it will be difficult for the businesspersons involved to be certain at the time they enter into transactions whether the Convention or an alternative set of national rules, such as the UCC in the United States, governs the transaction. Since presumably the application of the Convention will make a substantive difference, this difficulty poses a serious problem.<sup>19</sup>

Moreover, in the United States, the distinction between local, as opposed to interstate and international, transactions is embodied in the jurisdictional and constitutional allocations of power between state and federal governments. Part IV will give special attention to the incompatibility of the competencies delineated in the Convention and the successful structure of constitutionally mandated divisions of power in this country.

### *B. Harmonization by Diplomatically Negotiated Conventions and Legal Certainty*

The Convention proceeds from the correct assumption that undesirable costs are associated with the special uncertainties of international transactions. Undoubtedly, special costs and risks attend doing business over a distance with strangers who live in what is likely to be an unfamiliar political regime. Perhaps too simplistically, the Convention's approach identifies these uncertainties with the existence of separate national statements of legal rules and seeks a solution based on a unified statement of norms. Yet experience suggests that the law governing international transactions can be substantially harmonized without disturbing national legal systems.

More importantly, the drafters of the Convention have treated legal uncertainty as a function of the existence of divergent statements of the substantive norm. Yet despite the identity of the texts stating the norm, great uncertainty often will persist

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19. This problem has been recognized by Professor Honnold, who suggests that in cases of doubt the parties include a provision in the sales contract excluding the jurisdiction of the Convention. J. HONNOLD, *supra* note 2, § 42, at 80.

because of different understandings of the meanings of the terms used. Even greater uncertainties arise because of different ways used to find the operative facts or the legal significance to be attached to those events. In the modern context, the uncertainty of commercial transactions appears much less likely to be the result of differences in legal norms than of doubts regarding the fairness and reliability for foreigners of national institutions of dispute resolution and of the structures for enforcement of rights. The Convention does not appear to recognize the reality that identical wording of a legal norm in various jurisdictions does not preclude uncertainty resulting from different understandings and applications in practice.

These problems raise doubts about the ability of the Convention to reduce significantly legal uncertainty in international transactions. While the Convention provides a unified statement of contract law, it arrived at this apparent unity through provisions that obscure divergent positions. The problem with this approach is that the result, like so many compromises, is difficult to apply in concrete cases.

The process by which agreement was reached at Vienna testifies to the complexity of the task and suggests the salient characteristics of the product. The delegates of the sixty-two participating nations did not reach consensus by a magical process. The majority, representing nations that follow the civil-law tradition, did not suddenly realize the virtues of the common-law approach to contract and commercial transactions. Nor did the representatives of states with planned socialist economies suddenly recognize the virtues of free enterprise and the private allocation of risks by contract. And the many representatives of poorer and underdeveloped nations did not come to a new appreciation of the plight of the wealthy creditors of this world. After thirty years of hard technical negotiation by experts, worldwide agreement was reached by diplomatic compromise. This is hardly surprising, nor is it a vice. Nonetheless, the diplomat's drive to be inclusive and reach an agreement on the text of a treaty is at odds with the needs of the primary user of this particular Convention, the businessperson who has to make transactional decisions. Businesspersons do not place a high value on doctrinal purity nor do they especially value the political capacity to accommodate persistently conflicting views in an acceptable diplomatic text. They do need to set prices and undertake risks; hence, they need legal guidance in responding to particular situations.

Simply stated, too often the Convention does not resolve differences. Instead, as part III of this Article will illustrate, it glosses them over or buries them in layers of rhetoric. Or if the two sides cannot agree, the text uses a new term whose meaning is not made clear. Or one article may follow one approach while another article takes a divergent or contradictory approach. Or two different subparts of a given article may take opposite tacks.

Despite the triumph of producing a unified statement of international commercial law, the Convention does not bespeak a unified understanding of commercial law. Unfortunately, a unified statement of rules does not guarantee, nor even inevitably advance, a unified approach to substantive problems. If the rules are understood differently, differing results will be reached. More significantly, the interpreter of the Convention is left at sea without the anchor of a coherent conceptual framework in which to understand specific provisions of the Convention and without any clear

sense of what the drafters meant beyond wanting to soften the conflict of opposing viewpoints with a new verbal formula. The interpreter is also cast adrift from the security of the national traditions of commercial law which often supplied the basis on which gaps in understanding could be filled.

Harmonization of diverse laws is only one function of international unification of law. Legal unification has long been a half sister of law reform. Through international harmonization the anomalies of municipal law can be excised or reduced. Consideration of uniform laws provides an opportunity to reconsider domestic laws that call for revision. A major function of the unification of world commercial law is to free sales law from what Professor Ernst Rabel described thirty years ago as the "awesome relics from the dead past."<sup>20</sup> In this respect the Convention appears to be a missed opportunity, for it is hard to find many substantive areas in which even its partisans perceive its formulations as a significant improvement on familiar national solutions. More seriously perhaps, in a number of areas ripe for reform the Convention masks persistent disagreement among legal systems with provisions that are so obscurely drafted that they give no guidance at all on substance.<sup>21</sup> The appropriate question is whether adoption of the Convention will alleviate difficulties in the present state of world trade law.

### C. *The Convention and Mechanisms for Future Legal Growth*

Unification and harmonization of the law are not the same as nationalization, or in this case, internationalization. Law can be harmonized without distorting the traditional allocations of legislative jurisdiction. The UCC is the law of the United States for virtually all practical purposes, but Congress has not enacted it as national law. Volumes of other kinds of harmonized state law testify to this capacity in the United States.<sup>22</sup> In Europe, a generation of experience with harmonization under the directive power of the EEC conferred by the Treaty of Rome also demonstrates this basic premise.<sup>23</sup> Harmonization is not always neat or speedy, but it is possible. It is worthwhile because of the costs associated with shifting long-standing, successful legislative competence from one government to another. Part IV of this Article will discuss two of these costs: the new repository of legislative power may not be equipped to deal effectively with the responsibility it inherits, and the change may be

20. Rabel, *supra* note 15, at 61.

21. Article 79, for example, provides excuses from contract performance because of supervening events that interfere with the contract. Convention, *supra* note 1, art. 79.

Professor Gyula Eörsi, of the University of Budapest and president of the 1980 diplomatic conference that adopted the Convention, described article 79 as an instance in which "both 'parties' agreed in the hope that their doctrinal interpretation would be reflected in the practice of the Convention." He goes on to suggest that this "does not bridge the gap, only covers it up. The piquancy of the [compromise on article 79] is that in practice there is no gap, only in theory." Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 355 (1983). See also Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231 (1979) (discussing article 74 of ULIS, *supra* note 16, a provision comparable to article 79 of the Convention).

22. See the 14 volumes of *Uniform Laws Annotated (U.L.A.)*, prepared under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

23. See B ENCYCL. OF EUR. COMM. L. (SWEET & MAXWELL 1974) for three volumes of European Community treaties and C ENCYCL. OF EUR. COMM. L. (SWEET & MAXWELL 1975) for six volumes of European Community secondary legislation; H. SMIT & P. HERZOG, *supra* note 7.

a one-way street preventing further changes if the results are not as hoped. A question of prime importance is whether ratification of the Convention is irrevocable, precluding both effective ongoing adjustment of the law by local and national interpretation and amendment to correct drafting weaknesses and meet new circumstances.

Part IV of this Article will discuss some of the foreseeable difficulties that will arise from the Convention's approach to interpretation and amendment and that will inhibit both continued common-law development and local or national legislation. This process may be irrevocable in the sense that national and local processes for interpretation and amendment will be displaced and the federal government will be under an international obligation not to go its own way. If the Convention proves unsuccessful, it is likely to prove very difficult as a practical and legal matter to unwind these international commitments and reinstall state competence over this subject matter. The Convention leaves little room for variation in national interpretation. Each signatory is obliged to follow the interpretation of the others, although the process for selecting those national decisions that are to be emulated by the other signatories is not made clear.<sup>24</sup>

These interpretative difficulties are particularly troubling since most of the participants in the Convention have legal systems that do not accord court decisions the dispositive authority which they possess in the common-law system. In the absence of residual national legislative competence and oversight, the correction of errors, amendments, and incremental reforms in sales law governed by the Convention can be accomplished only by a return to the negotiation process. This mechanism has obvious flaws. First, UNCITRAL is committed to decisions by unanimity;<sup>25</sup> that commitment is a simple concession to necessity, for UNCITRAL possesses authority to make decisions only by reports and recommendations to other UN organs. It follows that changes are possible only if nobody disagrees or if nobody considers them useful as a hostage for forcing other changes. Thus, it is unlikely that the Convention will grow organically into a new coherent body of law. The fifty years of international negotiations that led to this Convention should demonstrate the great difficulty of reaching consensus and of obtaining amendments and clarifications. This process is not likely to encourage experimentation and growth.

The Convention would represent a major displacement by federal and international law of what has heretofore been a body of state law in the United States. Yet the proposed process of adopting the Convention is simple approval by two-thirds of the Senate under the treaty power without implementing legislation. Some may

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24. Convention, *supra* note 1, art. 7(1). See J. HONNOLD, *supra* note 2, § 92, at 120.

25. The Chairman recalled that the Commission [on International Trade Law], at its first session, had agreed that its decisions should, as far as possible, be reached by consensus, and 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.

The decisions taken by the Commission in the course of its third session were all reached by consensus. Report of the United Nations Commission on International Trade Law on the Work of Its Third Session to the General Assembly, ¶¶ 15-16, 25 U.N. GAOR Supp. (No. 17), U.N. Doc. A/8017 (1970), reprinted in [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 129, 132, U.N. Doc. A/CN.9/SER.A/1970.

Professor Honnold reported that, as of 1979, UNCITRAL had yet to take a formal vote or adopt its own procedural rules and noted that "the procedures bear a striking resemblance to those of a Quaker meeting." Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 210 (1979).



find it ironic that a national administration that has been so vociferous in its defense of state and local, rather than national, control of affairs has chosen to excise a large and successful area of state rulemaking by this process of lawmaking. Congress as a whole will not consider the substance of the Convention. Yet ratification would put into place a new body of national law different from that produced by several centuries of state lawmaking and harmonized nationally through the adoption of the UCC. While international trade has always been within the legislative jurisdiction of the federal government, the Convention would shift the center of gravity in lawmaking sharply away from the states toward more remote and probably less competent national and international lawmaking bodies.

The organizational provisions of the Convention and the process of interpretation it contemplates are weak in these respects and do not adequately address the need to nurture growth of the law and the clarification of open questions. Moreover, the process of adoption by the Senate does unnecessary violence to successful and established American juridical processes, the balance between local and national government, and the possibility of correcting errors by revision and amendment. The process contemplated would commit the United States to the regime established by the Convention with little possibility of returning to the existing flexible system of state law. The existing system of commercial law in this country has been notably open to creative growth, yet the Convention would replace it with a rigid process that effectively will preclude restoring the status quo if the international experiment proves unsatisfactory.

## II. THE TRANSACTIONAL SCOPE OF THE CONVENTION

A clear, unambiguous, and simple definition of the Convention's jurisdictional scope is crucial to the success of the whole enterprise. The strategy of the Convention is not to harmonize all commercial law, but only a particular subgroup of transactions, the international sale. Within that subgroup, unified international rules are supreme and displace national rules. But the residual national laws remain in force for all transactions not within the definitional scope of the Convention. Viewed from the perspective of an international law scholar, the law of international transactions is harmonized by this approach. Yet viewed from the perspective of the ultimate user, the businessperson engaged in transactions, the rules appear more complex, for the familiar rules of domestic law now must compete with a new and different set of laws.<sup>26</sup> This becomes a serious problem if the standards indicating which set of rules applies are not clear.

If the drafters had adopted a different strategy, the jurisdictional definitions might not be so crucial. For instance, if a harmonized set of rules were created for all sales transactions throughout the world, or for those of a certain size, or only for

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26. Professor Peter Winship has informed the author that this point, like so many in the field, was first suggested many years ago by Professor Ernst Rabel. See Rabel, *International Sales Law*, in *LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS AND COMPARATIVE LAW* 34, 36-37 (Summer Institute on International and Comparative Law, University of Michigan Law School) (1951).

those as to which the parties decided they would apply,<sup>27</sup> the definitional lines could be less clear without threatening the transactional security of the parties.

Presumably, the drafters intended to have the Convention apply only to international transactions. After all, the title of the document states that it is a "Convention on Contracts for the International Sale of Goods," although significantly the word "international" does not appear anywhere in the text of the articles that define the Convention's scope.<sup>28</sup> The omission of the magic word is not simply an oversight, for the definition of the transactional scope of the law was an issue for decades. The unsatisfactory nature of the jurisdictional definition in ULIS was one of the first problems to which UNCITRAL turned its attention in the late 1960s.<sup>29</sup> A variety of proposals were offered during the decade of work on the new Convention. Yet despite this effort, the solution of the new Convention may be distinctly inferior to the imperfect solution of ULIS two decades earlier.

### A. *The International Character of a Transaction*

Article I of ULIS<sup>30</sup> provides a good starting point for determining what constitutes an international contract. ULIS bases jurisdiction on the parties having a place of business in different countries and the presence of one or more of the following factors: the movement of the goods across borders during the transaction, the formation of the contract by international communications, or the ultimate delivery of the goods in a country other than that in which the contract was formed.<sup>31</sup> This definition rests on two broad indicators of the international character of a transaction. First, the

27. See article V of ULIS:

Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare, by a notification addressed to the Government of the Netherlands, that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article 4 of the Uniform Law, chosen that Law as the law of the contract.

ULIS, *supra* note 16, art. V. This option was exercised by Great Britain when it adopted ULIS. Uniform Laws on International Sales Act, 1967, ch. 45, § 1(3).

28. Professor Honnold states that sales under the Convention must be international. J. HONNOLD, *supra* note 2, § 13, at 57. See also Réczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513, 517-22 (1981).

29. Report of the Working Group on the International Sale of Goods on the Work of Its First Session to the Third Session of the United Nations Commission on International Trade Law, ¶¶ 30-44, Jan. 5-16, 1970, U.N. Doc. A/CN.9/35, reprinted in [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 176, 180-81, U.N. Doc. A/CN.9/SER.A/1970; Report of the Working Group on the International Sale of Goods on the Work of Its Second Session to the Fourth Session of the United Nations Commission on International Trade Law, ¶¶ 11-31, Dec. 7-18, 1970, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. INT'L TRADE L. COMM'N 50, 51-54, U.N. Doc. A/CN.9/SER.A/1971.

30. Article I of ULIS provides in pertinent part:

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;

c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

3. The application of the present Law shall not depend on the nationality of the parties.

ULIS, *supra* note 16, art. 1.

31. *Id.*

parties must be from different countries. Two Americans buying and selling goods located overseas are not engaging in an international transaction under this definition, nor are two Americans buying and selling goods that the buyer ultimately intends to ship overseas. Second, something about the transaction must be transnational. Either the goods must physically move across a border, or the dealings between the parties must be across a border. A Frenchman buying machines at a showroom in Los Angeles for delivery at the factory is not engaging in an international transaction, although the purchase of the same machines by telex communications from his home office in Paris may be.

The factors are cumulative, and the conclusion that the sale is international becomes more persuasive as the number of factors present increases. The actual movement of the goods in the course of the transaction seems the most persuasive indication of international character, but the presence of no one factor alone is likely to satisfy the definitional requirements. The international quality of the transaction thus often eludes easy definitional capture.

The definitional uncertainty in the Convention arises from the lack of instrumental reference in the definition itself. What an international transaction is depends on why one wants to know. If the concern is with the transport of goods on the high seas or the payment of obligations across borders separating different monetary systems, then international transactions are easily defined. Likewise, if the definition's context is a system of economic planning which sharply distinguishes between domestic and foreign trade, perhaps by assigning responsibility for planning and conducting particular transactions to one governmental ministry while those in another category are the responsibility of a completely different set of officials, a transaction that is international is easily distinguished from one that is not on the basis of which officials are conducting it.

The converse should be equally clear. If one does not have a functional aim in view, it is difficult to recognize international transactions other than those that possess so many indicia of an international character that the question is obviated. The source of the Convention drafters' problem is that, because international trade is increasingly integrated, it is not an economically or functionally distinct category of trade engaged in by a distinct group of people. The drafters therefore lacked a clear rationale for treating a particular set of transactions distinctly from all others. They knew they wanted the Convention to cover broadly all sales transactions that might be deemed international, but they were not politically prepared to convert their project into an effort at true world law harmonization of all sales transactions.

The problematic quality of the definitional provisions of ULIS were promptly addressed by the Working Group on the International Sale of Goods when work on the new Convention began.<sup>32</sup> In particular, the Working Group was unhappy with the

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32. UNCITRAL depends on Working Groups for drafting and technical studies. This process is described in Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 *AM. J. COMP. L.* 201, 208-09 (1979). See Report of the United Nations Commission on International Trade Law on the Work of Its Fourth Session to the General Assembly, 26 U.N. GAOR Supp. (No. 17), U.N. Doc. A/8417 (1971), reprinted in [1971] 2 *Y.B. INT'L TRADE L. COMM'N* 9, 18, U.N. Doc. A/CN.9/SER.A/1971 (recounting the history and duties of the Working Group on the International Sale of Goods).

idea of making carriage of the goods across national borders a condition of the Convention's applicability. Clearly, if parties enter into a contract that calls upon the seller to ship and deliver goods to the buyer's nation before payment is due, the contract is international. However, such transactions are not very common. More frequently, the parties will make a C.I.F. contract<sup>33</sup> that contemplates the packing, shipment, and insurance of goods from one country to another. This is an international contract, even though the definition of a C.I.F. contract provides that title passes and risk of loss shifts from the seller to the buyer before the goods leave the seller's country. A contract that provides delivery F.A.S. a ship in the harbor would also seem quite unambiguously international in character even though the transaction is complete before the goods leave port.<sup>34</sup> It is less self-evident that a contract contemplating delivery of goods at the seller's place of business is an international contract, even if the seller agrees to pack the goods in ways appropriate for international carriage or to provide documentation, such as consular invoices or certificates of origin, which indicate that the goods will be sent to another country.

The Working Group, wishing to include all these types of transactions within the definition, sought to produce that result by providing that it would be enough if carriage of the goods were contemplated at the time of the contract.<sup>35</sup> However, translating the nuances of the French text into English revealed the weaknesses in this proposal.<sup>36</sup> The text left uncertain whether it would be enough that the goods were in fact later carried, without regard to what the parties contemplated at the time the contract was formed. This proposal also presented the anomalous possibility that an unanticipated shipment of goods sold domestically might bring the Convention into play after formation of the contract, thereby retrospectively invoking a different set of rules. The term "contemplated" also implied the element of *scienter*, raising the question of what the parties would have to know at the time of contract formation before they would be deemed to have contemplated international movement of the goods. As this Article demonstrates, this recurrent question of the parties' knowledge casts doubt on other solutions to the jurisdictional problem.

At its core, the notion of an international transaction is clear and specific. But like so many legal concepts, it blurs at the edges. Unless the creator of the concept has some definite functional purpose in mind, the outcome in these indeterminate situations will depend on the characterization of the parties' uncertain mental state, that is, what they contemplated. When a jurisdictional legal standard turns on the

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33. The C.I.F. contract, in which the seller's price includes cost, insurance, and freight, is defined in U.C.C. § 2-320 (1978) and INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 350, INCOTERMS (1980). See generally D. SASSOON, C.I.F. AND F.O.B. CONTRACTS (2d ed. 1975) (extensive statement of the law relating to C.I.F. and F.O.B. contracts and the practice applicable thereto).

34. U.C.C. § 2-319(2) (1978); INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 350, INCOTERMS (1980).

35. Report of the Working Group on the International Sale of Goods on the Work of Its First Session to the Third Session of the United Nations Commission on International Trade Law, U.N. Doc. A/CN.9/35, ¶ 40 (1970), reprinted in [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 176, 180, U.N. Doc. A/CN.9/SER.A/1970; Report of the United Nations Commission on International Trade Law on the Work of Its Third Session to the General Assembly, ¶¶ 50-51, 25 U.N. GAOR Supp. (No. 17), U.N. Doc. A/8017 (1970), reprinted in [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 129, 135-36, U.N. Doc. A/CN.9/SER.A/1970.

36. See *infra* note 128.

determination of the contemplation of the parties, the capacity for predicting outcomes is likely to be very limited.

One obvious solution would have been to limit the scope of the Convention to transactions whose core is truly international, that is, those in which carriage is either part of the contract or expressly mentioned by provisions that call for delivery to a ship or export documentation. The problems could also have been avoided by requiring that the parties trigger application of the Convention by express agreement.<sup>37</sup> Instead, the Working Group, frustrated in its efforts to define an international transaction, spread the jurisdictional net wider and provided that application of the Convention shall depend on only one factor, the parties having places of business in different countries.

### *B. Parties with Places of Business in Different Countries*

At first glance the transnational character of the parties' businesses appears to provide a convenient way of determining whether a contract is international. It avoids drawing distinctions between C.I.F., F.O.B., and F.A.S. contracts, between parties who contemplated shipment as part of the contract and those who did not, and between goods that in fact move across borders at some time and those that do not. It also avoids difficult issues of nationality by focusing on the physical location of the parties' activities, rather than their citizenship or legal status. As long as the parties deal with each other from their home base and without intermediaries, the standard seems easy to apply. Each side will inevitably be aware that it is dealing with a foreigner.

The problem is that the two conditions just mentioned often do not apply in modern commerce. Businesspersons, and their employees and agents, are highly mobile. International commerce is aided by opportunities for face-to-face dealings. In addition, over the centuries a great variety of forms of intermediaries have developed to connect buyers and sellers in different countries. Some of these intermediaries deal on their own account, while others are employees or commission agents acting on behalf of their principal. In French and German law the picture is much more complex, for the codes provide a bewildering number of variations on this theme, each relationship having distinct legal consequences.<sup>38</sup> Discussion of subjects like the complexity of the law of undisclosed principals<sup>39</sup> and the special English rules regarding foreign principals<sup>40</sup> is beyond the scope of this Article, but suffice it to say that the area is full of complexities which the Convention does not directly address.

Presumably, a foreign buyer in retaining a local purchasing agent that discloses its status will be within the Convention, but the agent may deem it prudent for

37. See *supra* note 27 for a comparable provision in ULIS.

38. See, e.g., Burkard, *Termination Compensation to Distributors Under German Law*, 7 INT'L LAW. 185 (1973); Lando, *The Commercial Agent in European Law*, 1965 J. BUS. L. 179, 374 (continued in 1966 J. BUS. L. 82); Schmitthoff, *Agency in International Trade: A Study in Comparative Law*, in 1 RECUEIL DES COURS (Collected Courses of the Hague Academy of International Law) 106, 129 (1970).

39. RESTATEMENT (SECOND) OF AGENCY §§ 186-211 (1957); Hill, *Some Problems of the Undisclosed Principal*, 1967 J. BUS. L. 122.

40. *Teheran-Europe Co. v. S.T. Belton Ltd.*, [1968] 2 Q.B. 545.

business reasons not to disclose the identity of the principal, or even that it is acting as an agent. For most legal purposes, the existence of an undisclosed principal causes no significant problems. According to article 1(2) of the Convention, the fact that the parties have their place of business in different nations is to be disregarded whenever "this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract."<sup>41</sup> This carefully crafted definition suggests by its very complexity the difficulties posed by the need to determine what "facts" or "information" are relevant in a given situation. A seller or a buyer may know that the person with whom it is dealing often represents foreign principals and that the person is listed in relevant trade directories and the yellow pages under the heading "export agents." The seller may be aware that the specifications for the product suggest that it is to be used abroad. The packing requirements may indicate that travel is expected. The problem with article 1(2) is that it creates the kind of legal complexities that legal advisors to business would rather avoid.

When the parties deal with each other face-to-face, the problems of knowledge multiply. A woman whose dress and demeanor are foreign comes into a showroom. Speaking in heavily accented English, she buys goods for delivery at the factory with payment through a local bank. The question arises whether the seller is put on notice from "information disclosed by the parties" that this is an international transaction. It is not clear that these factors suggest where her place of business or that of her employer is.

The language of article 1(2) appears to contemplate an objective standard of knowledge, dependent on facts that "appear from the contract" or matters "disclosed by the parties." But article 8 of the Convention contradicts this standard.<sup>42</sup> Article 8(1) provides that a party's statements and conduct are to be interpreted for purposes of the Convention according to "his intent where the other party knew or could not have been unaware what that intent was." According to article 8(2), when the crystal clear provisions of 8(1) do not apply, the statements and conduct of the parties are to be interpreted in accordance with "the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."

In sum, if the parties deal with each other from a distance, the jurisdiction of the Convention is relatively clear. If they deal with each other face-to-face or through an agent, however, sensitive questions of jurisdiction will turn on the trier of fact's

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41. Convention, *supra* note 1, art. 1(3).

42. Article 8 provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

*Id.*, art. 8.

assessment, according to either an objective or a subjective standard, of essentially indeterminate circumstances. In this way the law of the world has been unified.

### C. *What is a Place of Business?*

The concept of place of business itself is uncertain. It does not describe a juridical status, as citizenship or place of incorporation might. It requires something more than temporary presence; it is not parallel to the familiar concept of "doing business" used in this country to determine whether a corporation is amenable to suit in a particular jurisdiction.<sup>43</sup> Professor John Honnold, in his commentary to the Convention, seems quite sure that it describes a permanent and not a temporary place of business.<sup>44</sup> Neither having a hotel room or a rented office in a city nor engaging in sales transactions on repeated occasions in the nation appear to suffice. After reviewing the variety of factors that must be considered to resolve the problem posed by a party with places of business in two states, Professor Honnold concludes, "However, when the balance seems close the parties would be well advised to settle the point by contract—by stating whether the Convention or specified domestic law is applicable."<sup>45</sup> The weakness of the place of business standard is the likelihood that its application will be determined by circumstances that are remote from the informational context in which businesspersons are likely to be at the time of negotiation.

The Working Group Report to the Fourth Session of UNCITRAL indicates that those drafting the jurisdictional provisions of the Convention thought that the exclusion of consumer sales in article 2(a) would take care of the problems of contracts made and goods delivered in one country.<sup>46</sup> They proposed a definition of consumer sales that seems workable, although probably not broad enough to have the intended effect.<sup>47</sup> In any event, this definition was not included in the final Convention. Instead, the exclusion of consumer sales embodies another "knew or ought to have known" standard.<sup>48</sup>

43. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

44. During the preparation of the Convention, some delegates were concerned lest "place of business" be construed to extend to a hotel room or other temporary place where a traveling agent might conduct negotiations. Referring to a "permanent" place of business presented drafting difficulties, and most delegates concluded that temporary sojourns would not establish a "place of business."

J. HONNOLD, *supra* note 2, § 124 (footnote omitted). See also *id.* § 43 (demonstrating the problem of a temporary place of sojourn during negotiations through an example).

45. *Id.* § 42, at 80.

46. Report of the Working Group on the International Sale of Goods on the Work of Its Second Session to the Fourth Session of the United Nations Commission on International Trade Law, U.N. Doc. A/CN.9/52, ¶ 26 (1970), reprinted in [1971] 2 Y.B. INT'L TRADE L. COMM'N 50, 53, U.N. Doc. A/CN.9/SER.A/1971.

47. *Id.* ¶ 51, at 55-56.

48. Article 2(a) of the Convention actually provides an even less satisfactory standard than is suggested in the text since the definition of a consumer sale under this article includes "goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." This provision will create problems for a party trying to prove a negative regarding another party's state of mind, or what that party's state of mind ought to have been, from some indeterminate point in time to the moment of the conclusion of the contract. Convention, *supra* note 1, art. 2(a).

#### D. Other Jurisdictional Problems

The first ten articles of the Convention, which define its scope, contain a number of other problematic provisions. Although full exploration of these provisions is not possible in this Article, mention of a few of them will suggest the extent of the jurisdictional difficulties. For instance, the Convention applies to the "sale of goods." Yet despite their jurisdictional nature, neither sales nor goods are defined.<sup>49</sup> Article 3 explicitly includes contracts for goods to be manufactured unless the goods are incidental to supplying labor and services. The Convention provides no guidance concerning mixed goods, unfinished goods, unsevered minerals, or crops. It is surprising in a modern commercial setting that the drafters did not indicate whether sales include consignments, leases, barter transactions, franchises, or transactions in which title is retained for purposes of security.

Article 5 provides that the Convention does not apply to liability of the seller for death or personal injury caused by the goods to any person. The drafters thus avoided the need to produce a unified law covering the tangle of product liability issues which most legal systems have not satisfactorily resolved. But in severing personal injury claims the Convention might have indicated what is to happen when such claims arise in conjunction with property losses. Property loss and personal injuries are likely to arise from the same incident. It is not clear whether one set of rules regarding formation and performance govern the property claims and another the personal injury.

According to article 4, the Convention "is not concerned with . . . the validity of the contract or any of its provisions."<sup>50</sup> Validity is a term of art, which in European usage means that the Convention does not displace national law on so-called mandatory clauses. This protean body of law includes much of what American law classifies under the rubric of the doctrines of mistake, duress, unconscionability, fraud, and illegality.<sup>51</sup> The problem again is that these terms are not self-defining, and there appears to be substantial disagreement whether specific common problems are within their scope. For example, at least one expert opines that disclaimers of damages are permissible in contracts under the Convention, although others would hold that these questions are questions of validity under article 4 and are therefore governed by residual national law.<sup>52</sup>

If the parties wish to avoid the jurisdiction of the Convention, article 6 permits them to "exclude [its] application" or "derogate from or vary the effect of any of its provisions."<sup>53</sup> This provision preserves the autonomy of the parties and enables sophisticated contractors to avoid its problems by an express exclusion. The Conven-

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49. Compare U.C.C. §§ 2-102, -105, -106, and -107 (1978) (defining the scope and the terms of Article 2 on sales).

50. Convention, *supra* note 1, art. 4.

51. J. HONNOLD, *supra* note 2, §§ 64-70; Philip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations*, in *CONTRACT CONFLICTS* 81 (ed. P. North 1982). See *infra* text accompanying notes 103-09.

52. Eörsi, *supra* note 21, at 348-49.

53. Convention, *supra* note 1, art. 6.



tion is less clear on the extent to which the parties can exclude application of the Convention by implication. The most common instance of implicit exclusion would be the familiar choice of law clause now found in many international commercial agreements. Whether the parties' statement in the agreement that their contract is to be governed by the law of New York impliedly excludes the Convention would appear to be a question of interpretation on which article 8(1) directs an investigation of the parties' subjective intent, while article 8(2) specifies an objective view. To some extent this question raises *renvoi* issues: the reference to the law of New York may be to the domestic law of New York or to the total law of New York, which will, after ratification, include the Convention under the supremacy clause.<sup>54</sup> Although the drafters of article 6 could hardly have been unaware of these problems or of the commercial practices regarding choice of law clauses, they chose to provide little guidance.<sup>55</sup>

### E. Procedural Dimensions of the Problem

The Convention is quite insensitive to the procedural implications of the rules it announces. Undoubtedly, the drafters hoped that the parties would have recourse to commercial arbitration, in which these questions tend to be blended in the arbitrator's discretion and terms of reference. When litigation does occur, however, there will be great opportunities for dilatory motions in common-law courts, and in some court systems the jurisdictional quality of the issues will create opportunities for undesirable interlocutory appeals.

The Convention generally does not address procedural matters and therefore does not indicate where the burden of persuasion lies. This is an issue of great importance when the standards have uncertain empirical referents—what parties knew or should have known—or require the proof of a negative—what a party could not have been unaware of. Presumably, burdens of persuasion and proof are reserved for national law under article 4, but in that case the unification, in terms of the increased predictability of results produced by the Convention, is marginal. Rules of burden of persuasion or rules of decision for hard cases are likely to control the outcome of most cases worth litigating. The drafters could have been more sensitive to the impact on legal certainty and predictability of rules that places unsustainable burdens of persuasion on one party.

## III. THE UNEASY COMPROMISES OF THE CONVENTION

After years of inconclusive discussion, the fact that the delegates arrived at a text that displaces familiar national systems can only be explained as a compromise. A compromise is hardly a flaw in any human enterprise that seeks to bring under its umbrella the views of virtually all the tribes of humanity. In view of the ever

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54. U.S. CONST. art. VI, § 2.

55. Dore & DeFranco, *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, 51, 53-54 (1982). Professor Peter Winship discusses this problem in more detail in a paper entitled "The Scope of the Vienna Convention on International Sales Contracts," which he delivered at the 1983 Parker School Conference, *supra* note 6.

widening group of participants in the negotiations, agreement would have been impossible. Yet the Convention as drafted does manage to resolve real issues, and many of the solutions undoubtedly do not reflect the individual preferences of the delegates.

The difficulty with many of these apparent compromises is that they simply do not resolve the problem they purport to address. They do not reflect two parties having yielded part of their positions to each other for the sake of agreement, but rather two sides agreeing to give the appearance of agreement by a verbal formula which does not provide meaningful guidance in concrete situations.

There are gaps and shortcomings in the outcome of every effort at legislative codification. The final judgment on the acceptability of any legislation involves weighing its genuine accomplishments against its failures. In the context of the Convention, however, 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.

#### A. *The Strategy of Unification*

The inadequacies of the Convention as drafted do not reflect adversely on the competence or diligence of the negotiators. On the contrary, the team included luminaries from many countries, and the American delegation, headed by the Reporter of the *Restatement (Second) of Contracts*, was guided for decades by the first rank of scholars in the field.<sup>56</sup> The uneasy compromises of the Convention are of primary importance as symptoms of the inherent weakness in the methodology and strategy of law unification pursued by the drafters. Inevitably, the basic weaknesses of the Convention resulted from the impossibility of achieving by consensus what the delegates sought: a unified statement of contract rules satisfactory to the whole world. Over the half century of the project commercial and legal practices changed radically, and the goals originally set for the project were subtly transformed in ways that precluded their achievement.

It is only a slight exaggeration to suggest that the original efforts of this project were designed to bring the approaches of the French, German, and Italian codes into conformity, with the hope that perhaps those strange Englishmen across the Channel would cooperate and give up their idiosyncratic legal habits. In the context of the 1920s and 30s, agreement among those European neighbors would have been hard to reach, but should have been possible in light of the congruity of their economic, cultural, and political situations. The task became more complex after the Second World War, when an enlarged Europe, including several socialist countries, a few former colonies, and the Americans joined the effort.<sup>57</sup> The Americans were on the

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56. American participants have included Professors John Honnold; Willis Reese, Reporter of the *Restatement (Second) of the Conflict of Laws*; Allan Farnsworth, Reporter of the *Restatement (Second) of Contracts*; and Hans Smit, Director of the Parker School of Foreign and Comparative Law.

57. The United States was not formally represented at the Hague Conference of Private International Law until 1956 when official observers were sent by the State Department. Membership in the Hague Conference and the International Institute for the Unification of Private Law was authorized by statute in 1963. 22 U.S.C. § 269(g) (1982). The history has

brink of what was to prove a highly successful harmonization effort in this area of law. Moreover, their half century of experience with harmonization through the restatements, model acts, and uniform codes had persuaded the American delegates that the structure and strategy being followed were probably too rigid to achieve a satisfactory result. Although these difficulties were recognized by the American delegation when it first appeared in The Hague in the 1950s, in the end it cooperated with the others.<sup>58</sup> In any event, by the time that UNCITRAL assumed the dominant role in the project during the late 1960s, any vestige of the clubbish atmosphere of its origins in The Hague and Rome were long gone. No longer were the meetings merely among European neighbors, nor the points in contention simple differences in emphasis that had separated the various nineteenth-century codifications of French- and German-speaking, industrial, capitalistic, essentially liberal regimes. Now the sixty-two delegations included nations that were industrial and underdeveloped, capitalist and socialist, those generally accepting the rules that had governed international trade for a long time and those who perceived themselves as the oppressed victims of that legal regime. In such a setting, unification through compromise is a very different thing from what had been envisioned by the original participants in the project.

The strategy of the Convention from an early stage had been to harmonize the world's contract law systems insofar as they apply to international transactions, by providing a single conceptual statement of the rules that govern the enforceability of such transactions. If everyone could agree on a single, reasonable set of rules, that is, one that strongly resembled the one with which the speaker is most familiar, then the babel of divergent national legal systems would break down, and a coherent and predictable framework for these business transactions would emerge. This strategy has much to recommend it since many legal rules, and particularly contract rules, are largely conventional. In fact, world commerce is effectively segmented on inefficient lines that lead to cartelization because of the inability to agree on conventional rules regarding specifications of electric plugs, nuts and bolts, and the like. The Hague Rules on Bills of Lading,<sup>59</sup> the Banker's Customs on Documentary Credits,<sup>60</sup> the International Chamber of Commerce trade definitions embodied in Incoterms,<sup>61</sup> and other successful attempts at the coordination of trade law suggest that this conventional approach has the potential to succeed in many areas. It allows parties to allocate risks in ways that are quite certain. As long as the businesspersons involved recognize the risks, they can provide for them through insurance and the price mechanism.

This conventional approach to rule unification has, however, created difficulties

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been traced by Professor Nadelmann. See Nadelmann, *Hague Conference*, *supra* note 10, and Nadelmann, *Ignored State Interests*, *supra* note 10. During the period of observer status the American representatives were active participants. See Nadelmann & Reese, *The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958).

58. Nadelmann & Reese, *supra* note 57.

59. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted in* 2 U.N. COMM'N ON INT'L TRADE LAW, REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 130 (1973).

60. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 290, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1974).

61. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 350, INCOTERMS (1980).

on several levels. First, some rules come in sets, and problems result when part of the set is treated as merely conventional without necessary adjustments in the rest of the set. Since the rules of contract formation, for example, are highly conventional, it might appear inconsequential whether acceptances communicated over a distance are effective when mailed or when received, as long as the rule is clear. Similarly, business behavior can be adjusted to rules regarding the revocation of offers if those rules are clear enough so that both parties to a transaction know whether they have the power of acceptance or the liability of being bound to an offer. The Anglo-American and Continental systems traditionally have taken very different approaches to these issues, and both conventions seem to work satisfactorily.<sup>62</sup>

These rules are, however, not quite conventional. They are joined by common attitudes that in the Anglo-American experience emphasize the role of bargain in describing the legally enforceable promise. Emphasis on the notion that contracts are bargains, as embodied in the American legal doctrine of consideration and its sequels, tends to view the formation process as the moment in time when the contract is perfected by the delivery of the bargained for equivalent of the promise. That is, acceptance occurs when the promisee provides consideration. The familiar common-law mailbox rules and treatment of the revocability of promises exemplify this attitude. Continental European systems long ago took another path. No great harm is done by the Convention's modifications of the mailbox rules or those governing revocability of offers if the sequels are taken care of elsewhere in the Convention.<sup>63</sup> Unfortunately, they do not appear to be. The doctrine of consideration and its sequels, for instance, are left outside the unification project by operation of the exclusions in article 4.<sup>64</sup>

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62. 1 FORMATION OF CONTRACTS 747-91 (ed. R. Schlesinger 1968); A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 873-82 (2d ed. 1977).

63. Professor Melvin Eisenberg provides a brilliant illustration of the interrelationships among doctrines in his analysis of gift promises under civil-law and common-law consideration doctrine. He cogently suggests that what appear to be curious divergences in analysis between the two legal systems' treatment of gifts, may in fact reflect basic differences in legal style and court procedures.

As these rules suggest, our legal system could not appropriately follow the lead of the civil law by making donative promises enforceable on the basis of their form—as through recognition of nominal consideration—unless we were also prepared to follow the civil law by developing and administering a body of rules dealing with the problems of improvidence and ingratitude. Certainly such an enterprise is possible. It may be questioned, however, whether the game would be worth the candle. An inquiry into improvidence involves the measurement of wealth, lifestyle, dependents' needs, and even personal utilities. An inquiry into ingratitude involves the measurement of a maelstrom, since many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated. Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which have traditionally been oriented toward inquiry into acts rather than into personal characteristics. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 15-16 (1979) (footnotes omitted).

64. A number of years ago, the late Professor Addison Mueller offered a seminar at the UCLA Law School with the late Professor Folke Schmidt, of the law faculty of the University of Uppsala, that demonstrated the compensatory and complementary interrelatedness of apparently conventional rules. Each professor selected five factual situations which he believed his nation's law of sales (the UCC and the Scandinavian Sales of Goods Act) did not resolve satisfactorily. During each session of the seminar the first hour was occupied with an exposition of the situation and during the second hour the coparticipant from the other legal system described how the problem would be analyzed and resolved. Starting from a common factual statement, the two participants often went off in opposite directions, but while one would take an analytic sharp left turn, the other would turn right at the next intersection, producing parallel analytic paths. In most of the ten problems the last phase of the analysis also included a third opposite turn that led to almost the same resting point. Relatively harmonious results were produced by consistent divergence in rules. Yet if all these rules had been treated as merely conventional, as they certainly appeared to be at the outset of the discussion, one might well have been tempted to harmonize American and Scandinavian law by giving each side fifty percent of the conventional rules. The unanticipated result probably would be that at the end of the analysis the two systems would no longer converge.

Moreover, not all rules are merely conventional. Some do reflect deeply held cultural and ideological attitudes, although probably not as many rules have these profound bases as some commentators suggest. For example, the question of the proper treatment of custom and usage in contract interpretation sharply divided the UNCITRAL delegates for a decade.<sup>65</sup> This debate involved many factors, but a crucial one was ideology. 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. Nor are the representatives of centrally planned, authoritarian economies 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. Attitudes toward performance and rules governing breach also will differ significantly depending on whether one comes from an industrialized society with balanced numbers 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.<sup>66</sup>

A final flaw in the approach to unification that aims at reconciliation of conventional rules is that it places too much emphasis on the formal statement of the rules as the determinant of dispute resolution. It is assumed that if the rules are unified the outcome of disputes will be harmonized. This expectation is unjustified to the extent that it is not the rules, but the interpretation of agreements and factual situations, the decisionmaker's attitudes toward agreement behavior, and the understanding of the expectations created by a particular agreement that will determine the ultimate outcome of most contested situations.<sup>67</sup>

If rules are seen as conventional, all coherent compromises are real. Negotiators can trade one point for another and balance their advantage. To the extent that contract rules are not simply conventional, however, the process of compromise requires some substantive basis for accommodation. To gain agreement, one side has the all but impossible task of persuading the other of the superiority of the cultural and ideological underpinnings of the rule. In a few cases, there might be instrumental advantages to one approach over the other, but the Convention tries to unify a number of functioning systems which have been molded and polished by long experience. Like the rest of the legal world, the negotiators had no ready access to empirical evidence on the practical results of these rules, nor is there a body of experimental knowledge that would support the assertion that, operationally, one approach is superior to the other. Yet, the drafters of the Convention were committed to an approach that provided no clear way to resolve persistent disagreements on the rules.

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65. J. HONNOLD, *supra* note 2, §§ 112-122; Eörsi, *supra* note 21, at 341.

66. Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 REV. GHANA L. 50 (1979); Eörsi, *supra* note 21, at 349-50.

67. No one has yet improved on Judge Jerome Frank's dictum: "Perhaps nine-tenths of legal uncertainty is caused by uncertainty as to what courts will find, on conflicting evidence, to be the facts of cases." *Zell v. American Seating Co.*, 138 F.2d 641, 648 (2d. Cir. 1943).

If it is unlikely that either side will persuade the other of the superiority of its approach, agreement might be reached by finding solutions to old problems that are free of the conceptual baggage of any existing approach. This sort of imaginative resolution of old problems is the crowning achievement of article 2 of the UCC. The UCC's treatment of offers and acceptances that do not match,<sup>68</sup> of cure and assurance during performance,<sup>69</sup> and of liability issues that previously turned on title to the goods<sup>70</sup> indicates that law harmonization can be the occasion for liberating reform. Even critics of these reforms are likely to admire their capacity to free analysis from the morass in which old conceptual formulations had mired legal thought.

From the common-law perspective it is not clear in what situations the Convention's solutions are novel for other legal systems. The overriding impression, however, is that the number of substantive improvements in American law is small. The Convention adopts the continuum along which familiar doctrinal formulations are found as a given and looks for an acceptable unified provision somewhere along that axis, for the drafters did not resolve conflicting views by taking new conceptual approaches.

The net result was that only one course lay open for achieving verbal compromises of conflicting positions. The aim of the 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.<sup>71</sup> They sought to soften opposing perspectives, to grant small concessions to salve the feelings of the side that lost the last argument, and to straddle two points of view. Inevitably, they often sought refuge from specific disagreements through a formulation on a higher level of abstraction, by encompassing both alternatives and not choosing between them. This is an acceptable and perhaps a politically necessary course. Unfortunately, it provides no reliable framework for interpretation. The product conveys little to those who must counsel or predict probable outcomes of litigation. Instead of unifying the law, it undermines the organic coherence of a legal system. Elastic words are undesirable in international enactments even more than in national enactments because the international situation does not possess the coherent background for interpretation.

### 1. *Compromises Reached by Moving in Two Directions at the Same Time: The Puzzles of Article 8 on Interpretation*

Any useful unification of world contract law will have to proceed from compatible views of what a contract is and what sorts of evidence give reliable guidance on the content of an agreement. The reason is eminently practical; most contract disputes turn on questions of interpretation. When the contract is in writing, it is very likely that someone will suggest that the document imperfectly or incompletely expresses

68. U.C.C. § 2-207 (1978).

69. *Id.* §§ 2-518 and 2-609.

70. *Id.* §§ 2-401 and 2-509.

71. Professor Eörsi describes with good humor four different types of compromises: those that are clear and recognizable; those that are detectable only by initiates with access to Conference documents; those entered with mental reservations on each side, each side keeping its own view of what was agreed; and those, masking continuing disagreement, that are illusory and save face. Eörsi, *supra* note 21, at 346.

what the parties meant. The meaning of the contract depends either on the words and symbols of the document, or what the parties intended to say, but imperfectly expressed. Moreover, every contract is formulated against the backdrop of social expectations, practices, and experience that are essential to its fulfilment. No written contract is ever complete; even the most carefully drafted document rests on volumes of assumptions that cannot be explicitly expressed. The more basic the assumption, the less likely it is that either party will be conscious of it or will think it necessary to express it.

Attitudes toward the process of interpretation vary markedly among legal communities and are not static even within a single legal system. For example, the rules regarding the use of evidence of prior oral communications between the parties to supplement the written terms of an agreement have undergone substantial revision in this country over a quite short period of time.<sup>72</sup> These differences stem not merely from old habits in formulating abstractions; they reflect differences in the procedures used for resolving disputes in court and the differing roles assigned judges. Systems in which the trial is governed by a group of judges drawn from a professional, career judiciary, appointed by written examination and answerable to a governmental ministry, will have different expectations than systems that are dominated by lawyers and that continue to rely on lay jurors or autonomous, but arbitral judges popularly elected to office.<sup>73</sup> Differences in expectations also reflect the differing capacity of a powerful third party, such as a state planning agency in a socialist system or a flinty banker in a capitalistic system, to insist that the rules of contract give priority to its security, by allowing it to rely on what the document appears to mean, over the actual intention of the parties who negotiated the contract. These matters also are heavily influenced by ideology. Some commentators insist that interpretation must give preponderant weight to the expressed will of the individuals who created the contract as an exercise of their will.

Article 8 of the Convention seeks to bring uniformity to the conflicting approaches to interpretation of the parties' communications by melding inconsistent approaches in one article. The twain meet verbally, but the result is not easy to understand and is likely to prove impossible to apply. Article 8(1) declares that a party's statements and conduct are "to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." This statement points in the direction of what Americans call the subjective theory of contract; agreement is the meeting of minds, and the meaning of the contract is what the parties subjectively believe it to be, as revealed by the symbols they exchange, rather than the meaning that others would attach to those symbols. Article 8(2) provides that if the provision just described does not apply, statements and conduct are to be in-

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72. The certitude of Williston's treatise and the *Restatement of Contracts* contrasts with the substantially limited statements of the UCC and the *Restatement (Second) of Contracts*. Compare 4 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 631, at 951-53 (3d ed. 1961) and *RESTATEMENT OF CONTRACTS* §§ 237-240 (1932) with U.C.C. § 2-202 (1978) and *RESTATEMENT (SECOND) OF CONTRACTS* §§ 209-216 (1981).

73. Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Frankel, *The Search for Truth: An Unpireal View*, 123 U. PA. L. REV. 1031 (1975); Lind, Thibaut & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

terpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." This provision diverges from the one cited above, for it proposes to ascertain meaning through an objective reading of the agreement by a reasonable person. Note that the reasonable person is not one in the position of the utterer, but one in the position of the person to whom the communication is made. This may simply be a statement of the familiar principle that interpretation should be *contra proferentem*, that is, against the interest of the utterer who was the master of the communication.<sup>74</sup> At least one influential commentator has suggested that something more was meant and that the interpretation should take into consideration any deficiencies in the understanding of the kind of person to whom the statement was made.<sup>75</sup>

The question that remains is when to apply one half of article 8 and when to apply the other. The answer depends on the means by which it is decided whether one party to the contract "knew or could not have been unaware" of the other's intent. The obvious place to look would be the sources enumerated in article 8(3), which states that in determining the understanding of a reasonable person, due consideration should be given to "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct during the course of performance." But article 8(3) appears to limit the use of this evidence to the purpose of "determining the intent of a party or the understanding a reasonable person would have had," a rather careful formulation which appears to exclude determination of whether a "party knew or could not have been unaware what that intent was."

Similarly, English and American attitudes differ significantly on the use of subsequent conduct as an interpretative tool, yet the Convention, as Professor Honnold recognizes, does not clarify its position on this matter.<sup>76</sup> The role of customs and usage emerged with a comparable lack of clarity in article 9. Accordingly, two leading American scholars have expressed doubt that the Convention allows the use of custom in interpretation.<sup>77</sup>

## 2. *Compromises Reached by Including Two Inconsistent Provisions: Articles 14 and 55, and Open Price Terms*

In this country and other industrialized nations sales contracts for long-term supplies often provide the basic terms of the relationship, but leave the price and quantity of goods open to be adjusted in light of the parties' experience. The UCC explicitly authorizes contracts with open price terms as well as output and requirements contracts,<sup>78</sup> although they had been subject to attack under previous common law.<sup>79</sup> In French law there is also some hostility to such arrangements, particularly

74. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

75. Date-Bah, *supra* note 66.

76. J. HONNOLD, *supra* note 2, § 111.

77. Berman & Kaufman, *supra* note 9, at 271-72.

78. U.C.C. §§ 2-305 and 2-306 (1978).

79. Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571, 580-83 (1925), reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LAW OF CONTRACTS 434, 443-45 (1931); Patterson, "Illusory" Promises and Promisors' Options, 6 IOWA L. BULL. 129, 209-14 (1921), reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra*, at 401, 415-19 (1931).



when they resemble a franchise or exclusive dealing contract and greatly disadvantage the weaker party.<sup>80</sup> Other European regimes seem more accepting of these arrangements, referred to as "shell" contracts. In some socialist legal regimes, however, these arrangements are invalid and deemed a threat to the security of the agreement from the perspective of the superintending state planning agency. In that kind of setting flexibility of price and delivery are not considered a virtue. Parties are expected to conform to the plan.

These differing attitudes are primarily reflected in the part of the Convention dealing with formation and particularly in article 14(1), which contains the basic definition of an offer. This subarticle establishes two criteria for offers capable of giving rise to a valid contract: intention to be bound and definiteness. The last sentence of article 14(1) provides that the proposal is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Upon careful reading, this provision would appear to render unenforceable open price and requirements contracts, although requirements contracts might be found implicitly to make provision for determining the quantity.

In a later part of the Convention article 55 appears to undercut this conclusion by providing that

[w]here 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.

The language of this article appears directly keyed to article 14(1) and seems to undercut the earlier provision. Experts who participated in the diplomatic negotiations disagree about the import of their compromise.<sup>81</sup>

### 3. *Compromises Reached by Leaving Disagreements Unmended: Article 7 and Good Faith and Fair Dealing*

The inclusion of a provision creating an obligation of good faith and fair dealing was the occasion for extensive and obscure dispute between common-law, continental, and socialist representatives. All sides recognized the multiple meanings of good faith and the differing connotations the doctrine possesses in different legal systems.<sup>82</sup> The president of the diplomatic conferences has noted, "[I]t was widely thought that the rule was vague, or at least would remain vague for a long time and,

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80. *E.g.*, Judgment of Dec. 13, 1982, Arrêt No. 1062, Cass. civ. comm., Fr.; Judgment of May 25, 1981, Arrêt No. 535, Cass. civ. comm., Fr.; Judgment of May 25, 1981, Arrêt No. 536, Cass. civ. comm., Fr.; Judgment of Apr. 27, 1981, Arrêt No. 417, Cass. civ. comm., Fr. (all available on LEXIS, Prive library, Cassci file).

81. At the 1983 Parker School Conference, *supra* note 6, Professor Allan Farnsworth suggested that article 55 is essentially an empty set since it applies, according to its opening clause, only in cases "where a contract has been validly concluded," and an agreement with an open price is not based on a valid offer. Under this interpretation the ambit of article 55 would be limited to those signatory nations that choose, under article 92, not to adopt the formation provisions of the Convention. Professor Denis Tallon took a less restrictive approach to article 55, although it is clear that the compromise reached, however unclear, has been obscured by the inclusion of two incompatible articles in the Convention.

82. Section 1-203 of the UCC states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).

because of the laconic language of [the Convention], would never become unambiguous.”<sup>83</sup>

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.<sup>84</sup> 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. It operates as a limit on the right of a party to terminate the formation process. It is not possible to say whether this potentially mischievous concept is part of the final product. Professors Honnold and Eörsi think it is,<sup>85</sup> Professor Farnsworth disagrees.<sup>86</sup> Professor Eörsi characterizes the final compromise thus: “[A]most everybody thought it a strange compromise, in fact burying the principle of good faith and thus covering up the lack of compromise.”<sup>87</sup>

#### 4. *Compromises Reached by Covering Over Persistent Differences with Rhetoric: Article 16 and the Revocability of Offers*

Problems of formation have been treated as distinct by the international unifiers of contract law. For several decades the strategy was to propose a distinct convention on formation, which was in fact the format of the conventions of the 1960s.<sup>88</sup> The new Convention treats the formation articles as a severable part of the document. Article 92 permits signatories to exclude part II, dealing with formation, from their ratification.

83. Eörsi, *supra* note 21, at 349.

84. *Cf.* *Parev Prods. Co. v. I. Rokeach & Sons, Inc.*, 124 F.2d 147 (2d Cir. 1941).

85. J. HONNOLD, *supra* note 2, § 94.

86. A. Farnsworth, Remarks at the 1983 Parker School Conference, *supra* note 6.

87. Eörsi, *supra* note 21, at 349. After describing the subsequent manoeuvring on the issue at the diplomatic conference of 1980, Professor Eörsi concludes, “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.” *Id.*

Two other Convention provisions demand at least passing mention under this heading, although the limitations of this Article do not permit their full discussion. For a review of article 78 on the payment of interest, see *infra* text accompanying notes 112–16 & note 114. Professor Barry Nicholas, who was an active participant in the British delegation at the negotiations, opens his rather ambivalent discussion of article 79 on supervening events with these cogent observations:

It is true that at the international level, as at the national, the disagreements which are ultimately the most intractable are those relating to legislative policy. However, at the international level an identity of formulation may conceal a failure to agree on policy, and conversely, what appears to be a disagreement on policy may be no more than a difference in choice of concepts. One must be on the lookout for superficial harmony which merely mutes a deeper discord and for verbal conflict which hides a fundamental identity of aim. In both cases the key lies in the conceptual presuppositions of each system or family of systems. The deeper discord escapes notice because the same formula means different things according to the framework in which it is read; the fundamental agreement on the end to be achieved is not seen because the conceptual routes which lead to that end are different.

Nicholas, *supra* note 21, at 231.

88. ULIS, *supra* note 16; ULF, *supra* note 17.

The legal systems of the world have dramatically different attitudes toward the process of forming a legally binding agreement. Some demand a great deal of formality and that the process of negotiation be crowned by a ceremony that clearly marks the moment of agreement. The most common formality is the writing, which most advanced Western nations have abandoned. Ironically, it is the United States, with its sentimental attachment to the Statute of Frauds, and the socialist regimes, which place a high priority on the security of state planning agencies, that continue to defend the writing as the requisite of a binding contract.<sup>89</sup> Articles 12 and 96 of the Convention permit states that require contracts of sale to be evidenced by a writing to exclude article 11, which states that contracts under the Convention need not be concluded in or evidenced by writing, or subject to other requirements of form. Finally, article 4(a) excludes from the concerns of the Convention the validity of the contract, which presumably includes matters of duress, fraud, and the abuses of the formation process encompassed by the concept of unconscionability in American law. In each of these instances the drafters appear to have sought to avoid definitive resolution of conflicts of contract formation by allowing signatory nations to insist on their own approach. To the extent that this occurs, however, unification and harmonization are abandoned at the threshold.

Much more troubling is the failure of the Convention to identify the points in the sales transaction at which the parties' freedom to withdraw is significantly limited. 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. At one extreme is the rule that until a formal written contract is executed the parties are not bound by their discussions and remain free to terminate them without penalty. At the other extreme is the notion that opening negotiations is an invitation to enter a relationship and a commitment to pursue the process of bargaining in good faith, which includes the obligation to carry that process to its logical conclusion, that is, to give the other side a chance to make a sale or a purchase. Under this view it is bad faith or oppression to enter the market unless one intends to buy;<sup>90</sup> when one makes an offer, one impliedly gives the other side a reasonable time to consider it and respond. The making of an offer therefore binds the offeror to leave it open until the other side has had a chance to respond.

Both of these attitudes influence most legal systems to some extent, and the tension between them is played out in formation rules of substantial complexity. For example, in the last several generations in the United States the common-law attitude that left negotiators largely unbound until a completed contract was concluded has been softened by rules that make offers firm and irrevocable. This has been accomplished by statute or judicial construction of open-ended concepts such as promissory estoppel.<sup>91</sup> Despite these changes, American law still requires the formation process

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89. The United States does not appear prepared to reserve its right to perpetuate the rule that contracts for sale be in writing when it ratifies the Convention. The President's letter of transmittal to the Senate does not raise this possibility. *President's Message*, *supra* note 1.

90. Rabbinic law has held this view for several millenia. *Mishnah, Baba Metzia* 4:10.

91. *See, e.g.*, U.C.C. § 2-205 (1978); N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 1978). *See also* *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965); RESTATEMENT (SECOND) OF CONTRACTS §§ 82-94 (1981).

to be quite advanced before the liberty of the parties to abandon the deal is significantly limited.<sup>92</sup> Apparently this tension is also felt by other legal systems, although it is of course expressed in different doctrinal terms.

The parties to an international transaction are likely to approach these questions from national experiences and legal cultures that engender quite different expectations. Yet the Convention's formulations are not likely to help the parties in a specific situation by indicating when it is too late to withdraw. Part of the problem is the retention of the abstract structural formalism of the concepts of offer and acceptance. The Convention has retained the classical doctrine that there is something called an offer which evokes a reciprocal communication called an acceptance and that the conjunction of the two produces a contract. This familiar perspective creates problems because most significant commercial transactions are not marked by offers and acceptances but by a stream of partial, conditional, and contingent communications that only gradually ripen into a firm and definite deal. A strictly formalistic approach to formation would require that an offer be a piece of paper with the word "offer" at the top of it in large type and that that paper be matched with a similar piece of paper marked "acceptance" to form a contract. But no modern system in the world takes this approach to the sale of goods.

Article 14(1) of the Convention identifies two earmarks of the offer: it must be sufficiently definite and it must indicate the intention of the offeror to be bound in case of acceptance. According to that article, the offer must indicate the goods to be sold and expressly or implicitly fix, or make provision for determining, the quantity and the price. Moreover, proposals addressed to more than one person are presumed to be invitations to make offers, not actual offers, unless a contrary intention is shown.

The problem with this approach should be manifest. 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. The compromise on the good faith provision discussed earlier also serves to obscure questions of formation. It is clear that key participants in the negotiations believed that the good faith provisions of article 7 import to some extent a notion of good faith in formation that presents additional, and for Americans unfamiliar, limitations on the right of a party to withdraw before the formation process is complete.

##### *5. Compromises Reached by Procrustean Solutions: Article 35 and Conforming Goods*

A formal statement of contract rules like the Convention can help illuminate the consequences of a failure of performance by (a) delineating the risks that buyers and

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92. E. FARNSWORTH, *CONTRACTS* § 3.17, at 148-51 (1982); *RESTATEMENT (SECOND) OF CONTRACTS* § 42, at 113-15 (1981).

sellers are assumed to undertake in the absence of a different contractual allocation, (b) advising a disappointed party what legal remedies it can expect, and (c) advising a disappointed party at what point during the course of unsatisfactory performance it can terminate its own obligations and avoid the agreement. In the Anglo-American experience these areas are among the murkiest, and even the reformulations of the UCC and the *Restatement (Second) of Contracts* provide at best only limited guidance.<sup>93</sup> The Convention's approach to these problems also leaves difficulties unresolved, but it does arrive at some intriguing innovations in dealing with the puzzles of performance and breach. Unfortunately, this novel approach glosses over the untidy parts of the problem.

Common-law attempts to describe the quality of the goods that will conform to a contract have been confused by a welter of conflicting analytical approaches. Without pausing to consider each in detail, Anglo-American law demands that a seller deliver what was promised and that there be a perfect tender of the promised goods.<sup>94</sup> The same body of rules is also concerned with, and treats separately, warranties and affirmations of fact, whether express or implied, that create obligations to deliver goods with certain characteristics. When the goods fail to meet the expectations of the buyer, the seller's liability may be greater if it is found that the seller guaranteed or represented the goods to have the characteristics said to be lacking. In some circumstances, the seller may be liable for innocent misrepresentations about the goods.

Article 35 of the Convention achieves a sensible unification of these overlapping ideas that appears to be an improvement over American law. Insofar as the Convention treats the obligations of the buyer and the seller *inter se* the solution should work. The glaring weakness of the resolution, however, is the Convention's failure to deal with the question of who can assert the breach of these obligations by the seller. Goods pass from hand to hand in the chain of distribution, while the complexities of warranty and guarantee law are largely concerned with the liability of sellers to persons other than the immediate purchaser of the goods. It is not clear what position the Convention takes on product liability to remote vendees and third parties who suffer losses because of nonconforming goods. Personal injury claims are excluded from the coverage of the Convention by article 5. Article 4 states that the Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. This provision has been the subject of little commentary, perhaps indicating that domestic rules of product liability are left intact for third party claims, although presumably buyers and sellers would be limited to their rights under the Convention.<sup>95</sup>

#### IV. THE CONVENTION AND THE FUTURE

Were the points made up to now in this Article the whole of the matter, one might be tempted to stifle one's doubts and plunge bravely into the future of a world

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93. Rosett, *Contract Performance: Promises, Conditions and the Obligation to Communicate*, 22 UCLA L. REV. 1083 (1975); Rosett, *Partial, Qualified, and Equivocal Repudiation of Contract*, 81 COLUM. L. REV. 93 (1981).

94. U.C.C. § 2-601 (1978).

95. Professor Honnold avoids this issue in his treatise with the incontrovertible observation that the problem is "elusive, and can best be considered in a specific context." J. HONNOLD, *supra* note 2, § 62.

governed by one unified set of unsatisfactory contracts rules. The gaps this Article has pointed out in the Convention as drafted could be filled in, the errors corrected by later amendments, and the holes plugged by the process of judicial interpolation so familiar to Americans. But these corrective measures would be hard pressed to deal with the most problematic aspect of the Convention structure, the way it deals with the future. In their zeal to unify sales law the drafters created a comprehensive code, but cut it off from national processes of lawmaking without devising workable international substitutes. The discussions during the long process of negotiation were devoted almost exclusively to reaching agreement on doctrinal statements of contract law, as if it were thought that once agreement was reached on the text the law would be a static and unchanging monument. This is both unfortunate and unnecessary. It is possible to accept an unsatisfactory text if one is confident that it can be improved with experience. Conversely, one's expectations of a text must be higher if the opportunities for growth are frustrated. The inadequacies of the structure created by the Convention undoubtedly mirror more general problems with decisionmaking in the organs of the United Nations. They also reflect wide divergence among national traditions on the appropriate roles of courts and continuing code reform.

Nonetheless, the failure to make some provision for the future was unnecessary. As the text of a comparable convention on contracts, adopted by the EEC in the same year as the Convention was signed, indicates, the contract law of nations may be harmonized in a number of ways that respect the need for further development after adoption of a common text.<sup>96</sup> While some of these devices may be more suitable for the relatively compatible cultural climates of the European community than for the diversity of the United Nations, a number of them should have been considered by the drafters and would have provided significant room for growth.

The Administration proposes that the Convention become the law of the United States through a simple process of treaty approval by two-thirds of the Senate, without its implementation as domestic law by act of Congress. This process of ratification appears unique in the substantial history of adoption by the United States of law harmonization conventions and will aggravate the limitations in the Convention's structure for correction, filling gaps, clarification of ambiguities, and growth through experience. While this process has constitutional dimensions, the emphasis should be on its imprudence. Experts entertain divergent attitudes about the constitutionality of extending the treaty power to its extreme limits or the wisdom of a major displacement of state legislative competence in the direction of federal and international lawmaking, but few would reach the conclusion that the Convention provides a workable structure for future organic growth of the law.

#### *A. The Convention's Insistence on Uniformity and Exclusivity*

The Convention's very broad jurisdictional reach includes essentially all sales transactions between persons with places of business in different contracting states. Subject to the limited exceptions of the first five articles, the Convention fully

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96. See *infra* text accompanying notes 103-09.

occupies the field, excluding all national law in these transactions. Only by a denunciation of the Convention, which itself would be a breach of our national obligations,<sup>97</sup> could Congress change individual provisions of the law applying to transactions within the ambit of the Convention. Moreover, it is unlikely that Congress readily would intervene in this area in which neither Congress nor committee staffs have extensive experience. The technical aspects of the code demand familiarity before even an intrepid legislature begins to tinker with it. These considerations presumably weighed heavily in the decision not to adopt the UCC as a national code for transactions affecting interstate commerce. In recent decades Congress has had notable difficulty in dealing with the challenges of code revision in taxation, patents, securities regulation, copyright, and other areas of national legislation. The overriding political issues that occupy the time and talent of Congress foreclose detailed consideration of technical areas like these. If issues of contract damages and avoidance of performance are left to congressional oversight, it is very likely that they will not be addressed. While many state legislatures are not better suited than Congress to deal with these matters, fortunately, some state legislatures have taken the lead on major issues of commercial law, consumer protection, and the like. The process of state law revision has proceeded effectively and on the whole in sound directions.

Ratification of the Convention would totally strip the states of legislative competence by operation of the supremacy clause.<sup>98</sup> Following the Senate's advice and consent and the President's ratification, potential state and federal legislative oversight and correction will be effectively eliminated. This is precisely the effect intended by the drafters, who limited the power of national reservation in article 98 and left no scope to national divergence once accession to the Convention has occurred.

### B. *The UNCITRAL Decision Structure*

Although the Convention denies national competence to modify the rules, it does not recognize any supranational body to exercise these functions. No international tribunal is given the power to interpret and interpolate. More surprising is the failure to grant to any ongoing body the power periodically to review and put forward modifications, improvements, and amendments. The Convention does not establish anything equivalent to the Permanent Editorial Committee which oversees the UCC and periodically proposes needed changes. UNCITRAL itself does not possess any ongoing competence under the text of the Convention. This is understandable since UNCITRAL has a rather obscure structure and uncertain de-

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97. Article 101 of the Convention permits denunciation of part II, part III, or the entire Convention, but permits neither selective reservations at the time a state enters the Convention (article 98) nor selective denunciation of specific provisions. *But see* Vienna Convention on the Law of Treaties, art. 44, *opened for signature* May 23, 1969, [1968-69] Official Records of the United Nations Conference on the Law of Treaties, U.N. Doc. A/Conf.39/27,288, *reprinted in* 63 AM. J. INT'L L. 875 (1969) and 8 I.L.M. 679 (1969) [hereinafter cited as Vienna Convention]. Although the United States has not ratified it, the Department of State has stated that it considers the Vienna Convention a codification of customary international law and thus authoritative for interpretation of international agreements. 1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 307-08, 482-83.

98. U.S. CONST. art. VI, § 2.

cisional authority.<sup>99</sup> its 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 itself, to a diplomatic conference called by the General Assembly.<sup>100</sup>

If, for example, it becomes obvious to a broad cross section of the governments concerned that article 14(2) of the Convention was a mistake and needs to be revised, the Convention has established no mechanism for this purpose, nor is any apparent UNCITRAL mechanism empowered to change the text or propose changes to signatory nations. A diplomatic conference of the sixty-two signatory nations could be convened, but without the unanimous agreement of all contracting parties the Convention would stand unchanged, even though the modification might be effective among the agreeing parties *inter se* under article 90.<sup>101</sup>

In short, the Convention creates no mechanism for change consistent with the maintenance of the unity that is the prime justification for its existence. This limited capacity for growth is hardly workable. Were a diplomatic conference convened, its chances of producing significant changes would be slim. Predictably, this process would produce only changes that create no controversy or that no party deems a suitable trading point. In view of the inertia that would have to be overcome to convene a diplomatic conference in the first place, the class of changes that could succeed would appear to be virtually nil.

This rigid structure, with its limited capacity for national development within a harmonized framework, was not inevitable. From the beginning of American participation, as an observer, in the project leading to the Convention in the 1950s, the American delegates pointed out these problems and suggested the adoption of a more flexible approach resembling the highly successful model statutes used in this country.<sup>102</sup> Beginning in 1967 the members of the EEC labored to produce a Convention on the Law Applicable to Contractual Obligations (EEC Contract Convention). The final product was opened for signature in 1980 and immediately was signed by seven of the EEC's nine members.<sup>103</sup> The EEC Contract Convention resembles the United Nations convention in that both attempt to harmonize rules to which national systems have taken divergent approaches that are deeply imbedded in their own legal cultures. In contrast to the United Nations convention the European effort includes a variety of devices that encourage continuation of the process of harmonization and maintenance of the essential unity of direction, while providing latitude for corrections, improvements, and expansions on the basis of continuing national ex-

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99. The General Assembly resolution creating UNCITRAL is Resolution 2205 (XXI), 21(3) U.N. GAOR (1447th plen. mtg.) (Agenda Item 88) at 1, U.N. Doc. A/6594 (1966), reprinted in [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 65, U.N. Doc. A/CN.9/SER.A/1970. A brief but illuminating history has been provided by Professor Honnold. Honnold, *supra* note 32, at 207-11.

100. 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).

101. Article 90 provides: "This 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, provided that the parties have their places of business in States parties to such agreement." Convention, *supra* note 1, art. 90.

102. Nadelmann & Reese, *supra* note 57.

103. Convention on the Law Applicable to Contractual Obligations, opened for signature June 19, 1980, 23 O.J. EUR. COMM. (No. L 266) 1 (1980), 2 COMMON MKT. REP. (CCH) ¶¶ 6312-48 (1983); [hereinafter cited as EEC Convention]; I. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 147 (1982).



perimentation. To this end the European convention (a) contains a declaration that the parties will consider referring all disputes to the European Court and will have their representatives meet at regular intervals;<sup>104</sup> (b) recognizes the continuing power of the states to legislate the subject matter of the convention, but requires that they coordinate new legislation through the Secretariat and delay amendments pending consultation;<sup>105</sup> (c) contemplates and establishes a procedure for revision of the convention;<sup>106</sup> (d) provides a ten-year lifespan for the convention, with five-year renewal periods;<sup>107</sup> (e) commits member states to uniformity of interpretation and application;<sup>108</sup> and (f) establishes a procedure for consultation and composition if a member state enters another international agreement which another member considers prejudicial to the unification achieved by the convention.<sup>109</sup>

### C. Growth by Judicial Interpretation

Limited potential for legislative growth may not distress the seasoned common lawyer, for until this century commercial contracts were the subject of only the most limited legislative attention. The Convention might be seen as a return to the grand tradition of the common law, in which judges working with incomplete and very general legislative direction fashion world jurisprudence, much as was done with the law merchant long ago.<sup>110</sup>

The Convention takes no position on the major issues of jurisprudential process, that is, it explains very little about the role, if any, contemplated for authoritative judicial interpretation. Whether judges hearing cases under the Convention are under a special obligation to decide future cases consistently with earlier cases is unclear. By its form alone the Convention is a code, in the sense that term is used in continental and socialist systems, rather than a detailed set of decisional rules like the UCC.<sup>111</sup> For this reason, broad interpretation by scholarly treatises, judicial reason-

104. EEC Convention, Joint Declaration, *supra* note 103, 2 COMMON MKT. REP. (CCH) ¶¶ 6347-48 (1983).

105. *Id.*, art. 23, 2 COMMON MKT. REP. (CCH) ¶ 6335 (1983).

106. *Id.*, art. 26, 2 COMMON MKT. REP. (CCH) ¶ 6338 (1983).

107. *Id.*, art. 30, 2 COMMON MKT. REP. (CCH) ¶ 6342 (1983).

108. *Id.*, art. 18, 2 COMMON MKT. REP. (CCH) ¶ 6330 (1983).

109. *Id.*, art. 25, 2 COMMON MKT. REP. (CCH) ¶ 6337 (1983).

110. Every man knoweth, that for Manners and Prescriptions, there is great diversitie amongst all Nations: but for the Customes observed in the course of trafficke and commerce, there is that sympathy, concordance, and agreement, which may bee said to bee of like condition to all people, diffused and spread by right reason, and instinct of nature consisting perpetually.

G. MALYNES, *LEX MERCATORIA* 3 (1622 & photo. reprint 1979).

On a more recent note, Professor Berman has observed:

In no other major branch of law is there more uniformity among the principal legal systems of the world than in the law of international sales. Contract law relating to documentary transactions, the law of carriage of goods by sea, rail, and air, the law of marine insurance, and the law of bank credits and acceptances, are basically the same in their general character—so far as international sales are concerned—in the so-called "common law" and "civil law" systems as well as in the legal systems of the centrally planned economies of the Soviet Union, Eastern Europe, and China.

Berman, *supra* note 9, at 354.

111. Eörsi, *supra* note 21, at 336-37; Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 315 (1979). Professor Farnsworth has discussed this matter with reference to earlier drafts of the Convention. Farnsworth, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. PA. L. REV. 305, 310-11 (1962). See also J. MERRYMAN, *THE CIVIL LAW TRADITION*, ch. 5 and 7 (1969).

ing by analogy, emphasis on conceptual analysis, and other continental interpretative techniques are to be expected. This concept also suggests less emphasis on common-law *stare decisis*, the following of past judicial authority with attention to decisions turning on the factual circumstances of prior cases.

The differences in these traditional approaches to interpreting a statutory text are easily overstated. Anglo-Americans, Europeans, and judges in socialist states all are called upon to interpret code provisions, and the results usually are quite sensible, despite their differing explanations of the process. Nonetheless, these differences do persist, and without some guidance from the Convention's text or its legislative history it is difficult to see what interpretative responses should emerge. Without such guidance the predictability of case decisions cannot be enhanced or carried across borders.

Consider the position of a judge presiding at a trial, the issue being the meaning of article 78 of the Convention, which deals with the extent to which a party is entitled to interest on failure to pay the price or other sum due. The text of the article is uninformative,<sup>112</sup> although it does indicate a general intention that interest shall be payable on arrearages. Professor Honnold explains that the rules on interest generated sharp differences of view and reversals of opinion which persisted to the very end of the negotiating process, resulting in the obscurities of the final provision.<sup>113</sup> The interpretative task thus is not a simple matter of giving specific meaning to the text on the basis of its words, for the meaning of the article is uncertain and gives no indication when and how interest is to be computed. Moreover, the drafter's intentions as revealed in the legislative history and the discussions leading up to the final document are not helpful.<sup>114</sup> These will reveal that the delegates disagreed and that the appearance at the last moment of the provision in its final form was an obvious effort to cover over the deep and persistent disagreement. Nor is the hypothetical judge likely to be assisted by recourse to domestic law. It is quite clear that the drafters explicitly intended to preclude such reference. In any event, in many nations and many states of this country,<sup>115</sup> interest of this kind is not allowed. Local law therefore can provide little guidance.

In this situation the hypothetical judge would look to article 7, which provides directions for interpreting the document.<sup>116</sup> Article 7(1) points to three considerations: the Convention's international character; the need to promote uniformity in its appli-

112. Article 78 provides: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74." Convention, *supra* note 1, art. 78.

113. J. HONNOLD, *supra* note 2, §§ 420-422.

114. Cf. Vienna Convention, *supra* note 97, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," in cases of ambiguity, obscurity, absurdness, or unreasonableness.).

115. 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1045-1052 (1964).

116. Article 7 provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Convention, *supra* note 1, art. 7.

caution; and the observance of good faith in international trade. The first and last items do not shed much light on the problem, nor does the need for uniformity in application. Since most of the signatories to the Convention have only partial systems for reporting court decisions and since they generally do not recognize the binding force of precedent, it will be quite difficult for the judge to learn how the Convention is being applied elsewhere. Turning to article 7(2), the judge is advised that "matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." This provision makes clear that the principles on which the Convention is based have priority over any reference to rules of law applicable by virtue of the conflicts provisions of private international law. Therefore, the first step would be to determine what general principles, if any, are applicable. The Convention does not indicate where these general principles are to be found, and the task appears formidable considering the contradictory systems from which the Convention is drawn.

The United Nations Treaty Convention suggests that the preamble is to be used as a guide to treaty interpretation.<sup>117</sup> The Preamble to the Convention contains only one specific reference and that is to the United Nations Resolutions on a New International Economic Order. It is doubtful that the grandiloquent rhetoric of those resolutions can provide much reliable guidance for the judge.<sup>118</sup>

As Professor Eörsi suggests, it may not be a fault that the Convention contains so few principles,<sup>119</sup> but then it is a poor guide for those faced with the concrete task of giving meaning to the words. Article 7 seems to express the wish that the broad terms of the Convention be filled in over time by a world common law, a shared body of interpretation that would supply a gloss on the text. But the Convention does not suggest how such a body is to grow, given the different traditions of jurisprudence, the different authority accorded judicial utterances in different systems, and the conflicting social and economic systems underlying the law.

#### *D. The Process of Ratification by the United States*

The process for adopting the Convention contemplated by the Administration raises two distinct issues. First, adoption of the Convention requires a reallocation of legislative competence between the states and the national government. Transactions that had been integrated within the general framework of commercial law and left to the states are now to be treated as a special class of international transactions, subject to international rules adopted by the national government. Second, the Administration proposes that this change be made by exercise of the treaty power, without having Congress consider implementing legislation. Each of these issues possesses

117. Vienna Convention, *supra* note 97, art. 31(2).

118. Declaration on the Establishment of a New International Economic Order, May 9, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.M. 715 (1974); Programme of Action on the Establishment of a New International Economic Order, May 16, 1974, G.A. Res. 3202, 29 U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.M. 720 (1974).

119. Eörsi, *supra* note 21, at 336-37.

constitutional dimensions which must be placed in context. Too often, constitutional allocation of governmental functions is treated exclusively as a question of power. Admittedly, these issues are most likely to arise in this context as part of the great confrontations leading to decisions by the Supreme Court of the United States. But it is important to note that the traditional allocation of power between the states and the federal government, or the limits, if any, on the treaty power of the executive vis-à-vis the other organs of national government are not senseless, arbitrary divisions of responsibility. The modern understanding of the commerce power certainly provides a flexible basis for federal legislative activity. The possibility also exists in the minds of the fearful that with the advice and consent of two-thirds of the Senate, the President of the United States can make treaties that eliminate virtually all domestic legislation.<sup>120</sup> Yet, if one treats the question whether the Supreme Court will strike down the statute on such grounds as the end of the constitutional discussion, one will fail to see that, beyond its function of allocating governmental power, the Constitution provides guidance on wise governmental action. Were a majority of the Justices of the Supreme Court to accept that congressional power under the commerce clause may control the farthest reaches of local economic activity, it would not necessarily mean that this extension of federal power would be the wisest course, nor that the Constitution does not suggest where prudent lines should be drawn.

### 1. *The Commerce Power*

The Convention draws some jurisdictional lines that are hard to reconcile with the American constitutional scheme. Jurisdiction under the Convention is not transactional since nothing about the sale itself triggers its provisions. Instead, jurisdiction is based on an aspect of the personal status of the parties, the location of their place of business. The Convention does not apply to goods shipped from nation to nation in a sale between citizens of different nations if their places of business are in the same nation, but it does apply to the sale of goods that never leave the United States entered into by two American citizens if one of them has his or her place of business in another country. Indeed, the jurisdiction of the Convention does not even depend ultimately on the personal status of the parties, but instead upon how one party should have perceived the personal status of the other.<sup>121</sup> These rules are likely to produce neither authoritative predictive judgments nor uniformity of result.

Recent decisions of the Supreme Court evince substantial deference to congressional judgments when the Court perceives that international commerce is involved.<sup>122</sup> The conjecture that the Court would not strike down the Convention as an intrusion on the reserved powers of the states<sup>123</sup> does not mean that this is the wisest

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120. The broad extent of this power and its possible limits are suggested by *Reid v. Covert*, 354 U.S. 1 (1957); *Missouri v. Holland*, 252 U.S. 416 (1920); Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952).

121. Under article 1 of the Convention, jurisdiction rests on the existence of parties "whose places of business are in different States." Convention, *supra* note 1, art. 1(1). Under article 10 of the Convention, if a party has a place of business in more than one State, the jurisdictional determination is to be made "having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." *Id.*, art. 10.

122. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-18 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

123. U.S. CONST. amend. X.

course. The allocation of power between the national government and the states to make legal rules in commercial matters reflects two centuries of experience demonstrating that the organs of state law are better qualified to deal with these issues. This is the practical teaching of *Erie Railroad v. Tompkins*.<sup>124</sup>

The major loss in this transfer of power would be the creative role of state judges, and federal judges sitting in diversity, in commercial law cases. Those readers who set a great store on the tenth amendment to the Constitution may find a residual constitutional category of state power on which the national government may not encroach. Those who find less substance in the tenth amendment may nonetheless decide that, since the Convention offers so uncertain a guide to legislation, such substantial opportunities for confusion, and so little affirmative benefit from adoption, the prudent course for the national government would be to stay out of this area.

## 2. *The Treaty Power*

Treaties made pursuant to the Constitution are the supreme law of the land and directly displace preexisting state and national law without further legislative action. This approach contrasts with English law, which views the making of treaties as an exercise of sovereign prerogative for the Crown without parliamentary participation, but does not make treaties part of the internal law of England without implementing legislation.<sup>125</sup>

Despite this basic legal approach, the practice in the United States has been to adopt international conventions which have an impact on domestic law by simultaneous ratification and the adoption of a statute.<sup>126</sup> It is unclear why the Administration decided to depart from long-standing practice in this instance. For at least three practical reasons it would be preferable to reconsider this decision and resubmit the Convention both for ratification and as a statute. First, the process of statutory enactment by both houses of Congress entails greater substantive review, which may well provide the occasion for fuller study and improvement of the law finally adopted. Second, as with the Hague rules embodied in the Carriage of Goods by Sea Act,<sup>127</sup> the English text of the Convention would be adopted as the law of the United States. Article 101(2) of the Convention provides that the Arabic, Chinese, English, French, Russian, and Spanish texts constitute a single original, all of which are equally authentic. Inevitably, the various versions of the Convention are not perfectly faithful to each other since subtle nuances will elude even the most highly skilled translators. Professor Honnold makes it clear that some shades of meaning diverge in the present text because of the negotiating process rather than any lack of translating

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124. 304 U.S. 64 (1938).

125. European Communities Act, 1972, ch. 68, §§ 1-4 and sched. 1-3. See *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] Ch. 401 (C.A.); *Blackburn v. Attorney-General*, [1971] 1 W.L.R. 1037 (C.A.).

126. For example, the Hague Rules are embodied in the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1976 & Supp. V 1981), and domestic legislation implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards may be found at 9 U.S.C. §§ 201-208 (1982). The history of the adoption of the Carriage of Goods by Sea Act is recounted by A. KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 118-31 (4th ed. 1953).

127. See *supra* note 126.

skill.<sup>128</sup> Given both the limited availability of non-English United Nations materials in this country, even in depository libraries,<sup>129</sup> and the limited foreign language ability of American judges, it would be desirable to eliminate any need for recourse to foreign language materials to discover what American law is. This can be accomplished by enactment of the Convention in its English version.

Third, enactment of the Convention as a statute would create greater possibilities for modifying the Convention in light of experience by national legislation, without reconvening an international conference. The internal coherence of the law dealing with similar transactions might be maintained better by leaving power to modify in the same hands as those responsible for legislation regarding commercial transactions in general.

## V. CONCLUSIONS AND RECOMMENDATIONS

The process of negotiating the Convention has extended over half a century. During that time the nature of the problem itself has changed. At the outset it seemed a good idea to promote trade through a unifying codification of national legal regimes. During the intervening period economic integration has proceeded rapidly and has supported a number of important harmonizations of law. These have reduced the substantive anomalies that concerned Professor Rabel thirty years ago.<sup>130</sup> The need for a unified doctrinal statement of contract principles is therefore less essential than it appeared at the beginning of the project.

This diminished urgency is reflected in the slightly outdated character of some of the issues that most concerned the drafters. The definitions of offer and acceptance and the careful delineation of the mailbox rules hardly seem at the cutting edge of

128. J. HONNOLD, *supra* note 2, § 124.

The Secretary to the UNCITRAL Working Group on the International Sale of Goods and a legal officer serving the Working Group have provided eloquent testimony to the problems of translation:

The most obvious difficulty which arose during the history of art. 46 was its mistranslation from French to English. Much has been written about the difficulties of interpreting multilingual legal texts where the different language versions are not identical. Less has been written about the impact of such discrepancies on the negotiation process. It is obvious that much of the misunderstanding of art. 46 during its preparation arose out of its mistranslation.

There are many ways for divergences in the different language versions to occur. Sometimes the text in the original language does not permit precise translation. Sometimes the text is misunderstood by the translator. Sometimes typographical errors are not caught by proofreaders who do not know the subject matter.

These divergences must be isolated and corrected as early as possible so that in the subsequent stages of the drafting process all the participants are working with the same text. There is only one way in which this can be accomplished. The various language versions must be rigorously compared by persons who are concerned with the substance of the project. This is a tedious task, but ideally it should be done each time the text is revised. If it is not, the quality of the comments and proposals of the participants, and therefore of the legal solution on which they finally agree, will be adversely affected.

Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255, 276 (1979).

129. It is very difficult to find non-English UN materials at even the largest law libraries in North America. For example, during the course of writing this Article the author sought to check the English text of a provision against the French counterpart. Several UN depository libraries in the western United States were unable to provide the French text, nor was the Convention text carried on the French Journal Officiel service of LEXIS, although France has ratified the Convention. The UCLA Research Library sought to borrow the text from the United Nations Library at headquarters in New York, but that library also was unable to locate a French text. After a number of frustrating weeks a French text finally was obtained by mail from the UNCITRAL library in Vienna. No attempt was made to obtain the presumably less common Chinese or Arabic texts.

130. Rabel, *supra* note 15.

contemporary concern. At the same time the Convention does not deal with many of the contemporary issues of commercial law considered important in this country and abroad. For instance, the Convention does not directly address the complex of product liability issues that are intimately connected to other doctrinal rules announced by the Convention. Similarly, as one knowledgeable commentator has observed, the treatment of supervening events in article 79 is an exercise in "superficial harmony which merely mutes deeper discord."<sup>131</sup> The possible connotations of the key phrase in article 79, which provides an excuse for impediments beyond a party's control, are myriad. The conclusion is inevitable that the negotiators did not agree on the meaning of this provision; thus, the Convention cannot claim to unify the law on this subject. Therefore, the Convention is not instructive on how the obligations of parties are affected by rapid inflation, changes in world price levels, or by monetary fluctuations that may interfere with the parties' performance. The Convention also provides no unifying guidance on the host of issues subsumed within the rubric of validity under article 4. The definition of "validity" continues to divide the commentators who participated in the drafting process and cannot avoid becoming a source of great mischief. Validity does include, however, the body of mandatory provisions of law that deal with all those current issues of contract law thought significant enough to be the subject of modern legislation.

A significant weakness of the Convention lies in its creation of a separate substantive law for international transactions, particularly in view of the amorphous quality of the category. World economies have reached a point of integration at which a clear economic distinction between foreign and domestic trade no longer exists, except perhaps in those state controlled economies in which the distinction is maintained by reposing authority over foreign trade in a special ministry that operates under a plan separate from that for the domestic economy.

For the sophisticated international trader the Convention holds few perils. Article 6 permits sophisticated parties to draft their way out of any undesirable provisions or to choose not to be governed by the Convention at all. It is the small, unsophisticated dealer who is most likely to assume that the same rules apply to all sales, whether foreign or domestic, and who is least likely to have a lawyer to advise the exclusion of the Convention by contract. Individuals of this kind are most likely to find themselves burdened with unknown or unknowable rules.

There are several factors that the United States should consider in choosing its course. First, ratification of the Convention should await more careful study of its provisions than has occurred to date. The Convention has not aroused much detailed attention from the practicing or scholarly branches of the legal profession. The resolution of a few major issues awaits the adoption of the Convention. In view of the difficulty of making subsequent changes, time to study specific provisions carefully now would be well spent.

Second, particular attention should be given to the utility of part II of the Convention, dealing with formation of the contract. Article 91(2) provides for res-

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131. Nicholas, *supra* note 21, at 231; see J. HONNOLD, *supra* note 2, §§ 423-427.

ervations to part II. The precise benefits to the United States of adopting this set of rules, which does not appear in any significant respect superior to our existing law under article 2 of the UCC, should be examined. This question crystallizes the issue of the lengths to which the United States should go in the interest of participating in the international project.

Third, Congress and the President should reconsider the wisdom of ratifying this Convention under the treaty power, without implementing domestic legislation. Again, no advantage to this procedure nor any precedent for so significantly undercutting state legislative authority is apparent. Any advantages to this approach should be made explicit and balanced against the costs. Among the advantages of implementing a convention of this sort by legislation is the clear indication that Congress undertakes responsibility for continuing supervision of this subject matter. This responsibility can be exercised by simple legislative act or by delegation of power to the states without denunciation of the whole Convention. Legislation would also establish a single authoritative text in English.

Fourth, the possibility of retaining some continuing role for the states should be studied. It would be desirable to coordinate the international transactions rules and the rules that govern other contracts, particularly since the Convention does not treat, or exclude from its coverage, many issues of great contemporary concern. An alternative to retaining a role for the states would be for Congress to federalize the whole body of commercial law, which it may be empowered to do under the commerce clause. It seems doubtful, however, that national opinion would favor such a course.

Preserving the state role may be accomplished by either of two different approaches. One is provided by the EEC Contract Convention, which permits local legislatures to continue to make rules in the subject area of the convention, but requires them to suspend implementation of any laws pending consultation and coordination with a central agency. A second approach is suggested by article 93 of the Convention, which provides in pertinent part:

If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

This Article suggests that the Senate might proceed with some form of ratification on a national basis, but at the same time declare that implementation of the Convention within any state must await appropriate state legislative action.

Fifth, the process of ratification may be subject to reservations, despite the strictures of article 98, which limits reservations to those provided in the text of the Convention. Although this approach would give the ratification by the United States a strange status in international law, it would create few practical difficulties. For instance, the act of ratification might explicitly indicate that the United States deems the Convention applicable only to international sales transactions. Strong legislative



history could make clear the intention that the goods actually move across borders, perhaps drawing upon some of the jurisdictional language of ULIS.

Finally, Congress may decide that adoption is simply not justified and that the Convention does not deserve ratification at this time. A project that has taken a half-century can take a few years longer. This approach would place the United States in an uncomfortable position, for it is already a signatory of the Convention and the executive is under an implied obligation to seek ratification.<sup>132</sup>

Perhaps needed most is an opportunity for critical reflection on the benefits and costs of this kind of law harmonization. If it has not been possible after this period of time to produce a comprehensive and exclusive text on contract rules, then maybe the process of law harmonization should be directed toward more flexible and hopeful strategies. As suggested throughout this Article, law harmonization depends neither on the displacement of national law nor on an exclusive or comprehensive statement of doctrinal concepts. Pragmatic harmonization has been proceeding at a much faster pace in the world of business than conceptual harmonization has proceeded in the academic worlds primarily concerned with the project that produced the Convention. A unified, exclusive, and comprehensive statement of the law applicable throughout the world is a commendable goal for legal harmonization, but it is a poor method for reaching that end. The nations of the world are unlikely to arrive at substantive agreement by accepting a uniform conceptual statement of the rules. True harmonization would be better promoted by building a framework within which diverse legal systems can work and grow together and within which all nations are encouraged to develop compatible rules through common experience. The Senate should carefully consider whether ratification of this Convention will promote the long-term goal of a coherent and sensible world legal order for commercial transactions.

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132. Vienna Convention, *supra* note 97, art. 18.