Commentary on Professor Kastely's Rhetorical Analysis Symposium: Reflections on the International Unification of Sales Law

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Rhetorical Analysis

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I. INTRODUCTION

I am pleased to add Professor Kastely’s Article¹ to my growing collection of English-language commentaries on the Sales Convention. Many of the early commentaries are descriptive. They sketch the background and present status of the Convention and then provide a doctrinal gloss to all or part of the text. Recent commentaries are more diverse, and while the descriptive pieces continue, some of the recent literature probes the Convention text more deeply, frequently approaching it from new perspectives. Professor Kastely’s rhetorical analysis of the Convention text clearly falls among these more provocative commentaries. I commend in particular her identification and discussion of the values implicit in the Convention text, as well as her more specific analysis of the scope of the Convention’s trade usage provision in Article 8. On these topics, as well as others, she provides insight that will be of


interest to both academics and practitioners.²

What follows is an elaboration of several of my marginal notes to Professor Kastely's manuscript. I had hoped to weave these notes into a coherent Commentary on the Article, but I soon found that it stimulated too many disparate ideas. You should read my marginalia, therefore, as part of an ongoing conversation between Professor Kastely and myself. And just as most conversations between law professors focus on disagreements and matters of emphasis, most of my notes are quibbles and queries. This should not obscure, however, the broad areas of agreement between us or my genuine pleasure in engaging in this conversation with Professor Kastely.

II. THE CONVENTION IN THE CONTEXT OF SIMILAR TEXTS

Professor Kastely focuses almost exclusively on the Convention text and the actions of the 1980 diplomatic conference which approved the Sales Convention's final form. She recognizes, of course, that there are other relevant texts. She refers, for example, to prior drafts prepared within the United Nations Commission on International Trade Law (“UNCITRAL”), to the 1964 uniform sales laws that served as the bases for the UNCITRAL drafts, and even to other UNCITRAL conventions. I think, however, that her rhetorical analysis would have been richer if she had drawn more heavily on a comparison of the Convention text to these other documents. By comparing the documents she would have identified what is new, what is old, and what is omitted. Each of these variations, I would argue, raises particular problems that a rhetorical analysis should address.

Compare, for example, the Sales Convention’s Preamble with the preambles of other UNCITRAL texts. The second and third paragraphs of the Sales Convention³ are similar to earlier preambles.⁴ New, how-

² It is worth stressing the practical utility of Professor Kastely's analysis. As she herself discusses, Article 7(1) directs the reader to interpret the Convention to carry out its purposes (international character, uniformity, observance of good faith) and, when filling gaps in the Convention text, Article 7(2) refers first to the general principles on which the text is based. Professor Kastely's discussion is a particularly stimulating guide to an understanding of these provisions.

³ The text of the Sales Convention’s Preamble is set out in Kastely, supra note 1, at 586.

⁴ The two conventions compared here are:


Compare Professor Kastely’s analysis with Evans, Preamble, in COMMENTARY ON THE INTER-

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ever, are the references in the first paragraph to the New International Economic Order, in the second paragraph to "equality and mutual benefit," and in the third paragraph to "different social, economic and legal systems" and to "the removal of legal barriers in international trade." Repetition of clauses from prior documents raises the question of whether the repetition is a reaffirmation or merely a perfunctory reprinting of boilerplate. The new references, on the other hand, highlight topics on the minds of the drafters at the time of drafting.

With these points in mind, I have some difficulty with Professor Kastely's reading of the Preamble. In a footnote she comments in passing that "[t]he style of the Preamble is a familiar one in United Nations documents." This does not, as I have already suggested, do justice either to the similarities and differences in language or to the much more complex statement of motives in the Preamble than appears in the earlier texts. She goes on to state in the same footnote that "[t]he use of this form and the lack of dispute reflects the broad acceptance of the principles underlying the Preamble . . . ." Ignoring the question of what is meant by "form" (is it the same as or different from "style"?), the lack of dispute about the Preamble does not necessarily reflect broad acceptance. Certainly as to the language in paragraphs two and three, which is also found in prior treaties, the repetition without objection could reflect indifference to the use of language that has become familiar and considered innocuous.

More troubling is Professor Kastely's conclusion that the community formed by the Preamble is both consensual and motivated by self-interest. My own reading of the same text would stress the altruism implicit in it rather than self-interest. This alternative reading would focus on several new phrases added to the preambles of prior treaties that respond for the first time to concerns of developing countries. To join the community formed by the Sales Convention is to recognize the equal status of less developed countries, to remove barriers to self-development, and to create a "New International Economic Order"—a phrase redolent with meaning to the states that form the audience, but which Professor Kastely does not bother to explain. Even the concept of "exchange" implicit in "trade" is not simply one of self-interest. Reading the same text, Professor Kastely concludes that "[t]he Preamble does refer to the

5 See Kastely, supra note 1, at 586 n.42.
6 Id.
7 Id. at 589.
8 Id.
desirability of promoting friendly relations among states, but its main focus is on the possibility of encouraging international trade, to the benefit of both developed and industrialized nations. I think this conclusion skews the meaning of the text, even if referring to the last clause of the Preamble.

A second example of the additional meaning the comparison of texts can provide arises from the 1964 Hague sales conventions with the 1980 Sales Convention. The drafters of these two conventions distinguished between the law of contract formation and the substantive rights of contract parties. Moreover, the drafters addressed these conventions to Contracting States; the uniform laws addressed to sellers and buyers are set out in separate "uniform laws" appended to the conventions. The Sales Convention eliminates both distinctions. Formation provisions are combined with substantive contract provisions, and the formal provisions of the old conventions are combined with the texts of the uniform laws that had been appended to the conventions. Why eliminate these distinctions? Should contract formation provisions be treated separately because they are addressed, directly or by analogy, to a broader audience (i.e., all parties who contract with each other no matter what the object of the contract) than the audience of sellers and buyers interested in their rights and obligations under a sales contract? Should "treaty" provisions addressed to states in their sovereign capacity be clearly separated from those provisions addressed to parties to a sales contract? Struggling with the answers to these questions, Professor Kastely might have

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9 Id. The last paragraph of the Sales Convention's Preamble states:

Being of the Opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, . . . .


11 But see Sales Convention, art. 94 (authorizing a Contracting State to declare that it will not be bound by Part II (Formation of the Contract) or Part III (Sale of Goods)).

12 This question is not a trivial one. In the United States, for example, the format of the Sales Convention has important implications on how the Convention would become law in the United States. A combined text permitted the Convention to become law by action of the Senate alone, without the need for implementing legislation enacted by both houses of Congress. This would not have been possible if the format of the 1964 conventions had been used. See Winship, Congress and the 1980 International Sales Convention, 16 GA. J. INT'L & COMP. L. 707, 721-24 (1986).

The answer to this question, on the other hand, may be trivial. My research notes record only one reference to this question. R. Loewe, a delegate from Austria, commented at the May 1974 annual meeting of UNCITRAL that integrating the texts as proposed by the Working Group was "an important proposal," apparently because it made a substantial shortening of the text. Summary Record, UNCITRAL Meeting No. 151, in Combined Summary Records for the Seventh Session, Meetings Nos. 143-50, May 13-17, 1974, at 9 (Aug. 7 1974)(Source verified by author from notes of
brought into sharper focus the different audiences which various parts of the Sales Convention address.

A third example of how attention to prior, related documents may enrich a rhetorical analysis involves omission from the Sales Convention of a provision found in an earlier text. In other words, silence itself may have important rhetorical implications. The example is the disputed question of whether parties may exclude the Convention by implication or whether they may only do so effectively by express agreement. Article 3 of the 1964 Convention Relating to a Uniform Law on the International Sale of Goods stated that exclusion could be either express or implied. The UNCITRAL Working Group omitted this formula on the ground that the provision “might encourage courts to conclude, on insufficient grounds, that the [Sales Convention] had been wholly excluded.”

Several delegates to the 1980 conference attempted to resolve the issue by amendment but failed. I have argued elsewhere that despite this inconclusive legislative history, express exclusion should not be required. When analyzing this question, however, some attention must be paid to explaining the omission of the clause in the 1964 text.

I am not sure how Professor Kastely would handle the question of implied exclusions or the question of silences generally. She might reject altogether the idea that a text can speak through its silences. If so, I would be concerned that this is a limitation of rhetorical analysis. On the other hand, she might accept the idea that silences “speak” and argue that the text’s rhetorical goal of creating a worldwide community is one that requires a narrow reading of permission to opt out of the Convention. If so, I might disagree with her conclusion but recognize the strength of her analysis. But before we enter into dialogue we must recognize that there is a question to be answered. Comparison of texts makes it easier to recognize the question.

III. THE DIFFERENT AUDIENCES

At several points in her text Professor Kastely groups together the readers of the Sales Convention as “the states which would ratify and the
traders, lawyers, courts, and arbiters."\textsuperscript{15} As I suggested earlier when writing about the differences between the 1964 conventions and the 1980 Convention, I think her analysis would be richer if she focused more distinctly on the audiences for those provisions addressed primarily to states (the Preamble and Part IV) and those addressed primarily to trading enterprises (Parts I to III).

I do not mean to suggest that Professor Kastely makes no distinction between these different audiences. Indeed, she draws interesting parallels between the provisions addressed primarily to states acting as sovereigns in the international arena and those provisions addressed primarily to trading enterprises—a parallelism that works only if she recognizes a distinction between the two sets of readers.\textsuperscript{16} I find, however, her parallelism symptomatic of a compulsion to find common ground between the very different members of the audience. In particular, I think closer attention to the audience of trading enterprises would yield additional insight.

To Professor Kastely's discussion of the rhetorical community of nation-states I would add only several nuances to her analysis.\textsuperscript{17} I would, for example, point out the Sales Convention's recognition that there are a number of different communities of states, and its refusal to displace them. Article 90 provides that the Convention does not prevail over "any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention."\textsuperscript{18} Similarly, Article 94 authorizes states with "closely related legal rules on matters governed by the Convention" to declare that the Convention will not apply to sales contracts between enterprises with their places of business in these countries.\textsuperscript{19} The Sales

\begin{footnotes}
\item[15] Kastely, \textit{supra} note 1, at 577. \textit{See also id.} at 590-91.
\item[16] She points out, for example, that both sets of provisions reinforce the consensual character of the community created by the text.
\item[17] There are examples other than the one given in the text. Professor Kastely suggests that the Convention's rules on reservations (Article 98) and denunciations (Article 101) could be read as reaffirmations of the importance of having a uniform text and thereby creating a worldwide substantive law. She could have added several nuances. She could have drawn a parallel with the Convention's provisions on contract formation and modification. She might have indicated whether the prohibition on reservations is unusual and what role these reservations play in other treaties. She might also have analyzed the five authorized reservations (Articles 92-96) to draw out common themes rather than treating them individually.
\item[18] Article 90 would cover regional arrangements, such as the General Conditions of Delivery of Goods adopted by the Council for Mutual Economic Assistance, and rules adopted by international commodity organizations. For more detailed discussion, see Winship, \textit{supra} note 14, \textit{§} 1.0313[3].
\item[19] Article 94 would permit countries with established trading relations to continue without the possible disruption of having to adjust contracting practices to the Sales Convention. The article would be of interest to the United Kingdom and the Commonwealth countries, the Scandinavian
\end{footnotes}
Commentary
8:623(1988)

Convention recognizes these existing communities and places a high value on loyalty to them. These loyalties are not to be set aside lightly, even if it means delaying the growth of a truly international uniform law at the present.

But as I said, these comments merely add nuances. By contrast, closer study of the audience of trading enterprises would yield more significant insights into the Convention's substantive sales law provisions. Leaving aside the question of whether there presently exists a distinct community of international traders, I might divide the audience of trading enterprises as follows: 1) enterprises which have not yet entered into an international sales contract; 2) those that enter into a contract with another enterprise governed by the Sales Convention; and 3) enterprises involved in a dispute. Different parts of the text are addressed to each of these groups.

Enterprises that have not yet entered into an international sales agreement constitute a large, diverse, and fluctuating community. This community will be interested primarily in the Convention's sphere of application (Part I, especially Chapter 1). The text must persuade these enterprises to become a participating enterprise by entering into contracts governed by the Convention. At least two devices are used to persuade: the relative simplicity of the scope provisions (Articles 1-5) and the affirmation of the principle of freedom of contract (Article 6). Implicit in the straightforward statement of the Convention's sphere of application is the suggestion that enterprises which opt to have the Convention apply to their contract will benefit because they will benefit from the decreased legal transaction costs that they would otherwise incur without the Convention. These costs would include difficulties in reaching agreement on applicable law, in determining what State's domestic law is applicable if agreement is not reached, and in proving what foreign domestic law is. To choose the Convention, in other words, is to

countries, and the Benelux countries. It has even been suggested that the United States and Canada should consider making such a declaration. Ziegel, Canada and the 1980 International Sales Convention, 12 CAN. BUS. L.J. 366 (1987). For more detailed discussion of Article 94, see Winship, supra note 14, § 1.03[4][c].

20 The only discussion of the community of traders in Professor Kastely's work appears to be Kastely, supra note 1, at 587-88 nn.48, 49.

21 Professor Phillipe Kahn has argued that there is a distinct community of international traders ("la société internationale des commerçants") that sociological study can identify. P. KAHN, LA VENTE COMMERCIALE INTERNATIONALE (1961). Professor Kahn's colleagues in France have expressed some skepticism. If there is such a pre-existing community then, of course, one could study how that community reacts to the Sales Convention. Rhetorical analysis, however, is apparently not concerned with this sociological dimension.
take part in a more “efficient” community and self-interest dictates this choice.

Enterprises that decide to enter into a contract governed by the Convention might be said to form a separate audience. These enterprises will be interested primarily in whether they have concluded enforceable contracts and what the terms of the contract are. This group will be most interested in the contract formation rules of Part II and the suppletory provisions in Part III. One can only speculate on what these enterprises would make of the formal “offer” and “acceptance” provisions of Part II, or of the skeletal suppletory rules of Part III.22 They might conclude, for example, that they are protected by the formalism of the formation process and by the need to spell out most details of their agreement.

Yet another community of enterprises might be identified as those faced with contract disputes. This audience will be primarily concerned with the Convention’s remedy provisions (Part III). These provisions might be designed to preserve the community that is threatened with dissolution by encouraging dialogue and reconsideration. Options will be spelled out. At the same time there is an additional audience addressed—the courts or arbitrators. The provisions must determine the authority of these figures who may wish to intervene to preserve the community or to mete out justice.

This sketch of the different audiences is suggestive only. But consider its implications. The analysis considers not merely the Convention but all sales laws, including the Uniform Commercial Code. I can only urge Professor Kastely to consider following up this study with a rhetorical analysis of the Code, which I am sure will be as suggestive as her analysis of the Convention itself.

IV. GOOD FAITH

“The notion of good faith in international trade,” Professor Kastely writes, “is explicitly stated as a principle of the Convention in Article 7. In addition, this value is implicit throughout the Convention’s detailed provisions.”23 Article 7(1) states: “In the interpretation of this Convention, regard is to be had . . . to the need to promote . . . the observance of good faith in international trade.” In the light of the text of Article 7, I

22 An interesting comparison can be made between the Convention’s provisions and the Uniform Commercial Code with respect to contract formation and the contract terms supplied in the absence of agreement by the parties. The Convention does not have a provision similar to U.C.C. § 2-204; its suppletory provisions are less comprehensive than those found in U.C.C. Article 2, Part III.

23 Kastely, supra note 1, at 597 (footnote omitted).
am not persuaded that Professor Kastely's paraphrase of that provision accurately reflects its wording or the compromise that dictated the wording. In particular, I do not think Professor Kastely is sufficiently clear that the reference to "good faith" is limited to interpreting the Convention. There is no explicit general obligation—as there is in the Uniform Commercial Code—that parties must act in good faith when performing or enforcing contractual or statutory duties.

The drafting history clearly supports, as I have written elsewhere, this limited reading of the role of "good faith." The 1964 uniform laws do not refer explicitly to good faith. In the debates within UNCITRAL, the concept was suggested only after the Commission had completed revision of the sales provisions. At the eighth meeting of the Working Group on International Sales, the representative of Hungary proposed the following new provision for the contract formation provisions: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith." After considerable debate at its ninth session, the Working Group adopted the proposal with one representative taking the relatively unusual step of expressing a reservation to this decision. When the Working Group's report was circulated for comment, several governments urged deletion due to its vagueness, several suggested that it should be deleted unless the text provided sanctions for breach of the obligation, and several welcomed its inclusion.

Reviewing the report and these comments at its annual meeting in 1978, the Commission found itself divided. Some members argued that the provision should be deleted because it was unnecessary, it created uncertainty, and it did not provide sanctions for its breach. Other members noted that many national commercial laws impose good faith obliga-

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24 Professor Kastely does recognize that the provision was subject to much debate at the 1980 conference. See id. at n.99.
25 U.C.C. § 1-203. The domestic law of many countries recognizes an obligation of good faith. In some countries this obligation extends to pre-contractual bargaining and thus is even broader than the U.C.C. provision.
28 Id. paras. 70-87, with particular attention to paras. 73-77.
tions, that developing case law would provide certainty, and that sanctions were unnecessary. Moreover, the obligation would be a modest recognition of the need to develop a new international economic order. After extensive debate the Commission decided to refer the provision to a small working group to draft a compromise. This working group submitted the text which the Commission adopted and which ultimately became Article 7(1) of the final text. While not all members were satisfied, the minutes conclude that "the proposal was generally supported as containing a realistic compromise solution." The Commission incorporated the text into the consolidated draft submitted to the Diplomatic Conference in Vienna.

Delegates to the 1980 conference continued to press many of the earlier arguments or comments made to the draft convention. The additional dynamic at the conference, however, was the feeling shared by many delegations that hard-won compromises reached within UNCTRAL should not be overturned unless significant new arguments were made. It was this dynamic that appears to have swung the balance against an Italian proposal to introduce a separate article providing that "[i]n the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith and international cooperation." End runs were also cut off. When the final text was ap-

31 Id. para. 58.
33 Governments and international organizations were given an opportunity before the 1980 conference to comment on the 1978 UNCITRAL draft. The Secretary General then collated and analyzed these comments. United Nations Secretary General, Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, U.N. Doc. A/CONF.97/9 (1980), reprinted in U.N. OFFICIAL RECORDS, supra note 32, at 71. As for the "good faith" provision (draft Article 6), the United States remarked that the proposed text was an acceptable compromise and that it was preferable to inclusion of a separate article imposing an obligation to act in good faith. Id. at 73.
proved, the UNCITRAL compromise was incorporated without a change in substance.\textsuperscript{36}

I recite this drafting history to emphasize that the reference to good faith was deliberately limited to questions of interpretation. Given the explicit rejection of a direct good faith obligation one would expect that commentators would read Article 7(1) narrowly. Yet, notwithstanding the language of Article 7(1) and this history, a number of commentators suggest that the Article does impose a general obligation to act in good faith.\textsuperscript{37} Directed as they are to a different purpose, Professor Kastely's comments do not make this assumption expressly; at the very least, however, they do not recognize the complexities implicit in an apparently simple text.

After reflecting on Professor Kastely's analysis and the repeated broad readings of Article 7(1), I am persuaded that the question of how "good faith" relates to the Convention is more complex than I originally suggested. One can distinguish at least three different classes of cases.

1) \textit{Cases that involve interpretation of the Convention text to promote good faith.} No commentator disagrees that Article 7(1) clearly applies. One commentator gives the following example of a case to which it would apply.

Under Article 24, a declaration of acceptance "reaches" the addressee when "it is . . . delivered . . . to his place of business or mailing address." If a party knows that the other party who has a place of business is away from his home for a considerable period of time, and he nevertheless sends the declaration to the mailing address, he may violate the requirement of good

\textsuperscript{35} For debate on a Canadian proposal to amend the text which ultimately became Article 6 of the official Convention text, see First Committee Report, supra note 34, at 86. In language borrowed from U.C.C. § 1-102(3), this proposal would have prohibited the exclusion or derogation from the Convention's obligations of good faith. The Summary Records of the Third Meeting of Committee I report the debates on this proposal. \textit{Summary Records of Meetings of the First Committee}, (3d mtg.) paras. 53-65, U.N. Doc. A/CONF.97/C.1/SR.3 (1980), \textit{reprinted in U.N. Official Records}, supra note 32, at 244, 247-48 [hereinafter \textit{Summary Records (3d mtg.)}]. At this meeting the United States delegate noted that he could not support the Canadian proposal because "[a]n a contrario interpretation would suggest a general obligation of good faith."

\textsuperscript{36} This reading of the legislative history is supported by an important participant. Eörsi, \textit{A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods}, 31 Am. J. Comp. L. 333, 348-49 (1983)("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."). Professor Eörsi has since expressed the hope that good faith will play a more active role than its location in the Convention would suggest. Eörsi, \textit{General Provisions}, in \textit{International Sales}, supra note 14, § 2.03 [hereinafter \textit{General Provisions}].

2) Cases where neither the Convention nor the contract provides an answer (i.e., there is a gap in the Convention). Professor Kastely makes a persuasive case that implicit in many of the Convention's provisions is an obligation to act in good faith. From these provisions can be distilled a general principle of good faith performance which under Article 7(2)—added at the 1980 conference, although much debated before then—should be used to fill gaps in the Convention. As a consequence, not only should good faith be considered when interpreting the Convention text, but also when filling gaps in the Convention. The following is an example of how this analysis might operate.

Assume that a sales contract requires the seller to deliver by handing over documents but does not specify the place where the documents are to be presented. Article 34 of the Convention merely says that the seller is bound to hand over the documents at the place required by the contract. Both the contract and Convention are, therefore, silent on this point. The general obligation of good faith requires the seller to present the documents at a place that is convenient for the buyer, and the buyer must not arbitrarily refuse presentment of the documents no matter where presented.

3) Cases where the parties have agreed on a contract term, whether or not there is a relevant Convention provision. If parties have agreed on a contract term, their agreement will derogate from any relevant provision of the Convention. When interpreting the rights and obligations that arise from the contract term can one say there is an obligation to act in good faith? A narrow reading of Article 7 would suggest that these cases would not be covered by an obligation of good faith. An example would be a variation on the first hypothetical stated above.

The sales contract states that notices are to be mailed to a specified address. If a party knows that the other party is away from this address for a considerable period of time, and he nevertheless sends a notice...

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38 Eörsi, _General Provisions, supra_ note 36, § 2.03.

39 See also P. SCHLECHTRIEM, _UNIFORM SALES LAW_ 39 (1986) (“the function of such a general [good faith] clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of the ‘reasonable person,’ which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention”); Bonell, _Article 7_, in _COMMENTARY_, _supra_ note 4, § 2.4.1, at 85:

There are a number of provisions . . . confirming that good faith is also one of the ‘general principles’ underlying the Convention as a whole. As such it may even impose on the parties additional obligations of a positive character. This will be the case, if during the negotiating process or in the course of performance of the contract a question arises for which the Convention does not contain any specific provision and the solution is found in applying, in accordance with Article 7(2), the principle of good faith.
notice to the mailing address agreed upon, does he violate the requirement of good faith?

At least one author, a civilian, has suggested that there is an obligation of good faith in the last hypothetical because he sees no distinction between interpreting the Convention and interpreting the contract. In that author's opinion, "interpretation of the two cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract." If this analysis is accepted, however, is there not a general obligation of good faith in all possible cases—a result expressly disapproved by UNCITRAL and the Vienna Conference?

Whether or not courts or arbitrators will be persuaded by the logic of the above analysis, I am convinced by the persistence of the critics who seek to expand the operation of a good faith concept that over time a general obligation on contracting parties to act in good faith will be accepted. Although she approaches the question of good faith from a different perspective, I take it from Professor Kastely's analysis that she will not deplore this development.

V. GAPS IN THE LAW: ISSUES OF VALIDITY

Professor Kastely deplores Article 7(2)'s reference to national law if there are gaps in the Convention that cannot be filled by reference to general principles underlying it. "The adoption of Article 7(2)," she writes, "was unfortunate from a rhetorical perspective because it compromised the integrity of the Convention as an autonomous basis for deliberation." Yet she is sanguine that over time discussion of the Convention will lead to recognition of more and more general principles, thereby obviating reference to national law.

I join with Professor Kastely in hoping that common law judges, who are less familiar than their civil law counterparts with drawing out general principles from discrete statutory rules, will make a good faith effort to elaborate such principles. Just as importantly, I also hope that these same judges will not be quick to find gaps in the Convention. Despite the broad language used in much of the Convention, a judge so disposed will not find it difficult to find gaps. Unlike some other commentators, Professor Kastely unfortunately does not discuss how one

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40 Eörsi, General Provisions, supra note 36, § 2.03. This analysis is cited with apparent approval by Professor Schlechtriem. P. Schlechtriem, supra note 39, at 40 n.115a (1986)
41 Kastely, supra note 1, at 606.
42 Bonell, supra note 39, § 2.3, at 75.
determines that there are gaps.

My marginal note to Professor Kastely's discussion of gaps in the Sales Convention, however, says simply "if you think this is bad consider questions of validity!" This note refers to Article 4's exclusion of issues of validity from the coverage of the Convention. That Article states that "except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage." My concern is that a judge so disposed may find issues of validity much more readily than anticipated by the drafters and thereby turn to national law solutions. The issue of validity is a potential "black hole" removing issues from the Convention's universe, and as such deserves attention for the same reason Professor Kastely deplores the problems latent in Article 7(2).

The history of Article 4(a) differs in many ways from the elaborate drafting history of Article 7(1) traced in the previous note. There was a similar exclusion in the 1964 uniform sales law. Article 8 of the Hague Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods provided that "the present Law shall not, except as otherwise expressly provided therein, be concerned with . . . the validity of the contract or of any of its provisions or of any usage." The unofficial commentary to the Uniform Law prepared by Professor Tunc states that issues of validity are difficult matters which the differing national traditions made difficult to unify in the Uniform Law. Although the Bulgarian delegate suggested that the Uniform Law should include references to validity, there was no protest to the exclusion of the issue of validity and virtually no discussion of the provision at the 1964 Hague conference.

The records of the 1964 uniform laws provide some guidance as to what was meant by "validity." In his commentary Professor Tunc suggests that the issues of validity included questions of "the capacity of the parties or the exchange of their consents or in regard to vitiating factors," as well as "[municipal] regulations of a police character or for the protection of persons." A French comment on a draft text gives the examples of rulemaking agreements unenforceable for lack of a writing


\[44\] 1 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS—RECORDS 363 (1966).

\[45\] Id. at 33.

\[46\] Id. at 363 (The text in French is: "elle ne la règlemente ni quant à la capacité des parties, ni quant à l'échange de leurs consentements ou aux vices de ceux-ci;" "règles de police ou de protection des personnes.").

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or for lack of a specified price. Deliberations within UNCITRAL did not consider the exclusion of issues of validity controversial. Indeed, governments and international organizations made virtually no comments on Article 8 of the 1964 Uniform Law on the International Sale of Goods. When the text was placed before the Commission at its 1977 session, it was suggested that the provision be deleted because it was merely declaratory. The argument ultimately prevailed that such a provision was useful in preventing the "overruling [of] domestic law on validity of contracts." In the meantime, the Commission's Working Group on International Sales studied whether to include provisions on validity at its eighth and ninth sessions, and ultimately concluded that there should not be any rules on validity. The 1980 conference approved the final draft text of Article 4 with very little debate.

Despite this lack of controversy, Article 4(a) has the potential for mischief. The very reason for excluding issues of validity—the differing and strongly felt national traditions—suggests that judges and arbitrators will be tempted to enforce domestic rules on validity: either of the forum, or of the state whose laws would apply by virtue of the rules of private international law.

Professor Kastely's analysis of related problems suggests some of the steps to be taken to guard against this temptation. Article 7(1) directs that Article 4(a) is to be read in a way so as to maintain uniform application of the Convention. Interpretation of "validity" is not, therefore, initially a question of domestic law. As Professor Honnold has written, "the substance rather than the label or characterization of the competing rule of domestic law determines whether it is displaced by the Convention; the crucial question is whether the domestic rule is invoked

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47 2 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS—DOCUMENTS 118 (1966). How the Sales Convention deals with purported contracts where the price is not specified continues to be problematic. Compare art. 14(1) with art. 55 (the latter text being the only place where the Convention explicitly refers to "validity" in the substantive provisions). For discussion of this problem, see Farnsworth, *Formation of Contract*, in *INTERNATIONAL SALES*, supra note 14, § 3.04[1].


by the same operative facts that invoke a rule of the Convention." 51 If the same operative facts are involved, then the Sales Convention does expressly provide otherwise and there is no exclusion of issues of validity. This will be the case, for example, with some aspects of the civilian concept of "error." 52

It is possible that a common core of meaning can be given to "validity" as used in the Convention. Most (if not all) countries will not enforce agreements on the grounds of illegality, capacity, fraud, mistake, and duress. Even within the "catch-all" category of illegality, there are generally accepted "police" regulations for the safeguard of persons or vital national interests.

It is with the less definite concepts, such as unconscionability, that the possibility of abuse appears. As to these latter concepts, Professor Schlechtriem suggests that the contractual clause should be governed by the Convention rather than by domestic law. Thus, he suggests, a contract clause that limits recoverable damages to foreseeable losses should be valid because of the damage principles of the Convention (Articles 74 and 76) even if domestic law would declare such clauses unconscionable. 53 It is not clear, however, that the Convention will always provide guidance. Consider, for example, the closely related contract clause that purports to liquidate damages, but which would be unenforceable in an Anglo-American jurisdiction as a penalty clause. The Convention does not address this issue in its damage provisions. While it recognizes the principle of freedom of contract (Article 6 on freedom of the parties to exclude or derogate from the Convention), that principle is subject to the express exclusion of validity issues.

Despite Professor Honnold's belief that Article 4(a) does not provide a large door for escape from the Convention, 54 I am concerned that Article 4(a) will be a potent force undercutting the uniform law Professor Kastely desires. There have been intimations of this already in the academic literature. In the United States, for example, there has been serious discussion about whether disclaimers of warranties in international contracts must include the word "merchantability" (as at least some authors believe is required by U.C.C. § 2-316). 55 Given Professor Kastely's concern for the possible "abuse" of Article 7(2) of the Convention, she

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51 J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 97 (1982).
53 P. SCHLECHTRIEM, supra note 39, at 33 n.83b.
54 J. HONNOLD, supra note 51, at 98.
will no doubt share my concern that the Article 4(a) exclusion be interpreted narrowly.