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Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention Symposium: Reflections on the International Unification of Sales Law

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Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention

*Amy H. Kastely**

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I. INTRODUCTION

The United Nations Sales Convention¹ went into force on January

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¹ For a compilation of documents and records of the Sales Convention, see UNITED NATIONS

1, 1988, following ratification² by eleven nations as of December 11, 1986.³ This is a significant event, and the Convention has generated comment and evaluation by scholars and practitioners around the world.⁴ Some observers have focused on a particular aspect of the Sales

CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS (1981)[hereinafter U.N. OFFICIAL RECORDS].

² Different nations have or will "ratify," "accept," "approve," or "accede to" the Sales Convention depending on their domestic law and on whether they are signatories to the Sales Convention. See Sales Convention, arts. 91, 99. This Article will refer collectively to these procedures as ratification.

³ The Sales Convention was to have entered into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification. Sales Convention, art. 99. On December 11, 1986, China, Italy, and the United States deposited instruments of ratification, bringing the number of ratifications to eleven. U.N. Dept. of Public Information, Press Release I/T/3849, Dec. 11, 1986. The Sales Convention therefore came into force as law on January 1, 1988. The first eight nations to ratify were Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia. *Status of Conventions: Note by the Secretariat* 4, U.N. Doc. A/CN.9/271 (1985).

⁴ Commentaries on the Sales Convention available in English now include the following:

1) Two treatises: J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* (1982); P. SCHLECHTRIEM, *UNIFORM SALES LAW: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (Eng. trans. 1986);

2) three major collections of essays: *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (N. Galston & H. Smit eds. 1984)[hereinafter *PARKER SCHOOL ESSAYS*]; *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURE* (P. Sarcvic & P. Volken eds. 1986)[hereinafter *DUBROVNIK LECTURES*]; *Problems of Unification of International Sales Law*, 7 *DIGEST OF COMMERCIAL LAWS OF THE WORLD* (1980)[hereinafter *Problems of Unification*];

3) two major law review symposia: *Unification of International Trade Law: UNCITRAL's First Decade*, 27 AM. J. COMP. L. 201 (1979); *Symposium on International Sale of Goods Convention*, 18 INT'L LAW. 3 (1984); and

4) numerous law review articles and student comments, among them Bonell, *Some Critical Reflections on the New UNCITRAL Draft Convention on International Sales*, 1978 REVUE DE DROIT UNIFORME 2; 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); Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521 (1983); 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 (1982); Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333 (1983) [hereinafter *A Propos*]; Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461 (1979) [hereinafter *Developing International Trade Law*]; Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C.J. INT'L L. & COM. REG. 63 (1980); Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263 (1986); Reczei, *The Area Of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981); Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

Bibliographies of commentary in numerous languages are also available. See J. HONNOLD, *supra* at 29-34; Honnold, *Bibliography: Unification of Trade Law and UNCITRAL*, 27 AM. J. COMP. L. 212 (1979); Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987).

Convention and have discussed issues regarding its interpretation and effect,⁵ in a manner much like that regarding specific pieces of domestic legislation or judicial opinion. Yet much of the other commentary, both favorable and critical, has a peculiar tone and direction. It focuses not only on specific rules and provisions but also on the great potential and inspirational strength of the Convention, as if to say that the Convention must be judged not only by the wisdom and precision of its particular provisions, but by its ability to inspire as well.⁶ What is this larger, higher goal that has been the focus of much of the favorable commentary on the Convention? One answer is that the Convention attempts to *unify* the law governing international commerce, seeking to substitute one law for the many legal systems that now govern this area. Accepting this as the Convention's goal, one should evaluate how well the text of the Convention articulates a single legal system, and whether the Convention will be widely accepted.⁷

Yet this description of the Convention's goal as a simple unification of the law overlooks the powerful context of the Convention's drafting and ratification. One way to understand this point is to think about what is required to unify the law on an international scale. To unify the law among nations means to subject people around the world to a single set

⁵ See, e.g., Clausson, *Avoidance in Nonpayment Situation and Fundamental Breach Under the 1980 U.N. Convention on Contracts for the International Sale of Goods*, 6 N.Y.L. SCH. INT'L & COMP. L. 93 (1984); Dore & De Franco, *supra* note 4; Winship, *Formation of International Sales Contracts Under the 1980 Vienna Convention*, 17 INT'L LAW. 1 (1983).

⁶ Professor John Honnold, with characteristic understatement and grace, opens his treatise with the observation, "There is basis for hope that this Sales Convention, culminating the work of half a century, has escaped the lethargy and divisiveness that plague international legal work and will provide a widely-accepted legal basis for international trade." J. HONNOLD, *supra* note 4, at 47. For other instances see, e.g., Gonzalez, *Remedies Under the United Nations Convention on Contracts for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW. 79, 99-100 (1984); Naon, *The U.N. Convention on Contracts for the International Sale of Goods*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 89 (N. Horn & C. Schmitthoff eds. 1982); Patterson, *supra* note 4, at 265, 300-03; Reinhart, *Development of a Law for the International Sale of Goods*, 14 CUMBERLAND L. REV. 89, 101 (1984); Roth, *The Passing of Risk*, 27 AM. J. COMP. L. 291, 310 (1979); Sono, *The Role of UNCITRAL*, in PARKER SCHOOL ESSAYS, *supra* note 4, at 4-1, 4-11; Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in PARKER SCHOOL ESSAYS, *supra* note 4, at 9-2 to 9-4; see also Steenhoff, *Dutch Attitude Concerning the Unification of Private International Law*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE 223 (1984)(honoring J. Sauveplanne)(essays discussing the value of international unification of private law).

⁷ Several important analyses have evaluated the Sales Convention from this perspective, and the authors have disagreed on how successful the Sales Convention is in reaching this unifying goal. Compare Rosett, *supra* note 4 (concluding that the Sales Convention will not be successful in harmonizing the law of international trade) with Hellner, *The UN Convention on International Sales of Goods—An Outsider's View*, IUS INTER NATIONES 71 (S. Riesenfeld ed. 1983)(Commemorative Edition)(concluding that even with its shortcomings, the Sales Convention will provide a basis for unification of the law of international commerce).

of rules and principles and to have them understand and conform to these rules and principles as they would to the laws of their own communities. This in turn requires that the unified system be able to respond to future changes by and develop in a uniform fashion.

By considering this context, one can see more clearly what is required to unify the law on an international scale. There must be an international community of people who perceive themselves as bound together and governed by a common legal system and who have some way to deliberate together over matters of continuing verification and development. The creation of such a community is fundamental to the unification effort; without such a community, a theoretical unification will have no function or significance in the world of human affairs. It is this goal, the achievement of an international community, that is the true underlying purpose of the Sales Convention.⁸

This task was understood, well or roughly, by the many people who worked on the Sales Convention over the years of its preparation. In order to unify the law governing contracts for the international sale of goods, the drafters of the Sales Convention attempted to establish a sense of shared interest among its readers, including the states which would ratify and the traders, lawyers, courts, and arbiters who would use the Convention to structure and guide future transactions and deliberations. The text of the Convention seeks to establish, in short, a rhetorical community in which its readers first assent to the language and values of the text itself, and then use the language and values to inform their relations with one another. The important discourse that will define this community will occur as lawyers and businesspeople negotiate international sales contracts, as lawyers present arguments to courts and arbitral tribunals, and as these courts and tribunals apply the Convention to particular international sales agreements.⁹

The Sales Convention, thus, is deeply political, fundamentally rhetorical; in its aspirations. The text of the Convention establishes a relationship between author and reader, as well as among readers. This

⁸ This is also the focus of the most forceful criticism of the Sales Convention. Professor Rosett has argued, for example, that international consensus on significant legal issues is impossible. See Rosett, *supra* note 4, at 282-86; see also Comment, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984). This criticism, however, too easily dismisses the possibility of genuine discourse within the international community. Such discourse holds the opportunity for discovery of common grounds beyond a mere reconciliation of existing legal systems.

⁹ The dynamic of discourse can be seen, for example, in litigation before a judicial tribunal: lawyers present conflicting arguments regarding an issue involving international sales, the tribunal interprets the matter in dispute in a certain way, and this decision in turn influences the arguments presented in future cases.

textual community is united by a common interest in the activity of trade and defined by the common language of the Convention. The text itself creates a community, international in scope yet limited in its range of shared activity, it defines the fundamental values of this community, and it establishes a common language and process through which the community can develop.

A rhetorical community is one formed or constituted by and through discourse. The art of rhetoric may be described as the art of rendering an indeterminate situation determinate for the purpose of action.¹⁰ It is the art of discourse and deliberation. One branch of rhetoric focuses on the ways in which discourse forms human community. The idea of rhetoric as constitutive of a community flows from the relationship between speaker and audience and the importance of language to both that are essential elements in the traditional art of rhetoric.¹¹ The fundamental insight of this branch of rhetoric is that human communities are formed and critically shaped in and by discourse. In this view the study of rhetoric becomes the study of how we constitute ourselves and our communities through our use of language and the study of law comes to focus on the ways in which legal discourse forms understandings of ourselves and our communities.¹²

In evaluating the constitutive nature of language and of particular texts, rhetorical analysis focuses attention on the nature of the community formed by a text, on its points of coherence and on its potential vulnerabilities. By emphasizing the importance of author, audience, language, and the occasions for discourse, rhetoric provides a way to explore the constitutive power of a text. When applied to the Sales Convention, rhetoric provides a useful analytic tool that allows one to understand the

¹⁰ The art has had a long and rich history, beginning in a sophisticated form with the Greeks. See Plato, *Gorgias* (W.D. Woodhead trans.), in *THE COLLECTED DIALOGUES OF PLATO* (E. Hamilton & H. Cairns eds. 1961); ARISTOTLE, *THE "ART" OF RHETORIC* (J.H. Freese trans. 6th printing 1975).

¹¹ This aspect of rhetoric was emphasized by Cicero, see M. CICERO, *De Inventione* (H.M. Hubbell trans. 3d printing 1968), and it has been exquisitely elaborated by Professor James B. White. See J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984)[hereinafter *WHEN WORDS LOSE THEIR MEANING*]; J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985)[hereinafter *HERACLES' BOW*]; see also J. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973)[hereinafter *LEGAL IMAGINATION*].

¹² Professor White has offered this definition of rhetoric: "It is the knowledge of who we make ourselves, as individuals and as communities, through the ways we speak to each other." J. WHITE, *HERACLES BOW*, *supra* note 11, at 44. The rhetorical analysis of legislation is discussed in J. WHITE, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 11, at 231-74; J. WHITE, *LEGAL IMAGINATION*, *supra* note 11, at 215-40; and J. WHITE, *HERACLES' BOW*, *supra* note 11, at 28-48, 77-106, 192-214.

achievements of the Convention and to explore its weaknesses. This Article pursues such a rhetorical analysis of the Convention. Section II discusses the history of the Convention and examines some of the rhetorical goals of its drafters. Section III provides a general description of the rhetorical community established by the Convention. Section IV explores in greater detail some of the rhetorical problems confronted by the Convention's drafters, explains the significance of some of the most controversial issues addressed by the drafters, and evaluates the resolutions reached from the perspective of the Convention's rhetorical purpose.

II. THE UNIFICATION OF INTERNATIONAL TRADE LAW

The efforts toward development of the Sales Convention can be traced most directly to the work of the International Institute for the Unification of Private Law ("UNIDROIT"), a private organization based in Rome,¹³ and of the Hague Conference on Private Law.¹⁴ In 1930 UNIDROIT began preparation of a uniform law on the international sale of goods. A preliminary draft, which was completed in 1935, was circulated among the members of the League of Nations and comments were solicited.¹⁵ This project, however, was interrupted in 1939 by World War II.

In 1951, a diplomatic conference was organized by the Netherlands

¹³ See David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 5, at 133 (1971); see also Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Law*, 27 INT'L & COMP. L.Q. 413 (1978); Matteucci, *UNIDROIT: The First Fifty Years*, in NEW DIRECTIONS IN INTERNATIONAL TRADE LAW xvii (UNIDROIT 1977)[hereinafter NEW DIRECTIONS]; Monaco, *The Scientific Activity of UNIDROIT*, in NEW DIRECTIONS, *supra*, at xxvii.

¹⁴ See David, *supra* note 13, at 141-48; Steenhoff, *supra* note 6, at 223. The modern unification movement began in the nineteenth century, as scholars and others sought to revive the internationalism that pre-dated the establishment of powerful nation-states. Prior to the nineteenth century, an international trade law was taught in European universities and promoted by bankers and merchants. See generally *Historical Introduction to the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 (1979), reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 3; David, *supra* note 13, at 123. For further discussion of the unification movement, see R. H. GRAVESON, ONE LAW: ON JURISPRUDENCE AND THE UNIFICATION OF LAW (1977); UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS (J. Honnold ed. 1966); INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW (1948) [hereinafter UNIFICATION OF LAW]; Cairns, *Comparative Law, Unification and Scholarly Creation of a New Ius Commune*, 32 N. IR. L.Q. 272 (1981); David, *Methods of Unification*, 16 AM. J. COMP. L. 13 (1968); Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4 (1968); Reinhart, *supra* note 6.

¹⁵ For background on the early unification work on sales, see Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 302 (1959); Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979)[hereinafter *Overview*].

to renew the unification effort.¹⁶ This conference discussed the UNIDROIT drafts and created a special committee to prepare a new draft, incorporating suggestions made by the conference participants. After much deliberation over several years time, a final version of the Uniform Law on the International Sale of Goods was proposed in 1964 by the special committee to a diplomatic conference held in the Hague ("Hague Conference").¹⁷ At the same time, UNIDROIT submitted a draft Uniform Law on the Formation of Contracts for the International Sale of Goods. This conference adopted both the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods ("1964 Uniform Laws") and the conventions to which they were attached.¹⁸

Both conventions entered into force in 1972.¹⁹ Yet the 1964 Uniform Law on International Sales has been ratified or acceded to by only nine nations: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom,²⁰ and the Uniform Law on Contract Formation has been ratified by the same nine.²¹ These laws have not been widely ratified primarily due to the European dominance in their production and the European orientation in their content.²²

Meanwhile, efforts were being made within the United Nations to sponsor work on a uniform law for international trade that would involve the developing nations and other states that had not participated in de-

¹⁶ See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952).

¹⁷ Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague 2-25 (April 1964). See Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 L. & CONTEMP. PROBS. 326 (1965).

¹⁸ Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, Annex I (Uniform Law on the Formation of Contracts for the International Sale of Goods), 834 U.N.T.S. 171, 185 (1972); Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on International Sale of Goods), 834 U.N.T.S. 109, 123 (1972)[hereinafter 1964 Uniform Law on International Sales].

¹⁹ 834 U.N.T.S. at 109 n.1, 171 n.1.

²⁰ *Id.* (confirmed in telephone conversation with United Nations Treaty Office, April 15, 1988).

²¹ Italy, having become a contracting party to the Sales Convention, will necessarily renounce the 1964 uniform laws.

²² See Date-Bah, *Problems of the Unification of International Sales Law from the Standpoint of Developing Countries*, in *Problems of Unification*, *supra* note 4, at 39, 43-44 [hereinafter *Problems from the Standpoint of the Developing Countries*]; Patterson, *supra* note 4, at 267-70; Reinhart, *supra* note 6, at 94; Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?*, 2 NW. J. INT'L L. & BUS. 129 (1980). Twenty-two of the 27 original signatories of the 1964 Uniform Laws were European. See Honnold, *Overview*, *supra* note 15, at 223, 225 (1979); *Progressive Development of the Law of International Trade: Report of the Secretary-General*, 21 U.N. GAOR Annex 3 (Agenda Item 88) para. 30, U.N. Doc. A/6396 (1966), reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 18, U.N. Doc. A/CN.9/SER.A/1970.

velopment of the 1964 Uniform Laws.²³ As a result, the United Nations Commission on International Trade Law ("UNCITRAL" or "Commission") was created in 1968 and included representatives from every region of the world.²⁴ After soliciting comments on the 1964 Hague Uniform Laws, UNCITRAL instructed its Working Group²⁵ either to modify the 1964 Uniform Laws or develop a new text "capable of wider acceptance by countries of different legal, social, and economic systems."²⁶

The Working Group met once a year over the next nine years. It considered both the Uniform Law on the International Sale of Goods and the Uniform Law on Formation of Contracts for the International

²³ See generally *Request for Inclusion of an Item in the Provisional Agenda of the Nineteenth Session of the General Assembly: Note Verbale from the Permanent Representative from Hungary to the United Nations*, 19 U.N. GAOR Annex 2, U.N. Doc. A/5728 (proposing United Nations sponsorship of work toward the unification of international trade law), reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 5 (1970), U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *Request for Inclusion*]; *Unification of the Law of International Trade: Note by the Secretariat*, 19 U.N. GAOR Annex 2, U.N. Doc. A/5728, reprinted in [1970] 1 COMM'N ON INT'L TRADE L. 13, U.N. Doc. A/CN.9/SER.A/1970 (surveying unification movement); Honnold, *Unification of Law*, in UNIDROIT 1959 (recommending United Nations involvement in the unification of law).

²⁴ Discussion in the United Nations on the creation of UNCITRAL often emphasized the need for wider involvement in the unification effort. See *Debate in the Sixth Committee of the General Assembly on Agenda Item 88 (Progressive Development of the Law of International Trade): Excerpts from Summary Records*, 21 U.N. GAOR C.6 (947th-955th mtgs.), U.N. Doc. A/6594, reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 45, 52, 55-58, U.N. Doc. A/CN.9/SER.A/1970. The UNCITRAL charter originally allocated membership in the following regional distribution: Africa, 7; Asia, 5; Eastern Europe, 4; Latin America, 5; Western Europe and Others (including the United States, Australia and Canada), 8. G.A. Res. 2205 (XXI), U.N. Doc. A/6396 (1966), reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 65, 66 U.N. Doc. A/CN.9/SER.A/1970. The Commission was enlarged from 29 members to 36 in 1973, with two new members from Africa and Asia and one new member from each of the other regions. G.A. Res. 3108 (XXVIII), U.N. Doc. A/CN.9/SER.A/1974, reprinted in [1974] 5 Y.B.U.N. COMM'N ON INT'L TRADE L. 11-12, U.N. Doc. A/CN.9/SER.A/1974. UNCITRAL identified several priority areas in its first report to the General Assembly: international sale of goods, commercial arbitration, transportation, insurance, international payments, intellectual property, anti-discrimination in international trade, agency, and the legalization of documents. *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, 23 U.N. GAOR Supp. (No. 16) paras. 40-42, U.N. Doc. A/7216 (1968), reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 77, U.N. Doc. A/CN.9/SER.A/1970.

²⁵ The Working Group on the International Sales of Goods was created at UNCITRAL's second session, originally with 14 members (Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom, and the United States). See *Report of the United Nations Commission on International Trade Law on the Work of its Second Session*, 24 U.N. GAOR Supp. (No. 18) para. 38, U.N. Doc. A/7618 (1969), reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 94, 99-100, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *UNCITRAL Second Session*]. The Group was later enlarged to 15 and three replacements were made, allowing for the participation of Austria, Czechoslovakia, the Philippines, and Sierra Leone. J. HONNOLD, *supra* note 4, at 54 n.9.

²⁶ *UNCITRAL Second Session*, *supra* note 25, para. 38.

Sale of Goods. In each case it recommended adoption of a new text, and it developed final proposed drafts that were submitted to the full United Nation Commission.²⁷ UNCITRAL approved a combined draft Convention on Contracts for the International Sale of Goods in 1978.²⁸ This draft was submitted to a Diplomatic Conference of sixty-two nations meeting in Vienna in March and April 1980 ("Vienna Conference").²⁹ Following extensive discussion and numerous amendments, the Convention was approved and opened for signature.³⁰ It was initially signed by twenty-one states.³¹

Throughout the many years of work on the unification of international trade law, participants engaged in an ongoing discussion of the goals and methods of the project. Recurrent in the conversation was the idea that unification would both require and facilitate the formation of an international community through the use of a common legal language. The dual goals of facilitating international commerce and promoting international harmony were often articulated.³² Some proponents who were motivated primarily by the possibility of world unity realized that unification of the law for the purposes of commerce would necessarily entail the promotion of an international community.³³ Similarly, some

²⁷ *Draft Convention on the International Sale of Goods*, U.N. Doc. A/CN.9/116, Annex I (1976), reprinted in [1976] 7 Y.B.U.N. COMM'N ON INT'L TRADE L. 89, U.N. Doc. A/CN.9/SER.A/1976; *Draft Convention on the Formation of Contracts for the International Sale of Goods*, U.N. Doc. A/CN.9/142/add.1 (1977), reprinted in [1978] 9 Y.B.U.N. COMM'N ON INT'L TRADE L. 14, U.N. Doc. A/CN.9/SER.A/1978.

²⁸ *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, 32 U.N. GAOR Supp. (No. 17), para. 27, U.N. Doc. A/33/17 (1978), reprinted in [1978] 9 Y.B.U.N. COMM'N ON INT'L TRADE L. 11, 14, U.N. Doc. A/CN.1/SER.A/1978.

²⁹ G.A. Res. 33/93, U.N. Doc. A/CONF.97/1 (1978), reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at xiii.

³⁰ *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18 (1980)[hereinafter *Final Act*], reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 176. A list of the 62 participating states is included in the Final Act. *Id.*

³¹ The 21 signatories were Austria, Chile, China, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, German Democratic Republic, Ghana, Hungary, Italy, Lesotho, Netherlands, Norway, Poland, Singapore, Sweden, the United States, Venezuela, and Yugoslavia. J. HONNOLD, *supra* note 4, at 47 n.1.

³² See David, *supra* note 13, at 5-328. Cf. Bagge, *International Unification of Commercial Law*, in UNIFICATION OF LAW, *supra* note 14, at 253, 253-55 (1948)("There must be some strong common practical interest in unification. A desire, in itself very commendable, to get the whole international community under the reign of one system of private law, thus contributing to peaceful intercourse between individuals and thereby also between nations, will, I am afraid, not be enough. But even where a common practical interest is evident the obstacles to unification may be too great. . ."). A condition for a successful international unification of such law is that the countries in question have a common culture and common conceptions and interests. For an excellent historical survey of various schools of thought regarding the relationship between international trade and world harmony, see F. PARKINSON, *THE PHILOSOPHY OF INTERNATIONAL RELATIONS* 91-110 (1977).

³³ This point is of course an oversimplification of any one scholar's or organization's work. With

who were principally concerned with the development of international trade recognized that a sense of commonality was necessary to achieve unification of law.³⁴

As the Right Honorable Lord Justice Kennedy wrote in 1909:

The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country

. . . But I do not think that the advocate of the unification of law is obligated to rely sole upon such material considerations, important as they are. The resulting moral gain would be considerable. A common forum is an instrument for the peaceful settlement of disputes which might otherwise breed animosity and violence [i]f the individuals who compose each civilised nation were by the unification of law provided, in regard to their private differences or disputes abroad with individuals of any other nation, not indeed with a common forum (for that is an impossibility), but with a common system of justice in every forum, administered upon practically identical principles, a neighborly feeling, a sincere sentiment of human solidarity (if I may be allowed the phrase) would thereby gradually be engendered amongst us all—a step onward to the far-off fulfillment of the divine message, 'On earth peace, goodwill toward men.'³⁵

It was a happy correspondence that the needs of international commerce would necessarily promote a sense of shared purpose and understanding, and this goal propelled much of the unification work during the late nineteenth and early twentieth centuries.³⁶

that warning, see Matteucci, *supra* note 13, at xvii (arguing that the unification of private law would promote peaceful relations among nations and would also facilitate international commerce); Steenhoff, *supra* note 6, at 223 (examining efforts towards unification that emphasize world unity).

³⁴ With a warning against oversimplification similar to that *supra* note 33, see Johnson, *Harmonisation and Standardisation of Legal Aspects of International Trade*, 51 AUSTRALIAN L.J. 608 (1977)(commercial advantages of unification require international cooperation); Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449 (1965)(emphasizing the advantages of unification to international trade, yet stressing the necessity of international cooperation to this effort). Cf. Note, *A Modern Lex Mercatoria: Political Rhetoric of Substantive Progress?*, 3 BROOKLYN J. INT'L L. 210 (1977)(discussing the link between unification and the development of international trade). See generally David, *supra* note 13 at 26. (unification of law "is political in nature, and must therefore be approached in a spirit of refinement and conciliation."); R. H. GRAVESON, *supra* note 14, at 205 (discussing the preconditions for unification: "[u]nification is likely to be most successful among countries that share a desire for unification of their legal systems for political, racial or other reasons, or even without such conscious desire if there exists a real social or economic need for unification.").

³⁵ Kennedy, *The Unification of Law*, 10 J. SOC'Y COMP. LEGIS. 212, 214-15 (1909).

³⁶ The unification movement in Western Europe in the late nineteenth and early twentieth century emphasized the goal of international harmony and the World Wars intensified this. See Matteucci, *supra* note 13, at xvii; Bagge, *supra* note 32, at 253. Unification efforts in other parts of the world also accelerated after the wars. The Bustamante Code was accepted on February 28, 1928,

In the United Nations, arguments for unification have tended to emphasize the economic benefits to be gained by the unification of trade law, especially for the developing nations.³⁷ Yet delegates clearly have recognized that the activity of international trade could itself provide a basis for friendly relations if it were structured by a common set of rules, informed by the principles of equality and mutual respect.³⁸ In the discussion of the proposal to create UNCITRAL, for example, the delegate from Rumania observed:

The development of international trade, therefore, would meet real needs of the international community; it would be an essential contribution to the efforts to create . . . conditions of stability and well-being, which were necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Accordingly, it was necessary to establish rules that would facilitate commercial transactions on the basis of respect for sovereignty and national independence, non-intervention in the domestic affairs of States and mutual

and ratified by 15 Latin American nations. David, *supra* note 13, at 149-50. The Council for Mutual Economic Aid was established in 1949 by Bulgaria, Czechoslovakia, Hungary, Poland, Rumania and the Union of Soviet Socialist Republics; its General Conditions for Delivery of Goods Between Organizations of Member Countries were adopted in 1958. David, *supra* note 13, at 194-95; I. SZASZ, *THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES* 33-34 (1985); Hoya & Quigley, *Comecon 1968 General Conditions for the Delivery of Goods*, 31 OHIO ST. L.J. 1 (1970).

³⁷ See, e.g., *Progressive Development of the Law of International Trade: Report of the Secretary-General*, 21 U.N. GAOR Annex 3 (Agenda Item 88), U.N. Doc. A/6396, reprinted in 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 18, 41, U.N. Doc. A/CN.9/SER.A/1970 ("it should be kept in mind that the unification process is desirable per se only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade.") [hereinafter *Progressive Development*]; *Excerpt from the Summary Record of the 948th Meeting*, 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 47, para.1, U.N. Doc. A/CN.9/SER.A/1970 ("Mr. Herran Medina (Columbia) said: The removal of obstacles, including legal obstacles, to international trade was of special importance to the developing countries whose economies depended largely on their foreign trade, but it would also be to the advantage of the developed countries, whose trade would expand proportionately."). Some delegates also emphasized that needed reform or "progressive development" of the law could be promoted through unification. See, e.g., *Request for Inclusion*, *supra* note 23 (arguing for work towards the progressive development of international trade law).

³⁸ See, e.g., *Debate in the Sixth Committee of the General Assembly on Agenda Item 88* (Mr. Piradov, Union of Soviet Socialist Republics, "conditions were now favorable for the development of world trade, which in turn could help to promote peaceful coexistence"); *id.* at 49 (Mr. Resich, Poland, "the progressive development of the law of international trade was essential for the establishment of peaceful and normal relations between nations"); *id.* at 53 (Mr. Sinha, India, "peace must rest on a sound economic foundation and international co-operation based on equality"); *id.* at 54 (Mr. Secarin, Romania, "trade was one of the most important and dynamic elements of cooperation among States"); *id.* at 56 (Mr. Yanko, Bulgaria, "international trade, based on the equality and mutual benefit of the parties, was a prime factor in co-operation between States"). See also *Progressive Codification of the Law of International Trade: Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)*, U.N. Doc. A/CN.9/L.19, reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 285, U.N. Doc. A/CN.9/SER.A/1970 ("International trade is one of the most important factors in economic development and as such, a means of promoting understanding and peace among peoples.").

benefit³⁹

For those active in the United Nations, the dual goals of developing international trade and promoting world harmony seemed to correspond well with the mission of that organization.⁴⁰

III. AN INTERNATIONAL RHETORICAL COMMUNITY

The Sales Convention is a rhetorical text, contemplating and creating an international rhetorical community. The Convention invites ratification by government leaders throughout the world and offers a language in which to conduct and discuss international trade, including a set of significant issues and a set of terms in which these issues can be discussed and deliberated upon. The Convention implicitly recognizes a set of roles, shared expectations, and occasions for dispute and deliberation. Rhetorical analysis confirms the importance of these elements in the creation of an international community.

A. The Community and Members

The Preamble to the Sales Convention reveals its author: "The States Parties to this Convention . . . have agreed as follows"⁴¹ The text that follows this passage is framed as a statement by the States who are united as a single author. The audience is composed, in turn, of all states who may consider joining the Convention and all business people, lawyers, courts, and arbiters concerned with the activity of international trade.

Yet the line between author and audience in this text is doubly blurred. At the time of approval of the final draft, no state could yet ratify and thus technically there were no states parties to the Convention. All states were among the audience. At the same time, however, the ratification process was established as a way for nations to become parties to the Convention. Thus the mechanism existed for members of the audience to join as authors of the text. This blurring of author and audience is significant to the rhetorical character of the Convention, as it emphasizes the potentially creative role for the members of the commu-

³⁹ Debate in the Sixth Committee of the General Assembly on Agenda Item 88, *supra* note 24, at 54.

⁴⁰ See *Progressive Development*, *supra* note 37, at 42-43. The goal of unifying international trade law corresponded especially with the United Nations articulated goal of promoting the New International Economic Order. See *Declaration on the Establishment of a New Economic Order*, G.A. Res. 3201 (S-VI), U.N. GAOR (6th Special Session Supp. 1) at 3, U.N. Doc. A/9559 (1974); *Programme of Action on the Establishment of a New Economic Order*, G.A. Res. 3202 (S-VI), U.N. GAOR (6th Special Session Supp. 1) at 5, U.N. Doc. A/9559 (1974).

⁴¹ Sales Convention, Annex 1.

nity it seeks to create. By highlighting the fluid character of the document's author and audience, the text offers to its readers the possibility of joining the community on an equal footing with other member states.

The Preamble also describes the character of the union among the states who have authored the text and with those who read it. This is a thoroughly consensual, deliberative community: the words of the Preamble emphasize the conscious act of agreement by the member states ("The States . . . , Bearing in Mind . . . , Considering . . . , Being of the Opinion . . . , Have Agreed . . . "). The union of nations is the result of careful consideration and express agreement. It is a creation and a construct, the result of human choice.

Finally, the Preamble makes clear that the Sales Convention is concerned about the union among the member states and that it contemplates that this union must exist beyond the text itself. The nations are united not merely as author and audience of this document; they have actual relations with one another in the world. The purpose of the Convention is to promote economic and political cooperation among people on an international scale:

The States Parties to this Convention,

Bearing in Mind the broad objectives of the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among the 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,

Have Agreed⁴²

The purpose of the Convention, as set forth in this passage, is to contribute to a new economic order, to promote friendly relations among the states, and to encourage the development of international trade. The relationship among the states who have joined and will join in this Convention exists not merely in the writing and reading of the Convention,

⁴² *Id.* The Preamble was drafted at the 1980 Conference and it was adopted without significant debate. See *Report of the Drafting Committee*, U.N. Doc. A/CONF.97/17, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 154; *Summary Records of the 10th Plenary Meeting*, paras. 4-10, U.N. Doc. A/CONF.97/SR.10, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 219-20. The style of the Preamble is a familiar one in United Nations documents. The use of this form and the lack of dispute reflects the broad acceptance of the principles underlying the Preamble, as discussed in the text.

but also in the world beyond the text, as an actual political and economic community.⁴³ By emphasizing the agreement between states, the Preamble makes clear that the textual community of the Convention itself is of interest and use only to those who would join the political community it promotes. To one who is not a member of that political community or would not at least consider joining it, the text has nothing to say.

Other parts of the Convention reinforce the consensual nature of the community it promotes. At the time of ratification a state may declare that it will only join in a part of the Convention. A state may refuse, for example, to be bound either by Part II, on the formation of contracts, or by Part III, on the rights and obligations of parties. Only Part I, regarding the sphere of application and other general provisions, and Part IV, the final provisions on ratification and related matters, are mandatory.⁴⁴ Similarly, a contracting state with two or more territorial units may declare that only one or more of these units has joined the Convention.⁴⁵ In addition, two or more contracting states may declare that the Convention does not apply to contracts between parties who have their places of business in those states.⁴⁶ Indeed, a final article provides that a member state may denounce the Convention or a part of it simply by giving formal notification to the United Nations.⁴⁷

Individual traders also may choose not to join in the common language and values of the Convention. Article 6 provides that parties may exclude the application of the Convention or any part of it.⁴⁸ Under this provision, individuals are free to structure their relationships according to their choice, even if this means straying from the terms of the Convention.⁴⁹

⁴³ For a discussion of a similar dynamic in Edmund Burke's *REFLECTIONS ON THE REVOLUTION*, see J. WHITE, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 11, at 193.

⁴⁴ Sales Convention, art. 92. On the various ratification choices available to contracting states, see Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in PARKER SCHOOL ESSAYS, *supra* note 4, at 1-1, 1-39 to 1-48.

⁴⁵ Sales Convention, art. 93.

⁴⁶ *Id.* art. 94. See also *id.* art. 90 (preserving existing agreements between states). But see *id.* art. 99(3) (parties to the Hague Uniform Laws must denounce them upon ratification of the Sales Convention).

⁴⁷ *Id.* art. 101.

⁴⁸ *Id.* art. 6: "The parties may exclude the application of this Sales Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Article 12, the one exception, involves domestic requirements of written evidence of a contract. See *infra* notes 183-87 and accompanying text.

⁴⁹ See generally J. HONNOLD, *supra* note 4, at 105-12; P. SCHLECHTRIEM, *supra* note 4, at 35-36. Although Article 6 does not state whether an exclusion of the Sales Convention or a part of it may be implicit as well as explicit in the parties agreement, Article 8(3) allows consideration of both express and implied understandings, and this approach would give effect to implied agreements regarding application of the Convention. See J. HONNOLD, *supra* note 4, at 106; Winship, *supra* note

The community created and promoted by the Convention, then, is thoroughly consensual and artificial. This approach is quite different from the view that human communities are natural, organic, or inevitable. "We the People," of the United States Constitution, for example, are treated in that text as united before and without their consent. Similarly, one of the problems addressed by the Declaration of Independence was how a community bound together by nature and history could ever split into two separate nations.⁵⁰ The rhetorical problem for the Declaration of Independence was to establish the possibility of deliberation and choice in the composition of nations. The Declaration argues for this possibility in its opening passage with the idea that one group of people may "dissolve the political bonds which have connected them with another" and may then "assume the separate and equal station to which the Laws of Nature and of Nature's God entitle them."⁵¹ The Sales Convention, in contrast, begins with the assumption that a community may be created by choice and agreement.

In addition to defining the consensual character of the international community, the Convention suggests that the principal motive for joining this community will be self-interest. The Preamble does refer to the desirability of promoting friendly relations among states, but its main focus is on the possibility of encouraging international trade, to the benefit of both industrialized and the developing nations.⁵²

The consensual community formed by the Sales Convention is

44, at 1-34 to 1-35. *But see* Dore & DeFranco, *supra* note 4, at 53 ("the Convention does not seem to recognize implied agreements which exclude application of the Convention"); Bonell, *supra* note 4, at 4-5 (arguing that unsophisticated traders may be unfairly surprised by fine print excluding the Convention).

⁵⁰ Gary Wills has explored this aspect of the Declaration of Independence and Jefferson's original draft at length in G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 76-90, 284-92, 307-19 (1978). *See also* J. WHITE, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 11, at 231-40.

⁵¹ The opening passage of the Declaration of Independence is as follows:

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

One of the most significant causes thereafter mentioned is the following:

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation

See also G. WILLS, *supra* note 50, at 312-16 (discussion of Jefferson's emphasis on this idea in his original draft of the Declaration).

⁵² For a full quotation of the preamble, see *supra* text accompanying note 42.

therefore quite delicate: its bonds are vulnerable to the whim of human choice and self-interest. Yet it is not surprising that this community is conceived as consensual and motivated by self-interest because the Convention must use the language and ideas of our time and there exists no convincing language of internationalism. We perceive ourselves in nation-states, cultures, ideological alliances, races, and religions. Although claims of international unity are often made,⁵³ they are not convincing to many people and therefore cannot provide a common basis for action.⁵⁴ More convincing is the language of peaceful coexistence and limited co-operation, and the Sales Convention uses this language in its Preamble.

In addition, the Convention carefully limits its scope. The community defined by the Convention is limited to those concerned with or engaged in the international sale of goods⁵⁵ and who are transferring goods for some commercial use, typically either for resale or for use in manufacturing. By defining its scope according to this activity, the Convention acknowledges that individual members of the community it defines will function as members of the community only part of their time. Individual traders, lawyers, judges, and arbiters engage in many activities other than international trade, and these activities are unaffected by the Sales Convention. These individuals, like most people, are members of several communities, defined in part by their numerous activities and in part by their cultures, citizenship, ethnicity, religion, and the like.

The Convention defines its audience as persons engaged in or concerned with the international sale of goods, but it excludes people who purchase goods for "personal, family, or household use."⁵⁶ This exclusion of consumers is important to the language and values of the Convention. Numerous legal systems have distinguished consumer transactions

⁵³ Perhaps the most powerful claims of world unity are made by various religions.

⁵⁴ See generally David, *supra* note 13, at 4 (observing that the idea of a worldwide legal system is universally dismissed).

⁵⁵ Sales Convention, art. 1(1)(a). Article 1(1)(b) also provides that the Sales Convention will apply in other cases when the rules of private international law require application of the law of a contracting state. Yet states are permitted to opt out of this provision under article 95, and the United States has done so. Telephone conversation with the United Nations Treaty Office, April 15, 1988. Cf. *id.* art. 1(2) (contract will not be treated as international if this fact did not appear from the contract or the other dealing between the parties; "one cannot be misled" into the Sales Convention). See generally Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538 (1988).

⁵⁶ Article 2 excludes sales "of 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." One consequence of the second half of this passage is that the seller cannot be misled out of the Sales Convention. Also excluded are sales by auction, by authority of law, of investment securities, of negotiable instruments and the like, of ships and aircraft, and of electricity. Sales Convention, art. 2.

from other contracts based upon the existence of inequities in information, sophistication, and other resources generally lumped under the concept of "bargaining power."⁵⁷ By excluding consumers, the Convention avoids the issues addressed by domestic laws of consumer protection.

It is a separate question, of course, whether inequality between contracting parties ought to be relevant in disputes involving professional traders. Although the Convention does not explicitly recognize inequality as a significant issue, some of its provisions may best be understood as indirectly raising this issue.⁵⁸ The tension created by these provisions provides an important opportunity for development of the Convention's language. It provokes discussion of how we are to understand the notion of equality among people with different resources and levels of commercial sophistication. This tension will be explored at greater length in Section III below.⁵⁹

The general character of the community to be created by the Convention is further defined through its detailed provisions. The contracting states are conceived as equal; no hierarchy of power or authority is recognized. The states are acknowledged as autonomous, each pursuing important domestic policies that outweigh common international interests. The Convention preserves domestic law on the validity of contracts, for example.⁶⁰ This preserves each member state's autonomous policies regarding fraud, duress, unconscionability, contractual capacity, and mistake.⁶¹ Member states are seen as capable of acting upon moral concerns and not merely out of self-interest. By acknowledging these important interests, the Convention both frees itself from the obli-

⁵⁷ See generally COMMERCIAL AND CONSUMER LAW FROM AN INTERNATIONAL PERSPECTIVE 337-408 (D. King ed. 1986)(essays on comparative consumer protection law).

⁵⁸ See *infra* notes 190-205 and accompanying text.

⁵⁹ *Id.*

⁶⁰

"This 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. In particular, except as expressly provided in this Convention, it is not concerned with: (a) the validity of the contract of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."

Sales Convention, art. 4 (emphasis added).

⁶¹ Although the precise definition of "validity" is unclear, most agree that it includes at least the topics listed in the text. See J. HONNOLD, *supra* note 4, at 96-98; P. SCHLECHTRIEM, *supra* note 4, at 32; Rosett, *supra* note 4, at 280; Winship, *supra* note 44, at 1-37. At least one commentator has argued that it includes much more. Comment, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863, 871-74 (1985). Cf. UNIDROIT Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods: Critical Analysis, UNIDROIT: Etude XVI/B, Doc.22, U.D.P. 1972, reprinted in [1977] 8 Y.B.U.N. COMM'N ON INT'L TRADE L. 104, U.N. Doc. A/CN.9/SER.A/1977 (covering mistake, fraud, and duress).

gation to address these issues and incorporates a sense of mutual respect and independence among the state parties to the Convention.⁶²

Similarly, individual traders, lawyers, courts, and arbiters are implicitly portrayed as independent, yet morally responsible. The Convention allows individuals to exclude or modify almost all of its provisions. Parties are free to define the details of their own trade relationships. In the absence of agreement, however, individuals are assumed to be motivated by a desire for economic gain while recognizing that most transactions will result in mutual benefit.⁶³ In addition, individual traders are assumed to operate in good faith,⁶⁴ to communicate with one another throughout the transaction,⁶⁵ and to bear some limited responsibility for protecting each other's interests.⁶⁶

B. A Common Language

Having limited and defined the character of an international community engaged in international trade, the Convention's next task is to provide for a language in which this community can conceive relationships and resolve conflicts between its members. This is done by articulating a set of issues or topics and a set of terms in which to discuss these topics. In order to be coherent and persuasive, moreover, these topics and terms are selected and organized to reflect a set of values that operate throughout the language. These values provide a basis for coherent understanding of the Convention's language because they suggest a common origin for the topics and terms and they indicate an ordering or structure to these elements. By the same token, ambiguities in and conflicts between the Convention's underlying values provide opportunities for further growth.

⁶² In this way the preservation of domestic law on issues of validity can be distinguished from the preservation of domestic law on the less significant issues of specific performance (Article 28) and the requirement of a writing (Article 12). For further discussion of these issues, see *infra* notes 173-87 and accompanying text.

⁶³ The Sales Convention assumes voluntary agreement of the parties, and embraces a freedom of contract model. See J. HONNOLD, *supra* note 4, at 47-48.

⁶⁴ Sales Convention, art. 7 ("In the interpretation of the Convention, regard is to be had to . . . the observance of good faith in international trade").

⁶⁵ See *id.* art. 19(2) (contemplating negotiation over differences in terms); *id.* art. 21 (formation rules regarding late communications conditional on further correspondence); *id.* art. 26 (requiring notification of avoidance of the contract); *id.* art. 32 (seller must give buyer notice regarding shipping arrangements and must provide information buyer may need to purchase insurance); *id.* art. 39 (buyer must give notice of defect within a reasonable time); *id.* art. 72 (party intending to avoid the contract must give the other side reasonable notice to allow for adequate assurance that the contract will be performed).

⁶⁶ See *id.* arts. 85-88 (party in control of the goods may have a duty to preserve them or resell them for the benefit of the other party).

The Convention organizes discussion of contractual relationships according to the three general topics of formation, obligations of the parties, and remedies for breach. This structure orients debate towards questions related to voluntary consent, promissory responsibility, and governmental coercion. In establishing these topics the Convention draws upon a general conception of contractual relationships that is well recognized in many national legal systems. Furthermore, the Convention frequently uses words that refer to specific events that are typical of international transactions.⁶⁷

Within each of these three general topics, the detailed provisions of the Convention establish significant issues and the terms in which these can be discussed. For consideration of contract formation, for example, the provisions in Part II of the Convention focus attention on whether the parties communicated a definite proposal and indicated their willingness to make a commitment to one another. The Convention uses various terms to discuss these matters, including "offer," "acceptance," "rejection," "sufficiently definite," "effective," "revocation," "reliance," and others.⁶⁸ Similarly, Part III of the Convention establishes significant topics regarding the rights and obligations of the parties and articulates the terms in which these topics are conceived.⁶⁹

One difficulty for the Sales Convention is the fact that there is no single international language. Instead, the Convention was approved in six official languages: Arabic, Chinese, English, French, Russian, and Spanish.⁷⁰ The first difficulty with this solution is simply the practical problem of producing adequate translations without error.⁷¹ Another se-

⁶⁷ The rules on risk of loss provide good examples of the use of event-oriented words. *See, e.g., id.* art. 67 ("the risk passes to the buyer when the goods are handed over to the first carrier Nevertheless, the risk does not pass to the buyer until the goods are *clearly identified* to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.")(emphasis added); *id.* art. 69 ("the risk passes to the buyer *when he takes over the goods*")(emphasis added). *See generally* J. HONNOLD, *supra* note 4, at 114 (discussing the use of "plain language that refers to things and events for which there are words of common content in the various languages."); Roth, *supra* note 6, at 296 (discussing the decision to draft rules "based on overt commercial events").

⁶⁸ Sales Convention, arts. 14-24.

⁶⁹ *See id.* art. 25 ("A breach of contract committed by one of the parties is fundamental"); *id.* art. 30 ("The seller must deliver the goods, hand over any documents relating to them and transfer property in the goods"); *id.* art. 50 ("If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price").

⁷⁰ *Final Act, supra* note 30.

⁷¹ The preparation of the official versions was a coordinated effort of United Nations language specialists, the UNCITRAL Working Groups, and the Drafting Committee of the 1980 Vienna Conference. *See* J. HONNOLD, *supra* note 4, at 54-55. The difficulty of translation and reproduction is illustrated by a typographical error in the Argentinean version of the Sales Convention which resulted in the omission of a negative from the opening passage of Article 2. *See* CONVENCIÓN DE

rious difficulty is that the six languages do not translate with exact precision, so that the words used in one language will carry implications different from those in another.⁷² The terms "offer" and "acceptance" provide powerful examples of this. In English these words carry a rich heritage of legal doctrine, and their equivalents in the Western European languages have similar depth.⁷³ Yet the translations of these words used in the other official versions, such as Chinese and Arabic, do not carry similar implications.⁷⁴ Although attention was given to all official language versions of the Convention, debate tended to focus on legal concepts drawn from either the civil law or the common law traditions.⁷⁵ As a result, most of the words and concepts used in the Convention are Anglo-American or Western European in origin.⁷⁶

A second important problem for the Convention in its articulation of significant terms was whether to include detailed definitions of these terms.⁷⁷ The eventual choice was to include some definitions as needed within the text of particular provisions,⁷⁸ but not to have separate definitions of key terms as a separate part of the Convention.⁷⁹ This choice of drafting style has rhetorical significance. Detailed definitional sections encourage the reader to understand the words in a technical and limited way, and to perceive the text as self-contained. The reader is led to interpret such a text as limited to its specifically defined terms and to disre-

LAS NACIONES UNIDAS SOBRE LOS CONTRATOS DE COMPRACENTA INTERNACIONAL DE MERCADERIAS ART. 2, BOLETIN OFICIAL, Mar. 3, 1983, at 3, Ley 22.765. This would have resulted in the inclusion of consumer sales and other transactions explicitly excluded by the official versions of the Convention. Although this error occurred only in the Argentinean version and not in the official Spanish version of the Sales Convention, it does demonstrate one problem of multilingual texts. Cf. *Convencion de las Naciones Unidas Sobre los Contratos de Compreventa Internacional de Mercaderias*, U.N. Doc. A/CONF.97/18, Anexo I (official Spanish language version of the Convention).

⁷² See generally H. GUTTERIDGE, *COMPARATIVE LAW* 121-22 (2d ed. 1949)(discussing the difficulties with multi-lingual treaties).

⁷³ See generally *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* (R. Schlesinger ed. 1968).

⁷⁴ See generally *id.*

⁷⁵ See Eörsi, *Problems of Unifying the Law on Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 315-23 (1979) [hereinafter *Problems*].

⁷⁶ This issue is discussed at greater length *infra* notes 146-50 and accompanying text.

⁷⁷ See Farnsworth, *Problems of the Unification of Sales from the Standpoint of the Common Law Countries*, in *Problems of Unification*, *supra* note 4, at 7 [hereinafter *Problems from the Standpoint of the Common Law Countries*].

⁷⁸ See Sales Convention, art. 14 ("A proposal for concluding a contract addressed to one or more specific persons constitutes an offer . . ."); *id.* art. 18 ("A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."); *id.* art. 25 ("A breach of contract committed by one of the parties is fundamental . . .").

⁷⁹ This style is more reflective of civil code drafting style than common law statutory practice. See Farnsworth, *Problems from the Standpoint of the Common Law Countries*, *supra* note 77, at 7. This style contrasts with the detailed definitional system in the U.C.C.

gard its broader implications or implicit significance. Informal, contextual definitions, in contrast, encourage a broad and conversational interpretation of the words of the text, leading to greater depth and complexity in the interpretation of individual provisions. The use of informally defined words may initiate discussion of what ideas are held in common and what are not, a discovery process that might otherwise be foreclosed. The international trade community will grow and shape itself in such conversations.

Finally, underlying the topics selected and the terms established by the Sales Convention is a set of values that give coherence to the language of the Convention. Perhaps the most fundamental of these is the conception of actors under the Convention as different in background and circumstances, yet entitled to equal treatment and respect. This value is expressly mentioned in the Preamble ("international trade on the basis of equality and mutual benefit," "take into account the different social, economic and legal systems"), and it informs many other provisions.⁸⁰ Article 8(2), for example, provides that statements made by a party should be interpreted according to "the understanding that a reasonable person *of the same kind as the other party*" would have in the circumstances.⁸¹ Implicit in this rule is the idea that parties to an international contract differ in their cultural, social, and legal backgrounds, and that each should be sensitive to these differences. During the negotiation of a contract, each party should attempt to learn the circumstances of the other, and should take note of his or her understanding of the contract.⁸²

This commitment to equal treatment and respect for the different cultural, social, and legal backgrounds of international traders is consis-

⁸⁰ Professor Hellner has observed that the structure of the remedial provisions reflects the commitment to equality in its formal parallelism between buyer and seller. Hellner, *supra* note 7, at 85 ("the symmetry in the rules on the remedies for the seller's and the buyer's breach of contract is probably prompted by a desire of being impartial to the seller's and the buyer's sides But it is of course a grave mistake to believe that impartiality is achieved by having identical rules for both parties' obligations and for the breaches of both sides.").

⁸¹ Sales Convention, art. 8. This rule applies only if the party's subjective intention cannot be established. See *id.* art. 8(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.")

⁸² Similar language appears in Article 25, in the discussion of "fundamental breach." A breach is fundamental if it substantially deprives the other party of the benefit of the contract unless this result was not foreseen by the breaching party or it could not have been foreseen by "a reasonable person of the same kind in the same circumstances." Sales Convention, art. 25. Under this provision, the particular background and circumstances of the breaching party must be considered by a court or arbiter in evaluating whether a breach is fundamental. See generally Clausson, *supra* note 5, at 95-97 (discussing the definition of fundamental breach).

tent with and reinforces other important values underlying the Convention. These values are discussed in further detail below, but include: 1) contractual commitment; 2) forthright communication between parties; 3) good faith and trust; and 4) the forgiveness of human error. These values structure the Convention's choice of topics and terms while providing a fundamental coherence to the language of international trade.

First, the value of contractual commitment is evident throughout the Convention. Explicit statements of this value appear in Articles 30 and 53, which provide that both seller and buyer must comply with the terms of the contract.⁸³ Similarly, remedial provisions grant each party a right to require performance of the contract or to recover damages for the failure to perform any obligation under the contract.⁸⁴ A person is relieved of his or her contractual commitments only if the failure to perform was caused by some impediment beyond his or her control⁸⁵ or if it was caused by some act or omission of the other party.⁸⁶

A related value in the Convention is the protection of expectations created in one person by the other party's words and behavior. As mentioned above, Article 8 provides that statements and conduct should be interpreted according to the reasonable understanding of the other party.⁸⁷ Similarly, a party may be bound by conduct indicating that he or she has agreed to a contract modification even if another term of the contract purports to require written evidence of modifications.⁸⁸ Yet it is significant that the value of protecting reasonable expectations is subservient to the value of contractual commitment. The principal source of obligation recognized in the language of the Convention is the voluntary contractual promise. Reliance is protected only when there has been a promissory undertaking. The ranking is demonstrated in Article 19,

⁸³ "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, *as required by the contract* and this Convention." Sales Convention, art. 30 (emphasis added). "The Buyer must pay the price for the goods and take delivery of them *as required by the contract* and this Convention." *Id.* art. 53 (emphasis added); *see also id.* art. 54 ("The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract . . .").

⁸⁴ *See id.* arts. 45, 46, 61, 62. *But see id.* art. 74 (damages limited to those foreseeable at the time of the conclusion of the contract).

⁸⁵ *Id.* art. 79. This exemption applies only to damages, not to the right to performance. *Id.* art. 79(5).

⁸⁶ *Id.* art. 80.

⁸⁷ *See supra* notes 81-82 and accompanying text.

⁸⁸ Sales Convention, art. 29(2) ("However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."). *See also id.* art. 16(2) ("an offer cannot be revoked: . . . if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.").

concerning the so-called battle of the forms. Under this provision, unlike section 2-207 of the U.C.C.,⁸⁹ an expression of acceptance that contains additions or other modifications does not operate to conclude a contract unless the changes are immaterial and the offeror does not object promptly.⁹⁰ A person is not bound unless he or she clearly has agreed to all of the significant terms of the contract.⁹¹ Similarly, a proposal will not be treated as the basis for contractual obligation unless it is "sufficiently definite," i.e. unless it indicates the goods and fixes or makes provision for the quantity and price.⁹² In each case, a definite undertaking must exist before contractual obligations will attach.

The second value, that of forthright communication, informs many of the provisions in Parts II and III of the Convention. Parties are expected to communicate with one another regarding all important aspects of the contract.⁹³ During the formation of a contract, the parties are expected to communicate their intentions in a way that is comprehensible to the other side.⁹⁴ During performance, parties are obligated to inform each other regarding the details of their performances,⁹⁵ and to give prompt notice of any delay or inability to perform.⁹⁶ Similarly, the buyer is required to give prompt notice of any defect in the goods delivered,⁹⁷

⁸⁹ U.C.C. § 2-207.

⁹⁰ Sales Convention, art. 19:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

See Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 26 (1984); Comment, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms*, 21 COLUM. J. TRANSNAT'L L. 529 (1983); Comment, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107 (1984).

⁹¹ See also Sales Convention, art. 18 (no agreement by silence).

⁹² *Id.* art. 14. United States lawyers will notice that this test is more demanding than the comparable provision in the Uniform Commercial Code, section 2-204(3): "Even though one or more of the terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

⁹³ See generally J. HONNOLD, *supra* note 4, at 131, 160 n.2.

⁹⁴ Sales Convention, arts. 8, 18, 21.

⁹⁵ *Id.* arts. 32, 43, 65, 68.

⁹⁶ *Id.* art. 79(4) ("The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform.").

⁹⁷ *Id.* art. 39. For further discussion of this provision see *infra* notes 190-205 and accompanying text.

and the parties generally are required to communicate their intentions regarding breach, cure, cancellation of the contract, and the like.⁹⁸

Underlying the value of forthright communication is the even more fundamental value of good faith. The notion of good faith in international trade is explicitly stated as a principle of the Convention in Article 7.⁹⁹ In addition, this value is implied throughout the Convention's detailed provisions. It is reflected in the commitment to honest communication between the parties and in provisions requiring the parties to act with some concern for each other's interests.¹⁰⁰ The best example of this are the provisions on preservation of goods and the mitigation of damages.¹⁰¹ If the buyer has wrongfully failed to take delivery or the seller has made a defective delivery, the party in possession of the goods is obligated to preserve them for the benefit of the other.¹⁰² This duty may include arranging for storage or resale of the goods.¹⁰³ If the person in possession does resell the goods, he or she must account to the other party for the proceeds.¹⁰⁴ Similarly, Article 77 provides that a party injured by the other's breach must take reasonable steps to mitigate his or her damages.¹⁰⁵

⁹⁸ Sales Convention, art. 26 (declaration of avoidance of the contract); *id.* art. 46(3) (request for repair); *id.* arts. 47, 63 (communication regarding an additional period of time for performance); *id.* art. 48 (communication regarding the seller's right to cure); *id.* art. 71 (communication regarding suspension of performance); *id.* art. 72 (assurance of performance); *id.* art. 88 (notice regarding resale of perishable goods).

⁹⁹ *Id.* art. 7 ("In the interpretation of this Convention, regard is to be had . . . to the need to promote . . . the observance of good faith in international trade."). This provision was subjected to much debate at the 1980 Vienna Conference. Opinions ranged from the idea that good faith should be viewed as a fundamental obligation arising from each contract to support for the final version of Article 7 (which states good faith as a principle of the Sales Convention) to the view that good faith should not be explicitly mentioned in any provision. For debate on the good faith provision, see *Summary Records of Meetings of the First Committee*, (5th mtg.) U.N. Doc. A/CONF.97/C.1/SR.5, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 254, 257-59 [hereinafter *Summary Records First Committee, 5th mtg.*]. See also *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 14, 17-18 [hereinafter *Commentary on the Draft Convention*]; J. HONNOLD, *supra* note 4, at 123-24; Eörsi, *General Principles*, in PARKER SCHOOL ESSAYS, *supra* note 4, at 2-1, 2-6 to 2-8 [hereinafter *Principles*]; Eörsi, *Problems*, *supra* note 75, at 313-15.

¹⁰⁰ See generally J. HONNOLD, *supra* note 4, at 125 (suggesting a connection between good faith and forthright communication).

¹⁰¹ Sales Convention, arts. 85-88.

¹⁰² The obligation to preserve goods also would apply if the buyer has failed to pay the price where the contract requires concurrent payment and delivery. Sales Convention, art. 85.

¹⁰³ *Id.* arts. 85-88. Storage costs and other expenses can be recovered from the breaching party. *Id.* arts. 85, 87, 88.

¹⁰⁴ *Id.* art. 88(3). He or she may retain out of the proceeds an amount equal to the reasonable expenses. *Id.*

¹⁰⁵ *Id.* art. 77. The duty to mitigate applies only to a claim for damages. A failure to mitigate would not bar an action for specific performance, although a failure to mitigate may constitute a

The value of good faith concern for the other party is also seen in provisions regarding errors in transmission, performance of the contract, and the exercise of rights in the event of breach. The recipient of an erroneously transmitted acceptance, notice of defect, or other such communication is obligated either to notify the other side of the error or to treat it as effective.¹⁰⁶ The recipients in these cases must consider the interests and expectations of the other party; in most cases the sender will not know of the error in transmission, and the recipient must take account of this.

Similarly, the seller must consider the interests of the buyer when arranging for carriage and insurance¹⁰⁷ or when specifying the goods to be sold.¹⁰⁸ When there has been some defect in the goods delivered or in documents relating to the goods, the seller normally has a right to cure the defect;¹⁰⁹ yet in exercising this right, the seller must consider any inconvenience or extra expense to the buyer.¹¹⁰ In like fashion, a buyer must consider the interests of the seller by promptly inspecting the goods and giving notice of any defect.¹¹¹ The buyer normally has a right to require the repair of any defect, yet in exercising this right, the buyer must consider whether this would entail excessive difficulty or expense for the seller.¹¹²

Another important value underlying the issues and terms established by the Convention is one that might be called the forgiveness of human error. Although contractual commitments are treated as serious

breach of good faith. See generally Ziegel, *supra* note 6, at 9-1, 9-41 to 9-42 (discussing the limited application of article 77); J. HONNOLD, *supra* note 4, at 302, 420-21 (arguing that Article 77 may apply to actions for the price or for specific performance or that the good faith principle of Article 7 may sometimes precludes specific performance).

¹⁰⁶ Sales Convention, arts. 21(2), 27.

¹⁰⁷ *Id.* art. 32(1), (2). If the seller is not bound to provide insurance, then he or she must give the buyer all available necessary information. *Id.* art. 32(3).

¹⁰⁸ *Id.* art. 65. If the seller chooses the goods, he must think of the buyer's needs and then must give the buyer a chance to object. *Id.* art. 65(2).

¹⁰⁹ *Id.* art. 34 (seller may cure defect in the documents); *id.* art. 37 (seller may cure defect in the goods); *id.* art. 48 (seller may cure any failure to perform).

¹¹⁰ *Id.* arts. 34, 37, 48.

¹¹¹ *Id.* art. 38 (buyer must examine the goods "within as short a period as possible"); *id.* art. 39 (buyer must give seller notice of defect "within a reasonable time"). See also *id.* art. 40 (seller is not entitled to rely on buyer's failure to give notice of defect if the seller knew or should have known of the defect); *id.* art. 44 (buyer may reduce the price despite a failure to give notice if he had a reasonable excuse).

¹¹² "If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances." Sales Convention, art. 46(3). Presumably the question whether repair is unreasonable with depend upon the difficulty and expense of repair as compared with the significance of the defect. See Enderlein, *Rights and Obligations of the Seller Under the U.N. Convention on Contracts for the International Sale of Goods*, in DUBROVNIK LECTURES, *supra* note 4, at 133, 191-92.

and breaches of obligation result in enforceable liability, the Convention makes clear that small mistakes should be forgiven and parties should try to avoid overly strict application of contractual requirements. Thus one party may not terminate the contract on account of the other's breach unless the breach was so serious as to substantially deprive the former of the expected benefit of the contract.¹¹³ Similarly, a breaching party must be allowed to cure the defect unless this causes unreasonable inconvenience or expense to the other party.¹¹⁴ Even apart from the right to cure, the Convention explicitly allows an aggrieved party to extend the time for performance.¹¹⁵ A buyer is relieved of the normal obligation to give prompt notice of any defect if he or she has a reasonable excuse for the failure,¹¹⁶ errors in transmission are forgiven,¹¹⁷ and even a serious breach of contract may be excused if it was beyond the control of the breaching party.¹¹⁸

In addition, the incorporation of established practices and trade usage adds flexibility and the forgiveness of minor error to contractual arrangements. The Convention provides that parties to an international contract are bound by any practices that they have established in prior dealings and by any trade usages that are regularly followed in similar contracts.¹¹⁹ Usages and practices frequently recognize that small mistakes and defects are inevitable and should not be a basis for contract termination or other liability.¹²⁰

¹¹³ Sales Convention, arts. 25, 49, 64. *See also id.* art. 71 (suspension of performance). A less substantial breach may be the basis for avoidance of the contract, however, if the aggrieved party has extended an additional period of time for performance and the breaching party still has failed to perform. *Id.* arts. 49, 64.

¹¹⁴ *Id.* arts. 34, 37. *See also id.* art. 72 ("If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.").

¹¹⁵ *Id.* arts. 47, 63.

¹¹⁶ *Id.* art. 44.

¹¹⁷ *Id.* arts. 27, 21.

¹¹⁸ *Id.* art. 77. This excuse applies only to a claim for damages, however, and the other party still may claim a right to substitute performance. *See* P. SCHLECHTRIEM, *supra* note 4, at 63, 99; Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, in PARKER SCHOOL ESSAYS, *supra* note 4, at 5-1, 5-18 to 5-20; Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 241 (1979). It is also possible that even substitute performance may be so onerous that this would constitute bad faith and Article 7 would require an interpretation disallowing this result.

¹¹⁹ Sales Convention, art. 9:

1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. 2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

¹²⁰ A classic trade usage is one in the lumber industry: a contract calling for "2 x 4s" does not

These values, taken together, provide coherence to the language established by the Convention. There is, throughout, a sense of individual autonomy and serious promissory commitment, balanced by the need for honest communication, good faith, concern for others, and the forgiveness of innocent mistakes. This complex of values structures the particular issues emphasized by the Convention and gives a richness to the language that is essential to its ability to generate a sense of commonality among its readers and to serve as the medium for development of an ongoing community. If the Convention does have the potential to do these things, it is because of the persuasiveness and coherence of its underlying values.

C. Occasions for Discussion and Deliberation

A final element in the Convention's rhetorical system is the way it provides for future deliberation and decision. First, although some might hope for the establishment of an international court with jurisdiction over disputes arising under the Convention, this idea has never been a realistic possibility,¹²¹ and the implicit assumption is that the Convention will be applied by domestic courts and arbitral tribunals around the world.¹²² The risk that inconsistent interpretation could frustrate the goal of uniformity in the law was well understood by those working on the Convention.¹²³ The most frequent response to this concern was the hope that courts and arbiters applying the Convention would understand and respect the commitment to uniformity, and would thus interpret the text in light of its international character.¹²⁴ What is called for, in es-

require that every board be precisely two inches by four inches. Cf. *Michael Schiavone & Sons v. Securalloy Co.*, 312 F. Supp. 801 (D. Conn. 1970) (alleged trade usage that amount of steel specified in the contract represented an estimate only).

¹²¹ See David, *supra* note 13, at 4.

¹²² See *Progressive Development*, *supra* note 37, at 39-40.

¹²³ See Bonell, *supra* note 4, at 5-9; Farnsworth, *Problems from the Standpoint of the Common Law Countries*, *supra* note 77, at 9-10. The effort to ensure uniform interpretation of the Sales Convention and to inspire international discourse on issues raised by it are on-going. See, e.g., J. Honnold, *Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention* (1986) (report to the Twelfth Congress of the International Academy of Comparative Law, Sydney/Melbourne, Australia, August 1986).

¹²⁴ See, e.g., *Working Group on International Sale of Goods: Report of Work of Second Session*, U.N. Doc. A/CN.9/52 (1971), reprinted in [1971] 2 Y.B.U.N. COMM'N ON INT'L TRADE L. 50, 62, U.N. Doc. A/CN.9/SER.A/1971 [hereinafter 1971 *Second Session*]; *Summary Records First Committee, 5th mtg.*, *supra* note 99, at 254, 255. Other suggestions have been made for UNCITRAL to issue commentaries or advisory opinions interpreting the Sales Convention. See *Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods: Note by the Secretary-General*, U.N. Doc. A/CN.9/WG.2/WP.11, reprinted in [1972] 3 Y.B.U.N. COMM'N ON INT'L TRADE L. 69, 77, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *Comments and*

sence, is the development of a jurisprudence of international trade. This is the heart of the rhetorical aspiration that is the subject of this article. The success of the Convention directly depends on the achievement of this goal.

The dynamic for developing a jurisprudence of international trade is established in Article 7(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."¹²⁵ This section anticipates debate over the Convention in individual cases and directs tribunals to interpret the text with regard for its international character and the need for uniformity in application.¹²⁶ This dynamic adds an important dimension to interpretation and discussion of the text. In addition to the other values giving coherence to the Convention, Article 7 injects loyalty to an international community as a crucial element in the interpretation of the detailed provisions of the text.

Article 7 envisions deliberation in which courts will treat the decisions of other national courts as significant to their own interpretation of the Convention.¹²⁷ This provision requires courts to pursue uniformity in the interpretation of the Convention despite that fact that once ratified, the Convention becomes a part of the domestic law of each member state. Article 7 requires, in other words, that domestic courts make decisions under the Convention not merely as a part of their own law, but

Proposals Articles 1-17; Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat 4-7, U.N. Doc. A/CN.9/267 (1985). Such materials would provide additional occasions for discussion and debate under the Sales Convention. One opportunity that was not provided was some formal mechanism for amendment of the Sales Convention. See Rosett, *supra* note 4, at 294; Winship, *supra* note 44, at 1-1, 1-49.

¹²⁵ Sales Convention, art. 7(1). Article 7(2) requires that these principles also be used to fill gaps in the Sales Convention. See *infra* notes 133-43 and accompanying text. Similar provisions appear in other UNCITRAL conventions. Uniformity will also be encouraged through use of the Draft Commentary to the 1978 draft prepared by the Secretariat. *Commentary on the Draft Convention*, *supra* note 99. This can be a useful common source for discussion even though it was not officially adopted by the 1980 Vienna Convention. See Winship, *A Note on the Commentary of the 1980 Vienna Convention*, 18 INT'L LAW. 37 (1984).

¹²⁶ See J. HONNOLD, *supra* note 4, at 113-23; Bergsten, *The Law of Sales in Comparative Law*, in LES VENTES INTERNATIONALES DE MARCHANDISES 3, 4-6 (Y. Guyon ed. 1981); Eörsi, *Provisions*, *supra* note 99, at 2-1, 2-3 to 2-6; Reczei, *The Rules of the Convention Relating to its Field of Application and to its Interpretation*, in *Problems of Unification*, *supra* note 4, at 53, 91-93.

¹²⁷ See 1971 *Second Session*, *supra* note 124, at 50, 62, ("It was also suggested that the provision would contribute to uniformity by encouraging recourse to foreign materials, in the form of studies and court decisions, in construing the Law."). Proposals have been made to disseminate judicial and arbitral decisions interpreting the Sales Convention through UNCITRAL or some other organ of the United Nations. See, e.g., *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat*, U.N. Doc. A/CN.9/267 (1985).

also as a text that is shared by an international community and is the basis for international deliberation and discussion.

In addition to deliberation by courts and arbiters, the Convention anticipates discussion and debate by individual traders and their representatives, both legal and lay. The remedial provisions, especially, contemplate communication between the parties regarding their rights and obligations following a breach. Articles 46 and 62 provide each side with the right to performance.¹²⁸ The drafters thought that explicit recognition of such a right was important even if it was not eventually enforced by injunctive order.¹²⁹ The existence of the right should be a factor in the parties post-breach negotiations, as will the seller's right to cure, the duty to mitigate loss, and the obligation to preserve goods.¹³⁰ All of these provisions suggest the likelihood of discussion and negotiation between the parties. And as the parties use the language of the Convention to discuss and define their mutual rights and obligations, they will in turn enrich the language through its application in specific circumstances.

IV. RHETORICAL PROBLEMS

The rhetorical challenge of drafting a text for the creation and promotion of a unified law of international commerce was enormous. International trade is currently subject to numerous domestic legal systems that differ radically in their jurisprudential heritage and in their political and cultural contexts. Unification of the law inevitably entails changes in the legal outlook of courts, scholars, practitioners, and traders throughout the world. In the place of national commercial law, the Sales Convention must provide a new way to discuss and deliberate upon the complex relationships of international trade.

The Convention has met this challenge by defining a community of

¹²⁸ Sales Convention, art. 46 ("The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."); *id.* art. 62 ("The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.").

¹²⁹ See, e.g., *Report of the Working Group on the International Sales of Goods on Work of its Sixth Session*, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 49, 56, U.N. Doc. A/CN.9/SER.A/1975 [hereinafter *Sixth Session*]; *Report of the Secretary-General: Pending Questions with Respect to Revised Text of a Uniform Law on International Sale of Goods*, Annex III, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 88, 101, U.N. Doc. A/CN.9/SER.A/1975 [hereinafter *Secretary-General: Pending Questions*]; *Summary Records of the Meetings of the First Committee*, (18th mtg.) U.N. Doc. A/CONF.97/C.1/SR.18, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 328, 330-32 [hereinafter *Summary Records First Committee, 18th mtg.*].

¹³⁰ Post-breach negotiations will also be affected by the buyer's right to reduce the price, the right to extend time for performance, and the duty to give notice of avoidance of the contract. Sales Convention, arts. 45-52.

people united in the activity and concern of international trade, and by establishing a language for use by this community, including a set of topics and the terms in which these topics can be discussed. As this system was elaborated, numerous difficulties arose and were resolved through debate and compromise—itself a rhetorical process.¹³¹ In many cases, these resolutions improved the Convention's rhetorical system by enriching its language or by strengthening the coherence and persuasive force of its underlying values. Yet the final version of the Convention contains several significant unresolved rhetorical difficulties, some of which were actually aggravated by surface compromise.

The most significant of these remaining rhetorical problems are raised by the Convention's treatment of gaps in the law, by its use of Western legal concepts and international trade usages, by the deference given to the narrow views of some states, by the recognition of genuine differences among peoples of the world, and finally by the essential precariousness of the community contemplated by the Convention. These problems will be discussed in the following sections.

A. Problems of Integrity: Gaps in the Law

The first rhetorical problem is the persistent tension in the Sales Convention as to whether it should function as a limited set of technical rules or as the basis for an autonomous legal and rhetorical system in which the text must be interpreted and supplemented as part of broader set of considerations. These two fundamentally different views of the Convention's function recurred throughout its drafting history, despite a prevailing broad consensus that the Convention should function as an autonomous legal system. UNCITRAL includes representatives of thirty-eight nations, some of which are separated by deep conflict and suspicion. Understandably, these divisions occasionally surfaced and representatives occasionally responded by calling for formal and limited rules that could be mechanically applied. This approach effectively denies the possibility of a common language and shared deliberation among the member states.

The tension between these two views is most clearly evident in the debate over Article 7 of the Convention. As discussed above, subsection (1) of this Article provides that the Convention should be interpreted

¹³¹ Professor Honnold has stressed the importance of discussion to the work of UNCITRAL, leading to consensus without the need for formal votes. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 210-11 (1979). For one participant's wry view of this process, see Eörsi, *Unifying the Law (A Play in One Act, With a Song)*, 25 AM. J. COMP. L. 658 (1977).

with regard for its international character and for the need to promote uniformity in its application and the observance of good faith in international trade.¹³² This section clearly directs that the Convention should be interpreted as a complex legal text, in which each detailed provision is to be understood as a part of a larger analytic system, given coherence by an underlying set of values.

This approach was opposed by some representatives on the ground that "it was difficult and dangerous to attempt to solve problems by reference to unstated general principles."¹³³ This view suggested, in essence, that the Convention should be limited to a set of clear rules that could be applied simply; matters not clearly addressed by the rules would be governed by national law. The system thus envisioned would lack the complexity of an active jurisprudence. There would be no need for debate and deliberation, and the language of the Convention could be treated in a mechanical, simplistic way. There would be no need, in other words, to develop an international rhetorical community.

To the extent that there exists distrust and suspicion among nations, this view has appeal. Fortunately, however, a spirit of commonality prevailed within UNCITRAL, and the Convention reflects a strong commitment to the view that it should function as a more complex legal system. Nevertheless, compromise with the more limited view can be seen in subsection 2 of Article 7:¹³⁴

(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.¹³⁵

This subsection was adopted in response to arguments that some clear guidance should be given to courts on how to treat gaps in the Convention. Those arguing for a limited view of the Convention asserted that any gap in the uniform law should be filled with the national law of the underlying contract, according to conventions of current international private law. Those supporting the contrary view that the Convention should serve as a foundation for the development of an international jurisprudence argued that gaps should be filled as they would under a civil

¹³² See *supra* notes 124-26 and accompanying text.

¹³³ 1971 Second Session, *supra* note 124, at 50, 62 para. 134.

¹³⁴ The more limited view of the Sales Convention is reflected in some sections that provide very detailed and precise direction, as if to avoid misunderstanding and preclude discussion. See, e.g., Sales Convention, art. 20 (specifying the effect of official holidays on the time for acceptance); *id.* art. 56 (price is to be calculated on net weight in the case of doubt); *id.* art. 84 (interest on refunds).

¹³⁵ *Id.* art. 7(2).

code or under an independent common law system, by extrapolation from the general principles of the Convention, including notions of justice, fairness, efficiency and the like.¹³⁶

The debate over this provision reflects the dispute over the Convention's rhetorical aspirations and possibilities. The final draft approved by UNCITRAL in 1978 provided simply that "[i]n the interpretation and application of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."¹³⁷ At the 1980 Vienna Conference, Bulgaria and Czechoslovakia proposed amendments specifying that gaps in the Convention would be filled by national law.¹³⁸ Italy proposed an alternative amendment according to which gaps would be filled "in conformity with the general principles on which the Convention is based or, in the absence of such principles, by *taking account* of the national law of the parties."¹³⁹

The Bulgarian representative, Mr. Gorbanov, explained his view that national law should govern gaps in the Convention. Experience with the 1964 Uniform Law had shown "that it was a costly illusion to imagine that all gaps in an international legal instrument could be filled solely by means of the interpretation of its own provisions and without the help of private international law"¹⁴⁰ Mr. Kopac, the Czechoslovakian representative, agreed with this and added that "The questions to be settled were bound to be concrete in character and it was totally unrealistic

¹³⁶ See, e.g., *Comments and Proposals Articles 1-17*, *supra* note 124, at 49; *1971 Second Session*, *supra* note 124, at 50, 62; *Sixth Session*, *supra* note 129, at 49, 54; *Text of Comments and Proposals of Representatives on Revised Text of a Uniform Law on International Sale of Goods as Approved of Deferred for Further Consideration*, Annex II, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 70, 78, U.N. Doc. A/CN.9/SER.A/1975; *Secretary-General: Pending Questions*, *supra* note 129, at 88, 96, 112; *Commentary on Draft Convention on International Sale of Goods*, Annex II, U.N. Doc. A/CN.9/116 (1976), reprinted in [1976] 7 Y.B.U.N. COMM'N ON INT'L TRADE L. 96, 103, U.N. Doc. A/CN.9/SER.A/1975; *Summary Records First Committee, 5th mtg.*, *supra* note 99, at 254, 255-57.

¹³⁷ *Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law*, art. 6, U.N. Doc. A/CONF.97/5 (1979), reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 5 [hereinafter *1979 Draft Convention*].

¹³⁸ See *Report of the First Committee*, U.N. Doc. A/CONF.97/11 (1980), reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 82, 87 [hereinafter *Report of the First Committee*]. Bulgaria's amendment referred to the law of the seller's place of business, Czechoslovakia's referred to the law applicable under private international law. *Id.* Mr. Gorbanov, the representative from Bulgaria, explained the reference to the law of the seller's place of business as a predictable alternative to ambiguous choice of law rules. *Summary Records First Committee, 5th mtg.*, *supra* note 99, at 254, 255. In defining what would be considered as a gap in the Sales Convention, Bulgaria's amendment referred to questions not settled by paragraph 1, and Czechoslovakia's referred to questions not settled in the Sales Convention. *Report of the First Committee, supra*, at 82, 87.

¹³⁹ *Report of the First Committee, supra* note 138, at 82, 87 (emphasis added).

¹⁴⁰ *Summary Records First Committee, 5th mtg.*, *supra* note 99, at 254, 255.

to try and solve them with the aid of general principles."¹⁴¹

The Italian representative, Mr. Bonell, responded that his proposal was "diametrically opposed"¹⁴² to both the Bulgarian and Czechoslovakian proposals:

[A]ccording to them, when a judge found a gap in the Convention he would have to refer to the relevant rule of conflict to determine the applicable national law. Such an approach doubtless had the advantage of being backed by long tradition. Nevertheless his delegation would prefer the opposite approach . . . according to which the *Convention, it being a step towards the creation of a new jus commune*, should be interpreted. If necessary its gaps should be filled not on the basis of the rules taken from a particular national law, but on the basis of those principles and criteria which reflected the letter and spirit of the Convention itself.¹⁴³

Mr. Bonell explained that his proposal mentioned the national laws of the parties only to aid the courts in interpreting and developing the international law of the Convention.¹⁴⁴ Whenever possible, the court should find guidance in the common ground between various national laws, but these laws should not be binding in the development of an international law under the Convention.

At issue in this debate was the jurisprudential potential of the Convention. Would it be possible to use the Convention as a basis upon which to build an autonomous law of international trade, or would this uniform law always be so precarious and limited so as to require supplementation by national law? Although many different views were represented throughout the drafting history, enough apprehension was expressed at the Vienna Conference to convince a majority of the delegates to adopt subsection (2) of Article 7, requiring application of national law to resolve some questions concerning matters governed by the Convention.

The adoption of Article 7(2) was unfortunate from a rhetorical perspective because it compromised the integrity of the Convention as an autonomous basis for deliberation. If issues arising under the Convention are not to be completely resolved according to the topics, terms, and values established by the Convention itself, then the significance of this language is diminished. Indeed, subsection 2 admits the possibility that there actually are not general principles underlying the Convention, or at least that the principles are not comprehensive. The constitutive function of the language—to create and promote a community which uses it

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Id.* at 256.

to discuss the activity of international trade—is undercut because the language is not sufficient to resolve issues relevant to that activity.

Yet this provision need not finally undermine the rhetorical thrust of the Convention. Subsection 2 itself provides that national law should not be invoked unless there is an “absence” of general principles from which to develop a solution to questions left unanswered by the express terms of the Convention. As discussed above, the Convention is structured upon a complex set of values that suggest numerous principles adequate to resolution of questions arising under the Convention. In addition, Article 7(1) of the Convention encourages a process of discussion and deliberation that will allow discovery of principles beyond those elaborated in the text itself.¹⁴⁵ As courts and others engage in such discourse, the need to resort to national law will be less and less felt.

B. Problems of Universality: Western Legal Concepts, Usages Imposed by Powerful Traders

There is no doubt that the Sales Convention is less dependent upon the conceptual tools of any one legal system than were the 1964 Hague Uniform Laws and other unification attempts.¹⁴⁶ It is also true that many non-Western legal systems have been heavily influenced by Anglo-American or Western European jurisprudence¹⁴⁷ and that *lex mercatoria*, the unofficial international law merchant, was developed during the primacy of Western European-oriented trade.¹⁴⁸ Nevertheless, it is also true that the Sales Convention draws heavily from Anglo-American and European legal concepts and systems.¹⁴⁹

This characteristic of the Convention raises two potential problems. First is the possibility that some will perceive the Convention and its international community as dominated by the industrialized Western nations. Such a perception might discourage some nations from ratifying

¹⁴⁵ See notes 125-27 and accompanying text. Such discourse is also encouraged by the informality of many of the Sales Convention's definitions, as discussed *supra* notes 77-79 and accompanying text, and by numerous provisions embodying general values that invite elaboration. See *supra* notes 80-119 and accompanying text.

¹⁴⁶ See J. HONNOLD, *supra* note 4, at 67-70.

¹⁴⁷ See generally R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 69-73, 419 (1978); David, Sawyer, Szabo, Afchar, Derrett, Iyer, Noda & M'Baye, *The Different Conceptions of the Law*, in 2 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* ch. 1 (1975).

¹⁴⁸ See generally L. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983).

¹⁴⁹ The substantial difference between the Sales Convention and the uniform law among several socialist states is discussed in Comment, *The Convention on Contracts for the International Sale of Goods and the General Conditions for the Sale of Goods*, 12 GA. J. INT'L & COMP. L. 451 (1982). See also Farnsworth, *Problems from the Standpoint of the Common Law Countries*, *supra* note 77 (discussing the similarities and differences between the Sales Convention and the common law).

the Convention. In addition, this perception may influence interpretation and deliberation under the Convention by focusing attention on conflicts between the industrialized West and the rest of the world. If this is seen as a legitimate topic of concern under the Convention, then courts and others may be persuaded to interpret the text in light of these conflicts.

The second problem threatened by the Sales Convention's use of Anglo-American and Western European legal terms is that courts and others may rely too heavily on these legal systems in interpreting the Convention.¹⁵⁰ For example, even though the Convention's formation provisions use the terms "offer" and "acceptance," it would be a mistake to assume that these words carry the detailed meanings given to them in Anglo-American or Western European law. Dependence on Western law in the interpretation of the Convention would undermine its rhetorical integrity in a way similar to that discussed earlier. The language of the Convention has force only as it can be used to resolve disputes involving contracts for the international sale of goods. If the terms of the Convention are interpreted to incorporate Western domestic law, then the focus of deliberation must shift to that domestic law. This shift would substantially undermine the Convention's claim to internationalism and uniformity.

Some representatives saw a similar danger of Western domination in the Convention's treatment of trade usage. Influenced by the weight given to commercial practices by the international law merchant, some UNCITRAL members argued that trade usage should be recognized as an important element in international commerce.¹⁵¹ This view favored inclusion of a provision specifying that the parties are bound by accepted trade usage.¹⁵²

¹⁵⁰ Cf. Hellner, *supra* note 7, at 79 ("Since the Convention is intended to work impartially, . . . no preference can be given to any particular legal system in its interpretation."); Herber, *The Rules of the Convention Relating to the Buyer's Remedies in Cases of Breach of Contract*, in *Problems of Unification*, *supra* note 4, at 104, 106 (1980): The Sales Convention "must be interpreted out of itself, not in connexion with a national or regional legal concept. And it should therefore be able to be looked at by all countries as a result of their common endeavour to create something new and appropriate to modern world trade, so that parties can entrust their case to it without surrendering to unknown foreign law.")

¹⁵¹ See generally, J. HONNOLD, *supra* note 4, at 144 (noting the importance of trade usage to the Sales Convention); Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the U.N. (1980) Sales Convention*, in DUBROVNIK LECTURES, *supra* note 4, at 55 (discussing the law merchant and the Sales Convention).

¹⁵² The 1964 Uniform Law on International Sales includes a section on trade usages. See 1964 Uniform Law on International Sales, *supra* note 18, art. 9. Article 9 of the Sales Convention differs from this in significant respects. See Comment, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619 (1984).

This suggestion was very controversial.¹⁵³ Opponents argued first that trade usage, if binding, would function as an independent source of law and should not be given prominence over the terms of the Convention itself.¹⁵⁴ In addition, several representatives objected that international trade usage was established during a period of dominance by traders in the western industrialized nations and therefore should not be given weight under the Convention.¹⁵⁵

In the view of Mexico, the subordination of the Uniform Laws to normative and interpretative usages and practices could result in the imposition of unfair usages or inequitable practices . . . which in standard contracts were usually laid down by the economically stronger party to the detriment of the weaker party

. . . [t]he Union of Soviet Socialist Republics expressed a similar view. . . . Usages were often devices established by monopolies and it would hence be wrong to recognize their priority over the law.¹⁵⁶

. . . .

[One] view considered usages as a means of imposing the will of the stronger party on the weaker. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them.¹⁵⁷

Both objections raised important issues regarding the significance of trade usage within the language of the Convention. If trade usage is considered to be an independent source of law, then its recognition seriously undermines the integrity of the Convention. Moreover, if trade usage is

¹⁵³ See Eörsi, *A Propos*, *supra* note 4, at 342; Farnsworth, *Developing International Trade Law*, *supra* note 4, at 465-66.

¹⁵⁴ See, e.g., *Analysis of Replies and Comments by Governments on Hague Conventions of 1964: Report of the Secretary-General*, U.N. Doc. A/CN.9/31, reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 159, 169, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *Analysis of Replies and Comments on 1964 Hague Conventions*]; *Sixth Session*, *supra* note 129, at 52. *Pending Questions: Secretary General*, *supra* note 129, at 93. 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 1, at 71, 73.

¹⁵⁵ These objections were pressed especially by the socialist countries. See Eörsi, *A Propos*, *supra* note 4, at 342; Farnsworth, *Developing International Trade Law*, *supra* note 4, at 465. Some representatives also objected that trade usage was too vague and difficult to prove. See, e.g., *Summary Records of the Meetings of the First Committee*, (6th mtg.) U.N. Doc. A/CONF.97/C.1/SR.6, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 259, 263 [hereinafter *Summary Records First Committee 6th mtg.*].

¹⁵⁶ *Analysis of Replies and Comments on 1964 Hague Conventions*, *supra* note 154, at 169. See also *Summary Records First Committee, 6th mtg.*, *supra* note 155, at 169. (Mr. Kopac of Czechoslovakia stated: "It should not be forgotten also that the buyers and sellers from some countries, particularly those from the developing countries, had not participated in the establishment of usages and would yet be bound by them, even if those usages were contrary to the Convention.").

¹⁵⁷ *Sixth Session*, *supra* note 129, at 52.

viewed as a manifestation of domination by merchants from the industrialized West, then deference to it would belie the Convention's claim to equality and mutual respect among the member states.

These objections prompted debate over the Sales Convention's trade usage provision that persisted throughout the drafting history. The final version of Article 9 evolved as both a partial answer to the objections and as a compromise with them.¹⁵⁸ Proponents argued that trade usage is not an independent source of law, but rather that parties normally expect regular trade practices to be followed and therefore that trade usage is an important part of the unspoken, implied agreement of the parties. If this is true, then parties should be bound by trade usage as an actual part of their contract.¹⁵⁹ This conception overcame the first major objection, and Article 9 was written to emphasize the agreement of the parties as the core of the obligation to follow trade usage and accepted practices.¹⁶⁰ As a corollary, Article 9 provides that parties are not bound to follow trade usage if they so agree.¹⁶¹ Yet subsection 2 of Article 9 does provide that parties are considered to have implicitly agreed to widely known usages of which the parties ought to have known.¹⁶² Under this formulation, a party could be bound by a usage of which he was not actually aware, if it were found that he should have known of it. This aspect of the provision was of great concern to representatives of the developing nations, whose merchants typically are new to international trade and might not know of established usage. This concern in turn revived the second major objection to the use of trade usage: traditional trade usage has been developed without the participation of the developing nations and reflects the interests of powerful traders at the expense of weak traders.

Debate on this issue was reopened at the Vienna Conference by an amendment submitted by China to the effect that only "reasonable" us-

¹⁵⁸ See *Summary Records First Committee, 6th mtg.*, *supra* note 155, at 263. (Mr. Kopac, Czechoslovakia, "was well aware that Article 9 was regarded as being the result of a compromise.").

¹⁵⁹ *Secretary-General: Pending Questions*, *supra* note 129, at 94 ("consideration might be given to making more explicit the justification for recourse to custom: the expectation that the other party will perform in the manner that is customary in the trade.").

¹⁶⁰ Sales Convention, art. 9:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. This was unchanged from 1978 to final version.

See 1979 *Draft Convention*, *supra* note 137, art. 8, at 178, 179.

¹⁶¹ Sales Convention, art. 9.

¹⁶² *Id.*

ages be made binding,¹⁶³ and by a Czechoslovakian suggestion that a usage may be binding only if it "is not contrary to this Convention."¹⁶⁴ The importance of this issue was reflected in the serious remarks made during these debates:

Mr. Blagojevic (Yugoslavia) explained that he had [supported] the Chinese amendment since, in his view, it should constitute a step towards the recognition of usages established with the consent of all peoples, whereas commercial usages to date had been formed by a restricted group of countries only whose position did not express worldwide opinion.

. . . .

Mr. Kopac (Czechoslovakia) said that, although he was well aware that [A]rticle [9] was regarded as being the result of a compromise, he had grave doubts about its content and the principles it set forth. The principle was valid when it was a question of usages which the parties had agreed to apply in accordance with paragraph 1 of the article, but that was not the case when it was merely a question of usages to which they were considered to have impliedly referred, as set forth in paragraph 2 It should not be forgotten also that the buyers and sellers from some countries, particularly those from the developing countries, had not participated in the establishment of usages and would yet be bound by them, even if those usages were contrary to the Convention¹⁶⁵

The concern expressed by these delegates goes to the heart of the Convention's claim to establish equal treatment and mutual respect. If the Convention requires merchants from the developing nations to comply with usages of which they are unaware and which serve the interests of merchants from the industrialized nations, then the Convention truly operates as an instrument of continued domination. Moreover, if usages are perceived as serving the interests of some merchants at the expense of others, the Convention's claim of equal treatment is called into question.

The Chinese and Czechoslovakian amendments were rejected in relatively close votes.¹⁶⁶ Opponents of these amendments argued first that issues of the validity of usages was left to domestic law under Article 4 and second that respect for the parties right to determine the terms of their contract required that the usages to which they had agreed should be given effect even if they conflict with other provisions of the Convention.¹⁶⁷ These arguments meet part of the objections raised by propo-

¹⁶³ *Report of the First Committee*, *supra* note 138, at 89.

¹⁶⁴ *Id.*

¹⁶⁵ *Summary Records First Committee*, 6th mtg., *supra* note 155, at 263.

¹⁶⁶ The Chinese amendment was rejected by a vote of 9 votes in favor, 17 against, and 15 abstentions; the vote on the Czechoslovakian amendment is not reported, but the debate indicated a similar breakdown in support. *Report of the First Committee*, *supra* note 138, at 89; *Summary Records First Committee*, 6th mtg., *supra* note 155, at 262-64.

¹⁶⁷ *See supra* note 166.

nents of the amendments, yet concern for merchants from the developing nations and the fear that trade usages work to the advantage of more powerful traders remain.¹⁶⁸

As these concerns persist, they complicate the development of a coherent jurisprudence under the Convention. They require that the language of the Convention address the issues of inequality and domination in some direct fashion. Courts, arbiters, and others concerned with the activity of international trade must find some way to discuss these issues without challenging the basic integrity and fairness of the Convention. One possibility would be to focus on the validity of usages under domestic law, as preserved in Article 4, and to develop standards of fairness and equality as an aspect of validity. This approach was suggested in the course of debate over Article 9, and Article 4 was written expressly to preserve national law on the validity of usages as well as of other elements of the contract.¹⁶⁹ Yet this solution tends to undermine the rhetorical strength of the Convention by diverting this important issue to domestic law. If, instead, the topic can be discussed and explored within the language of the Convention itself, then the international community may strengthen its bonds through significant discourse. Concern with issues of inequality and domination are critical to an international community. The Convention's contribution to formation of such a community will be significantly greater if it can allow for discussion of these matters.

Such discourse is possible under the current text of the Convention if Article 9 is interpreted to allow individual consideration of whether newcomers to a trade should be bound by its usages and whether usages that operate to the distinct advantage of powerful traders should be binding. Article 9(2) provides that parties are considered to have incorporated a usage impliedly only if they knew or "ought to have known" of it. In United States law, all people who engage in a particular trade are treated as though they "ought to have known" of its usages, even if they

¹⁶⁸ See Enderlein, *Problems of the Unification of Sales Law from the Standpoint of the Socialist Countries*, in *Problems of Unification*, *supra* note 4, at 26, 32-33 ("unification of law must not sanction customs developed by capitalist monopolies vis-a-vis weaker parties, specially in developing countries. On the other hand, unification of law can take into account, as its corner stone such international usages and customs which can rightly be considered as democratic and equitable."); Date-Bah, *Problems from the Standpoint of the Developing Countries*, *supra* note 22, at 39, 46; Goldstajn, *supra* note 151, at 77-85, 95-99.

¹⁶⁹ See Sales Convention, art. 4 (*quoted supra* note 60); see also *Analysis of Replies and Comments on 1964 Hague Conventions*, *supra* note 154, at 169 ("The representative of Norway expressed the view that under article 8 of the Uniform Law the validity of usages was left to national law."); *Summary Records First Committee, 6th mtg.*, *supra* note 155, at 262.

are newcomers to the trade.¹⁷⁰ During debate over Article 9, the International Chamber of Commerce argued for a similar rule under the Convention,¹⁷¹ but no explicit mention of newcomers was included in the text. The rhetorical analysis suggested above indicates that Article 9 should be interpreted to allow discussion of whether newcomers and others who lack experience or sophistication in international trade "ought to have known" of its usages.

In addition, interpretation of Article 9 with regard to promoting the observance of good faith in international trade, as mandated by Article 7,¹⁷² suggests that discussion should focus on whether a particular trade usage operates to the advantage of powerful traders. Article 9 should be interpreted to say that a usage perpetuating domination by the powerful threatens the spirit of good faith in international trade and therefore is not impliedly incorporated into contracts under Article 9(2).

The foregoing interpretation of Article 9 will reclaim for the Convention the critical issue of inequality and domination in international trade. If this is done, the community will have a significant opportunity to explore and develop a common understanding of these important elements in international relations.

C. Problems of Character: Petty Values of Member States and Inequality Among Traders

The language constructed and promoted by the Sales Convention provides the tools for discussion and deliberation within an international community. The language defines significant topics and the terms with which these topics can be discussed. These topics and terms in turn define a set of coherent values upon which the community is based and define the ways in which the character of members of the community may be perceived. Together these elements form a rich language capable of ordering the complexity of human activity.

Incoherence within or among these elements weakens the fabric of

¹⁷⁰ See Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981). But see U.S. ex rel. Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978)(newcomer to the trade was not bound by usages of which it was unaware); Flower City Painting Contractors, Inc. v. Gumina Constr., 591 F.2d 162 (2d Cir. 1979)(newly formed, minority-owned business was not bound by trade usages).

¹⁷¹ *Report of the Secretary-General: Analysis of Comments by Governments and International Organizations on Draft Convention on International Sale of Goods as Adopted by the Working Group on International Sale of Goods*, U.N. Doc. A/CN.9/126, reprinted in [1977] 8 Y.B.U.N. COMM'N ON INT'L TRADE L. 142, 148, U.N. Doc. A/CN.9/SER.A/1977 ("ICC concludes that the essence of any rule as to usages is that the newcomer in the trade should not be able to plead his ignorance of the usages as a defence.") [hereinafter *Report of the Secretary-General: Analysis of Comments*].

¹⁷² Sales Convention, art. 7(1)(quoted *supra* note 125).

the Convention's language and undercuts its constitutive force. At the same time, conflicts and inconsistencies present positive opportunities for elaboration and development of the rhetorical community. Conflicts of this kind occur in the Convention's definitions both of member states and individual traders.

With respect to member states, some parts of the Convention are explicable only as petty exertions of power or nationalistic identity, thus undercutting the general principle of member state autonomy and equality. They tend, instead, to portray member states as petty and narrowly nationalistic. Article 28, for example, reflects the insistence of some common law countries, particularly the United States and the United Kingdom, that the Convention allow courts to apply domestic law regarding the remedy of specific performance, for no other reason than the traditional common law approach to this remedy conflicts with the Convention's remedial provisions.¹⁷³ In brief, the Convention provides that each party has a right to performance of the contract,¹⁷⁴ an approach similar to that in most civil law and socialist legal systems.¹⁷⁵ Representatives from common law countries argued that this approach was inefficient and unduly burdensome, but this view was rejected by a majority of the delegates.¹⁷⁶ Delegates from the United States and the United Kingdom continued to object, however, and they eventually won the concession providing that a court "is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale"¹⁷⁷

The only rationale for this broad provision is that the common law

¹⁷³ Sales Convention, art. 28 ("If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."). See generally Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Sales Convention*, WASH. L. REV. (forthcoming 1988).

¹⁷⁴ See *id.* arts. 46, 62.

¹⁷⁵ See generally Treitel, *Remedies for Breach of Contract*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 16 (1976).

¹⁷⁶ See *Summary Records First Committee, 18th mtg.*, *supra* note 129, at 328, 330-32. A general section on specific performance included in the 1978 UNCITRAL draft provided that a court was not bound to order specific performance if it "could not" do so under its own law. *1971 Draft Convention*, *supra* note 137, art. 26, at 5, 7. The section was designed to avoid overburdening those few nations without any form of injunctive procedure. See *Commentary on the Draft Convention*, *supra* note 99, art. 26 ("In other legal systems courts are not authorized to order certain 82 forms of specific performance and those states could not be expected to alter fundamental principles of their judicial procedure in order to bring this Convention into force."). See generally Farnsworth, *Problems from the Standpoint of the Common Law Countries*, *supra* note 77, at 13-15 (recounting the objections to the original version of Article 28 raised by the common law countries).

¹⁷⁷ Sales Convention, art. 28. See *Report of the First Committee*, *supra* note 138, at 100.

countries wanted it.¹⁷⁸ Their substantive objections to the right to performance were rejected by a majority of the members of UNCITRAL and by a majority of the delegates to the 1980 Vienna Conference. Even though some common law courts view specific performance as administratively burdensome and economically inefficient,¹⁷⁹ this is not a sufficient reason to subvert the goal of uniformity. Certainly it would be possible to have a system in which common law courts would order specific performance more readily in international transactions than in domestic ones. This would both preserve the preference against specific performance for domestic contracts and further the goal of uniformity in international sales law.

One result of Article 28 will be to complicate of post-breach negotiations between parties due to uncertainty over the right to performance.¹⁸⁰ Moreover, since Article 28 makes the availability of specific performance dependent on the law of the forum, parties will be encouraged to forum-shop for a national court system that will or will not grant specific performance.¹⁸¹ In addition, Article 28 weakens the rhetorical thrust of the Convention because it removes from international discourse important questions regarding the right to performance. Without Article 28, the Convention would present the opportunity for discovery and elaboration of numerous points of agreement regarding the propriety of coerced performance. This is a topic ripe for international discussion because, as commentators have observed, the differences among various legal systems' treatment of specific relief mask many important similarities.¹⁸² Yet under Article 28, this issue is removed from international discussion, and domestic differences are reinforced.

Finally, Article 28 attenuates the rhetorical structure of the Convention because it tends to portray the member states as petty, nationalistic, and capable of wielding inequitable influence. Happily, few other provisions suggest this characterization. The only other one of significance is Article 12, which provides that a contracting state may preserve its stat-

¹⁷⁸ See generally Ziegel, *supra* note 6, at 9-9 to 9-11; Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW. 79, 96-97 (1984).

¹⁷⁹ There is some question whether common law courts actually are as restrictive in the use of specific performance as the articulated doctrine would suggest. See generally Axelrod, *Specific Performance of Contracts for Sales of Goods: Expansion of Retrenchment in the 1980s*, 7 VERMONT L. REV. 249 (1982)(reviewing evidence on both sides of the question).

¹⁸⁰ On the effect of rules regarding specific performance on negotiations between the parties, see Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

¹⁸¹ See Gonzalez, *supra* note 178, at 98; Naon, *supra* note 6, at 107.

¹⁸² See, e.g., Drobniig, *General Principles of Contract Law*, in DUBROVNIK LECTURES, *supra* note 4, at 305, 319-22 (criticizing Article 28 for its failure to allow reconciliation on this issue); Treitel, *supra* note 175, at 173; Zeigel, *supra* note 105, at 9-9 to 9-10.

ute of frauds despite the Convention's general rule that no writing is required for contract formation or modification.¹⁸³ Article 12 was adopted at the insistence of the socialist countries, particularly the Union of Soviet Socialist Republics.¹⁸⁴ Representatives from these countries argued that documentation is of great practical importance in the enforcement of international contracts and the Convention ought to defer to domestic law on this issue.¹⁸⁵ This suggestion was not supported by a majority of the UNCITRAL working group,¹⁸⁶ yet the Soviet representatives continued to press for express preservation of official writing requirements, and the First Committee finally approved Article 12.¹⁸⁷

Article 28 should be interpreted narrowly, to retain for international discourse as many significant issues as possible and to deemphasize the assertion of privilege by individual states. Article 28 provides merely that a court "is not bound" to order specific performance unless it would do so under domestic law. A court may still go beyond domestic law and use the language and values of the Convention to decide specific performance cases.¹⁸⁸ In a case involving the international sale of computer hardware, for example, a court in the United States might decide that the purposes of the Convention will best be served by ordering specific performance by the seller even though this remedy would not have been granted under section 2-716 of the U.C.C. In rendering such a decision,

¹⁸³ Any provision of article 11, 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Sales Convention, art. 12.

A Contracting State whose legislation requires contracts of sale to be concluded in or evidence by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Id. art 96.

¹⁸⁴ See Eörsi, *Principles*, *supra* note 99, at 2-31 to 2-33.

¹⁸⁵ See, e.g., *Analysis of Replies and Comments on 1964 Hague Conventions*, *supra* note 154, at 170; *Comments and Proposals Articles 1-17*, *supra* note 124, at 48; *Report of Secretary-General (Addendum): Pending Question with Respect to Revised Text of a Uniform Law on International Sale of Goods*, Annex IV, U.N. Doc. A/CN.9/100 (1975), reprinted in [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 110, 111-12, U.N. Doc. A/CN.9/SER.A/1975.

¹⁸⁶ *Sixth Session*, *supra* note 129, at 53-54 (no agreement reached on the question of a writing requirement).

¹⁸⁷ See 1971 *Draft Convention*, *supra* note 137. See also Eörsi, *Principles*, *supra* note 99, at 2-32. The United States eventually supported some deference to national law on the required form of a writing, apparently in an attempt to placate the Union of Soviet Socialist Republics. See *Report of Secretary-General: Analysis of Comments*, *supra* note 171, at 150.

¹⁸⁸ See Date-Bah, *supra* note 4, at 62.

the court could discuss the importance of the right to performance under the Convention and in international sales. This approach could recover for the Convention a clear conception of equity and mutual respect among member states.

The rhetorical problem regarding individual traders is similar to that concerning member states, also involving problems of coherent definition. Here the tension is between the Convention's overall commitment to the equality of individual traders and various specific provisions which suggest some inequality, at least in information and sophistication.

To understand this issue, one must note that the success of the Convention depends in large measure on its ability to establish and maintain fair and equal *treatment* for traders from all parts of the world. This is crucial both because the Convention is consensual in nature, and because there still exists a real fear of international economic domination and exploitation. The drafters of the Convention sought to establish the necessary fair and equal treatment by incorporating a standard of equality throughout the text. Thus the structure of the Convention sets up strict parallels between the rights and obligations of buyers and sellers and its detailed provisions carefully avoid any preference between the two. The rhetorical strategy is to assure equal treatment to traders of all nationalities by establishing equality between buyers and sellers in the Convention's language.¹⁸⁹

The problem with this strategy is that merchants in different parts of the world are not equal in their resources, access to information, and level of sophistication in international commerce. This reality inevitably led to some textual recognition of the differences between traders in the developing and industrialized states. This recognition creates a tension within the Convention's language of equality. Simple equality in the sense of blindly equal treatment is no longer possible. This tension presents an important opportunity for the elaboration of a more complex notion of equality within the international community.

The most controversial provisions recognizing some difference among traders are Articles 38 through 40 and Article 44, involving a buyer's obligation to notify the seller of any claimed defect in the

¹⁸⁹ Cf. *Debate in the Sixth Committee of the General Assembly on Agenda Item 88 (Progressive Development of the Law of International Trade): Excerpts from Summary Record*, reprinted in [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 45, 46, U.N. Doc. A/CN.9/SER.A/1970 (Mr. Potocny of Czechoslovakia observed that "Under the current international system of production and exchange of goods, the smooth flow of international commerce depended in large part on the maintenance of a balance between sellers and buyers; consequently, individual States had to assume—willingly or not—that their nationals would be sellers on one occasion and buyers on another.").

goods.¹⁹⁰ At the 1980 Vienna Conference, representatives from developing nations argued strenuously against a strict requirement of notification of defects.¹⁹¹ Behind these objections lay the concern that merchants from developing countries were unfairly burdened by notice requirements. These merchants tend to buy complex technical machinery in which defects are difficult to ascertain, especially because the purchasers often lack the technological expertise to conduct necessary inspections and tests.¹⁹² Moreover, purchasers in developing countries tend to be less experienced in the law and in commercial practices, and they may well be unaware of the duty to give prompt notice of defects.¹⁹³

This issue became quite controversial and created a division between the delegates from the industrialized and developing countries.¹⁹⁴ Representatives of the industrialized nations argued that sellers should be entitled to prompt notification of claimed defects in order to exercise their right to cure and to collect timely evidence regarding the claim.¹⁹⁵ These representatives also argued that the requirement is not unduly burdensome on buyers and that the requirement of timely notification is necessary to prevent speculation by buyers at the expense of their sellers.¹⁹⁶

The debate over notification of defects focused on three separate points. Mr. Date-Bah, from Ghana, first moved that the proposed requirement of notice "within a reasonable time after he has discovered it or ought to have discovered it" be deleted and that the only requirement

¹⁹⁰ Sales Convention, arts. 38-40, 44. See Date-Bah, *Problems from the Standpoint of the Developing Countries*, *supra* note 22, at 47-50; Patterson, *supra* note 4, at 283-94 (emphasizing the significant issues of domination and compromise in the controversy over Article 39).

¹⁹¹ See, e.g., *Summary Records of the Meetings of the First Committee*, (16th mtg.) U.N. Doc. A/CONF.97/C.1/SR.16, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 318, 320-23 [hereinafter *Summary Records First Committee, 16th mtg.*]; *Summary Records of the Meetings of the First Committee*, (17th mtg.) U.N. Doc. A/CONF.97/C.1/SR.17, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 323, 323-26 [hereinafter *Summary Records First Committee, 17th mtg.*]; *Summary Records of the Meetings of the First Committee*, (21st mtg.) U.N. Doc. A/CONF.97/C.1/SR.21, reprinted in U.N. OFFICIAL RECORDS, *supra* note 1, at 345, 345-50 [hereinafter *Summary Records First Committee, 21st mtg.*].

¹⁹² See Eörsi, *A Propos*, *supra* note 4, at 350; Patterson, *supra* note 4, at 289. Cf. *Commentary on the Draft Convention*, *supra* note 99, art. 36, para. 3 (reasonable examination may depend on the technical expertise available to the parties).

¹⁹³ See *Summary Records First Committee, 16th mtg.*, *supra* note 191, at 320 ("Mr. Date-Bah (Ghana) . . . The sanction contained in paragraph 1 was too draconian. Traders in jurisdictions which did not have a rule requiring notice to the seller might be unduly penalized . . ."); see also Date-Bah, *Problems for the Standpoint of the Developing Countries*, *supra* note 22, at 47-50; Eörsi, *A Propos*, *supra* note 4, at 350.

¹⁹⁴ See Eörsi, *A Propos*, *supra* note 4, at 350-51; Farnsworth, *Developing International Trade Law*, *supra* note 4, at 467; Patterson, *supra* note 4, at 289.

¹⁹⁵ See *Summary Records First Committee, 16th mtg.*, *supra* note 191, at 321-22. Mention was also made of the uncertainty to sellers of unknown outstanding claims. *Id.* at 321.

¹⁹⁶ *Id.* at 322.

be of notice within two years of delivery.¹⁹⁷ In the alternative, he proposed that rather than being an absolute bar to recovery, the failure to give notice within a reasonable time should be treated as a failure to mitigate loss, so that the seller could reduce liability by any loss resulting from the buyer's failure to give timely notice, but the buyer would retain a claim for the remaining damages.¹⁹⁸ Following debate on these proposals, the first was rejected and the second was withdrawn.¹⁹⁹ This precipitated a crisis at the Conference. Many feared that the failure to give some deference to this important concern might result in the developing nations refusing to ratify the Convention. The conception of a general equality of buyers and sellers simply was not enough. It was crucial that the text give some recognition to the differences between the situations of buyers in developing countries and those of buyers in the industrialized states. The developing nations, in effect, insisted that there be some way to talk about the special problems of merchants in their countries within the language of the Convention.²⁰⁰

After some maneuvering by the developing countries and others who feared defeat for the Convention, a joint proposal was submitted by delegates from Finland, Ghana, Nigeria, Pakistan, and Sweden that eventually became Articles 39 and 44 of the Sales Convention.²⁰¹ This proposal retained the requirement of notice within a reasonable time and the total bar of claims as the result of failure to give timely notice. It provided, however, that if the buyer had a reasonable excuse for failure to give timely notice, a claim for damages, excluding lost profits, could be made or the buyer could declare a reduction in the price under Article 50. The seller would reduce any such claim by losses resulting from the buyer's failure to give notice.²⁰² This proposal was obviously a compromise: it retained the core requirement of timely notice and the penalty of total bar, yet allowed of the circumstances of a buyer's failure to give notice to be considered and acknowledged the possibility of a "reasonable excuse" justifying the failure. Finally, it provided an economic disincentive to use of the "reasonable excuse" device by denying recovery for lost

¹⁹⁷ *Report of the First Committee, supra* note 138, at 107.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *Summary Records First Committee, 17th mtg., supra* note 191, at 323:

Mr. Hjernner (Sweden) said that during informal talks after the previous day's meeting he had come to realize the importance of the Ghanaian amendment for the Asian-African Legal Consultative Committee. Although he had made his own position on the question perfectly clear, he would not like to miss an opportunity of finding a solution to the problems raised by articles 37 and 38 which would be more satisfactory for delegations that were in the majority.

²⁰¹ *Report of the First Committee, supra* note 138, at 108-09.

²⁰² *Id.* See also *Summary Records First Committee, 21st mtg., supra* note 191, at 345-57.

profits even if a legitimate excuse was found.²⁰³

Most significantly for the Convention's rhetorical system, this compromise introduced into the text a consideration of differences in traders' circumstances. Under these provisions, it is appropriate to discuss differences in the technological expertise, material resources, and commercial sophistication of different merchants. This is a substantial deviation from the general principle of equal treatment that creates a tension within the Convention's rhetorical system. This, in turn, threatens incoherence because the focus on inequality in the notice provisions may suggest that other provisions requiring equal treatment are deceptive or unfair. Yet this apparent inconsistency prompts reconsideration of the meaning of equality within the international community. In interpreting these provisions and reconciling them with the general principle of equal treatment, decisionmakers will be able to develop a notion of international equality that goes beyond the simple refusal to acknowledge difference. In a case involving a sophisticated French manufacturing company and an illiterate Argentinean farmer, for example, a court might decide that the French company cannot expect the same promptness and precision of communication that it would expect of a more sophisticated trader. Such an approach is consistent with the Convention's commitment to respect legal, social, and economic differences.²⁰⁴ Debate over true equality thus may become a way of speaking about the significance of difference and the appropriate response of individuals in a world that is acutely aware of inequality.²⁰⁵

The Sale Convention's rhetorical strength may be greatly enhanced by this complexity. Yet this again emphasizes the ways in which the success of the Convention is dependent on future discussion and deliberation. The Convention has defined a community, its language, and the occasions for discussion; the success of this community will depend on the vigor of its discourse.

V. CONCLUSION—A PRECARIOUS COMMUNITY

Attention to the rhetorical aspirations of the Sales Convention has revealed a number of factors significant to its success and development. First, the unification of international trade law requires the creation of a

²⁰³ See J. HONNOLD, *supra* note 4, at 278-84; Patterson, *supra* note 4, at 292-94.

²⁰⁴ See *supra* notes 80-82 and accompanying text.

²⁰⁵ This issue recurs in discussion of international trade. See, e.g., Eörsi, *Contracts of Adhesion and the Weaker Party in International Trade Relations*, in NEW DIRECTIONS, *supra* note 13, at 155; Lando, *Unification of Commercial Law Between Societies at Equal and Different Levels of Industrial and Social Development*, in LEGAL ORGANIZATION OF COMMERCE AND ITS RELATION TO THE SOCIAL CONDITION (Symposium 1979).

community of people who consider themselves governed by a common legal system and it requires the establishment of a shared language in which legal deliberation can be conducted. Second, the Sales Convention defines and promotes such a community by creating a textual community between the state parties that are the Convention's authors and the states, traders, courts, lawyers, and others who make up its audience. It further promotes the functioning of this community by providing for discussion and deliberation beyond the text of the Convention itself. Finally, the textual community will remain lifeless without the activity of states which ratify and people who discuss and deliberate.

The community made possible by this text consists of those who participate by deliberate choice, and are, at least initially, motivated purely by self-interest. The community can thrive only insofar as it serves the self-interest of its members; the text relies on no deeper or more lasting bonds. There is thus a real possibility of failure for the Convention. It is possible that it will only be ratified by a few states or in only a limited part of the world. Even with wide acceptance, it is possible that the system of unified law will be short-lived, with states denouncing the Convention after a trial period, or by domestic courts interpreting the Convention in mechanical or isolated ways.

The likelihood of the Convention's success also depends in part on factors extraneous to the document itself. International conflict will certainly undermine efforts towards unification; increased cooperation among nations on issues of disarmament, international aid, cultural exchange, and the like will strengthen these efforts. Yet even with the most favorable conditions, the success of the Convention will depend in large part on the coherence and complexity of the common language it generates and on the vigor of the discourse it inspires.

Although some individual provisions lack clarity and some basic elements of the language remain ambiguous, the text of the Convention provides a comprehensive set of significant topics and terms, and a set of values that give coherence to the language. The critical question is how well courts, arbiters, lawyers, business persons, and scholars will interpret and elaborate these provisions. The Convention's language will lose its integrity if courts and arbiters interpret it according to their own domestic law. Similarly, courts may undermine the coherence of the Convention if they construe individual provisions without regard to the Convention's underlying values. To strengthen the Convention, courts and others must be sensitive not merely to the result in a single controversy or to the interpretation of an isolated provision. The rhetorical strength of the Convention, which derives from the complexity and com-

prehensiveness of its language and the coherence of its underlying values, should itself be an object of consideration, and judicial opinion must be guided by a desire to reinforce and enrich this structure. The critical issue for all people engaged with the Convention will be how they conceive of themselves—as members of a community who bear common responsibility or simply as a collection of individuals who seek minimum cooperation.