Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law

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I. INTRODUCTION: CONSENSUS, "DISSENSUS," AND CONTRACT

Under traditional notions of the nature of contract, binding "contractual" obligations come into being through manifestations of a corresponding common intent of the parties to a proposed transaction. The law then sanctions and gives value to this form of social ordering—upon satisfaction of certain requirements respecting form and content—by offering the power of the state in aid of the enforcement of those obligations.

The friction arises in identifying the contours of the transactors' common intent. Indeed, friction may be inherent in the very inquiry into shared intent itself, for the social institution of contract is part cooperative and part competitive in nature. In absence of a formal, final, integrated writing, it will thus be a rare case that the intent of the parties will correspond precisely. What is substantially more common in modern transactions is that the parties fail to reach an express agreement on all aspects of their relationship, but nonetheless acknowledge that they have concluded a binding deal. As a result of the flexibility and informality (or, sometimes,

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the complexity) of their relationship, the parties then proceed with the performance of the contemplated transaction and disregard the lack of agreement on the "details" previously proposed by one or both of them.

Traditional contract doctrine in the United States lacks an overarching conceptual device to capture these types of flexible and informal relationships. Indeed, the classical rules of contracting would in effect deny their existence. Under traditional notions, the parties to a proposed transaction do not establish *contractual* obligations as long as they continue to disagree over matters raised in the course of their negotiations. Even under the more accommodating approach of article 2 of the Uniform Commercial Code (U.C.C.), the debate has often centered not directly on the parties' actual intent, but instead on the narrow effect of their "forms" (hence, the "battle of the forms"). Much of recent contract law literature has discounted the process of agreement entirely. Instead, scholars have focused the analysis primarily on an identification of the appropriate substantive background law (the "default rules") to fill gaps in extant contractual relations.

All of this has tended to obscure what should be the threshold issue in addressing these more flexible and informal relationships: the role of the absence of a complete agreement of the parties in the creation *and* definition of contractual obligations *in the first instance.* Accepted contract doctrine in this country in fact lacks even the terminology to frame the analysis of this issue at the appropriate level of abstraction. In this Article, I discuss this common state of affairs in terms of a "dissensus" between the parties. This concept, which parallels terminology sometimes used by continental European scholars, broadly embraces both an affirmative disagreement and a passive lack of agreement between the parties. Of specific interest is the role of what I refer to below as a "partial dissensus," for the critical interpretive issue arises when the *dissensus* between the parties is overcome by a more powerful *consensus* between them that they have nonetheless concluded a binding deal.

It is difficult to overstate the significance of this issue in conceptualizing the formation process in modern contractual relationships. Advancements in communications technology—electronic data interchange, e-mail, the internet, telefax, and the like—have made it possible for the parties to a proposed transaction to identify in a concrete form all terms of potential interest to them and to transmit those terms with a convenience and rapidity unimaginable

even twenty short years ago. The result is that in a substantial share of modern transactions both parties will make reference to their standard proposed terms in one form or another before they proceed with performance. Commonly, however, the parties have neither the time nor the desire expressly to agree on all issues raised in this routine manner. As a result, very often legally non-essential, but nonetheless commercially significant matters—such as the seller's common proposal to exclude statutory warranties and to limit liability for consequential damages—will remain unresolved. Herein lies the heart of a partial dissensus.

The entry into force of the United Nations Convention on Contracts for the International Sale of Goods (U.N. Sales Convention or Convention or CISG) has presented contract scholars with a unique opportunity to revisit the role of a partial dissensus in the formation of contractual obligations. Indeed, for two related reasons the resolution of this issue under the U.N. Sales Convention will have particularly significant implications. First, the Convention broadly applies, to the exclusion of contract principles of national law, to all contracts for the international sale of goods between residents of states party to the Convention. The second reason relates to the decreasing relevance of this last prepositional phrase. Only nine years after its entry into force, the Convention's reach extends to commerce between states whose economies account for over sixty percent of all world trade—and the trend is decidedly toward a rapid increase in both the roster of contracting states and the relative significance of international over purely domestic trade (just as interstate displaced purely intrastate commerce in the maturing of the economy in the United States).

Unfortunately, there is a noteworthy absence of any detailed theoretical discussion of the proper role of a partial dissensus in contract formation under the U.N. Sales Convention. Scholarly attention has instead tended to focus on the mere fact that the Convention hews closely to the traditional offer-acceptance formation scheme and that, in their practical effect, the provisions of the Convention transform nearly all acceptances whose terms deviate from those of the offer into a rejection and counteroffer. This adherence to traditional notions has led to an inclination to view the Convention's formation provisions as inflexible, prescriptive rules that apply irrespective of the actual intent of the parties.

Such interpretive rigidity has, in turn, infected the received wisdom on the treatment of a partial dissensus. The traditional weight of opinion holds that the offer-acceptance scheme itself provides

the solution to all such issues of contract formation. In the event of a partial dissensus, therefore, an adjudicator need merely observe that each deviating reply amounts to a counteroffer coupled with a rejection of all previous proposals. Traditionalist commentators have proceeded from this formalist premise to the conclusion that the last formal declaration exchanged between the parties must be given effect *in its entirety* if the parties subsequently proceed to perform.

I argue here that the principles and policies of the U.N. Sales Convention require a more refined analysis. Specifically, my thesis is that an appropriate understanding of the effect of a partial dissensus must begin with an analysis of the values the Convention seeks to protect in the recognition and enforcement of contractual obligations in the first instance. My examination of the treatment of a partial dissensus thus begins with a review in Part III.A. of the general principles of uniform international sales law that inform the interpretation of the Convention itself. With this foundation, I then turn, in Part III.B., to a study of what these general principles reveal about the core values that underlie the Convention's contract formation scheme.

The conclusion that emerges from this analysis is that the traditional approach to the treatment of a partial dissensus, though possessing a certain analytical purity, lacks sufficient justification in the core policies and principles of the Convention. Of particular significance among these policies and principles are the primacy of party autonomy, a heightened significance of flexibility in the search for intent, and a rejection of normative solutions for intent-based interpretive issues. Contrary to these values, the traditional approach proceeds on the static premise that the offer-acceptance scheme is both the beginning and the end of the analysis. In the event of performance in spite of a partial dissensus, the consequence of this premise is that the parties are deemed to assent to the "last shot" exchanged between them. The nature of the parties' prior relationship—the level of complexity, the degree of formality, and their prior declarations—becomes irrelevant to the analysis.

This Article maintains that such a formalist adherence to the offer-acceptance scheme is ill-suited to accommodate the role of a partial dissensus in the formation of modern contractual relationships. The approach I advocate in Part IV.B. instead seeks to refocus the analysis to the essential interpretive inquiry in such cases: the effect of the parties' prior declarations of intent where

they proceed to perform in knowing, mutual disregard of the absence of a complete agreement (that is, a partial dissensus) between them. I argue that the Convention's interpretive values require that the effect of such a partial dissensus be calibrated to the nature of the parties' prior relationship. Refocusing the analysis in this way to the essential interpretive inquiry will give particular emphasis to the parties' prior express declarations of intent. Thus, for example, where the offeror affirmatively declares her objection to terms that deviate from her own, her performance would not (without more) manifest her assent to any "last shot" proposed by the other party. In other words, the intent the traditional approach purports to imply from performance alone would not be of sufficient expressive weight to overcome this prior express declaration of a contrary intent.

The result in such cases is that the declarations and expressive conduct of neither party manifest unqualified assent to the formal declaration of the other. It is in such situations that the principle of party autonomy assumes its appropriate function in the hierarchy of norms of uniform international sales law. In the event of mutual performance, that principle will, first, require the recognition of enforceable contractual obligations. Party autonomy then operates to define the content of those obligations on the basis of the actual common intent that emerges from the parties' prior express declarations. In practical outcome, this means that the parties' respective writings (in particular their standardized business terms) will take effect only to the extent that the writings are in agreement. Where gaps remain, the substantive provisions of the Convention respecting the rights and obligations of buyer and seller likewise assume their appropriate function of defining the "background" to the parties' relationship.

Much of the analysis in support of the approach I advocate departs from the traditional notions of the manner by which private actors create binding obligations. The difficulty with these traditional process assumptions arises from the tendency to view them as irreducible values in themselves. The result has been that the assumptions have often transformed themselves into rigid rules decoupled from the interpretive values they purport to reflect. The received wisdom on the interpretation of the U.N. Sales Convention nonetheless seeks to import a similar prescriptive rigidity to its formation provisions. The sum of the argument I advance below is that a reasoned appreciation of the Convention's interpretive values counsels against an adoption of formation rules so rigid in their

application that the Convention ceases to be an aid and begins to be an independent impediment to the effectuation of the common intent of the parties to international sales transactions.

II. CONTRACT FORMATION AND THE UNITED NATIONS SALES CONVENTION (CISG)[1]

A. *The Background*

1. The Scope and Significance of CISG

It can be said with little risk of overstatement that the United Nations Convention on Contracts for the International Sale of Goods[2] represents one of history's most successful efforts at the unification of the law governing international transactions. The significance of the Convention is revealed not only by the number, but also by the geographic and political distribution of its contracting states—in the eight short years since it entered into effect in 1988, forty-seven states have either acceded to or ratified the Convention,[3] the combined economies of which account for over sixty percent of world trade.[4] Moreover, represented among this number are states from all corners of the globe, from all political perspectives (former socialist states, as well as traditional western democracies), and from all stages of economic development (highly and newly industrialized countries, as well as developing ones).[5] This worldwide acceptance has provided ample confirmation of the

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1. The U.N. Sales Convention is commonly known, even outside of the English-speaking world, by its English language acronym, "CISG."

2. The official English language text of the Convention is published in the Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Official Records, Annex 1, at 178-90, U.N. Doc. A/CONF.97/18 (1980) [hereinafter CISG]. The official version of the Convention in the English language is also published at 52 Fed. Reg. 6264 (1987).

3. The United Nations Commission on International Trade Law, Status of Conventions, UNCITRAL, 29th Sess., at 7-10, U.N. Doc. A/CN.9/428 (1996) (identifying forty-seven nations that have either ratified or acceded to the CISG). The Status of Conventions is updated periodically. The most recent Status of Conventions can also be found on the UNCITRAL homepage on the internet: <http://www.un.or.at/uncitral/sessions/unc/unc-29/acn9-428.htm>.

4. Based on statistics published by the International Monetary Fund, in 1994 the forty-five states parties to the U.N. Sales Convention accounted for approximately 65% of all world imports of goods and 63% of all world exports. See International Monetary Fund, Direction of Trade Statistics Yearbook 2-9 (1995).

5. Included among the parties to the Convention are, for example, such diverse states as France, Germany, and the United States; China, Cuba, and Russia (as well as nearly all formerly socialist, eastern European countries); Argentina, Chile, and Mexico; Syria, Uganda, and Zambia; and Australia, New Zealand, and Singapore. See Status of Conventions, supra note 3, at 3-4.

observation of one German scholar as early as 1989 that the entry into force of the U.N. Sales Convention represented a "milestone in legal history."[6]

The U.N. Sales Convention in fact arose precisely from the failure of an earlier unification effort to address the diversity of cultures and legal traditions involved in international contracting. This earlier effort took the form of two separate conventions[7]—one governing contract formation[8] and the other the substantive rights and obligations of the parties[9]—adopted at a conference in The Hague in 1964. Although these "Hague Conventions" were comprehensive in their substantive application, nearly all participants in their creation represented industrialized western European states. As a consequence, neither developing states nor the then-socialist states viewed these conventions as a serious attempt at a *worldwide* unification of the law.[10] Thus, almost from their very adoption the 1964 Hague Conventions had "no chances for broad international acceptance."[11]

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6. Rolan Loewe, Internationales Kaufrecht 5 (1989) ("*Markstein der Rechtsgeschichte*"). Unless otherwise indicated, all translations in this article are the responsibility of the author. For simplicity, subsequent translations are occasionally made *sub silencio*.

7. The drafting work on the Hague Conventions first began in 1930 and was conducted under the auspices of the Rome Institute for the Unification of Private Law (commonly known by its French acronym "UNIDROIT"). For a more detailed examination of the drafting history of the Hague Conventions of 1964, see E. Allan Farnsworth, The Vienna Convention: History and Scope, 18 Int'l Law. 17, 17-20 (1984) [hereinafter Farnsworth, Vienna Convention]; Bradley J. Richards, Note, Contracts for the International Sale of Goods: Applicability of the United Nations Convention, 69 Iowa L. Rev. 209, 212-14 (1983).

8. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) [hereinafter Hague ULF]. The full text of The Hague ULF is to be found in John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 659-66 (2d ed., 1991).

9. Convention Relating to a Uniform Law on the International Sale of Goods (1964) [hereinafter Hague ULIS]. The full text of the Hague ULIS is to be found in Honnold, supra note 8, at 667-91.

10. See Elizabeth Hayes Patterson, United Nations Convention on Contracts for the International Sale of Goods and the Tension Between Compromise and Domination, 22 Stan. J. Int'l L. 263, 266-68 (1986); Richards, supra note 7, at 214; Martin L. Ziontz, Comment, A Uniform Law for the International Sale of Goods, 2 Nw. J. Int'l L. & Bus. 129, 130 (1980). The participation of the United States was limited to a small number of (largely disregarded) proposals at the Hague Conference in 1964. See Farnsworth, Vienna Convention, supra note 7, at 17; Henry Landau, Background to U.S. Participation in the United Nations Convention on Contracts for the International Sale of Goods, 18 Int'l Law. 29, 30-31 (1984).

11. Ulrich Huber, Der UNCITRAL-Entwurf eines Übereinkommens über Internationale Warenkaufverträge, 43 Rabelszeitung 413, 414 (1979).

With these developments as a backdrop, the United Nations Commission on International Trade Law (UNCITRAL) began as early as 1968 with the advance work for a comprehensive review of the Hague Conventions, and in 1969 established a Working Group charged with this responsibility.[12] This Working Group initially proceeded on the basis of separate documents governing formation and substantive sales law; after nearly ten years of drafting efforts, however, the drafters decided in 1978 to combine the drafts of the two conventions into one document.[13] In the course of these efforts, UNCITRAL also prepared and published extensive materials documenting the drafting history of the Convention. This *travaux préparatoires* provides a rich source of material for interpreting CISG's express provisions and for analyzing the meaning of the gaps in those provisions.[14]

After the preparation of a commentary by the General Secretariat of UNCITRAL,[15] the United Nations General Assembly convened a diplomatic conference in Vienna in April 1980 to debate the resulting unified draft convention. The delegates to the Vienna Conference unanimously adopted the Convention, with some revisions, on April 11, 1980.[16] The Convention then entered into effect according to its terms on January 1, 1988, after the ratifications of

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12. Although space limitations permit only a brief discussion of the history of the U.N. Sales Convention here, I examine the drafting history of specific provisions of the Convention in detail where it is relevant. Scholars interested in a more detailed introduction to the history of the Convention should see Landau, supra note 10, at 30-35; Patterson, supra note 10, at 265-77; Maureen T. Murphy, Note, The United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law, 12 Fordham Int'l. L.J. 727, 728-36 (1989). For an official summary record of the history of the drafting and adoption of the Convention, see Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Official Records, at 176-77, U.N. Doc. A/Conf.97/18 (1980) [hereinafter Final Act].

13. Report of the United Nations Commission on International Trade Law on the Work of Its Eleventh Session, U.N. GAOR, 33d Sess., Supp. No. 17, at 7-8, U.N. Doc. A/33/17 (1978), reprinted in [1978] IX Y.B. U.N. Comm'n Int'l Trade L. 13-14, U.N. Doc. A/CN.9/Ser.A/1978.

14. The compelling weight of scholarly opinion holds that adjudicators may consult the *travaux préparatoires* in interpreting the meaning of the specific provisions of the Convention. See Michael J. Bonell, Article 7, in Commentary on the International Sales Law 65, 90 (C. Massimo Bianca & Michael J. Bonell eds., 1987) [hereinafter Bianca & Bonell (author)]; Helen Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale J. Int'l L. 1, 22-25 (1993).

15. Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, Official Records, at 14, U.N. Doc. A/CONF.97/5 (1979) [hereinafter Secretariat Commentary].

16. See Final Act, supra note 12, at 177.

the United States, China, and Italy exceeded the required threshold of 10 member states.[17]

The significance of this event arises not only from the ever increasing number of states party to the Convention, but also from its very nature and status in the hierarchy of contract law norms.[18] Upon its ratification, the Convention applies as an independent contract law regime that supersedes national law principles for all contractual relationships within its scope. In the United States, the Convention functions as a self-executing treaty which applies by force of federal preemption without the need for any action by the fifty states.[19] In other words, the Convention is not merely a form of restatement of (international) contract law,[20] nor is it simply a "model law" which would be subject to modification by contracting

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17. See CISG, supra note 2, art. 99(1); Status of Conventions, supra note 3, at 3-4. The U.S. Senate ratified the U.N. Sales Convention in October 1986, and the United States deposited the ratification with UNCITRAL on December 11. For a history of this ratification, see Peter Winship, Congress and the 1980 International Sales Convention, 16 Ga. J. Int'l & Comp. L. 707 (1986).

18. The United Nations Commission on International Trade Law (UNCITRAL) has established a system for collecting and disseminating information on judicial decisions and arbitral awards relating to the conventions, such as the U.N. Sales Convention, adopted under its auspices. The result of this system, known by the acronym "CLOUT" (Case Law on UNCITRAL Texts), can be found on the UNCITRAL homepage on the internet: <http://www.un.or.at/uncitral/>. For a similar compilation, see UNILEX, International Case Law and Bibliography on the U.N. Convention on Contracts for the International Sale of Goods (Michael J. Bonell et al. eds., 1995) [hereinafter UNILEX]. UNCITRAL also annually develops and disseminates a bibliography of writings on its Conventions, of which the most recent on the U.N. Sales Convention is Bibliography of Recent Writings Related to the Work of UNCITRAL, U.N. Doc. A/CN.9/402 (1994). This document, as well as other comprehensive information on CISG, can also be found on the internet: <http://ananse.irv.uit.no/trade_law/nav/uncitral.html>. For a more extensive bibliography on the Convention, see Peter Winship, The U.N. Sales Convention: A Bibliography of English-Language Publications, 28 Int'l Law. 401 (1994).

19. Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2d Cir. 1993); Richard E. Speidel, The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods, 16 Nw. J. Int'l L. & Bus. 165, 166 ("In the United States, CISG is a self-executing treaty with the preemptive force of federal law.").

20. Following the completion of CISG, many of the scholars involved in the drafting work in fact turned their attention to the drafting, under the auspices of UNIDROIT, of a form of "Restatement" of international contracts. See Michael J. Bonell, An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts (1994); Joseph Perillo, UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review, 63 Fordham L. Rev. 281 (1994). Interestingly, these UNIDROIT Principles adopt an approach to the treatment of a partial dissensus in international commercial relationships that is very similar to the "consensus approach" I advocate infra part IV.B. See International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, arts. 2.19-2.22 (1994).

states to address local concerns; rather, upon ratification CISG applies of its own force to all proposed contractual relationships that satisfy its "internationality" requirements.[21]

Briefly summarized, the sphere of application of the Convention is defined by three requirements. The primary element of "internationality" concerns the entities involved in the transaction. Article 1 of the CISG requires for the applicability of the Convention that the parties to the putative contractual relationship have their "places of business"[22] in different states *and* that either (a) both of those states are CISG contracting states or (b) conflict of laws principles (known by the civil law label "private international law") lead to the application of the law of a member state.[23] The second requirement concerns the subject matter of the contract itself. Similar to the Uniform Commercial Code in this country,[24] CISG applies only to the sale (that is, not countertrade transactions) of moveable goods.[25] Finally, and not surprisingly, the contract at issue must have been concluded (or, if the issue is one of formation, the offer must have been made) after the relevant states became parties to the Convention.[26]

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21. The academic literature on the sphere of application of the U.N. Sales Convention is voluminous. Those interested in a more detailed examination of this issue should see John Honnold, The Sales Convention: Background, Status, Application, 8 J.L. & Com. 1 (1988); Kevin Bell, The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods, 8 Pace Int'l L. Rev. 237-58 (1996); Richards, supra note 7, at 217-40. For an introduction to foreign language literature on the sphere of application of the Convention, see Kurt Siehr, Der Internationale Anwendungsbereich des UN-Kaufrechts, 52 Rabelszeitung 587 (1988).

22. Where a party has more than one business location the CISG provides that the relevant place of business is the one with the "closest relationship" to the contract. See CISG, supra note 2, art. 10. Neither the nationality nor the "civil or commercial character" of the parties "is to be taken into consideration" in determining the application of the Convention, however. See id. art. 1(3).

23. This latter possibility based on conflict-of-laws principles is not binding on U.S. courts, for upon its ratification the United States exercised a right, set forth in article 95 of the CISG, to declare a corresponding reservation. Regarding the grounds for this reservation, see Message from the President, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. V-VI, 21-22 (1983); E. Allan Farnsworth, Review of Standard Forms or Terms Under the Vienna Convention, 21 Cornell Int'l L.J. 439, 440 n.4 (1988) [hereinafter Farnsworth, Standard Forms]. Germany responded to this declaration by the United States (and other countries) with its own reservation that it "assumes no obligation to apply [art. (1)(b)] when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of article 1 . . . ." UNILEX, supra note 18, at Section B.2.

24. See U.C.C. § 2-102 (article 2 applies to "transactions in goods"), § 2-105(1) (definition of "goods" as things that are "movable") (1987).

25. See CISG, supra note 2, art. 1(1).

26. Id. art. 100(1).

If a proposed transaction satisfies these elements, the Convention applies directly and automatically, and displaces (with certain limited exceptions identified in the Convention itself)[27] the various systems of contract law of its member states in their entirety.[28] The implications of this conclusion for international sales transactions are profound indeed, and no more so than on the issue of contract formation. What is often not sufficiently appreciated is that individual participants in sales transactions that are international in the sense of article 1 cannot—by clever drafting of general business terms or otherwise—avoid the initial application of the Convention's formation principles. To be sure, article 6 permits the parties to an international sales contract to exclude the application of the Convention or derogate from its provisions, a subject I explore in detail below.[29] A very significant subtlety emerges from the plural form of this provision, however. Although the principle of the primacy of "party autonomy" established by article 6[30] extends even to contract formation issues,[31] the language of that article makes clear that this result obtains only in the case of an express or implied *common* intent of the parties on the subject.[32]

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27. Article 2 specifically excludes from the scope of the CISG certain *types* of transactions with public policy implications, most notably sales of goods to consumers. Id. art. 2; see also id. art. 3 (standards for determining the application of the Convention to manufacturing contracts in which the "buyer" supplies the necessary materials, as well as to mixed goods and services contracts). In addition, certain *issues*—including, in particular, issues relating to the "validity" of contracts—are excluded from the scope of the Convention. Id. arts. 4, 5; see also infra notes 38, 213-14 and accompanying text.

28. See Honnold, supra note 8, at 88-89; Paul Volken, Das Wiener Übereinkommen über den Internationalen Warenkauf: Anwendungsvoraussetzungen und Anwendungsbereich, in Einheitliches Kaufrecht und Nationales Obligationenrecht 81, 83-85 (Peter Schlechtriem ed., 1987).

29. The significance of this power of the parties to vary, by agreement, the effect of the provisions of CISG is of fundamental significance in the examination of the treatment of a partial dissensus under the Convention. This significance is explored throughout this article, particularly infra part III.A.1.

30. See infra part III.A.1.

31. See infra notes 148-52 and accompanying text.

32. See CISG, supra note 2, art. 6 ("*The parties may* . . . vary the effect of any of [the Convention's] provisions.") (emphasis added). A significant dispute exists over whether this conclusion obtains for an exclusion of the Convention proposed by the offeror. Some commentators have argued that if the offeror, as "master of the offer," proposes an exclusion of the Convention in its entirety, the contract formation process as an initial matter is governed by applicable national law. See Rolf Herber, Abschluß Abweichung oder Änderung durch Parteiabrede, in Kommentar zum Einheitlichen UN-Kaufrecht 79, 83-84 (Ernst von Caemmerer & Peter Schlechtriem eds., 1994) [hereinafter CISG Kommentar (author)]; Huber, supra note 11, at 426-27. Others assert that for transactions within its sphere of application the Convention applies (including its formation principles) unless and until the *parties* have reached an agreement to the contrary. See E. Rehbinder,

This principle prevents a party to an international sales transaction from excluding the application of the Convention by unilateral action. The common practice of including a choice-of-law clause in one's standard business terms, taken alone, thus avails a party nothing: Whatever terms a party proposes, the *Convention's* policies and principles governing contract formation will apply *in the first instance* to determine whether the parties have reached a binding agreement. It is only if—in application of those policies and principles—the agreement includes an exclusion of the Convention that the uniform law will, in fact, be so excluded. In short, within its sphere of application the U.N. Sales Convention's contract formation principles will apply as an initial matter, and there is little that one party can do, by unilateral action, to avoid that result.[33]

The nature of the Convention as a directly applicable, independent contract law regime is reinforced by the principles governing matters not expressly resolved by its provisions. CISG article 7(2) prohibits reference to (non-uniform) national law on matters within its scope even if specific contract issues remain unsettled by its express provisions. Instead, the Convention establishes as the primary principle in such cases that gaps in its provisions must "be settled in conformity with the general principles on which it is based." Matters left unsettled by the Convention, in other words, are to be resolved on the basis of the principles of the *Convention itself*.[34] It is only in the (rare) cases in which those principles do

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Vertragsschluß nach dem UN-Kaufrecht im Vergleich zu EAG und BGB, in Einheitliches Kaufrecht und nationales Obligationenrecht 149, 152-53 (P. Schlechtriem ed., 1987) [hereinafter Rehbinder]; Rüdiger Holthausen, Vertraglicher Ausschluß des UN-Übereinkommens über internationale Warenkaufverträge, in 1989 Recht der internationalen Wirtschaft 513, 514. As the discussion in the text indicates, in my view this latter approach is correct. An offeror may indeed specify the manner and means of acceptance. She cannot, however, by unilateral declaration impose on the offeree the legal *standards* (i.e., the governing law) by which the actions in response to the offer are to be judged.

33. A party may, of course, demand an understanding on governing law and refuse to enter into negotiations as long as the matter remains unsettled. In absence of a corresponding agreement, however, the principles of the Convention will govern the formation process. The same conclusion obtains for a modification of the effect of specific provisions of the Convention. Where one party proposes a derogation from or variation of the Convention's provisions, and the parties do not reach an *express* agreement on the proposal, the contract formation policies and principles *of the Convention* will decide whether the derogation or variation is effective (for example, via an implied agreement). I explore this issue in greater detail in the immediately succeeding paragraphs of this section. See also infra part II (discussing the basic formation provisions of the Convention) and part III.A.- B. (analyzing CISG's broader formation values).

34. One German commentator has coined the phrase in connection with the rules of article 7 of the CISG that it is to be interpreted, developed, and supplemented "out of

not provide guidance that article 7(2) permits reference to national law to resolve gaps in CISG's provisions.[35]

Contract law issues falling in this latter category should be rare indeed, for the Convention broadly addresses not only the formation of international sales contracts (CISG Part II) but also the substantive rights and obligations of the parties to such contracts (CISG Part III). The scope of the Convention on matters of contract formation is particularly expansive. As a "structural" matter, CISG contains detailed provisions in articles 14 through 24 on the traditional manner by which contracts come into being.[36] Moreover, CISG identifies in articles 6 though 11 certain "general principles" whose application informs the identification of the policies that underlie the Convention's formation scheme.[37] The interaction between these general principles and specific provisions thus leaves little room for resort to principles of domestic law to resolve formation issues in transactions within CISG's sphere of application.[38]

The difficulty with this observation for present purposes issues from the very nature of a multilateral international treaty such as the Convention. The drafting history of the Convention is replete with compromises on matters over which the legal and cultural backgrounds of the delegates differed.[39] A derivative effect of these differences was that certain issues deemed too controversial

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itself." Huber, supra note 11, at 432 ("*aus sich selbst heraus*"). Even in the context of the interpretation of its express provisions, the Convention requires that "regard . . . be had to its international character . . . ." CISG, supra note 2, art. 7(1); see also Franco Ferrari, The Relationship Between the UCC and the CISG and the Construction of Uniform Law, 29 Loy. L.A. L. Rev. 1021, 1024 (1996) (stating that article 7(1) requires an "autonomous interpretation" of CISG).

35. CISG, supra note 2, art. 7(2) (stating that matters not resolved in the Convention itself nor by reference to its general principles "are to be settled . . . in conformity with the law applicable by virtue of the rules of private international law").

36. See infra parts II.A.2.-3.; see also CISG, supra note 2, art. 4 ("This Convention governs . . . the formation of the contract of sale . . . .").

37. See infra part III.A.

38. The one formation matter specifically excluded from the scope of the Convention is the "validity" of contracts. See CISG, supra note 2, art. 4(a) ("[E]xcept as otherwise expressly provided in this Convention, it is not concerned with: (a) The validity of the contract or of any of its provisions or of any usage . . . ."). The focus of this rule is the public policy of member states on the validity of consent itself, specifically such issues as infancy, mental competence, and the like. See Honnold, supra note 8, art. 4, at 114-17; Bianca & Bonell (Khoo), supra note 14, at 45-48. For a thorough analysis of article 4(a) of the CISG, see generally Hartnell, supra note 14.

39. See, e.g., Alejandro Garro, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 Int'l Law. 443, 444 (1989). See generally Gyula Eörsi, Problems of Unifying Law on the Formation of Contracts for

to permit an express consensus between the delegates were simply left unresolved in CISG's express provisions.

As I explore in detail below,[40] one such issue is the treatment of contractual relationships in which the declarations and expressive conduct of the parties do not track the traditional lock-step model of offer and unconditional acceptance. Because such an issue of contract formation is certainly a "matter[ ] governed by [the] Convention," the resolution of the treatment of a partial dissensus must be divined by reference to the core values of the Convention as revealed by both the "general principles" on which it is based and the rules that emerge from its more specific contract formation provisions. I turn to a brief review of these latter rules first.

2. *Contract Formation Under CISG: The Basics*

It is now common wisdom that the U.N. Sales Convention generally adheres to the "classical" or "traditional" conception of the manner in which private actors create contractual obligations.[41] The contract formation provisions of CISG thus reflect the traditional assumption that the determinative agreement of the parties to create such obligations arises out of two constitutive declarations of intent. That is, in the words of the General Secretariat's commentary to the 1978 "New York Draft" of the Convention, "contractual obligations arise out of expressions of mutual agreement."[42] It thus approaches a mere truism to observe that under the U.N. Sales Convention a contract is formed and defined by the

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the International Sale of Goods, 27 Am. J. Comp. L. 311 (1979) (analyzing the 1978 Draft Convention on Contracts for the International Sale of Goods).

40. See infra part II.B.

41. See, e.g., E. Allan Farnsworth, Formation of Contract, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods (Nina M. Galston & Hans Smit eds., 1984) [hereinafter Farnsworth, Formation]; Burghard Piltz, UN-Kaufrecht, in Handbuch des Kaufvertragsrechts in den EG-Staaten 8, 15 (Friedrich Graf von Westphalen ed., 1992).

42. Secretariat Commentary, supra note 15, art. 17, para. 2, Official Records, at 24.

manifested common intent, or "consensus,"[43] between the parties.[44]

With this general principle of consensus as a foundation, the Convention turns to what would appear to be the specifics,[45] that is, to the assumed "mechanics" of how that consensus typically will come into being. It is here, perhaps, that the Convention reveals itself most clearly as the "lowest common denominator" among the various legal systems represented in its preparation, for the basic "structural" contract formation provisions of the Convention will surprise neither common law nor civil law jurists and will challenge few with their complexity.[46] Only a brief examination of this basic formation scheme is thus necessary here.

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43. At this most elemental level, the U.N. Sales Convention's conception of the nature of contractual obligation reflects, not surprisingly, the common lineage of the civil and common law systems. Indeed, the development of the "consensus theory of contract" in this country in the nineteenth century was influenced, in no small measure, by parallel notions of the formation of contract obligations in continental European civil law systems. For an introduction to the debate over the origins of the consensus theory among legal historians, see Philip A. Hamburger, The Development of the Nineteenth-Century Consensus Theory of Contract, 7 Law & Hist. Rev. 241 (1989); A.W.B. Simpson, Innovation in Nineteenth Century Contract Law, 91 Law Q. Rev. 247, 265-69 (1975). Civil law commentators have continued to use corresponding terminology in analyzing contract formation under the Convention. See CISG Kommentar (Schlechtriem), supra note 32, at 122-23 (noting that contracts are formed through a "consensus"—in the original German "Konsens"—of the parties); Rehbinder, supra note 32, at 166 (CISG's formation scheme is "an expression of the material consensus principle"—"ein[ ] Ausdruck des materiellen Konsensprinzips"); Bianca & Bonell (Rajski), supra note 14, at 122 (observing in connection with the absence of form requirements that CISG follows "the theory of consensualism"); see also Summary Record of the 202nd Meeting of UNCITRAL, UNCITRAL OR, 11th Sess., 202d mtg. para. 49, at 8, U.N. Doc. A/CN.9/SR.202 (1978) (Czechoslovak representative observing that "the principle of consensus between the parties . . . [is] the most important tenet of international trade").

44. The necessity of an actual, and complete, consensus between the parties in the creation of contractual obligations under the Convention is, of course, of fundamental significance in the treatment of a partial dissensus. This is the precise focus of the analysis infra parts III-IV.

45. I say "appear to be" here intentionally. As I discuss in detail below, it is precisely the misapprehension of the nature of the specific formation provisions of CISG, and the conclusions drawn from this misapprehension, that threaten to "encrustify" the contract formation process under the Convention without a reasoned analysis of the assumptions underlying those conclusions, nor sufficiently compelling doctrinal or policy justifications for them. See infra part IV.A.

46. CISG's contract formation provisions have proved to be fertile ground for explanatory pieces in the academic literature. See Franz Bydlinski, Das Allgemeine Vertragsrecht, in Das UNCITRAL-Kaufrecht im Vergleich zum Österreichischen Recht 57 (Peter Doralt ed., 1985) (comparison with Austrian law); Rehbinder, supra note 32, at 149-70 (comparison with the Hague ULF and German law); Marc Wey, Der Vertragsschluss beim internationalen Warenkauf nach UNCITRAL- und Schweizerischem Recht (1984) (comparison with Swiss law); Burte A. Leete, Contract Formation Under the United

In accordance with traditional notions, the Convention identifies an offer and its acceptance as the basic "structural" components of a contract.[47] In conformance with traditional notions, an offer under the Convention sets the formation process in motion by "empowering" the offeree to conclude a contract solely with a corresponding expression of intent to be bound to the deal as proposed.[48] In other words, an offer within the sphere of application of CISG must alone be sufficient not only as a declaration of intent of the offeror but also as a definition of the necessary reciprocal obligations of the parties. In the language of article 14, an offer is a proposal to conclude a contract that both reveals an "intention of the offeror to be bound in case of acceptance" and is "sufficiently definite."[49]

The intent element of this standard, of its essence, involves interpretive considerations. This conclusion is made all the more clear by article 14's admonition that an effective offer need only "indicate" the offeror's intent to be bound.[50] The sum of the intent "requirement" of article 14 is thus a mere reference to the general

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Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary, 6 Temp. Int'l & Comp. L.J. 193 (1992); Clement Ngongola, The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a Contract of Sale, 4 Afr. J. Int'l & Comp. L. 835 (1992) (comparison with the law of certain southern African countries); James Edward Joseph, Note, 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). For general analyses of the contract formation provisions of CISG, see Kazuaki Sono, Formation of International Contracts Under the Vienna Sales Convention: A Shift Above the Comparative Law, in International Sale of Goods: Dubrovnik Lectures 111 (Petar Šarcevic & Paul Volken eds., 1986) [hereinafter International Sale of Goods]; John E. Murray, Jr., An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & Com. 11 (1988) [hereinafter Murray, Convention]; J. Clark Kelso, Note, The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms, 21 Colum. J. Transnat'l L. 529 (1983).

47. See CISG, supra note 2, arts. 14-17 (offer) and 18-24 (acceptance). In contrast to many common law systems, the Convention contains no provision requiring consideration for the formation of contracts. Modifications of contracts likewise do not require for their effectiveness any form of consideration. See Secretariat Commentary, supra note 15, art. 27, paras. 2-3, Official Records, at 28.

48. See Sono, supra note 46, at 118. This notion also comports with the nature of an offer in this country. See E. Allan Farnsworth, Contracts § 3.3, at 114-15 (2d ed. 1990) [hereinafter Farnsworth, Contracts].

49. See CISG, supra note 2, art. 14. With regard to these requirements in general, see Kelso, supra note 46, at 534-38; Joseph, supra note 46, at 118-28.

50. See CISG, supra note 2, art. 14(1) ("A proposal for concluding a contract . . . constitutes an offer if it . . . indicates the intention of the offeror to be bound in case of acceptance.").

interpretive provisions of the Convention (article 8), which define the standards for assessing the meaning of the declarations and expressive conduct of the parties.[51]

The focus of the "definiteness" requirement is the substantive elements of a sales contract. Article 14(1) thus sets forth the elemental proposition that in order to rise to the level of an "offer" a proposal to conclude a contract must identify the subject of the transaction (that is, the goods), as well as "the quantity and the price."[52] In other words, an offer under CISG must identify the essential elements of the contract, often known in civil law jurisdictions as the "essentialia negotii"[53] and in the United States by Professor Llewellyn's now famous "dickered terms."[54]

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51. In making this determination, the Convention prescribes a level of flexibility not often found in domestic law. As I analyze in detail in parts III.A.2. and III.B., article 8(3) of the CISG mandates in such interpretive inquiries an expansive consideration of "all relevant circumstances," including the negotiations prior and the conduct subsequent to the making of the proposal.

52. An examination of this provision and its place in the formation values of the Convention reveals significant flexibility in assessing whether the "definiteness" requirement for a valid offer is satisfied, however. Even the very subject of the contract, the goods, need only be "indicated" in the offer. Indeed, it would seem that the entire purpose of this language is not in the nature of a "requirement," but rather to ensure that adjudicators do not impose *more* stringent requirements on the identification of the goods. Were this provision considered otherwise, it would be wholly superfluous, for it is difficult to imagine an offer that would satisfy the requirements for the application of the Convention in the first place, see CISG, supra note 2, art. 1(1) (sale of "goods"), that does not "indicate" that the subject of the proposed contract is, in fact, "goods." Moreover, the search for an identification of the essential elements of a sales contract is not limited to the express or even such implied terms of the offer itself; rather, all that is required pursuant to article 14(1) is that the offer "make[ ] provision for determining" the quantity and price. See CISG, supra note 2, art 14(1); infra notes 114-15 and accompanying text.

53. See, e.g., Bianca & Bonell (Eörsi), supra note 14, at 138; CISG Kommentar (Schlechtriem), supra note 32, at 129 (also termed the "*essentialia contractus*").

54. For a definition of "dickered terms," see Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960); John E. Murray, Jr., The Revision of Article 2: Romancing the Prism, 35 Wm. & Mary L. Rev. 1447, 1449 n.9 (1994) ("'[D]ickered terms' [are] terms to which the parties have consciously adverted."); John E. Murray, Jr., The Chaos of the Battle of the Forms: Solutions, 39 Vand. L. Rev. 1307, 1385 n.44 (1986) [hereinafter Murray, Solutions] (same).

A final element of a valid offer under the Convention is an identification of the "empowered" offerees. In conformance with traditional notions, article 14(1) provides that a valid offer must be "addressed to one or more specific persons . . . ." CISG, supra note 2, art. 14(1). In absence of such a specification, a proposal is considered to be merely a solicitation of offers (often known in civil law jurisdictions by its Latin title "*invitatio ad offerendum*"). In contrast to the other elements of an offer, there is a presumption in support of this conclusion concerning the intent of the proposing party, namely, that there is no intent to be bound "unless the contrary is *clearly* indicated . . . ." Id. art. 14(2) (emphasis added). This presumption has correctly been the subject of intense criticism. See Murray, Convention, supra note 46, at 18.

Although this irreducible core of a sales contract will be significant in determining whether there has been a *complete* failure of agreement of the parties,[55] the appropriate treatment of a *partial* dissensus is to be found in the standards for acceptance by the offeree. At the core of the definition of an acceptance under the Convention is the requirement of manifested assent. Article 18(1) of the Convention provides that in order to qualify as an acceptance, the response of the offeree must "indicat[e] assent to [the] offer . . . ."[56] This indication of assent can take a variety of forms. In a noteworthy improvement on the unclear language of the 1964 Hague Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Hague ULF),[57] article 18(1) of the CISG instructs that the essential indication of assent can take the form of either a statement (that is, a return promise) or "other conduct."[58]

With the use of the term "*indicates* assent," CISG once again makes clear the central significance of the general interpretive provisions of article 8 for contract formation issues. The common case of a statement of the offeree communicated to the offeror will often pose few interpretive difficulties. But even here, confirmations of receipt, conditional responses, and ambiguous "order acknowledgments" will require an application of the principles outlined in article 8 to determine the import of the expressions contained in the response to the offer.[59]

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55. See infra notes 113-17 and accompanying text.

56. CISG, supra note 2, art. 18(1).

57. Article 6 of the Hague ULF provided only that an acceptance consists of a "declaration communicated . . . to the offeror . . . ," in article 6(1), or of "the dispatch of the goods or of the price or any other act equivalent to [such a] declaration . . . ," in article 6(2). Hague ULF, supra note 8, art. 6. By contrast, even the initial drafts of what is now article 18(1) of the CISG stated more clearly what was implicit in article 6 of the Hague ULF, namely, that a response to an offer must indicate the offeree's *assent* in order to qualify as an acceptance. See Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session, UNCITRAL Working Group on the International Sale of Goods, UNCITRAL OR, 9th Sess., para. 231, U.N. Doc. A/CN.9/142 (1978), reprinted in [1978] IX Y.B. U.N. Comm'n Int'l Trade L. 78 [hereinafter Report on the Ninth Session].

58. See Bianca & Bonell (Farnsworth), supra note 14, at 166-67.

59. A mere confirmation of receipt of an offer or an "acceptance" that sets forth conditions to its effectiveness will not indicate the requisite assent of the offeree to the offer, absent other circumstances that would permit the offeror reasonably to conclude otherwise, see CISG, supra note 2, art. 8(2), or contrary and established practices or international trade usages, see id. art. 9. See Bianca & Bonell (Farnsworth), supra note 14, at 165-66; CISG Kommentar (Schlechtriem), supra note 32, at 150.

Such an inquiry into the intent of the offeree becomes significantly more challenging when the only relevant external manifestation of that intent is the offeree's conduct. To be sure, article 18(1) sanctions the possibility of divining a valid indication of assent in conduct alone.[60] A closer examination of article 18 cautions restraint in doing so, however. First, the grammatical structure of the first sentence of article 18(1) makes clear that the analysis of a claimed implied acceptance is subject to no less exacting standards than an express statement of acceptance.[61] Moreover, concerns by the drafters about an overly liberal interpretation of article 18(1) led to the inclusion in that article of a specific admonition that "[s]ilence or inactivity does not in itself amount to acceptance."[62] This provision is unique among the contract formation provisions of CISG, for—although the principle that silence alone does not indicate assent is well established in civil and common law jurisdictions alike[63]—no such explicit admonition is to be found with reference to any other expressions of intent contemplated by the Convention.[64]

The difficulty of discerning whether the conduct of a merchant in international commerce is an indication of her unqualified assent is compounded when one considers that the focus of the inquiry is not simply on assent to the creation of contractual obligations in general. Rather, what is required is assent to the specific *offer* as proposed. Admittedly, the flexibility inherent in article 18(1) will permit the general statement that even silence may amount to acceptance when coupled with other "relevant circumstances" in

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60. This possibility arises from the disjunctive form of article 18(1) of the Convention. See CISG, supra note 2, art. 18(1) ("*or* other conduct indicating assent") (emphasis added).

61. See id. ("A statement made by or other conduct of the offeree indicating assent is an acceptance."); Bydlinski, supra note 46, at 67-68.

62. CISG, supra note 2, art. 18(1) (second sentence). This sentence was added in the ninth session of the UNCITRAL Working Group in September 1977, but provided only that silence did not amount to acceptance. See Report on the Ninth Session, supra note 58, para. 234. The words "or inactivity" were added to the article (then numbered article 16) at the Vienna Conference in 1980 upon the recommendation of the United Kingdom. See Final Act, supra note 12, at 95; U.N. Doc. A/Conf.97/C.1/L.56.

63. See Farnsworth, Contracts, supra note 48, § 3.15, at 155; I.J. Schlesinger, The Common Core of Legal Traditions 131 (1971) (summarizing the approach of a variety of jurisdictions). But see Restatement (Second) of Contracts § 69 (1977) (identifying attending factors that would permit the conclusion of assent by silence).

64. The significance of this admonition is explored in greater detail below. See infra notes 256-58 and accompanying text.

the sense of the interpretive standards of article 8.[65] The word "may" is significant here, however. It is essential to observe even at this initial stage in the analysis that whether the actions of a party attain a level equivalent to an affirmative and unconditional expression of assent is a fact-specific inquiry that will be driven by the circumstances of each case (including, in particular, the statements and actions of the parties both prior and subsequent to the conduct at issue).[66] It is here, perhaps more than with any other inquiry in the formation process, that the values that underlie the recognition of contractual obligations under the Convention,[67] in particular the interpretive standards of article 8,[68] will play a decisive role.[69]

The formation process is completed under the Convention at the moment the acceptance of the offer "becomes effective."[70] In conformance with traditional civil law notions, an acceptance becomes effective when the requisite indication of assent "reaches the offeror,"[71] as long as it does so within the time specified in the offer, or in absence of such a specification, within a "reasonable time."[72]

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65. See CISG Kommentar (Schlechtriem), supra note 32, at 152; Bianca & Bonell (Farnsworth), supra note 14, at 166-67.

66. See CISG, supra note 2, art. 8(3); infra notes 171-73 and accompanying text.

67. See infra part III.A.

68. These interpretive standards are discussed in detail infra part III.A.2.

69. This observation is of particular significance with regard to the main inquiry here—the treatment of a partial dissensus under the Convention. See infra parts IV.A.- B.1.

70. CISG, supra note 2, art. 23. For an analysis of the significance of this provision with respect to contract formations that do not track the lock step offer-acceptance scheme, see infra part IV.B.2.

71. CISG, supra note 2, art. 18(2). This approach is to be contrasted with the common law "mailbox rule." See Restatement (Second) of Contracts, § 63(a) (1977). As with an offer, see CISG, supra note 2, art. 15(2), an acceptance governed by CISG can be withdrawn. See id., art. 22.

72. CISG, supra note 2, art. 18(2). In the case of a purported acceptance in the form of expressive conduct, this timing issue is more complex. As a general proposition, to be effective even an acceptance by conduct requires that corresponding notice "reach" the offeror within the time fixed for acceptance. See Bianca & Bonell (Farnsworth), supra note 14, at 169-70; see also Huber, supra note 11, at 443. Article 18(3) of the Convention carves out a limited exception to this rule, however, for offers that, either directly or on the basis of established practices or trade usages, permit the offeree to indicate assent by performing an act without a corresponding notice to the offeror. In such a case, the acceptance "is effective at the moment the act is performed . . . ." See CISG, supra note 2, art 18(3). This provision has spawned considerable controversy. Compare Honnold, supra note 8, at 224-26 (arguing that even where an offer permits acceptance by performance, the offeror must receive actual *notice* of the act of acceptance, in the absence of "special circumstances," within the time defined by article 18(2) of the Convention) with Murray,

3. *The Treatment of Deviating Acceptances*

a. The Background and Structure of CISG Article 19

The issue of the appropriate treatment of a declaration that purports to be an acceptance but contains terms that differ from those of the offer has been a vexatious one in the United States and elsewhere for decades. Traditional contract doctrine adheres to a rigid assumption on this score: If a reply is not a "mirror image" of the offer, no contract is formed.[73] In recent decades, this rigid conclusion has become the subject of increasing criticism in light of, among other things, the widespread use of the preprinted, standard business terms that are exchanged as routine supplements to the respective contract declarations of the parties. To address these developments, the drafters of article 2 of the Uniform Commercial Code in the United States adopted a more flexible approach. The basic policy of U.C.C. § 2-207 is to recognize a binding contract if "in commercial understanding" the deal between the parties "has in fact been closed."[74] Although this undoubtedly represented a significant advancement in the recognition of mutually-intended contractual obligations, the particular solution of § 2-207 with respect to the *content* of the resultant contract has not, to put it mildly, received broad support among scholars[75] and the courts,[76] with the commentary of the former being particularly acerbic.[77]

Convention, supra note 46, at 30-33 (arguing that Professor Honnold misreads the clear language of article 18(3) of the CISG) and Kelso, supra note 46, at 541-42 (same).

73. See Restatement (Second) of Contracts § 59 (1977); Farnsworth, Contracts, supra note 48, § 3.13, at 150. For a recent case discussing this rule, see Safeco Ins. Co. v. City of White House, 36 F.3d 540, 546-47 (6th Cir. 1994).

74. U.C.C. § 2-207 cmt. 2 (1987).

75. The list of law review articles on the "battle of the forms" under U.C.C. § 2-207 is so long that one can hardly contain it in a single footnote. For an introduction to the literature on the subject (with extensive further citations), see Murray, Solutions, supra note 54, at 1307, 1309 n.5 (containing citations); Douglas G. Baird & Robert Weisberg, Rules, Standards and the Battle of the Forms: A Reassessment of § 2-207, 68 Va. L. Rev. 1217 (1982); Gregory M. Travalio, Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207, 33 Case W. Res. L. Rev. 327 (1983). The National Council of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute are currently involved in a comprehensive review and revision of U.C.C. Article 2, including § 2-207. The most current drafts from this work on the revision of Article 2 can be found at the home page of the NCCUSL at the University of Pennsylvania: <http://www.law.upenn.edu/library/ulc/ulc.htm>.

76. See Roto-Lith, Ltd. v. F.P. Bartlett Co., 297 F.2d 497, 500 (1st Cir. 1962) (noting that Section 2-207 is "not too happily drafted"); Southwest Eng'g Co. v. Martin Tractor Co., 473 P.2d 18, 25 (Kan. 1970) (referring to the section as a "murky bit of prose").

77. See, e.g., Baird & Weisberg, supra note 75, at 1224 ("[Section] 2-207 is a statutory disaster whose every word invites problems in construction."); John E. Murray, Jr., A

It is not surprising, then, that the treatment of a deviating acceptance likewise was among the most controversial issues in the deliberations over the contract formation provisions of the U.N. Sales Convention. Unfortunately, hopes for a comprehensive solution to this fundamental problem were left unsatisfied. In the end, the severe differences among the drafters on this issue allowed only a narrow compromise, now reflected in article 19, a prime objective of which remains to *protect* parties from the imposition of contractual obligations where they have failed to reach a clear agreement on the content of their relationship.[78]

The determinative issue on the effect of a deviating acceptance under the compromise of article 19 is, briefly, whether the "acceptance" contains terms that "materially alter" those of the offer.[79] The first paragraph of the article sets forth the traditional "mirror image" rule that a deviation in the reply to the offer has the twin effects of rejecting the offer and transforming the reply into a counteroffer. The second paragraph then purports to ameliorate the harsh effect of this rule in the case of "nonmaterial" terms in the "acceptance" declaration.[80] What the second paragraph giveth, however, the third paragraph taketh away, for the latter defines as material effectively all terms that could be of significance in international sales contracts.[81]

Surprisingly, the basic rule in article 19(1) that a deviating acceptance does not, in principle, operate to conclude a contract

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Proposed Revision of Section 2-207 of the Uniform Commercial Code, 6 J.L. & Com. 337, 344 (1986) ("[T]he ramifications [of the unclear language of § 2-207] are so broad as to be called the nuclear accident of Article 2.").

78. See infra notes 296-302 and accompanying text.

79. Article 19 provides as follows:

> (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.

CISG, supra note 2, art 19.

80. See infra part II.A.3.c.

81. See infra part II.A.3.b.

was not particularly contentious in the drafting process. The original proposal of the Secretary-General[82] on this score was only slightly amended in the deliberations of the Working Group.[83] The sum effect of the amendments was to make clear that a reply to an offer that merely makes inquiries or suggests, but does not insist on, possible additional terms does not invoke the rule of article 19(1).[84]

By contrast, the issue of whether more detailed provisions were appropriate beyond the simple rule of article 19(1) was among the most disputed matters of the entire Convention. The draft of article 19 initially[85] approved by the Working Group included only paragraph (1) along with a second permitting contract formation notwithstanding "nonmaterial" deviations.[86] It was this latter principle that proved to be a nexus of friction among the delegates. The dispute over this provision arose between, on the one hand,

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82. This proposal closely followed the corresponding provision of the Hague ULF. See Hague ULF, supra note 8, art. 7 ("An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer."). The proposal of the Secretary-General merely replaced, for clarity, "[a]n acceptance" with "[a] reply to an offer." See Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods, Working Group on the International Sale of Goods, Official Records, Annex II, Appendix I, art. 7, U.N. Doc. A/CN.9/128 (1977), reprinted in [1977] VIII Y.B. U.N. Comm'n Int'l Trade L. 100 [hereinafter Secretary-General Formation Report].

83. In the course of the deliberations, the drafters added the words "which purports to be an acceptance" after "a reply to an offer." See Summary of Deliberations of the Commission on the Draft Convention on the Formation of Contracts for the International Sale of Goods, U.N. Comm'n Int'l Trade L., Official Records, Annex I, para. 154, U.N. Doc. A/33/17 (1978), reprinted in [1978] IX Y.B. U.N. Comm'n Int'l Trade L. 42 [hereinafter Formation Deliberations].

84. See id. paras. 153-54. The amendments also made clear that a like conclusion obtains if the reply deviates not from the substantive content of the offer, but rather simply as a result of language differences or imperfect terminology. See Secretariat Commentary, supra note 15, art. 17, para. 3, Official Records, at 24 ("[T]he acceptance need not use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties."); see also CISG Kommentar (Schlechtriem), supra note 32, at 161 (noting that in international transactions minor differences in expression can "creep in" as a result of language barriers and imperfect translations).

85. For a discussion of a radically different approach proposed by the Secretary-General in 1977, see infra notes 315-16 and accompanying text.

86. This provision, like its antecedent, article 7(2) of the Hague ULF, was based on a comprehensive 1915 Scandinavian law to the same effect. See CISG Kommentar (Schlechtriem), supra note 32, at 160. In deference to the well-developed law on the basis of this Scandinavian statute, the drafters included a special right of reservation respecting contract formation issues. See CISG, supra note 2, art. 92(1) (permitting a contracting state to declare that it will not be bound by the contract formation rules in Part II of the Convention).

traditionalist scholars and representatives of socialist countries, who preferred only the strict mirror image rule and thus desired to strike the provision in its entirety,[87] and on the other, certain industrialized countries that supported a more flexible solution. When efforts to strike the second paragraph failed,[88] the former group sought to limit the definition of "nonmaterial" alterations to "mere differences in wording, grammatical changes, typographical errors" and similar insignificant matters.[89]

The dispute between the two camps led to the formation of a special working group charged with defining the contours of the term "material" in the context of deviating acceptances.[90] The result of the efforts of this working group was a proposed additional paragraph for article 19 (the present article 19(3)) which set forth a non-exhaustive list of terms that would be deemed material. This draft also included, however, a controversial final clause that would have given effect to an acceptance containing material alterations if the offeree had "reason to believe" such terms would be "acceptable to the offeror."[91] In spite of this controversy, the Working Group adopted this draft of article 19(3) in 1978 and included it within the comprehensive New York Draft of the Convention of the same year.[92]

Both of the latter two paragraphs of article 19 nonetheless remained controversial and were the subjects of attacks from both traditionalists and reformers at the Vienna Conference in 1980. Proposals made during the Conference to strike both paragraphs in their entirety failed, however.[93] Traditionalists were nonetheless successful to a limited extent at the Conference in that they were able to defeat France's proposal to limit the list of "material" terms in article 19(3) to price, quality, and quantity of the goods.[94] They

87. See Report on the Ninth Session, supra note 57, paras. 224-25.

88. Id. para. 227. A later attempt in the Working Group to delete the second paragraph of article 19 likewise failed. See Formation Deliberations, supra note 83, paras. 156-58.

89. See Formation Deliberations, supra note 83, para. 159; Francois Vergne, The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 33 Am. J. Comp. L. 233, 235-37 (1985).

90. See Formation Deliberations, supra note 83, para. 163.

91. Id. paras. 164-68; see also Bianca & Bonell (Farnsworth), supra note 14, at 176-77; Rolf Herber & Beate Czerwenka, Internationales Kaufrecht 103 (1991).

92. See Formation Deliberations, supra note 83, para. 171.

93. See Summary Records of the Deliberations of the First Committee—10th Meeting, paras. 23-49, Official Records, at 284-86, U.N. Doc. A/CONF.97/C.1/-SR.10 (1980) (proposals of the United Kingdom and Bulgaria) [hereinafter First Committee Deliberations (Meeting Number)].

94. Id. paras. 63-84, Official Records, at 287-88; see also Vergne, supra note 89, at 237.

likewise succeeded in deleting from the final text of article 19(3) the controversial proposal to give effect to materially deviating acceptances if there was "reason to believe" that the deviations were acceptable to the offeror.[95]

b. Deviating Acceptance with Material Alterations

The result of the "timorous"[96] compromise of article 19 was, in a practical sense, a departure in form only from the strict mirror image rule. The second paragraph of article 19 purports to mitigate the harsh effects of that rule for acceptances that deviate from the offer in nonmaterial respects only. Further examination reveals, however, that the relief afforded by article 19(2) is merely illusory, for article 19(3) then proceeds to define as "material" all terms worthy of mention.

The article 19(3) list of presumptively material terms in a deviating acceptance is indeed comprehensive. One finds there not only the "usual suspects" of price, quantity, and time of delivery (that is, the *essentialia negotii*) but also less "essential" terms such as those "relating to payment, quality . . . of the goods, place . . . of delivery, extent of one party's liability to the other or the settlement of disputes." And the scope of article 19(3) does not end there. The provision makes clear that the listed terms are only "among other things" that may be considered "to alter the terms of the offer materially." Thus, the materiality of terms beyond those expressly identified may also arise from the particular circumstances of a transaction.[97]

This latter category should be of limited practical significance, however. This follows from the simple fact that the terms listed in

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95. See First Committee Deliberations (10th Meeting), supra note 93, paras. 52-53, Official Records, at 286; Vergne, supra note 89, at 237.

96. Perillo, supra note 20, at 283.

97. See Rehbinder, supra note 32, at 165; CISG Kommentar (Schlechtriem), supra note 32, at 161-62. An interesting issue in this context is whether the converse is also true, that is, whether, in considering the circumstances of a particular case, the terms specifically identified in article 19(3) can nonetheless be deemed "not material." According to one view, article 19(3) establishes an irrebuttable presumption of materiality for such terms. See Herber & Czerwenka, supra note 92, at 103. Other commentators have argued that the principle of party autonomy set forth in article 6 mandates that article 19(3) be interpreted as establishing only a rebuttable presumption of materiality. See, e.g., Bydlinski, supra note 46, at 72; CISG Kommentar (Schlechtriem), supra note 32, at 162-63; Kelso, supra note 46, at 549-50; see also Secretariat Commentary, supra note 15, art. 17, para. 7, Official Records, at 24 (the listed terms "are *normally* to be considered material") (emphasis added).

article 19(3) embrace "most aspects of the contract,"[98] and in any event effectively all subjects that would be of significance in the typical sales transaction. Thus, the practical consequence of the broad list in article 19(3) is that in transactions within the sphere of application of the U.N. Sales Convention nearly all purported acceptances that are not limited to a simple "yes" will be deemed to alter the terms of the offer "materially" as contemplated by article 19(3).

The legal consequence in such a case is a straightforward one: As the "nonmaterial alteration" exception of article 19(2) does not apply, the reply, even though intended as an acceptance, is not one; rather, it constitutes a rejection of the offer by operation of article 19(1). At the same time, the deviating acceptance becomes a counteroffer, which, to form a contract, would in turn require a valid acceptance in the sense of article 18(1) of the CISG.[99] At this executory stage in the parties' relationship, application of article 19(1) thus leads to the practical result that no contract is formed on the basis of the parties' formal declarations.

It is here that the regulatory scheme of the Convention breaks down. As I discuss in Part II.B., article 19, though it supplies a clear rule at the executory stage of the parties' relationship, fails to address the case in which the parties nonetheless proceed to carry out the perceived "contract." The express provisions of the Convention, in short, fail to provide definitive guidance on the issue of the proper treatment of such a "partial dissensus" where the parties nonetheless manifest a broader agreement on the conclusion of a binding deal.[100]

c. Deviating Acceptance with Nonmaterial Alterations

Taken literally, the provisions of article 19(2) operate as an exception to the strict mirror image rule of the first paragraph of the article. According to article 19(2), additional or different terms

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98. Honnold, supra note 8, at 232.

99. The deviating acceptance will not operate as a counteroffer under article 19(1), however, if, in light of the existing circumstances, it fails to satisfy the requirements for an offer of definiteness and an intent to be bound. See CISG, supra note 2, art. 14; see also supra notes 49-54 and accompanying text.

100. See Arthur von Mehren, The Formation of Contracts, in VII International Encyclopedia of Comparative Law, ch. 9, at 9-168 (International Association of Legal Science, 1992) (The Convention "does not address the battle of the forms . . . ."); Jan Hellner, The Vienna Convention and Standard Form Contracts, in International Sale of Goods, supra note 46, at 335, 342 (article 19 provides "little guidance" on this score); see also sources cited infra note 106.

in a deviating acceptance that do not materially alter the terms of the offer likewise do not prevent the formation of the contract. The contrary result obtains only if the offeror, "without undue delay, objects orally to the discrepancy or dispatches a notice to that effect." If the offeror does not so object, the contract is concluded on the basis of the offer as supplemented by the modifications in the acceptance.[101]

As the list of terms deemed material by article 19(3) encompasses effectively all matters of significance, and as the purpose of the general terms of business in widespread use in such transactions is precisely to address such matters, the provisions of article 19(2) will rarely be of practical relevance. Indeed, as Professor Farnsworth has correctly observed, "it is difficult to imagine" modifications in an acceptance "that would not be material" in the sense of article 19(3).[102] As a consequence, it will be a rare case indeed where article 19(2) will operate to "save" a formation of a contract in the case of a deviating acceptance.[103]

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101. CISG, supra note 2, art. 19(2) ("If [the offeror] does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.").

102. See Farnsworth, Formation, supra note 41, § 3.04, at 3-16; Murray, Convention, supra note 46, at 42.

103. Indeed, even an acceptance containing only "non-material" deviations from the offer may not lead to the formation of a sales contract. Under article 19(2) the offeror retains a right of objection in such a case. See CISG, supra note 2, art. 19(2). Under § 2-207(2)(c) of the U.C.C. such an objection *only* affects the applicability of the proposed *terms*. See U.C.C. § 2-207(2)(c) (1987) (As between "merchants," the additional terms in a deviating acceptance "become part of the contract unless: . . . (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."). In contrast, the consequence of an objection as contemplated by CISG article 19(2) is to preclude the *formation* of a contract entirely. See CISG, supra note 2, art. 19(2). This right of objection creates a serious opportunity for abuse by offerors. In this case of a reply with deviations that are limited to non-material matters, the offeror will acquire a form of an "option" to permit or reject the formation of a contract even though the parties have agreed on all material terms. The potential for abuse (for example, speculating with the contract in a volatile market while the offeree remains bound to her acceptance) led the Netherlands to propose an amendment to article 19(2) at the Vienna Conference that would have recognized a binding contract if, after an objection by the offeror, the offeree chose to retract her non-material deviations. This proposal failed to garner sufficient support, however, and was withdrawn. See First Committee Deliberations (10th Meeting), supra note 93, paras. 56-59, Official Records, at 286. The proper manner to avoid speculation by offerors in such a case is to calibrate the "without undue delay" requirement of article 19(2) to the volatility in the relevant market. In cases of extreme price volatility, an offeror may well have to object within hours of receipt of the deviating acceptance.

B. *The Problem: The Role of Partial Dissensus in Contract Formation*

Although a system of contract formation founded on two constitutive declarations of intent may appear familiar to many western scholars, there has been no shortage of criticism of the particular formation scheme set forth in the U.N. Sales Convention with regard to the treatment of a partial dissensus.[104] This criticism is directed less at what the Convention does than at what it fails to do. The conceptual constructs of offer and unqualified acceptance can, of course, accurately describe the agreement process for some relationships. That a contract is formed through reciprocal expressions of assent may in fact be implied from the very nature of a formation scheme that founds contractual obligation on the manifested intent of the parties.[105]

The friction arises from the ability of the offer-unconditional acceptance scheme to accommodate the less formal relationship that perhaps more accurately describes modern commercial transactions.[106] These informal relationships may take a variety of forms. In some transactions, the parties may exchange a number of informal communications, none of which can be identified as a formal "offer" or "acceptance," but the sum of which reveals an agreement on the creation of binding obligations. In a similar vein, the parties may have a continuing commercial relationship founded on a mix of oral, written, and other informal understandings, such that the import of any one exchange of communications is unclear.

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104. See Perillo, supra note 20, at 283 (describing the approach of article 19 to contract formation as "timorous"); Murray, Convention, supra note 46, at 40 (stating that the drafters "deliberately ignored the absurdity of [the] notion" that an acceptance must comply exactly with the offer); id. at 43 (referring to the system in article 19(2) as "objectively absurd"); CISG Kommentar (Schlechtriem), supra note 32, at 167 (observing that the failure to address the fundamental issue of a partial dissensus was "regrettable").

105. A formation scheme based on the "building blocks" of offer and acceptance is a common one. See Schlesinger, supra note 64, parts I.A-B., at 75-172 (summarizing the common aspects of contract law among a variety of jurisdictions). For a discussion of the nature of contractual obligation under the Convention, see infra part III.

106. See Huber, supra note 11, at 445-46 (describing the variety of contract formation patterns not covered by the Convention's basic offer-acceptance scheme); Peter Schlechtriem, Einheitliches UN-Kaufrecht 34-35 n.151 (1981) [hereinafter Schlechtriem, UN-Kaufrecht] (same); cf. Hellner, supra note 100, at 342 (The battle of the forms "should not be judged at all by the rules on offers and counteroffers . . . ."); Schlesinger, supra note 63, at 154 (observing that formation other than by offer and acceptance is common); Charles M. Thatcher, A Critique of the Murray Model for Revising the U.C.C. § 2-207 and a Derivative Proposal for Revision, 39 S.D. L. Rev. 93, 101 (1994) ("It must be conceded that many of the traditional rules governing offer and acceptance are practically irrelevant in resolving questions of contract formation and content.").

In other transactions, the parties may indeed enter into negotiations toward a more structured and substantial contractual relationship. The point at which their negotiations cross the contractual threshold (with the result that all subsequent communications are viewed as mere proposals to supplement the contract), however, remains indeterminate. In still other transactions, the parties may informally agree on the essential elements of the deal, but their respective employees nonetheless exchange unread standard forms whose terms extend far beyond the business arrangement of their principals.

This short list is not intended to be exhaustive but descriptive. What is significant in these relationships is what they have in common: flexibility and informality, circumstances that are made possible by and remain a reflection of the convenience of modern means of communication. Electronic data interchange,[107] telefax, e-mail, the internet,[108] and the like have enabled transactors to transmit relevant information with an ease and rapidity certainly beyond the imagination of traditionalist U.S. scholars who shaped the law of contracts many decades ago and most likely beyond that of those who drafted the U.N. Sales Convention in the 1970s. The consequence of this convenience and rapidity is a flexibility in the formation of commercial relationships that permits each party to communicate the entirety of her standard business terms as a mat-

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107. Electronic data interchange refers to a technology that permits a party to transmit information and "electronic documents" for direct and immediate processing by another party's computer system. Through the use of standard electronic formats, buyers and sellers are able in this way to transmit electronic purchase orders and order acknowledgments without the necessity of direct human involvement. The standard formats typically contain, however, both computer data elements for processing by the receiving party's computer system and a so-called "free text" field. This field permits the inclusion of non-standard text—such as an incorporation by reference of a party's standard business terms—that must be reviewed by a human actor at the recipient's location. See Raymond Nimmer, Electronic Contracting: Legal Issues, 14 J. Marshall J. Computer & Info. L. 211, 213-14, 231-32 (1996). But see Thomas McCarthy, An Introduction: The Commercial Irrelevancy of the "Battle of the Forms", 49 Bus. Law. 1019, 1024-26 (1994) (suggesting that businesspersons will not make use of "free text" fields to wage a battle of forms).

108. As the accessibility and use of the internet increases, one should expect that future contract negotiations will not involve even the current routine exchange of standard business forms. Rather, negotiators will simply make reference to such standard terms made available on their "home pages" on the internet. This raises an interesting question of precisely what must be done to make a term a formal part of one's contract proposal. Specifically, the issue is whether a mere reference to contract terms elsewhere easily accessible to the other party suffices to make such terms part of a purported offer or acceptance. Although beyond the scope of the present article, this issue will almost certainly increase in significance along with the growth of the internet.

ter of routine in the course of the discussions over a proposed relationship.

Fortunately (or unfortunately), businesspersons have neither the time nor the capacity to accommodate fully these facets of modern communication. The common outcome in these flexible modern relationships is thus equally important. Precisely because of the complexity, flexibility or informality of their relationship, parties commonly are unwilling or unable to take the time, assume the effort or incur the cost necessary to reach an express agreement on all routine matters raised in the course of their relationship. In the common case, the parties nonetheless proceed with performance of the essential commercial elements of the transaction once they have expressly agreed on those elements.

From a perspective of the *law* of contract formation, the significant, common element among these relationships is the absence of a complete agreement between the parties. In terminology familiar to many continental-European scholars, I have labeled this state of affairs a "dissensus" between the parties.[109] In particular, the defining feature of this dissensus is that it affects only some aspects of the parties' relationship, that is, it is only "partial." Traditional contract doctrine in the United States lacks an overarching conceptual device to capture this phenomenon.[110] Instead, the common law has developed a variety of specific rules ("mirror image," "last shot," etc.) whose narrow focus either does not address all aspects of a partial dissensus or imposes a blanket result that often affirmatively disregards the core interpretive values the

109. One of the difficulties in the unification of the law in the international arena is the divergence between the terminology used to describe essentially the same legal phenomenon. I use the term "dissensus" here in part because of the similarity to the terminology sometimes used by scholars from German-speaking countries. See, e.g., CISG Kommentar (Schlechtriem), supra note 32, at 166 (discussing this issue in terms of a "*partielle[r] Dissens*"); Wey, supra note 46, at 487 ("*Partialdissens*").

110. The inability of traditional contract doctrine to accommodate the flexible relationships that are increasingly common in modern commerce was (and is) the foundation for the scholarly debate begun over twenty years ago regarding a "relational" theory of contract, the principal proponent of which is Professor Ian MacNeil. For an introduction to this debate, see Ian R. MacNeil, The Many Futures of Contracts, 47 S. Cal. L. Rev. 691 (1974) [hereinafter MacNeil, Many Futures]; Ian R. MacNeil, Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U. L. Rev. 854 (1978); Ian R. MacNeil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483 (1985) [hereinafter MacNeil, Relational Contract]. For a similar approach, see Steven R. Salbu, The Decline of Contract as a Relationship Management Form, 47 Rutgers L. Rev. 1271 (1995).

rules purport to apply.[111] Alternatively, even under the more flexible Uniform Commercial Code scholarly discussion has often concentrated narrowly on the popular label "battle of the forms."[112] The extrapolation of the supposed lessons from this concentration on "the forms" brings with it a serious risk of infecting the analysis of other, now increasingly common types of less formal relationships founded on communications other than a lock-step exchange of preprinted documents.

A principled analysis of the broad issues that result from the increased flexibility and informality of modern contractual relationships thus requires that scholars and adjudicators return to first principles. The foundational precept of contract law is that contracts are formed and defined by a corresponding common intent of the parties. The analysis of these flexible modern relationships should, therefore, focus on an identification of appropriate standards to effectuate a common intent of the parties to form binding obligations in knowing, mutual disregard of the *absence* of a complete agreement (that is, a dissensus) between them.

There are three necessary elements of this common state of affairs of a "partial dissensus" in modern contractual relationships: (1) the dissensus between the parties cannot relate to those "essential" terms (the "*essentialia negotii*")[113] which define the irreducible core of a sales contract under the Convention (the goods, quantity, and—perhaps[114]—price);[115] (2) at least one, though more com-

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111. For an insightful examination of the failure of some traditional common law interpretative rules to accomplish their intended result, see Melvin A. Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance, 82 Cal. L. Rev. 1127, 1148-80 (1994). Another useful source is Richard Craswell, Offer, Acceptance, and Efficient Reliance, 48 Stan. L. Rev. 481, 547 (1996) [hereinafter Craswell, Reliance] (many of the specific rules of contract law, including the rule that an offer terminates upon the making of a counteroffer, "probably do not reflect the intentions of all, or even most, contracting parties").

112. For an introduction into the relevant literature on the "battle of the forms," see sources cited supra note 75.

113. See supra notes 52-54 and accompanying text; see also CISG, supra note 2, art. 14(1) (stating that a valid offer must be "sufficiently definite").

114. Article 14(1) of the CISG would seem to require at a minimum an *implicit* identification of the price, see CISG, supra note 2, art. 14(1) ("A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining . . . the price."), but in light of a seemingly contradictory provision elsewhere in CISG (article 55), there is substantial debate in the legal literature about whether even this is necessary. Article 55 provides that in the case of a "validly concluded" contract that "does not expressly or implicitly fix or make provision for determining the price," there is in effect a presumption that the parties have agreed on the price "generally charged" for such goods at the time of the conclusion of the contract. Id. art. 55. This provision has led a number of commentators to conclude, in my view correctly, that a contract may be

monly both, of the parties must have proposed other terms in the course of the formation of their relationship over which they have either affirmatively disagreed or passively failed to agree; and (3) the other declarations and/or expressive conduct of the parties must manifest a broader *consensus* between them that they have nonetheless created binding contractual obligations.

In the absence of the first or third element, the consequence of a partial dissensus between the parties to an executory relationship governed by the U.N. Sales Convention is clear: (1) if the parties have failed to agree on the "*essentialia negotii*," pursuant to article 14 no sales contract has been formed in the contemplation of the Convention;[116] (2) likewise, if the parties do not in some manner manifest a common intent sufficient to overcome the dissensus on the non-essential terms previously proposed by one or both of them, the basic mirror image rule in principle adopted in article 19(1) will preclude the recognition of enforceable contractual obligations.[117]

When all three elements of a partial dissensus are satisfied, however, the Convention provides little explicit guidance on the definition of the parties' relationship. Uncertainty about this issue for a time led some commentators to argue that the problem was insoluble with the conceptual tools provided by the Convention. The result for these commentators was that adjudicators would have to resort to principles of the otherwise-applicable (and non-uniform) domestic law of the contracting states.[118] In light of the principles

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validly concluded under CISG on the basis of an offer that does not even "make provision for determining" the price, so long as the parties intend to conclude a binding contract without doing so. See Honnold, supra note 8, at 199-203; CISG Kommentar (Schlechtriem), supra note 32, at 132-33; Murray, Convention, supra note 46, at 17. Other commentators believe that such an interpretation misreads the clear language of article 14(1). See Farnsworth, Formation, supra note 41, § 3.04, at 3-8 to 3-10; Kelso, supra note 46, at 537.

115. The effect of the pliable language governing the "definiteness" requirement of a valid contract is to leave substantial flexibility to the parties in shaping their agreement. See supra note 52 and accompanying text. As long as there is a corresponding intent, an offer is considered "sufficiently definite" even if it proposes that the quantity or price be determined in the future (for example, by reference to a market quotation at the time of delivery), or that the determination be made by a third party, or even by the offeree. See CISG Kommentar (Schlechtriem), supra note 32, at 130-31.

116. See supra notes 52-54 and accompanying text.

117. See supra part II.A.3.

118. See Huber, supra note 11, at 444 (relying on the "validity exception" in article 4(a)); Vergne, supra note 89, at 256-57. Concerns about such an application of national law by the courts are also to be found in more recent scholarly writings. See Peter Winship, Changing Contract Practices in the Light of the United Nations Sales Convention: A

of article 7(2), a majority of scholars correctly reject this approach.[119] Because issues of contract formation certainly fall within the "matters governed by [the] Convention," and because the Convention sets forth "general principles" that inform the analysis of the role of a partial dissensus in contract formation, article 7(2) mandates that this issue be resolved within the Convention itself.[120]

III. THE NATURE OF CONTRACTUAL OBLIGATION UNDER CISG

The issue of contract formation in spite of a partial dissensus between the "contracting" parties arises at the very core of contract doctrine. Traditional contract theory, in its purest form, would seem to tell us that "contract" and "dissensus" are mutually exclusive propositions. By classical definition, a contract comes into being through a corresponding complete agreement between the parties. So far, so good. The friction occurs when an agreement on formation collides with a dissensus on content, specifically where the conduct and words of the parties unambiguously reveal a mutual assent to the creation of binding obligations notwithstanding a lack of agreement or outright disagreement on terms proposed by one or both of them. Traditionally, contract law resolves such frictions by adopting so-called "default" rules whose purpose it is to fit the practice into the doctrinal mold (or, occasionally, vice versa).

The subject of default rules has spawned considerable debate in U.S. academic literature in recent years. Although the terminology has differed, much of this debate has focused on the distinction between what can be labeled "mutable" and "immutable" default rules, or, in other words, between those rules that yield to a con-

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Guide for Practitioners, 29 Int'l Law. 525, 544 (1995) ("[T]he Convention does not have a rule that resolves [the partial dissensus] dispute and domestic law may govern . . . .").

119. See, e.g., Schlechtriem, UN-Kaufrecht, supra note 106, at 44; Frans J.A. van der Velden, Uniform International Sales Law and the Battle of the Forms, in Unification and Comparative Law in Theory and Practice, Contributions in Honour of Jean Georges Sauveplanne 233, 243 (1984) ("The absence [of] uniform laws . . . does not lead to the conclusion the ULIS and CISG are inapplicable and therefore to be replaced by rules of national law."); Christine Moccia, Note, The United Nations Convention on Contracts for the International Sale of Goods and the 'Battle of the Forms,' 13 Fordham Int'l L.J. 649, 674-75 (1990).

120. van der Velden, supra note 119, at 243; see also supra notes 34-35 and accompanying text.

trary will of the parties and those that do not.[121] The focus of this debate, though important in itself, has been directed, however, more to the definition of the *substantive* background law that serves to "fill the gaps" in extant contracts than to what Richard Craswell has termed the "agreement rules."[122] These rules govern the *process* by which the parties create and shape contractual obligations in the first instance.

It is important to observe at the outset that these "agreement rules" are of a fundamentally different nature from the "background law" that has occupied much of the recent contract law literature.[123] Although, as with the background law, the parties also retain the power to deviate from the rules governing the formation process,[124] the essential question with agreement rules is not what to do with gaps in the parties' relationship; rather, the function of such rules is to determine *whether* the parties have in fact so agreed to deviate from otherwise-applicable law (that is, *whether* the parties have validly created obligations and *on what* they have agreed).[125] The task in the treatment of a partial dissensus is thus to craft the appropriate rule to govern the process of agreement itself where the parties have not achieved an express understanding on the subject.

As with any other system of contract law, an analysis of such rules governing the process of contract formation under the CISG implicates the very grounds for recognizing and enforcing "con-

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121. See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989); Jules L. Coleman et al., A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law, 12 Harv. J.L. & Pub. Pol'y 639 (1989); Richard Craswell, Contract Law, Default Rules, and the Philosophy of Promising, 88 Mich. L. Rev. 489 (1989) [hereinafter Craswell, Default Rules]; see also Symposium, Default Rules and Contractual Consent, 3 S. Cal. Interdisc. L.J. 1 (1993).

122. See Craswell, Default Rules, supra note 121, at 503.

123. See Ayres & Gertner, supra note 121, at 119 n.133 (observing that, notwithstanding the debate over the appropriate background rules, a theory of contract formation is needed to determine whether the parties have agreed to derogate from such rules).

124. This power of the parties is particularly expansive under the U.N. Sales Convention. See CISG, supra note 2, art. 6 and the analysis infra part III.A.1.

125. Because the parties are (in principle) permitted to agree on terms that differ from the substantive background law, a failure to do so leaves considerable latitude to scholars and courts to pursue broader societal concerns in shaping the background law (hence the considerable scholarly debate). As I explain in more detail below, this latitude is circumscribed with respect to agreement rules, however, for the issue here is *whether* the parties have in fact exercised their power to deviate from otherwise-applicable law. In contrast to background law, therefore, the importance of actual agreement and individual autonomy may play a much greater role in shaping the appropriate agreement rules to govern specific factual situations. See infra notes 220-23 and accompanying text.

tractual" obligations. In other words, in order to define the "rules of the contracting game," we must first identify the values CISG seeks to further by enforcing contractual promises in the first place.[126] Fortunately, at a certain level an analysis of the grounds for enforcing promises under CISG is met with unique clarity: In contrast to a common law system—which by its nature admits of substantial flexibility in reexamining even established doctrine—CISG is an international treaty whose very purpose is to bring uniformity to international transactions involving participants from differing cultural and legal backgrounds.[127] In furtherance of this goal, CISG's drafters identified in the treaty's text itself certain express principles of general application (in particular, articles 6 through 11) whose purpose it is to inform the interpretation of the remainder of the Convention.

These principles fulfill their essential function in the context of issues that are not resolved by the Convention's express provisions.[128] As we have seen, one such matter on which the provisions

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126. In this country there has been an animated debate in the academic literature in recent years on the competing theoretical grounds for enforcing promises as binding "contractual" commitments. When addressed at a functional level of abstraction, these competing theories can be reduced into three general types: (1) autonomy theories; (2) reliance theories; and (3) what might be termed "communitarian" theories. For an introduction into this recent debate, see, e.g., Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 271-91 (1986) [hereinafter Barnett, Consent Theory]; Jean Braucher, Contract Versus Contractarianism: The Regulatory Role of Contract Law, 47 Wash. & Lee L. Rev. 697, 702-16 (1990); David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1825-48 (1991); see also the brief discussion of these theories infra notes 193 and 205-06. The debate between these competing theories is characterized principally by differing conceptions of the extent to which the social ordering sanctioned by the enforcement of promises is a purely private affair driven by the autonomy of private actors or whether social or other normative considerations influence the creation of "contractual" obligations as well. I examine these competing values in recognizing contractual obligations in the context of the U.N. Sales Convention in part III.B.

127. See CISG, supra note 2, Preamble (observing that "uniform rules" for international contracting "would . . . promote the development of international trade"); id. art. 7(1) (In interpreting the Convention, "regard is to be had . . . to the need to promote uniformity in its application . . . .").

128. As observed above, article 7(2) mandates that matters within the scope of the Convention but not addressed therein "are to be settled in conformity with the general principles on which it is based." See supra notes 34-35 and accompanying text. The general issue of contract formation is, of course, a "matter[] governed by th[e] Convention." See CISG, supra note 2, art. 7(2). Indeed, there is perhaps no subject more squarely within the scope of the Convention than the manner in which contractual obligations are created in international sales transactions. See Burghard Piltz, Internationales Kaufrecht 71 (1993) [hereinafter Piltz, Kaufrecht]; Schlechtriem, UN-Kaufrecht, supra note 106, at 34, 44.

of the Convention provide little explicit guidance is the treatment of a partial dissensus where, through their performance or otherwise, the parties manifest a broader agreement on the conclusion of binding obligations.[129] The principles of general application reflected in articles 6 through 11 will thus assume a particular significance in resolving this fundamental gap in the formation provisions of the Convention.[130]

As a foundation for an analysis of the appropriate "agreement rule" to govern contract formation in spite of a partial dissensus between the parties under the U.N. Sales Convention, this section will, accordingly, first address the relevant "general principles" on which the Convention is based. It will then turn to a more specific examination of what these core principles reveal about the values that underlie the enforcement of contractual obligations under the Convention.

A. *The Core Principles of the U.N. Sales Convention*

1. Party Autonomy

It can fairly be said that there is no provision more significant to an understanding of the policies and principles of the U.N. Sales Convention than article 6. At first glance, article 6 appears only to address the limited issue of the right of contracting parties to determine the law that is to govern their relationship. An analysis with a more discerning lens reveals something much more fundamental.

Article 6 initially sets forth the basic principle that the parties to a sales contract that is "international" in the sense of article 1 may nonetheless agree that the Convention should *not* govern their contractual relationship. As they did with many other provisions of CISG, the drafters distilled this principle into a few short words: "The parties may exclude the application of this Convention . . . ."[131] The proposition that the parties retain the power to

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129. See supra part II.B. and infra part IV.B.1-2.

130. See Bianca & Bonell (Bonell), supra note 14, at 80-82 (reference to the general principles such as those in articles 6, 7, 11, and 29 is particularly appropriate where an analogical application of the specific provisions on related issues would fail to resolve the gap in the Convention); Franco Ferrari, Uniform Interpretation of the 1980 Uniform Sales Law, 24 Ga. J. Int'l & Comp. L. 183, 221-26 (1994) (discussing the interpretation by analogy and role of the general principles of the Convention). An analogical application of the more specific contract formation provisions does not lead to a definite resolution of the partial dissensus issue. The precise problem is that in the typical case neither party will have expressed assent to the formal declaration of the other as contemplated by the offer-acceptance scheme. See infra Part IV.A.

131. CISG, supra note 2, art. 6.

exclude the application of uniform international law traces its origin to article 3 of the 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods (Hague ULIS) and was never seriously questioned in the preparation of the CISG. The only noteworthy limiting proposal—that in order effectively to exclude the application of the Convention in its entirety the parties must affirmatively identify what other system of laws will govern their relationship—failed to muster sufficient support in the drafting process.[132] Instead, there was general agreement already by the second meeting of the Working Group that the basic (unrestricted) principle of the Hague ULIS should be retained.[133]

The proposition that contract parties retain a choice-of-law power for their contractual relationship may not be surprising in itself.[134] The real message of article 6, however, is much broader and more fundamental to an understanding of the hierarchy of norms prescribed in the Convention. What is sometimes overlooked in resolving unclear issues under the Convention is the elemental principle established by article 6 of the preeminence of "party autonomy" in general, that is, the supremacy of the will of the parties even over the express provisions of the Convention itself. The drafters accomplished this policy of party autonomy through the latter half of article 6. In a marked improvement on the elliptical language of article 3 of the Hague ULIS,[135] article 6

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132. See Report of the Working Group on the International Sale of Goods on the Work of Its Eighth Session, UNCITRAL Working Group on the International Sale of Goods, UNCITRAL OR, 8th Sess., para. 26, U.N. Doc. A/CN.9/128 (1977), reprinted in [1977] VIII Y.B. U.N. Comm'n Int'l Trade L. 76 [hereinafter Report on the Eighth Session].

133. See Report of the Working Group on the International Sale of Goods on the Work of Its Second Session, UNCITRAL Working Group on the International Sale of Goods, UNCITRAL OR, 2d Sess., para. 43-46, U.N. Doc. A/CN.9/52 (1971), reprinted in [1971] II Y.B. U.N. Comm'n Int'l Trade L. 55 [hereinafter Report on the Second Session]. A similar restriction on the power of the parties to exclude the application of uniform international law had also been rejected in the preparation of the Hague ULIS. See Rolf Herber, Internationales Kaufrecht in Kommentar zum Einheitlichen Kaufrecht, 1, 19-20 (Hans Dölle ed., 1976); Bianca & Bonell (Bonell), supra note 14, at 51-52.

134. The parties to a contract otherwise subject to the U.C.C. may, pursuant to U.C.C. § 1-105(1) (1987), likewise agree that the law of another jurisdiction shall govern their contract, so long as the transaction at issue "bears a reasonable relation" to such other jurisdiction. Even this latter limitation does not apply in many other countries. See, e.g., Introductory Act to the German Civil Code and Marriage Law of the Federated Republic of Germany § 27 (Simon L. Goren trans., Ian S. Forrester ed., 1976).

135. Article 3 of the Hague ULIS simply provided that the parties were free "to exclude the application" of the Uniform Law "either entirely or partially." Hague ULIS, supra note 9, art. 3.

makes clear that the parties retain extensive power to "derogate from or vary the effect of any of [the Convention's] provisions."

This language goes far beyond simply permitting the parties to exclude, by express reference, the application of specific provisions of the Convention. Rather, the Working Group reserved to the parties the power to "vary the effect" of the rules of CISG with the broader purpose of clarifying "the relationship of the agreement of the parties and particular provisions of the Uniform Law" in general.[136] By permitting the parties to "vary the effect of" the provisions of the Convention, article 6 prescribes, namely, that the rules of the Convention are purely "background law." In the words of the Working Group, article 6 establishes, in short, that the express provisions of the Convention merely "are supplementary and yield to the agreement of the parties."[137]

Although this precept, too, may appear less than revolutionary, the drafting history makes clear that article 6 sets forth much more than a simple contract law truism. Rather, from the very beginning of the deliberations over the Convention the drafters saw the principle of party autonomy as essential not only to effectuate the common intent of the parties but also, and of equal importance, to ensure flexibility in the development of the law governing international commercial transactions. A study submitted to UNCITRAL in 1970 at the request of the Secretary-General forthrightly rejected suggestions[138] that the drafting of the Convention ought to proceed from a premise of inflexible, mandatory principles not subject to modification by the contracting parties.[139] Such an approach, the study concluded, "would frustrate the natural evolution of commercial practice to meet changing situations and new demands, and thereby impede the development of international

136. Report on the Second Session, supra note 133, para. 46.

137. Id.; see also Report of the Secretary-General: Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods, Annex III, para. 45, U.N. Doc. A/CN.9/100 (1975), reprinted in [1975] VI Y.B. U.N. Comm'n Int'l Trade L. 92; Bianca & Bonell (Bonell), supra note 14, at 51 (article 6 prescribes that "the Convention applies only to the extent that no contrary intention of the parties can be established"). Article 4 of the CISG makes clear, however, that the parties' agreement is subject to domestic law on the validity of the contract or any of its provisions. See supra note 38; Farnsworth, Standard Forms, supra note 23, at 440-41.

138. See Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General, para. 41, U.N. Doc. A/CN.9/WG.2/WP.6 (1970), reprinted in [1971] II Y. B. U.N. Comm'n Int'l Trade L. 43 (relating comments by the representative of Tunisia).

139. Id. paras. 40-43 (commenting on a study prepared by the representative of the United Kingdom).

trade."[140] Following these sentiments, the drafters had already reached a general consensus in that same year in favor of a flexible principle of party autonomy and thereby *against* a policy of restrictive mandatory provisions in the Convention.[141]

The significance of the flexibility inherent in this "general principle of party autonomy"[142] becomes apparent in a variety of more subtle, but equally important, policy determinations made in connection with the adoption of article 6. First, and perhaps most significant for present purposes, the preeminence of party autonomy applies not only to the power of the parties to shape their respective substantive rights and obligations as buyer and seller but also to their control of the contract formation process in the first instance. This conclusion follows directly from the location of article 6 in Part I of the Convention, which sets forth those provisions that apply to both Part II (Formation of the Contract) and Part III (Sale of Goods). Indeed, the drafters of the Convention had concluded even at the earliest stages of the (then separate) "Formation Draft" that—although the language of the corresponding provision in that draft differed slightly from the present article 6[143]—the principle of the primacy of party autonomy would apply with equal vigor to agreements affecting formation issues.[144] Ultimately, the Working Group decided to conform the language of the Formation

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140. Id. para. 43; cf. Honnold, supra note 8, at 60-61 ("The Sales Convention must be read and applied in a manner that permits it to grow and adapt to novel circumstances and changing times.").

141. See Report on the Second Session, supra note 133, paras. 44-46; see also Secretariat Commentary, supra note 15, art. 5, para. 1, Official Records, at 17 ("The non-mandatory character of the Convention is explicitly stated in article [6] . . . .").

142. See Secretary-General Formation Report, supra note 82, art. 2, cmt. 2.

143. In its Eighth Session in 1977 (the first relating specifically to formation issues) the Working Group agreed to the following language for the Formation Draft provision on party autonomy:

> (1) The parties may [agree to] exclude the application of the Convention.
>
> (2) Unless the Convention provides otherwise, the parties may [agree to] derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages widely known and regularly observed in international trade.
>
> (3) However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

See Report on the Eighth Session, supra note 132, paras. 21, 24-25, 29. With regard to the brackets around the words "agree to" in the first and second paragraphs, see infra note 149.

144. See id. n.132, para. 20 ("As to the extent to which particular [contract formation] rules could be excluded or modified by the parties, it was decided that the general principle should be that of [the] autonomy of the will of the parties.").

Draft to that of the Sales Draft.[145] Upon consolidation of the two drafts in 1978, it thus adopted a single "party autonomy" provision (the present article 6) as a general principle applicable to all provisions of the Convention.[146]

The core policy determination that emerges from this comprehensive applicability of article 6 is that the Convention ensures flexibility in the *formation* of contractual relationships as well. One party cannot, of course, *unilaterally* impose contract formation rules on the other.[147] The flexible principle of party autonomy embodied in article 6 nonetheless ensures that an agreement between the parties regarding their contractual relationship and how it comes into being will preempt any contrary rule set forth in Part II of the Convention.[148]

The liberality of the Convention toward the autonomy of the parties is perhaps no more manifest than with respect to the *manner* in which the parties may arrive at an agreement sufficient to "derogate from or vary the effect of" its provisions. The drafting history of the Convention makes clear that there are no formal requirements for an effective agreement as contemplated by article 6. That is, the modification of specific CISG rules need not be expressly agreed upon, but may arise solely by implication from the

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145. See Formation Deliberations, supra note 83, paras. 7, 11.

146. See id. para. 16. The only provision expressly identified in article 6 as outside of the principle of party autonomy is article 12. That article provides that the general rule of article 11 (which dispenses with formal requirements for contract formation, see infra part III.A.4.) does not apply to parties with a place of business in a member state that has made a corresponding declaration pursuant to article 96 of the Convention. For emphasis, article 12 also expressly provides that in such a case the parties "may not derogate from or vary the effect of this article." CISG, supra note 2, art. 12.

147. See in this regard Formation Deliberations, supra note 83, at paras. 8-9, 11-16.

148. The issue of the timing of such an agreement to deviate from the provisions of the Convention proved to be somewhat more troublesome in the drafting process. The draft of the party autonomy provision in the "Formation" draft prior to the consolidation with the "Sales" draft in 1978 seemed to indicate that the parties were *required* to "agree to" deviate from the Convention's formation provision *prior to* their negotiations over the substantive terms of their contract. For the text of this draft provision, see supra note 143. The "agree to" language was, as the Secretary-General's report at the time observed, to a certain extent, superfluous, for "it is understood that an agreement is necessary." See Report of the Secretary-General: Incorporation of the Provisions of the Draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods, UNCITRAL OR, para. 35, U.N. Doc. A/CN.9/145 (1978), reprinted in [1978] IX Y.B. U.N. Comm'n Int'l Trade L. 123. Nonetheless, concern about an interpretation of article 6 that would *require* an express agreement between the parties led the Working Group to strike the words "agree to" upon the consolidation of the Formation and Sales drafts in 1978. See Formation Deliberations, supra note 84, para. 12.

conduct of the parties or otherwise as determined by the Convention's interpretive standards.[149] Indeed, the drafters repeatedly rejected attempts during the drafting process to limit party autonomy to a corresponding *express* agreement between the parties.[150] A proposal by the Secretary-General to permit modification of the contract formation rules of the Convention only if the modification resulted in "more stringent" formation requirements likewise failed to find support in the drafting process.[151]

The principle of party autonomy set forth in article 6, in short, makes clear that the provisions of the Convention—whether affecting substantive rights and obligations or formation issues—function as mere background rules that yield to the common intent of the parties. Although this alone may be unsurprising, what is often overlooked in analyses of the Convention is the consequence of this policy determination. By giving effect even to implied modifications of its formation rules, the Convention broadly permits, indeed promotes, a *flexible* approach to the recognition and definition of contractual obligations in international sales transactions. Viewed in this light, article 6 will be of particular significance in

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149. See Bianca & Bonell (Bonell), supra note 14, at 55; see also CISG, supra note 2, art. 8 and infra part III.A.2. For a discussion of "implied" agreements between the parties in the form of "established party practices" and usages of trade, see CISG, supra note 2, art. 9 and infra part III.A.3. Article 3 of the Hague ULIS expressly provided that the exclusion of uniform law "may be express or implied." Hague ULIS, supra note 9, art. 3. The drafters of the Convention refrained from including such express language in CISG as a cautionary signal to courts on the issue of an exclusion of the Convention in its entirety. In the words of the Secretary-General, the language was eliminated from CISG "lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention *had been wholly excluded*." See Secretariat Commentary, supra note 15, art. 5, para. 2, Official Records, at 17 (emphasis added).

150. See Report of the Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods, UNCITRAL OR, Annex I, paras. 56-57, U.N. Doc. A/32/17 (1977), reprinted in [1977] VIII Y.B. U.N. Comm'n Int'l Trade L. 29. The deliberations at the Vienna Conference likewise make clear that article 6 (then numbered article 5) permits implied derogations from the provisions of the Convention. See First Committee Deliberations (4th Meeting), supra note 93, paras. 4-30, Official Records, at 248-50 (rejecting various proposals to restrict party autonomy, including one by Pakistan to limit the principle to express agreements); see also Report of the First Committee to the Plenary Conference, UNCITRAL OR, paras. 32-33, at 201, U.N. Doc. A/CONF.97/11/Add. 1 and 2 (comments by the representatives of Italy and Pakistan objecting that the final version of the Convention permits implied exclusions and derogations).

151. In its eighth Session in 1977, the Working Group rejected a proposal by the Secretary-General which would have recognized party autonomy respecting contract formation issues only if the parties' agreement would have led "to the application of more stringent legal rules or more stringent agreed principles to determine whether a contract has been concluded." See Report on the Eighth Session, supra note 132, paras. 22, 29; see also Secretary-General Formation Report, supra note 82, art. 2, paras. 4-5.

resolving uncertainties created by gaps in the provisions of the Convention itself.[152] The simple message of article 6 in such cases is that the principle of flexible party autonomy counsels against a rigid application of CISG's background rules and in favor of a flexible analysis that proceeds from a primary goal of effectuating the common intent of the parties.

2. *Interpreting Intent*

Although article 6 establishes the *principle* of the preeminence of the common intent of the parties, it does not prescribe how that intent is to be identified. Article 8 fulfills that function. That is, as a complement to the principle of party autonomy article 8 sets forth the standards for interpreting the meaning of the declarations and conduct of the parties. We are instructed in this regard that the task of interpretation must begin with the premise that a party's actual intent is to be given effect. It is only if that intent cannot be determined that reference to more objective factors is appropriate. Such interpretive standards are naturally of necessity found in civil and common law systems alike.[153] In its unique domain of interpreting the expressions of contracting parties from widely divergent cultures and legal traditions, however, article 8 will play a particularly significant role in identifying and accommodating the determinative common intent of the parties as contemplated by article 6.

Article 8 applies broadly to all statements and conduct of relevance under the Convention. The article's interpretive rules thus apply not only to the determination of the meaning of contractual terms but also to the interpretation of the declarations and conduct relevant to the formation of a contract in the first place.[154]

The structure of article 8 defines a clear order of priority in the interpretation of such declarations and conduct. The primary test

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152. See infra part IV.B.

153. See, e.g., Restatement (Second) of Contracts §§ 20(1), 201(1) (1977); Eisenberg, supra note 111, at 1130-35. For an example of the approach in a civil law country, see, e.g., The German Civil Code §§ 134, 157 (Ian S. Forrester et al. trans., 1975) [hereinafter Forrester, German Civil Code].

154. See Secretariat Commentary, supra note 15, art. 24, para. 1, Official Records, at 18; Bianca & Bonell (Farnsworth), supra note 14, at 97-98. The standards of article 8 likewise govern all other declarations of intent contemplated by the Convention. Examples of such declarations include notifications of avoidance (article 26), notices that goods are defective (article 39), notices fixing deadlines for curing such defects (article 48), and notices that future performance will otherwise be interrupted (articles 68, 71, 72, 79, 88). See CISG, supra note 2.

for interpreting a party's expressions of intent is a subjective one. According to article 8(1), the statements and other conduct of a party "are to be interpreted according to [her] intent where the other party knew or could not have been unaware what that intent was." In a substantial victory over the rigid objective tests of classical contract law,[155] the focus of the primary rule of interpretation in paragraph (1) is, in other words, on the *actual intent* of the speaker or actor.[156] This intent will govern where there is a common understanding between the parties of what that intent is, even if idiosyncratic or otherwise inaccessible to third parties. To be sure, article 8 continues the traditionalist presumption that a contract is the product of unilateral expressions of intent.[157] Where there is a mutually held subjective understanding between the parties, however, under the primary interpretive rule of article 8(1) that understanding will prevail.[158]

In the typical case, it may of course be a difficult task for a party to prove that the other party had actual knowledge of her unexpressed subjective intent. The more significant aspect of article 8(1) thus may well be the latter half of its interpretive standard. This supplement to the "subjective" standard provides that the actual intent of the speaker or actor will govern if the other party "could not have been unaware" of that intent.[159] The effect of this language is to bolster the significance of the actual intent of a speaker or actor in the interpretive values of the Convention in

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155. For a discussion of the strict objectivist approach of contract law in this country in the late nineteenth and early twentieth centuries, see infra note 205.

156. Traditionalist representatives repeatedly attempted throughout the drafting process to subordinate the subjective test in paragraph (1) of article 8 to a rigid objective test (now in a more flexible, modified version in paragraph (2) of the article). See Summary Records of the 189th Meeting of the Working Group, UNCITRAL, 11th Sess., 189th plen. mtg. paras. 5-6, 8-9, U.N. Doc. A/CN.9/SR.189 (1978); Formation Deliberations, supra note 83, paras. 32, 37-40; Report on the Ninth Session, supra note 58, para. 22 (rejecting a proposal to combine present paragraphs (1) and (2) of article 8 into a single objective standard).

157. See Secretariat Commentary, supra note 15, art. 7, para. 2, Official Records, at 18; Honnold, supra note 8, at 163. The original focus of article 8 was on the interpretation of the "common intent of the parties." See Report on the Eighth Session, supra note 132, paras. 155-68. In order to avoid confusion over which party's intent controlled in the event of a dispute, the Working Group decided at its Ninth Session to recast the article in terms of the "intent of a party." See Report on the Ninth Session, supra note 57, para. 25; Bianca & Bonell (Farnsworth), supra note 14, at 96-97.

158. This conclusion applies even if the actual common understanding of the parties is contrary to a "reasonable" interpretation of the statement or conduct at issue. See CISG Kommentar (Schlechtriem), supra note 32, at 97; Bianca & Bonell (Farnsworth), supra note 14, at 98. The same rule applies in this country. See, e.g., Restatement (Second) of Contracts § 201(1) (1977).

159. See CISG, supra note 2, art. 8(1).

that it decreases the risk of false claims by the *other party* that she subjectively did not "know" what the speaker's actual intent was.[160] The fortification of the subjective standard thus has the effect of providing greater protection to the actual intent of the speaker where under the circumstances known to both parties the addressee of a statement or act could not fail to understand what was actually intended.[161]

If the subjective standard of article 8(1) does not apply, the focus of interpretation switches to the understanding of a reasonable person in the position of the addressee. In such a case, article 8(2) prescribes that the ambiguous statement or unclear conduct is to be interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."

It is important to observe at the outset that this form of objective interpretation does *not* impose a normative resolution. Article 8(2) does not call upon a court or arbitral tribunal to decide what is the "better," "preferred" or even "normal" interpretation of an ambiguous statement or action. Indeed, the drafters of the provision specifically rejected proposals to subject ambiguous expressions to the interpretation "usually" given them in the relevant branch of commerce.[162]

Rather, the standard contemplated by article 8(2) remains squarely rooted in a factual analysis of what a reasonable person would have understood "in the same circumstances" as actually experienced by the addressee of the statement or action. By its nature the "objective" standard will admittedly require an adjudicator to extend beyond the simple observable facts and apply the understanding of a "reasonable" person. However, as the delegates to the Vienna Conference emphasized (by inserting in article

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160. CISG Kommentar (Schlechtriem), supra note 32, at 103-04; see also Fritz Enderlein & Dietrich Maskow, International Sales Law 63 (1992); CISG Kommentar (Junge), supra note 32, at 97 (Subjective intent will govern, even if the other party in fact misunderstood the expression used, if he "must actually have understood what was intended . . . .").

161. See Enderlein & Maskow, supra note 160, at 63 ("When one party *clearly expresses* his intent through a legal act, the addressee cannot pretend to have insufficient knowledge of that intent.").

162. See Report on the Ninth Session, supra note 57, paras. 44-46. Both the Hague ULIS and the Hague ULF prescribed an interpretation of common trade terms according to their "usual" interpretation in the trade concerned. See Hague ULIS, supra note 9, art. 9(3); Hague ULF, supra note 8, art. 13(2). It was precisely this form of normative or detached objective interpretation that the drafters of the Convention rejected in the drafting process. See Honnold, supra note 8, at 165 n.8, 176.

8(2)—after much debate—the modifier "of the same kind as the other party"),[163] the viewpoint of this reasonable person is directly controlled by the specific circumstances of each particular case. That is, the "understanding" of this reasonable person will include knowledge of the prior dealings and prior negotiations of the parties, the skill and expertise of the other party, et cetera. Even the subsidiary objective standard of article 8 thus affirms the significance of actual intent in the interpretive values of the Convention.[164]

The flexibility mandated by article 8 is reinforced by the scope of the factors that are to be considered in applying its interpretive standards. In a further rejection of the rigid evidentiary rules found in some legal systems, the third paragraph of article 8 provides that in applying the subjective as well as the objective standard "due consideration" must be given to "all relevant circumstances of the case."[165] The paragraph then specifically defines such circumstances to include "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." To American jurists, this concept may not at first blush appear particularly challenging.[166] There is more here than is initially apparent, however. The deliberations over this language in article 8(3) reveal a clear policy decision to promote a flexible analysis of all circumstances that would reflect on the intent of the parties—specifically includ-

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163. The drafting history of this modifier to the standard of article 8(2) is somewhat of a mystery. At the Vienna Conference, the representative of Egypt proposed amending the paragraph to provide that the interpretation would be governed by the understanding of a "reasonable person acting in the same capacity." See Consideration by the First Committee of the Draft Convention on Contracts for the International Sale of Goods, U.N. Conference on Contracts for the International Sale of Goods, art. 7(B)(3)(v), Official Records, at 88, U.N. Doc. A/CONF.97/C.1/L.43 (1981). In the course of the discussions of this proposal, the Danish representative suggested appending to this language the words "as the other party." The Official Records of the Convention indicate in one place that the Egyptian proposal was rejected and at another that it was accepted. Compare id. arts. 7(B)(3)(v), 7(B)(7), Official Records, at 88 (stating that the proposed amendment was accepted) with First Committee Deliberations (6th Meeting), supra note 93, para 42, Official Records, at 261, U.N. Doc. A/CONF.97/C.1/SR.6 (stating that the amendment was rejected). Nonetheless, the proposal obviously was adopted and sent to a drafting committee, which revised the language to the present version of article 8(2). See CISG, supra note 2, art. 8(2).

164. I explore this conclusion in detail below. See infra notes 234-39 and accompanying text.

165. CISG, supra note 2, art. 8(3).

166. Under the U.C.C., usages of trade and courses of dealing and performance are likewise relevant in determining the meaning of contractual provisions. See U.C.C. §§ 1-205(1)-(3), 2-208(1) (1987); see also infra note 170.

ing perhaps the most indicative factor, the pre-contractual negotiations of the parties[167]—and thereby to reject the rigid evidentiary rules of some legal systems that restrict inquiry into the actual intent of the parties.[168] Here as well, the drafters of the Convention chose a policy of flexibility over static rules that would prescribe a result detached from or in disregard of the actual intent of the parties.

The ultimate message of article 8 thus is part principle and part emphasis. The basic principle established is the importance of flexibility in the search for actual intent over the sterile objective standard applied in some legal systems. The emphasis provided by article 8 is on the importance of intent in a system of contract law constructed on the primacy of party autonomy. With its primary focus on the actual intent of the parties and its rejection of rigid rules in favor of flexible standards to define that intent, article 8 serves to remind us that the traditional rules originally developed to guide the determination of intent in specific contract formation issues should not be applied in such an inflexible manner as to obscure the ultimate issue of what that intent is.[169]

In contrast to such prescriptive or normative rules, the interaction of the principles in article 8 and article 6 mandates that issues not addressed by the express provisions of the Convention are to be resolved with a *primary* focus on the actual intent of the parties where that intent can be determined or, of equal importance, where one party cannot reasonably be in doubt over the actual intent of the other. As discussed in Parts IV.A. and IV.B., these considerations will be of particular significance in interpreting the content of "contractual" relationships not formed in accordance with the lock-step process assumed in Part II of the Convention.

3. The Role of Trade Usages and Established Practices

The above analysis shows that the basic policy of the U.N. Sales Convention on issues of contract formation and content favors a flexible analysis over prescriptive rules. Article 9 of the Conven-

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167. See CISG Kommentar (Junge), supra note 32, at 96.

168. The drafting history of article 8(3) reveals that the drafters of the Convention were well aware of the parol evidence rule in this country (now in a more moderate form in U.C.C. § 2-202), as well as the hostility in some countries to the consideration of subsequent conduct in interpreting intent. See Formation Deliberations, supra note 83, para. 36; see also Honnold, supra note 8, at 171-72.

169. This is precisely the point of Professor Eisenberg's article questioning the validity of many common law formation rules. See Eisenberg, supra note 111, at 1148-80.

tion carries forward—and reinforces—this approach on perhaps the most controversial issue in the drafting of the Convention, the application of trade usages and party practices.

There was little disagreement in the drafting process over the treatment of express agreements between the parties to be bound to particular commercial usages or practices. Pursuant to article 9(1), the parties are bound by "any usage to which they have agreed," as well as "any practices which they have established between themselves." This largely uncontroversial conclusion is common to numerous legal systems[170] and arguably is merely a specific reflection of the general principle of party autonomy set forth in article 6.[171]

The more significant issue for purposes of divining the core values of the Convention is the treatment of commercial usages *not* expressly agreed to by the parties. The direct antecedent of article 9 of the U.N. Sales Convention, article 9(2) of the Hague ULIS, prescribed a purely normative approach on this issue. Under the second paragraph of that article, the parties are deemed bound by usages that "reasonable persons" in the same circumstances "*usually* consider to be applicable to their contract."[172] This approach thus permitted the inclusion of contractual terms even without the knowledge or consent of the parties. As a result, it provided fertile ground for criticism in the drafting of the Convention. The then-socialist countries and the developing world, in particular, strenuously objected to the application of normative trade usages that, in

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170. Trade usages and "courses of dealing" also form essential elements of the contract formation and interpretation scheme of the Uniform Commercial Code. The very definition of "agreement" in § 1-201(3) (upon which term "contract" is based, see U.C.C. § 1-201(11) (1987)) embraces, *inter alia*, courses of dealing and usages of trade. U.C.C. § 1-201(3). Similarly, § 1-205(3) prescribes that courses of dealing and usages of trade "give particular meaning to and supplement or qualify terms of an agreement." "Unless carefully negated" under the U.C.C.'s parol evidence rule, see § 2-202 cmt. 2, a course of dealing or usage of trade may "explain[ ] or supplement[ ]" even the terms of a fully integrated agreement. § 2-202. Similar principles are also to be found in other legal systems. See, e.g., Forrester, German Civil Code, supra note 153, § 362.

171. See Bianca & Bonell (Bonell), supra note 14, at 107. An issue that may prove to be somewhat more contentious than express agreements on usages was that of the applicability of "practices" implied merely from the conduct of the parties. Here, too, the interpretive standards of article 8 will provide the governing guidelines.

172. Hague ULIS, supra note 9, art. 9(2) (emphasis added); see also Hague ULF, supra note 8, art. 13(2). For a comparative analysis of the Hague Conventions and the U.N. Sales Convention on the treatment of trade usages, see Muna Ndulo, The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis, 38 Int'l & Comp. L.Q. 1, 9-10 (1989).

their view, had been established solely to promote the interests of parties from industrialized, western states.[173]

In contrast to the Hague ULIS, the compromise adopted in the drafting process for the U.N. Sales Convention resulted—after much heated debate—in a clear rejection of a purely normative approach.[174] In its place, article 9 reaffirms the core value of the Convention that parties become bound to contractual terms only through corresponding express or implied declarations of intent.[175] Article 9(2) thus provides a rule that focuses on the intent that can fairly be implied as to specific trade usages: The parties are "considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation" those usages meeting certain defined criteria. In delineating those criteria, article 9(2) initially states that the parties are bound to usages of which they either knew or "ought to have known." It then sets forth, however, a series of strict, independent requirements,[176] the sum effect of which is that usages will apply in a particular transaction only where the circumstances permit a conclusion that there is a corresponding *actual* intent of the parties.[177]

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173. See E. Allan Farnsworth, Developing International Trade Law, 9 Cal. W. Int'l L.J. 461, 465-66 (1979); Alejandro M. Garro, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 Int'l Law. 443, 477-80 (1989); Note, Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods, 97 Harv. L. Rev. 1984, 1989-90 (1984).

174. The drafters of the Convention specifically rejected attempts of traditionalists to subject ambiguous expressions to the normative interpretation of that "usually" given them in the relevant branch of commerce. See Report on the Ninth Session, supra note 57, paras. 44-46; Honnold, supra note 8, at 165 n.8, 176.

175. See Secretariat Commentary, supra note 15, art. 8, paras. 2, 5, Official Records, at 19 ("By the combined effect of paragraphs (1) and (2), usages to which the parties have agreed, are binding on them. The agreement may be express or it may be implied . . . . [U]sages which become binding on the parties do so *only* because they have been explicitly or implicitly incorporated into the contract . . . .") (emphasis added).

176. Under article 9(2) of the CISG a trade usage is binding on the parties by implication only where (1) in international (not merely national or even regional) trade, and (2) it is "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." CISG, supra note 2, art. 9(2).

177. Viewed in this light, article 9 in effect merely defines standards for interpreting intent that are similar to those in article 8, but are more closely tailored to the implied inclusion of commercial usages. Where the intent of the parties on the applicability of a particular usage is clear, that intent will govern pursuant to article 9(1). Compare art. 9(1) (parties bound by usages to which they have agreed) with art. 8(1) (statements and conduct of parties are to be interpreted in light of the intent of the actor). Where that intent is not clear, however, the import of the statements and conduct of the parties will be judged by standards of reasonableness. See art. 8(2) (Where intent is unclear, statements and conduct of parties are "to be interpreted according to the understanding that a reasonable person . . . would have had in the same circumstances."). These inquiries must take into

Ultimately, the rules of the Convention on the applicability of trade usages, like the general interpretive standards of article 8, are properly viewed as more specific expressions of the fundamental principle set forth in article 6 of the preeminence of party autonomy. Where there is a common understanding between the parties on the applicability of a particular usage, whether express or reasonably implied from the circumstances, article 6 mandates that that understanding supersede even the express rules of the Convention.[178] Indeed, attempts to subordinate trade usages implied pursuant to article 9(2) to conflicting provisions of the Convention were specifically rejected in the drafting process.[179] As a result of the acceptance of an amendment to article 9(2) proposed by Professor Farnsworth of the U.S. delegation,[180] even usages affecting issues of contract formation will preempt the corresponding formation rules of the Convention.[181]

4. Proving the Common Intent

As the above examination of the core values of the U.N. Sales Convention reveals, article 6 establishes, and articles 8 and 9 reinforce and apply, a basic, flexible principle of party autonomy. Article 11 of the Convention serves to complete the circle. Whereas those former provisions set forth flexible standards for establishing and interpreting the common intent of the parties, article 11 mandates a flexible approach in proving that intent.

The principle established by article 11 is a simple one: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." The obvious

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account "all relevant circumstances," including usages and established practices. Art. 8(3). In the context of trade usages, article 9(2) likewise gives effect to the intent of the parties reasonably implied under the circumstances, and provides more specific guidelines for resolving that issue. See Honnold, supra note 8, at 178-79; Wey, supra note 46, at 71-72; Bianca & Bonell (Bonell), supra note 14, at 107.

178. See Secretariat Commentary, supra note 15, art. 8, para. 5, Official Records, at 19 (usages applicable pursuant to article 9 "will be applied rather than conflicting provisions of this Convention on the principle of party autonomy"); CISG Kommentar (Junge), supra note 32, at 101; Stephen Bainbridge, Note, Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions, 24 Va. J. Int'l L. 619, 661 (1984).

179. See First Committee Deliberations (6th Meeting), supra note 93, paras. 71-82, Official Records, at 263-64 (rejecting the proposal of the Czechoslovak delegation); Schlechtriem, UN-Kaufrecht, supra note 106, at 28.

180. See First Committee Deliberations (7th Meeting), supra note 93, paras. 1-8, Official Records, at 265.

181. See Bianca & Bonell (Bonell), supra note 14, at 104 (also noting that this conclusion flows from the location of article 9 in Part I of the Convention, which applies to both Part II (Contract Formation) and Part III (Sale of Goods)).

targets of this rule are form requirements prescribed by some domestic laws (such as the Statute of Frauds)[182] for the enforceability of certain types of contracts. The drafters of the Convention could hardly have been clearer on this score: Contracts within the sphere of applicability of CISG are not subject to any requirement as to form.[183] Indeed, to emphasize the point, the drafters appended a second sentence clarifying that this principle extends with equal vigor to form requirements cloaked as evidentiary rules. Accordingly, a contract of sale "may be proved by any means, including witnesses."[184]

Here, again, the basic policy that emerges is the promotion of the freedom of the parties to structure their contractual relationship in a flexible manner unimpeded by prescriptive rules. In a clear recognition of the particular significance of flexibility for international commercial transactions,[185] article 11 accomplishes this objective by renouncing all form requirements for the conclusion and proof of sales contracts. By so reaffirming the power of the parties to define for themselves the manner by which they arrive at a contractual understanding, article 11 both reflects and reinforces the Convention's basic principle of the primacy of the common intent of the parties.[186]

The policy of flexibility promoted in article 11 is a broad one indeed. The freedom of the parties from form requirements applies not only to the *fact* of the conclusion of the contract, but

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182. See, e.g., U.C.C. § 2-201 (1987).

183. Article 12 provides that the provisions of article 11 shall not apply where a party has a place of business in a contracting state that has made a corresponding declaration (via article 96). CISG, supra note 2, art. 12. Only a very small number of States (principally former republics of the Soviet Union, and not the United States) have made such a declaration. See Status of Conventions, supra note 3, at 7.

184. In adopting this language, the drafters rejected arguments that the rules of the Convention should not spill over into the law of evidence. Instead, the drafters clearly saw the principle set forth in the second sentence of article 11 as necessary to promote the broader goal of ensuring flexibility in international commercial transactions. See Formation Deliberations, supra note 83, paras. 20-22.

185. See Secretariat Commentary, supra note 15, art. 10, para. 2, Official Records, at 20 ("The inclusion of article [11] in the Convention was based on the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract."); CISG Kommentar (Schlechtriem), supra note 32, at 110.

186. In the context of form requirements, this precept has variously been described as the "theory of consensualism," Bianca & Bonell (Rajski), supra note 14, at 122, and "the principle of freedom of form." See CISG Kommentar (Schlechtriem), supra note 32, at 109-10 ("*der Grundsatz der Formfreiheit*").

also to proof of its *contents*.[187] The article permits a party to prove, "by any means, including witnesses," even an oral or other informal agreement that conflicts with express provisions of the Convention itself. This policy of flexibility is mirrored by the rule in article 29(1) of the Convention that even written contracts can be modified by "mere agreement" of the parties.[188] In this respect, article 11 (as bolstered by article 29(1)) reinforces the principle of party autonomy of article 6 in a particular way, because it sweeps away the formal impediments to the proof of the requisite common intent of the parties to "derogate from or vary the effect of" the provisions of the Convention.

The impact of article 11 may be most profound with respect to the process of contract formation. By broadly abolishing the restrictions on the proof of both the fact and the content of sales contracts, article 11 supplies the conceptual tools for proving the existence of a contract concluded in a manner that deviates from the process assumptions defined in Part II of the Convention. Thus, significantly, where the parties arrive at a contractual understanding other than through a formal "offer" and a formal "acceptance," article 11, in conjunction with article 6, permits an adjudicator to give effect to such a contract.[189] Indeed, the language of article 11 reflects an intentional deviation from the wording of its antecedent in the Hague ULF—which phrased the principle in terms of the proof of the "offer" and the "acceptance"[190]—thus embracing contracts formed through protracted negotiations or other informal statements and conduct where the expressions of intent of the parties cannot be parsed into an offer and its unqualified acceptance.[191]

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187. See CISG Kommentar (Schlechtriem), supra note 32, at 110-12.

188. Article 29(2) does, however, give effect to a contractual provision requiring that contractual modifications be in writing, but states that a party may be precluded by her conduct from relying on such a provision if the other party has relied on such conduct.

189. See CISG Kommentar (Schlechtriem), supra note 32, at 111; Bianca & Bonell (Rajski), supra note 14, at 121.

190. Hague ULF, supra note 8, art. 3 ("An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form."); see also Hague ULIS, supra note 9, art. 15.

191. See Bianca & Bonell (Rajski), supra note 14, at 121; see also sources cited infra note 340 (observing that the Convention embraces contracts formed in a manner other than via an offer and acceptance).

5. *The Hierarchy of Norms of the Convention*

Through the identification of its core principles in articles 6, 8, 9, and 11, the U.N. Sales Convention defines a straightforward hierarchy of norms for the conclusion and content of international sales contracts. It should now be clear that the preeminent principle of the Convention is the primacy of the common intent of the parties ("party autonomy"). In recognition of the importance of flexibility in international commercial transactions, articles 8 and 11 then make clear that this common intent may be express or implied and, freed from the strictures of formality, may be proved by any means. Next in line of priority come usages of trade and party practices. These are on equal footing with party autonomy if expressly agreed, but of subordinate importance if their applicability arises only by implication under article 9(2). It is only then, if no express or implied agreement of the parties is established, that resort may be had to the express provisions in Parts II and III of the Convention.

It is equally important in the context of the role of party autonomy under the Convention to emphasize the converse of this latter statement. The express substantive provisions of the Convention themselves represent important values in its hierarchy of norms. After more than ten years of drafting work and a multitude of significant compromises to accommodate the divergent interests represented in the process, the drafters settled upon certain value judgments about the appropriate relationship between the parties to an international sales contract, in particular about the appropriate allocation of benefits and burdens between buyer and seller. The important negative implication that emerges from the preeminence of party autonomy in article 6 is that these important value judgments should be displaced only where a party can establish a contrary, common intent of the parties.[192]

B. *The "Formation Values" of the Convention*

As the initial foundation for an analysis of the treatment of partial dissensus under the U.N. Sales Convention, the discussion above has, in accordance with the mandate of article 7(2), identified and examined the relevant "general principles" on which the Convention is based. Like the parts of a disassembled machine,

192. I explore the implications of this observation in notes 295 and 327-28 and accompanying text.

however, the principles in articles 6, 8, 9, and 11 fail to explain fully the essence of the Convention's contract formation scheme. The question left unanswered is whether those "general principles" can be distilled into a unifying set of values that underlie the recognition and enforcement of contractual obligations under the Convention, which I will refer to here as its "formation values."

As is often the case in such inquiries, it is much easier as an initial matter to identify the grounds for enforcing promises that are *not* of significance in the formation values of the Convention than it is to divine a unifying theme for the nature of contractual obligation under its formation scheme. One such set of values that is not implicated in the Convention's formation scheme is a purely normative approach to the definition of contractual obligation[193] (whether on the basis of idealized norms or in the form of extant societal norms).[194] The drafters of the Convention repeatedly rejected proposals in the drafting process that would have permitted normative assessments of contractual relationships and their

193. A number of modern U.S. scholars find the moral justification for contractual obligations outside of liberal notions of pure individual autonomy. At their most extreme, some proponents of this normative approach have argued that requirements of communitarian justice mandate that adjudicators evaluate the *substantive fairness* of the contractual exchange. See, e.g., James Gordley, Enforcing Promises, 83 Cal. L. Rev. 547, 548 (1995). More commonly, the focus of these scholars has been on the more general normative role of contract law, specifically on a deeper understanding of the social (as opposed to individual) context of the institution of contract. With contract viewed as a social institution, the contours of its obligations may thus fairly be defined by and/or supplemented with "socially extant expectations of fairness or reasonableness," Charny, supra note 126, at 1836, or "minimum standards of decency and fairness," Braucher, supra note 126, at 732. In a broader sense, these scholars argue that embedded societal values or norms assume a positive role in recognizing contractual obligation, in that they set the context both for interpreting the meaning of promissory expressions and conduct and for filling gaps in the express agreement of the parties. See Lisa Bernstein, Social Norms and Default Rules, 3 S. Cal. Interdisc. L.J. 59, 69-73 (1993); Braucher, supra note 126, at 732-38. Indeed, this is one of the major premises of the flexible "relational theory of contract" advocated principally by Professor Ian MacNeil. See MacNeil, Relational Contract, supra note 110, at 485-93 (discussing the role of social norms in structuring "contractual" relationships); MacNeil, Many Futures, supra note 110, at 731 (discussing "non-promissory accompaniments of promise"); see also Salbu, supra note 110, at 1293-1304.

194. At a certain level, of course, all individuals are influenced by the norms of their community. The more significant issue when we speak of the "expectations" of reasonableness and fairness that arise in the community context, therefore, is how the relevant "context" is delineated. The spectrum of possibilities here is a broad one: Does the legal system prefer to further idealize community standards of fairness and reasonableness over the extant ones? On a separate but related track, is an adjudicator to apply broad-based societal expectations or instead focus on the expectations that arise in particular circumstances at issue? I examine these issues in notes 220-29 and accompanying text.

creation. The lively debate over the role of trade usages,[195] for instance, was resolved in favor of a clear rejection of the purely normative approach of the Hague Conventions.[196] This rejection of normative trade usages also carried with it a refusal to grant broad effectiveness to the contents of a written confirmation of a previously concluded contract based on normative considerations of a duty on the part of merchants to object to proposed terms.[197]

Indeed, the drafters were even unable to agree on the precise role of "good faith" in the conclusion and performance of contracts.[198] The records of the drafting process reveal that the national representatives were unable to achieve a consensus on such a norm precisely because of their concerns about the widely differing conceptions of "good faith" among the various legal and cultural traditions represented in the creation of the Convention.[199] In the interests of uniformity in application, therefore, the drafters adopted a compromise which deleted a provision in early drafts that would have imposed such an obligation on the parties in the formation process;[200] in its place the drafters inserted a clause

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195. See supra notes 172-77 and accompanying text.

196. To be sure, article 9(2) provides that the parties are considered to have "impliedly" agreed upon trade usages of which, *inter alia*, they "ought to have known." This standard is, however, substantially limited by the subsequent language of article 9(2), which limits the scope of the provision to usages that "in international trade [are] widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." For more detail on this issue, see supra notes 174-77 and accompanying text.

197. As a result of the insistence of the German delegation, the Hague ULF in principle gave effect to the terms proposed in a written confirmation of a contract based on the recognition of a corresponding normative trade usage. See Schlechtriem, UN-Kaufrecht, supra note 106, at 44; Ernst von Caemmerer, Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts, 29 Rabelszeitung 101, 125-26 (1965). The significant limitation of the scope of trade usages in article 9 of CISG, among other things, clearly amounted to a rejection of this approach to the treatment of written confirmations. See CISG Kommentar (Schlechtriem), supra note 32, at 124. The drafters of CISG likewise rejected attempts to give automatic effect to non-material terms in such confirmations in the absence of an objection by the other party. See Report on the Eighth Session, supra note 132, paras. 104-13; Report on the Ninth Session, supra note 57, para. 228 (deleting a corresponding provision because "it was generally considered that any modifications to the contract after its conclusion should require agreement of the parties in accordance with [article 29]").

198. See Formation Deliberations, supra note 83, paras. 42-60.

199. Id. paras. 44-45 (noting the argument of opponents of a general "good faith" article that "the development of a coherent body of case law was unlikely to take place, as national courts would be influenced by their own legal and social traditions in applying the article to individual cases"); see also Bianca & Bonell (Bonell), supra note 14, at 69.

200. See Formation Deliberations, supra note 83, para. 42. The drafters likewise rejected attempts to subject ambiguous contractual expressions to a normative interpretation. See Report on the Ninth Session, supra note 57, paras. 44-46.

merely requiring that in the interpretation of the *provisions of the Convention*, "regard is to be had to . . . the observance of good faith in international trade."[201]

Ultimately, the drafters of the Convention determined to avoid many normative issues by carving from the scope of the Convention those issues that typically underlie the concerns of communitarian theorists. Most significant, pursuant to article 2 the Convention does not apply to transactions with consumers.[202] In addition, the drafters left room for contracting states to apply national public policy principles relating to the "validity" of contracts, such as rules on incapacity and infancy.[203] In this way, adjudicators are permitted to address issues of "unconscionability" and related concepts *outside* of the Convention.[204]

Identifying the role of individual autonomy[205] in creating contractual obligations under the Convention presents a more chal-

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201. CISG, supra note 2, art. 7(1). Although the rationale underlying a rejection of a general obligation of good faith is clear, the practical result of this compromise is less so. Compare E. Allan Farnsworth, Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions and National Laws, 3 Tul. J. Int'l & Comp. L. 47, 55-57 (1995) (arguing that national courts can nonetheless apply domestic notions of good faith); Bianca & Bonell (Bonell), supra note 14, at 84-85 (arguing that the principle of good faith is implied in contracts governed by CISG in light of article 7(1)); Amy H. Kastely, Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention, 8 Nw. J. Int'l L. & Bus. 574, 597-98 (1988) (same); Peter Winship, Commentary on Professor Kastely's *Rhetorical Analysis*, 8 Nw. J. Int'l L. & Bus. 623, 631 (1988) (observing in response to Professor Kastely that "the reference to 'good faith' is limited to interpreting the Convention" but acknowledging the likelihood that "over time a general obligation on the contracting parties to act in good faith will be accepted"); and Gyula Eörsi, A Propos the 1980 Convention on Contracts for the International Sale of Goods, 31 Am. J. Comp. L. 333, 349 (1983) (stating that the compromise "bur[ies] the principle of good faith"); Honnold, supra note 8, at 46 (observing that the drafters "decided that a 'good faith' provision should not be . . . imposed loosely and at large, but should be restricted to a principle for interpreting the provisions of the Convention").

202. CISG, supra note 2, art. 2(a) ("This Convention does not apply to sales: (a) of goods bought for personal family or household use . . . .").

203. Id. art. 4(a). For a detailed analysis of this "validity exception," see Hartnell, supra note 14.

204. Honnold, supra note 8, at 312-13; CISG Kommentar (Herber), supra note 32, at 71; id. (Schlechtriem) at 127 (applicability of national rules on "surprising clauses" in standard forms).

205. Under the traditional view in the United States, the moral ground for enforcing contractual obligations arises from notions of individual freedom and autonomy, specifically from the *consent* of the parties. Over the course of the development of the common law, however, the significance of such notions of individual autonomy has varied. Under the analytically purest form of these various "autonomy-based theories," the so-called "will" theory of contract, the moral ground for enforcing promises is to be found solely in the *actual*, or *subjective*, will of the parties. See Charles Fried, Contract as

lenging and for present purposes more significant task. Notions of individual autonomy may have little to offer in determining the content of the "background" law that serves to fill gaps in extant contractual relations. As Richard Craswell has observed, because the principle of individual autonomy is essentially content neutral, and because the law imposes no compulsion to conclude contracts, "any default rule would . . . be consistent with individual freedom, as long as the parties are allowed to change the rule by appropriate language."[206]

The value of individual autonomy in recognizing contractual obligation may be of controlling significance, however, in defining the *process* by which the parties must reach agreement sufficient to displace such substantive background rules, whatever their content.[207] The choice of the appropriate rules governing how parties become bound in the first instance (the "agreement rules") will be

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Promise: A Theory of Contractual Obligation 2-3, 14-17 (1981); see also Barnett, Consent Theory, supra note 126, at 271-74 (arguing that the "will" theory of contracts is frequently subverted to satisfy reliance interests); Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 574-76 (1933) (explaining the "will" theory and its conflict with classical theory). The response of classical (late nineteenth- and early twentieth-century) contract law to concerns about the ability to divine subjective intent was an equally rigid adherence to a purely objective view of contract obligation. See Oliver Wendell Holmes, The Common Law 242 (Mark D. Howe ed., 1963) ("The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."); see also Hotchkiss v. Nat'l City Bank, 200 F. 287, 293-94 (S.D.N.Y. 1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.").

Modern contract law in this country has retreated, at least in part, from such rigidity in the interpretation of intent by incorporating elements of both subjective intent and objective meaning. See Restatement (Second) of Contracts §§ 20, 201 (1979); Eisenberg, supra note 111, at 1130-35 (comparing modern contract law principles of interpretation with classical principles). Under this modern approach, the subjective intent of a party in making a promise will prevail if the other party attaches the same meaning to that promise. See Restatement (Second) of Contracts § 201(1). Similarly, even if the parties attach different meanings to a promise of one of them, the subjective intent of the promisor will prevail if the other party knew or had reason to know of that subjective intent. See id. § 201(2)(a), (b). It is only if the parties fail to achieve a common subjective understanding that the meaning of their expressions and conduct will be determined by objective criteria. See id. § 201(2)(c). Barnett espouses a variant of the approach of modern contract law. See generally Barnett, Consent Theory, supra note 126; Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, 78 Va. L. Rev. 821 (1992) (advocating a "consent theory of contract" under which the moral ground for enforcing promises arises from a manifestation of an intent to alienate property rights).

206. Craswell, Default Rules, supra note 121, at 515; cf. Braucher, supra note 127, at 703-6 (questioning the role of consent in defining the appropriate substantive background law).

207. See Craswell, Default Rules, supra note 121, at 514-15 (explaining the content neutrality of autonomy-based theories).

guided decisively by the extent to which the enforcement of contractual obligations requires *actual* consent (that is, is controlled by notions of individual autonomy). An identification of the appropriate "agreement rule" for the treatment of a partial dissensus under the U.N. Sales Convention must therefore include an assessment of the significance of individual autonomy in the values that underlie its formation scheme.[208]

At a theoretical level, we have seen from the above examination of the basic principles of contract formation[209] that the Convention conceives of a contract as a conformity between the declarations of *intent* of the parties. In accordance with traditional conceptions, an essential element of both offer and acceptance under CISG is that they reflect an intent to bind oneself to contractual obligations.[210] As the Convention imposes no duty to engage in "contractual" behavior, the journey to a conclusion that individual autonomy is the primary guiding value in recognizing contractual obligation would appear to be a short one.

Upon further examination, however, one confronts in the CISG the same tension found in other legal systems between "intent" in its purest, subjective form and the interactive, social nature of the institution of contract.[211] If one merely scratches the surface of CISG's provisions, it becomes apparent that the focus is not on intent alone but rather on the *expressions* of that intent.[212] It would appear, therefore, that the salient characteristic of the accepted constitutive elements of a contract is not that the parties *in fact intend* to bind themselves with the expressions used, but rather that the expressions merely "indicate" that such an intent exists.[213] This fact has led some European commentators to

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208. See supra notes 128-30 and accompanying text.

209. See supra part II.B.

210. CISG, supra note 2, art. 14(1) (offer must reflect "the intention of the offeror to be bound"), art. 18(1) (acceptance must indicate "assent").

211. A contract is a *social* institution because, by its very nature, it requires interaction between two (or more) legal entities. That is not to say that the institution of contract necessarily requires an interpretation of the declarations of the parties with reference to broad *societal* norms. Whether such communitarian values in fact play a role in the interpretive values of the U.N. Sales Convention is addressed below. See infra notes 220-29 and accompanying text.

212. See Secretariat Commentary, supra note 15, art. 17, para. 2, Official Records, at 24 ("[C]ontractual obligations arise out of *expressions* of mutual agreement.") (emphasis added).

213. See CISG, supra note 2, arts. 14(1), 18(2). Moreover, article 4 carefully carves from the scope of the Convention those issues of subjective assent (such as incapacity, fraud, mistake, and infancy) that touch on the validity of that assent. See CISG Kommentar

observe as a general proposition that the Convention is concerned only with the "external consensus"[214] of the parties, or in other words "the externally perceivable convergence of offer and acceptance."[215]

In light of this tension between the role of subjective intent and the necessity of evaluating "contractual" expressions by external criteria, the interpretive provisions of article 8 will assume decisive significance in resolving the central inquiry into the formation values of the Convention. The core values that emerge from these provisions are perhaps best illustrated by their simple hierarchy of interpretive standards. In spite of vigorous attempts by traditionalists to adopt a strict objective approach,[216] the *primary* rule of interpretation under article 8 is that a party's subjective intent must be given effect if the other party knew or "could not have been unaware" of that intent.[217]

An analysis of article 8 and its role in the CISG formation scheme reveals, moreover, that even under the subsidiary objective standard of article 8(2) the goal remains to identify and give effect to the actual intent of the parties. To be sure, the language of article 8(2), taken alone, does not refer to actual intent; the subject of the interpretive inquiry there is, rather, the "understanding" of a "reasonable person." In the context of contract formation, however, the critical "understanding" relates directly to the intent of the speaker or actor. In determining whether a statement or conduct has effectively concluded a contract, the essential interpretive issue is whether a "reasonable person" would understand the statement or conduct as "indicating assent"[218] to the assumption of contractual obligations on the basis of the terms proposed by the other

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(Herber), supra note 32, at 71; Honnold, supra note 8, at 114-15 (observing that the Convention does not govern cases of fraud).

214. CISG Kommentar (Schlechtriem), supra note 32, at 122; Piltz, Kaufrecht, supra note 128, at 71.

215. Piltz, Kaufrecht, supra note 128, at 71 (*"[das] äußerlich wahrnehmbare Zusammenfinden von Vertragsangebot und Vertragsannahme"*).

216. See supra note 156; Summary Record of the 189th Meeting of the Working Group, UNCITRAL, 11th Sess., 189th plen. mtg. paras. 5-9, U.N. Doc. A/CN.9/SR.189 (1978). In rejecting an attempt to subordinate the subjective standard to the objective standard, see Formation Deliberations, supra note 83, paras. 32, 37-40, proponents of the present version of article 8 noted: "In establishing the existence of a contract the primary concern must be the subjective intent of the parties." Id. para. 34.

217. For a more detailed discussion of the structure of article 8, see supra part III.A.2.

218. See CISG, supra note 2, art. 18(1); see also supra notes 59-69 and accompanying text.

party. The focus of the interpretive inquiry in this context remains, therefore, the actual intent of the speaker or actor.[219]

This conclusion is confirmed by the nature of the objective standard of article 8(2) itself. As with all such "objective" rules, article 8(2) necessarily implies a normative component, for the standard to be applied is the understanding of a "reasonable" person. This on the one hand makes clear that the effectuation of subjective intent alone is not the *sole* formation value of the Convention. Separated from its interpretive context, however, the adjective "reasonable" tells us little about the relative significance of this normative component as compared to the role of the specific factual circumstances in which the relevant expression is made.

In the context of default rules, David Charny has appropriately termed these dimensions of interpretive standards "idealization" and "generality."[220] "Generality" relates to the importance of interpretation in its strictest sense, that is, to "the extent to which the adjudicator particularizes her formulation to the particular transactors whose dispute is before her." As the subject of interpretation switches from the individual to the group of which she is a member, the role of normative considerations increases. "Idealization," on the other hand, will expose the degree to which values other than the effectuation of the intent of the parties are of significance in the interpretive inquiry.[221] Here, the extent to which an adjudicator may prefer the "better" or "fairer" interpretation will define the importance of the normative component of an objective standard. Where the rules of a particular legal system fall on these dual spectra[222]—generality vs. particularization, interpretation of

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219. Where, in contrast to an inaccurate interpretation of the legal effect of an expression intentionally used, a party unintentionally uses a mistaken expression (for example, $5,000 instead of $50,000), the possibility arises that the speaker can avoid the contract based on the doctrine of mistake. As an issue of the "validity" of a contract, whether a party may do so is excluded from the scope of the Convention by article 4 in favor of the otherwise-applicable national law governing mistake. See Bianca & Bonell (Farnsworth), supra note 14, at 103.

220. Charny, supra note 126, at 1820.

221. Id. at 1820-21.

222. "Generality" and "idealization" do not represent opposite ends of the same spectrum but rather independent dimensions of an interpretive scheme. A system can, for example, be both highly generalized (that is, identify as the relevant subject of interpretation the broad group of which the actors are members) and highly idealized (that is, apply the "best" or "fairest" norms applicable to that group).

intent vs. application of societal norms—will reveal a significant amount about the values that underlie its interpretive scheme.[223]

Even a cursory examination of article 8 reveals that the "objective" standard of its second paragraph falls squarely on both the most particularized and least idealized ends of these spectra. The drafters made clear that the analysis of the understanding of a reasonable person must proceed on the basis of the specific circumstances actually experienced by the addressee of the relevant statement or action.[224] In doing so, the drafters rejected attempts of traditionalists to subject ambiguous expressions to a more normative interpretation, specifically the interpretation "usually" given these expressions in the relevant branch of commerce.[225] Even as late as the final conference in Vienna, the delegates continued to refine the importance of a particularized and non-idealized interpretation. Modernist delegates succeeded, over vigorous objection, in inserting a modifier in article 8(2) to make clear that the perspective of the relevant "reasonable person" was to be determined with specific reference to the position of the actual addressee—with knowledge of the prior dealings and prior negotiations of the parties, the skill and expertise of the other party, et cetera—as opposed to an idealized reasonable person in the relevant branch of commerce in general.[226]

The final paragraph of article 8 reinforces this situation-specific form of "objective" interpretation by mandating effectively unrestricted evidentiary flexibility in seeking out the actual intent of the parties.[227] Particularly significant in article 8(3) is the express rejection of the evidentiary restrictions of some national systems that limit the consideration of "parol evidence" as well as

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223. It is interesting to note here that these spectra in fact capture the overlap between autonomy-based theories and communitarian theories of contract. See supra note 193 and text accompanying notes 205-06. The more a particular "objective" standard approaches the "generalized and idealized" ends of the spectra, the more a legal system seeks to promote communitarian values in recognizing and enforcing contractual obligations. The reverse is true as well, as the discussion of the U.N. Sales Convention in the text below reveals.

224. CISG, supra note 2, art. 8(2) ("[T]he understanding that a reasonable person . . . would have had *in the same circumstances*.") (emphasis added).

225. See supra notes 163, 174 and accompanying text; see also Report on the Ninth Session, supra note 57, paras. 44-46.

226. CISG, supra note 2, art. 8(2) ("a reasonable person of the same kind as the other party"). For the drafting history relevant to this amendment, see supra note 163.

227. For a more detailed discussion of article 8(3), see supra notes 165-68 and accompanying text.

the subsequent conduct of the parties in identifying actual intent.[228] This flexibility in the search for actual intent is validated with particular reference to contract formation in article 11. That provision broadly abolishes all form requirements for the creation of contractual obligations, as well as similar evidentiary restrictions on the proof thereof.[229] The interaction of the particularized standard of article 8(2) and the interpretive flexibility mandated by article 8(3) precludes generalized or normative conclusions about how transactors in international commerce express their intent.

The interpretive flexibility mandated by article 8(3) also has implications in the context of the allocation of burdens of proof.[230] An analysis of the structure of the interpretive standards of article 8 reveals that the burden of proof regarding "objective" meaning will fall on the recipient of the relevant statement or expressive conduct. Where a party seeks to rely upon favorable terms in a putative contract, in other words, the burden will be hers to prove that the other party's statements and conduct must be interpreted as indicating a corresponding assent (that is, that the parties in fact concluded a contract on such basis). Where the speaker or actor contends that a contrary subjective intent should control in this regard, the burden will switch to her to prove that the recipient "knew or could not have been unaware" of that intent.[231]

As a consequence of the flexibility prescribed by article 8(3), it should rarely be necessary for a speaker or actor to assume this burden. The sum effect of article 8(3) is a charge that *all* facts of which the recipient of an "indication" of intent knew or reasonably should have known must be considered even (and perhaps especially) under the objective approach of article 8(2). As a consequence, it will be a rare case indeed that the burden will fall on the speaker or actor to prove that the recipient knew or could not have

228. See supra notes 165-68 and accompanying text.

229. See supra part III.A.4.

230. The allocation of the burden of proof on matters within the scope of the Convention must be determined within the Convention itself, at least where the particular provision at issue is structured in the form of a rule and an exception. See CISG Kommentar (Herber), supra note 32, at 74. Article 8 follows such a rule-exception format. See article 8(1) (subjective standard applies only "if" the other party knew or could not be unaware of that intent); article 8(2) (objective standard applies only "if" the requirements for article 8(1) are not established).

231. See supra notes 155-61 and accompanying text.

been unaware of an intent not otherwise indicated by available facts.[232]

The flexibility in the interpretive standards of article 8 does not mean, however, that all indicative factors are of equal expressive weight. Notwithstanding the list of secondary factors identified in article 8(3), the primary interpretive material remains the parties' *express* declarations of intent.[233] In this sense, the objective standard of article 8(2) can, paradoxically, play a protective role for the speaker or actor: Where a party has made an *express* declaration of her intent, the burden imposed by article 8(2) on the other party to show a contrary implied intent from the secondary factors of article 8(3) will be an onerous one.

This latter point is worthy of emphasis with respect to the recognition of contractual obligations in the first instance. The objective standard of article 8(2) will often operate to protect the expectations of the recipient of an indication of intent. Under this standard, however, such a recipient must prove that her expectation was "reasonable." In light of the general preference in favor of express indications of intent, the latitude for such a party in claiming a "reasonable" misunderstanding will decrease as the degree of clarity in the declarations and expressive conduct of the speaker or actor increases. Where the speaker or actor has declared her intent *expressly*, the policies underlying the three subparts of article 8 will

232. The principal role of the "could not have been unaware" supplement to article 8(1) may well be merely to *emphasize* the central significance of actual intent in the formation values of the Convention. When taken to its logical end, the "could not have been unaware" extension of the subjective standard of article 8(1) will only rarely fall within the burden of proof of the speaker or actor in issues involving contract formation. Because *all* factors of relevance are to be considered even under the objective standard of article 8(2), the "reasonable person of the same kind" and "in the same circumstances" as the recipient should not, by simple logic, have *less* knowledge than the actual recipient. Thus, if the recipient "could not have been unaware" of a fact, then such a reasonable person would have like knowledge, with the ultimate result that this element of the "subjective" standard is actually merged into the recipient's burden to establish the "objective" meaning. As a result, observations by scholars regarding the effect of an unambiguous expression of intent under the "could not have been unaware" language of article 8(1) will apply with equal vigor to the burden of the recipient seeking to establish the "objective" import of such an "indication" of intent. See, e.g., Enderlein & Maskow, supra note 160, at 63 ("When one party *clearly expresses* his intent through a legal act, the addressee cannot pretend to have insufficient knowledge of that intent.").

233. See Secretariat Commentary, supra note 15, art. 7, para. 5, Official Records, at 18 ("In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in."); Wey, supra note 46, at 232-33.

effectively preclude proof of an assertion that the recipient "reasonably" understood a contrary *implied* intent.

Finally, the flexible interpretive standards defined in article 8 find support in specific protective provisions elsewhere in the Convention. These provisions achieve the goal of limiting the risk of inaccurate determinations of intent by creating presumptions in certain circumstances against finding an intent to be bound to contractual obligations. Such is the primary role of article 19. One essential function of that article is to establish a presumption that one party (the offeree) lacks an intent to be bound where she has proposed terms that deviate from those of the offer.[234] This proposition was sufficiently clear to the drafters that they deemed it unnecessary to include a more straightforward statement (found in some national systems)[235] that the parties have not established mutual contractual obligations at the executory stage in their relationship as long as they have failed to reach an agreement on all terms proposed in the negotiation process.[236]

A complementary protective presumption arises from the general provision of article 18(1) governing acceptances. This provision requires that a valid acceptance not merely indicate an intent to be bound to contractual obligations in general, but that it express an assent to contract formation specifically on the basis of the terms proposed in the offer.[237] The admonition in article 18(1) that "silence or inactivity" cannot alone be the basis for a conclusion of "assent" to such obligations has a like function: it operates to protect against the imposition of contractual obligations based

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234. Article 19(1) sets forth two other noteworthy presumptions. The first, rejection with consequent termination of the offer, see CISG, supra note 2, art. 17, protects the interests of the offeror by making clear that she becomes free to contract elsewhere without fear of a later acceptance; the second, the acceptance becomes a counteroffer, serves to open the possibility of a subsequent acceptance by the original offeror. See Secretariat Commentary, supra note 15, art. 15, paras. 1, 3, art. 17, paras. 2, 5, Official Records, at 22-24.

235. See, e.g., Bürgerliches Gesetzbuch (BGB) § 154 (F.R.G.); see also Farnsworth, Contracts, supra note 48, at 125 (noting the traditional premise that no contract is formed until parties have agreed on all terms on which they expected to reach agreement).

236. See Report on the Ninth Session, supra note 57, para. 208 (observing that each party "can always require agreement on those points that he considers essential" prior to the conclusion of the contract). In rejecting an interpretive rule based on the "common intent" of the parties, the Working Group commented that "it was hard to conceive of a court imposing a contract on the parties, if they had no actual common intent." Id. para. 17.

237. CISG Kommentar (Schlechtriem), supra note 32, at 150 (noting that the indication of assent must "also extend to the terms of the offer"); Bianca & Bonell (Farnsworth), supra note 14, at 166.

on normative considerations of a "duty to speak."[238] Similar policy determinations led to the refusal to grant broad effectiveness to the contents of a written confirmation of a previously concluded contract based on normative considerations of a duty to object to proposed terms.[239]

Ultimately, the tension between the moral significance of intent in recognizing binding obligations and the practical difficulties in divining that intent may frustrate any attempt to discern a single, unifying theme for the nature of contractual obligation under the U.N. Sales Convention. Nonetheless, the above analysis of the policies and principles of the Convention has identified certain *values* that underlie the recognition and enforcement of contractual obligations in international sales transactions within the Convention's scope:

> (1) One core value that emerges from the principles and policies of the Convention is a reaffirmation of the significance of actual intent in the recognition of contractual obligation. Risks of an inaccurate identification of intent necessarily attend a reference to the subsidiary "reasonable person" interpretive standard of article 8(2). Nonetheless, even with this "objective" standard the Convention reinforces a primary policy goal of giving effect to actual intent by mandating a highly particularized, non-idealized interpretive analysis that concurrently rejects the imposition of normative standards.
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> (2) As a corollary to the central role of actual intent in its interpretive values, the Convention mandates effectively unrestricted flexibility in the identification of that intent. The confluence of the particularized standard of article 8(2) and this interpretive flexibility prescribed by article 8(3) amounts to an injunction against the application of generalized or normative conclusions about how parties to international sales contracts express intent.
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> (3) These flexible interpretive standards likewise reveal a general hostility to theories of contract obligation that proceed on the basis of normative fictions. Where the intent of the parties is clearly established or where one party has otherwise unambiguously expressed her intent,

238. For a discussion of this provision, see supra notes 62-64 and accompanying text.

239. See supra note 197 and accompanying text.

> normative considerations should not operate to frustrate that intent.
> (4) Although articles 14 through 24 identify an offer and its unqualified acceptance as the assumed building blocks of contracts, in its general, foundational principles, the Convention establishes the effectuation of the common intent of the parties as the primary value in its hierarchy of norms. Together with the mandate of flexibility in the search for that intent, this principle of the primacy of party autonomy makes clear that express provisions of the Convention are not to be applied in such a rigid, prescriptive manner as to frustrate that common intent.

IV. CONTRACT FORMATION AND PARTIAL DISSENSUS UNDER THE U.N. SALES CONVENTION

As a device for conceptualizing the relationship between the parties to a proposed transaction, the notion of a "partial dissensus" departs substantially from the traditional assumptions about the manner by which private actors create binding obligations. Accepted doctrine would seem to require that a complete agreement be established by (or imposed on) the parties before the law will recognize *contractual* obligations. Within the scope of the U.N. Sales Convention, traditionalist commentators have pointed to the offer-acceptance scheme in general, as well as to the language of article 19(1), and have argued that the same rule should obtain there.[240]

The problem from a conceptual perspective arises when the parties proceed with the performance of their contemplated reciprocal "obligations" notwithstanding either a failure to agree or an outright disagreement on terms proposed by one or both of them at an earlier point in their relationship. Two principal solutions to this deviation from the lock-step model of contract formation present themselves: First, contract law could view the relationship between the parties simply as a *failed* attempt to create binding obligations. To the extent the common error of the parties has created imbalances as compared to their relative positions *ex ante*, the parties to a transaction otherwise within the scope of the U.N. Sales Convention would then be left with the appropriate restitutionary remedy under otherwise applicable national law. Alternatively, the law

240. See infra part IV.A.

could cast the relationship as a "contractual" one and apply an appropriate standard to define the contours of the parties' obligations (that is, adopt an "agreement rule" to resolve the effect of the "partial" element of the dissensus).

There is an almost intuitive allure to the first of these two solutions. An examination of the drafting history and provisions (in particular articles 18(1) and 19(1)) of the Convention reveals a general policy of restraint against imposing contractual obligations on the parties while they continue to disagree over terms proposed in the course of their negotiations.[241] A straightforward application of this policy would seem to mandate a conclusion that, notwithstanding the performance of perceived duties, the parties have failed to achieve the form of untainted agreement required for the recognition and enforcement of contractual obligations.

This option does not survive a more penetrating examination, however. Whatever the nature of their pre-performance declarations,[242] where the parties have actually carried out the core elements of a sales contract (delivery of goods, payment of price), they have at a minimum manifested a common intent on the creation of some form of *binding* mutual obligations. The principle of the primacy of party autonomy mandates that this common intent be recognized as an enforceable contract.[243] To be sure, the general protective policy of the Convention against the imposition of contractual obligations will add color to the analysis of the scope of the parties' respective rights and obligations; it does not, however, defeat the determinative common intent of the parties where their conduct unambiguously confirms an agreement on the conclusion of a binding deal. In other words, as Professor Farnsworth has remarked in the case of mutual performance, "it is clear that a contract has been concluded and the dispute is over the terms of that contract."[244]

This observation, though certainly correct when taken alone, may nonetheless plant the seeds of a misunderstanding if applied

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241. See supra notes 234-39 and accompanying text and infra notes 296-302 and accompanying text.

242. This issue is addressed infra parts IV.A. and B.

243. There will, of course, be cases on the margins where the conduct of the parties is sufficiently incomplete that it does not reveal a consensus on the essential elements of a sales contract as contemplated by article 14 (goods, quantity, and price). In such cases, the failure to agree on the "*essentialia negotii*" would preclude the recognition of a contract under article 14(1), even if the parties intended to create binding obligations. See supra notes 52-54 and accompanying text.

244. Bianca & Bonell (Farnsworth), supra note 14, at 179.

beyond its limited context. There has been an unmistakable trend in recent academic literature in the United States to focus the analysis more on an identification of the appropriate substantive background rules to fill gaps in extant contracts, and less on the significance of the *process* of contract formation where the mutual intent of the parties to assume contractual obligations is clear.[245] This focus on the substantive "default" rules, although important on its own plane, is one essential step removed from the analysis at issue here. In order to reach the issue of the appropriate background rules, one must first identify where there is a gap (a "default") in the agreement of the parties in the first place. The more significant inquiry in assessing the role of partial dissensus in the formation process appears, therefore, at the threshold itself: What are the standards in such a case for determining what the agreement of the parties is?

The received wisdom on this score applies a fiction of assent in order to reconstruct the agreement process of the parties to fit a rigid lock-step mold of contract formation. I argue below that this approach contradicts the policies that underlie the nature of contractual obligation under the Convention and that it should thus be rejected. I contend that the better-reasoned approach begins with first principles, and thus defines the contractual obligations of the parties in the first instance by the scope of the express agreement between their competing terms.

A. *The Traditional Solution*[246]

1. The "Fictional Assent" Rule

The received wisdom on the treatment of a partial dissensus offers a deceptively appealing simplicity in terms of both its content and its scope. The argument under this approach proceeds as follows: The traditional rules of contract formation followed in principle in the Convention identify as the "building blocks" of contracts an offer and its unqualified acceptance. Where a reply to a proposal to conclude a contract deviates in any respect worthy of

245. See sources cited supra note 121.

246. It is, almost by definition, inaccurate to refer to any theory relating to the Convention as "traditional," in that it has been in force for a mere eight years. Because the approach I describe in this section nonetheless closely parallels (in its result if not necessarily in all parts of its analysis) the traditional approach in the United States and in some other legal systems, I will occasionally refer to it as such in my analysis of the Sales Convention.

note,[247] article 19 prescribes a straightforward result: The reply is converted into a rejection of the offer coupled with a counteroffer. If the parties then proceed with performance notwithstanding the resultant dissensus between them, the (constructive) counteroffer is deemed accepted in its entirety by the original offeror solely as a result of her conduct.[248]

The parallel simplicity of this approach is comprehensive scope. It applies broadly to all "contractual" relationships irrespective of their structure, complexity or level of formality, and without regard to the particular circumstances in which the parties formed their relationship. Once it is determined that the parties have manifested a mutual intent to create binding obligations, an adjudicator need merely reconstruct the chronological sequence of their respective formal declarations and identify the most recent one. This declaration is then deemed the entirety of the contract of the parties.

Although there has been little theoretical examination of the foundation for this approach under the U.N. Sales Convention, it would appear that it proceeds from a simple premise. As conceptual constructs, "offers" and "acceptances" are indispensable and irreducible elements of the formation process. Where the parties proceed to perform following a deviating acceptance in the sense of article 19(1), therefore, the only permissible interpretation is that they have agreed to the (constructive) counteroffer as the exclusive basis for their contractual relationship. The "last shot" rule, in other words, merely operates as a self-evidently correct extension of the "mirror image" rule.[249] One would assume, then, that proponents of this approach would view a "partial dissensus" as either wholly irrelevant or an oxymoron—irrelevant because the constructive assent through performance supersedes any "partial" disagreements, an oxymoron because its counterpart ("partial con-

247. Article 19(2) admittedly purports to ameliorate the harsh effects of the traditional mirror image rule in the case of "non-material" deviations. In its practical effect, however, this provision changes nothing, for article 19(3) defines as "material" all terms that would be worth the cost and effort of a dispute between the parties. See supra part II.A.3.

248. See Kelso, supra note 46, at 554; Bianca & Bonell (Farnsworth), supra note 14, at 179; Herber & Czerwenka, supra note 91, at 107; Martin Karollus, UN-Kaufrecht: Eine systematische Darstellung für Studium und Praxis 71 (1991).

249. See Henry D. Gabriel, The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code, 49 Bus. Law. 1053, 1053 (1994) (stating that the last shot rule "is the logical result of the 'mirror image rule'"); Eisenberg, supra note 111, at 1137 (observing that the last shot rule is viewed by its proponents to be "self-evident" in light of the mirror image rule).

sensus") is for purposes of contract doctrine not a "contractual" agreement at all.

A review of the literature on this traditional approach nonetheless reveals some lack of clarity about its precise effect. Some commentators seem to suggest that the approach is merely of a presumptive nature.[250] This version would hold that even where both parties have proposed terms in the course of their negotiations there is a presumption of mutual assent to the last proposal exchanged between them. Although this presumption is rebuttable, the burden falls on the disadvantaged party to prove that she did not, in fact, express assent to the proposal. Other authors appear to support an even more rigid approach. Under this version, performance of the (perceived) obligations is deemed to constitute, apparently conclusively,[251] the mutual assent of the parties to "last shot" before such performance.[252]

The indication of assent required to impose contractual obligation, in other words, is taken as given. This conclusion apparently applies regardless of the complexity of the parties' previous relationship, the clarity of the disadvantaged party's previous insistence on the inclusion of her own substantive terms and/or

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250. See Gabriel, supra note 249, at 1062 ("The CISG . . . obviously favor[s] the last party to submit its terms."); Herber & Czerwenka, supra note 91, at 107 n.18 (arguing that the assent to the counteroffer resulting from article 19 "regularly occurs by performance of the contract").

251. See Bianca & Bonell (Farnsworth), supra note 14, at 179 (the counteroffer resulting from the application of article 19(1) "is then accepted by the other party's performance"); Kelso, supra note 46, at 554 ("[T]he party who fires the 'last shot' *will win* the battle of forms.") (emphasis added); Leete, supra note 46, at 214 ("With regard to the battle of forms issue, it seems clear that the party sending the last form will be the one whose terms prevail."); Kofi Date-Bah, United Nations Convention on Contracts for the International Sale of Goods: An Overview and Consideration of Some Practical Issues Relating to It, in Uniform Commercial Law in the Twenty-First Century, Proceedings of the Congress of the United Nations Commission on International Trade Law, at 69, 75, U.N. Doc. A/CN.9/SER.D (1995) ("The traditional mirror image rule in paragraph (1) of article 19 *will* result in the so-called last shot in the battle of forms prevailing.") (emphasis added); Karl Neumayer, Das Wiener Kaufrechtsübereinkommen und die sogennannte "battle of forms", in Freiheit und Zwang 501, 524 (1989) (reasoning that the Convention requires either the last shot rule or the recognition of no contract at all).

252. Melvin Eisenberg identifies these two forms of rules as "presumptive" and "categorical," labels which roughly correspond to the "general" and "constitutive" classifications identified by John Rawls. See Eisenberg, supra note 111, at 1137-41 (citing John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 23-25 (1955)). A third form identified by Professor Eisenberg is "maxims," which in effect are not rules at all but simply nonbinding guides to behavior. As Professor Eisenberg correctly observes, the level of necessary justification for a rule increases as one moves from a maxim to a presumption, and more so when the rule takes the categorical form. Id. at 1140.

rejection of foreign terms,[253] as well as the circumstances attending the performance itself.[254] Closely related to this fiction of assent is an implication of a prescriptive rigidity in the formation provisions of the Convention. In its practical application, the traditional rule requires that in all cases the statements and conduct of the parties be parsed into a formal offer and a formal acceptance and that the last express (often, the last written) declaration is the exclusive indication of intent of interest in the recognition of contractual obligations.

Whatever the allure of the simplicity of its analysis, the traditional approach in its substance is founded on a premise that often operates directly contrary to, or at best gives only superficial deference to, the formation values of the Convention. The elemental flaw of the approach is that it proceeds on the basis of a fiction of assent. The fiction is that the mere performance of the essential elements of a sales transaction (shipment or payment) *necessarily* expresses the *unqualified* intent of a party to bind itself to contractual obligations solely on the substantive basis of the declaration fortuitously deemed the last one. This rigid conclusion of unqualified assent disregards CISG's primary policy goal of identifying and giving effect to actual intent, a directive which emerges not only from the hierarchy of interpretive norms in article 8, but also from the nature of its subsidiary objective standard itself. At this level alone, the values of the Convention reveal a hostility to rules that apply a fiction of assent based on stylized assumptions of intent and meaning.[255]

Moreover, it is difficult to reconcile the fictional assent rule with the Convention's policy of flexibility in interpretive inquiries (as revealed by articles 6, 8(2), 8(3), and 11). The sum of this policy is a mandate that an adjudicator consider all circumstances that could reflect on a party's actual intent, and that as a general proposition

253. I use the phrase "foreign terms" here and in the text below to embrace all terms proposed by another party that deviate from one's own proposed terms.

254. It bears emphasis here that article 19 applies only where a reply to an offer "purports to be an acceptance." A recipient of such a declaration (the original offeror) could thus by definition reasonably conclude as a factual matter that the original offeree indicated her assent *to the original offer* through the deviating acceptance alone. See supra part III.A.2. (discussing the interpretation of party statements and conduct under article 8); infra note 314 and accompanying text.

255. Such standardized assumptions of meaning are suspect even in national law systems that govern individuals who, at some level at least, share a common culture and language. They are even more problematic for interpreting intent in international transactions involving parties from widely diverse linguistic and cultural backgrounds.

the adjudicator prefer express declarations of intent over a presumed intent that can only be surmised through implication. The distilled essence of a fictional assent approach, in contrast, is that mere performance in all cases amounts to unqualified assent to the "last" declaration, apparently irrespective of the actual prior relationship between the parties.

To be sure, article 19(1) contains a specific rule that defines a specific result: A deviating acceptance does *not* conclude a contract but amounts to a counteroffer.[256] That provision does not, however, define what happens next. The essential question left unanswered is how to describe the parties' relationship where the original offeror's declarations and conduct do not express the requisite assent[257] to such counteroffer, but the circumstances nonetheless indicate a mutual intent of the parties to conclude a contract. A reference to article 19 is circular, for the ultimate inquiry remains an interpretive one: Have the parties reached an agreement on contract formation on the basis of the counteroffer resulting from the application of article 19, or on some other basis? In other words, the structure of article 19 does not answer the essential interpretive issue of whether, in fact, the other party has "indicat[ed] assent to [the] [counter]offer" as required by article 18(1) for the recognition of contractual obligations.[258]

Indeed, a reference to the policies underlying articles 18(1) and 19(1) would seem to require a conclusion directly contrary to a fictional assent theory. One basic purpose underlying these provisions is to protect *against* the imposition of contractual obligations where the parties have failed to agree on material matters raised by

256. The "fictional assent" approach, once again, is a structural one: Because article 19 prescribes that every deviating acceptance is a rejection and counteroffer, every subsequent deviation creates a cascade effect, until performance (which is now deemed an unqualified acceptance) brings the game to an end. This ritualized view of contracting is inconsistent with the complexity of modern commercial transactions. To take only one example, there is a substantial lack of clarity about how the fictional assent approach would accommodate indirect exchanges of declarations, such as the terms of letters of credit that often accompany international sales transactions. Does a reference in such a letter of credit to one declaration of the parties (often the buyer's purchase order) supersede the direct exchanges between the parties? A reliance solely on the "last shot," in other words, does not tell us what qualifies as a "shot."

257. See CISG, supra note 2, art. 18(1); supra note 100 and accompanying text.

258. In fact, this was the focal point in the substantial dispute over the drafting of article 19. Traditionalists objected to any dilution of a strict mirror image rule precisely because it would permit parties to be bound to contractual obligations even though there remained a dissensus between them over proposed terms. See supra notes 90-100 and accompanying text.

either of them in their negotiations.[259] It would indeed be anomalous for one to use precisely those provisions as the conceptual basis for doing so.

2. *The Issue of Continuing Intent*

The central flaw in the fictional assent (or "last shot") theory is that it fails to separate the narrow role of the specific provisions of the Convention from the broader, determinative inquiry into the actual (or reasonably perceived) intent of the parties. Recall that the premise of this traditional approach is a formalist one: By operation of the rule in article 19(1) a deviating "acceptance" is transformed into a rejection and a counteroffer. The predicate for the conclusion of assent to this counteroffer arises from a derivative consequence of the rejection, namely, that the formal legal construct of "offer" is "terminated" upon the original offeror's receipt of the deviating acceptance.[260] From this predicate, the traditional rule makes a subtle, but significant leap to a factual conclusion about the intent of the original offeror: The formal legal rejection of the "offer" set forth in article 19 carries with it the much broader factual effect of "wiping clean the intent slate;" all prior statements, declarations of intent, and understandings of the parties thus wither to irrelevance. As a result, as of the deviating reply the original offeror apparently no longer has any relevant intent for purposes of contract formation. By default—so the traditional logic runs—her subsequent performance must amount to an implied assent to the only extant (albeit constructive) proposal, the counteroffer arising from the deviating acceptance rule of article 19(1).

The misapprehension of this reasoning lies in a failure to recognize that, notwithstanding the legal effect prescribed by the mirror image rule, the declarations made in and other circumstances attending the original offer do not cease to be a factual indication of the intent of the original offeror. The formal legal termination of the original offer may indeed mean that, as a general proposition,[261] the offeree's power to accept the formal offer is extin-

259. See infra notes 315-20 and accompanying text.

260. See CISG, supra note 2, art. 17 ("An offer . . . is terminated when a rejection reaches the offeror.").

261. Professor Honnold has suggested that if the provisions of the Convention in fact require an adoption of one "shot" of the parties in its entirety, the terms of the original offer should prevail. This suggestion is premised on the observation that the offeree has designated her reply an "acceptance." As this is the only such express declaration,

guished.[262] The flexibility mandated by the interpretive values of the Convention—in particular the injunction of article 8(3) that in interpretive inquiries an adjudicator consider "*all* relevant circumstances"—makes clear, however, that the indications of intent of the original offeror preceding this event cannot simply be disregarded in assessing the meaning of that party's subsequent performance.

This issue might be termed one of "continuing intent." The question here is whether a party is able to declare her intent with respect to the conditions for the assumption of contractual obligations with sufficient clarity and prominence that the expressive value of the declaration survives a negative response from the other party. The interpretive flexibility prescribed by article 8(3) provides the answer. The first factor expressly identified by that provision as among the "relevant circumstances" an adjudicator *must* consider in the interpretive standards of article 8 is "the negotiations" between the parties.[263] As evidence of the broad significance of such indications of the parties' intent, the Working Group deleted from an early draft of article 8(3) a proposed limitation that would have required consideration of only "preliminary" negotiations.[264] The purpose of this deletion was to make clear "that all negotiations would be relevant" in the interpretive standards of article 8.[265] The message here is that prior negotiations set the context for the interpretation of subsequent events, and thus shed important light on the meaning of subsequent statements and expressive conduct. The premise of the traditional "last shot" rule—that all prior declarations of intent become irrelevant upon a deviating acceptance—disregards this message entirely.[266]

Professor Honnold suggests that if the original offeree proceeds with performance without clarifying the ambiguity a reasonable person in the position of the other party, see CISG, supra note 2, art. 8(2), could—notwithstanding the rule of article 19(1)—understand that conduct as assent *to the original offer*. Honnold, supra note 8, at 237-38.

262. See CISG, supra note 2, art. 17(1); Bianca & Bonell (Eörsi), supra note 14, at 162.

263. CISG, supra note 2, art. 8(3) (in applying the standards of paragraphs 8(1) and 8(2) "due consideration is to be given to all relevant circumstances of the case including the negotiations").

264. See Report on the Ninth Session, supra note 57, paras. 11, 31.

265. Id. para. 31.

266. As a fall back argument, proponents of the fictional assent approach may suggest that as of the formal legal rejection of the offer manufactured by article 19(1) all factual indications of intent contained in the offer are no longer "relevant" in the sense of article 8(3). The unqualified specific inclusion in article 8(3) of the parties' negotiations as a "relevant" circumstance for purposes of interpretation ("all relevant circumstances of the case *including the negotiations*"), notwithstanding subsequent events, refutes such an

The required consideration of prior declarations and expressive conduct also addresses any argument that the original offeror failed to take advantage of a "last clear chance" prior to performance. Proponents of the fictional assent rule might point to the "reasonable person" standard of article 8(2) and argue[267] that the original offeror's performance with (constructive) knowledge of the effect of article 19(1) and without further objection necessarily amounts to her assent to the terms of the (constructive) counteroffer. There is a superficial appeal to this argument. But in the end it is merely a restatement of the same normative conclusion about a party's failure to object to proposed terms. The drafters of the Convention refused to grant dispositive effect to proposed terms in such circumstances based solely on normative notions of a "duty to speak."[268] And where a party has declared her continuing intent not to be bound to foreign terms with sufficient clarity and prominence,[269] the Convention's flexible interpretive values require that

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argument. Alternatively, fictional assent proponents could argue that, although "relevant," an indication of intent in the offer need only be given "due consideration" as provided in article 8(3). That may indeed be the case, but the point does not support a rigid fictional assent approach in any event. The "due consideration" language of article 8(3) simply makes clear that an adjudicator must take the indication of intent in the original offer into account along with other relevant circumstances; and, of course, the weight of this indication of intent will vary according to its clarity and the expressive content of other statements and conduct of the original offeror. In contrast to the fictional assent rule, the "due consideration" language certainly does not require stylized assumptions about the interpretive value of an indication of intent that disregard the specific circumstances attending that indication.

267. As most commentators have, without detailed analysis, simply accepted the fictional assent rule as a necessary extension of the Convention's express contract formation scheme, see supra part IV.A.1., there has been little detailed scholarly investigation into such potential justifications for a fictional assent approach under the Convention.

268. It is also worth emphasizing in this context that the fictional assent rule cannot find its justification solely in normative considerations such as a duty to object to proposed terms. See supra notes 193-205 and accompanying text. Even if the deviating acceptance itself provided that the original offeror would be deemed to assent to its proposed terms if she failed to object prior to performance, little would change in the analysis of the merit of the fictional assent rule. To be sure, under article 18(3) an offeror may *permit* an offeree to express her assent solely through the performance of an act. This does not mean, however, that the offeror has the power *unilaterally* to impose a conclusion of assent to the terms of the offer where the offeree (even if she performs the prescribed act) expressly or impliedly manifests a contrary intent. Cf. Report on the Ninth Session, supra note 57, paras. 112-18 (noting the "general agreement" that the offeror could not unilaterally impose a rule that the offeree's silence would constitute assent to the offer); id. paras. 128-31 (rejecting a proposal that would have given an offeror the power to unilaterally impose a written form requirement for contract formation).

269. In part IV.B.3. I address the necessity for and contours of the adjective "sufficient" in this clause.

an adjudicator weigh this "relevant circumstance" in interpreting the meaning of the party's subsequent conduct.

The application of the rule of article 19(1) to a deviating acceptance will indeed *permit* the conclusion of a contract on the basis of the counteroffer if the original offeror makes a corresponding expression of assent.[270] This is a very important "if," however. In the event of performance of the basic elements of the proposed transaction, the fictional assent approach would disregard the conditional form of this statement entirely and simply take the assent as given. The interpretive inquiry is over before it begins. Admittedly, the relevant interpretive standard under article 8 will often be the understanding of a "reasonable" person. But as we have seen, this too is a flexible standard that rejects static or similar normative conclusions for intent-based interpretive inquiries.

A reference to the deviating acceptance rule of article 19(1) alone thus tells us nothing about the essential interpretive inquiry in the case of a partial dissensus. The indicative value of the declarations and expressive conduct of the original offeror prior to a deviating acceptance will, of course, vary according to their relative clarity and context.[271] In any event, in light of the flexible interpretive values of the Convention the basic premise of the fictional assent approach—that the mere fact of performance demands a direct conclusion about the intent of the original offeror—is at a minimum in need of further justification.

The entrenchment of this fictional assent approach will, finally, have significant practical implications for the value of the U.N. Sales Convention in determining the rights of buyers and sellers in international sales transactions. In practical outcome, this approach requires that the standardized terms of one party (the one sending the "last shot") prevail in their entirety. This party

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270. The Commentary of the Secretariat of UNCITRAL on the pre-Vienna Conference draft of what is now article 19 (which differed only in a respect not directly relevant here) reflects this possibility. See Secretariat Commentary, supra note 15, art. 19, para. 15 (If there is performance after a materially deviating reply to an offer, "a contract may eventually be formed by notice to the original offeree of such performance."). Although one could suggest that this bland observation implies that the performance alone is an indication of assent, the essential inquiry, once again, remains an interpretive one, and articles 6, 8, and 11 provide the framework for the resolution of that inquiry.

271. I explore this point in greater detail in connection with the alternative approach to the treatment of partial dissensus advocated in part IV.B.

will most often be the seller.[272] As a result, exclusions of implied warranties and disclaimers of liability for consequential damages will, contrary to the value judgments made in the drafting of the Convention, become the standard for international sales transactions.[273] Sellers' common choice-of-forum and choice-of-law clauses (including exclusions of the Convention itself)[274] will likewise become the customary basis for defining the law governing the parties' relationship. All of this will occur without an examination of whether the parties' actual common intent embraced these significant matters, nor whether the parties in fact agreed so to "derogate from or vary the effect of" contrary substantive provisions of the Convention.

The traditional "last shot" rule thus encourages opportunism and dilutes the role of common intent in the formation of contractual obligations. Because modern means of communication now enable both parties routinely to transmit a list of all terms of potential relevance to them, the carefully-reasoned balance between the interests of buyer and seller reflected in Part III of the Convention will likewise routinely be displaced without requiring an analysis of the actual understanding between them. Contract formation instead becomes a game in which the party last able to maneuver a reference to its general business terms is rewarded with total vic-

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272. The buyer will most often send the "first shot" through its purchase order. Even if the roles are reversed, the seller will have the claim that it sent the "last shot" in the form of its (appropriately phrased) invoice forwarded along with the goods.

273. See, e.g., CISG, supra note 2, art. 35(2) (a contract of sale includes implied warranties of fitness, et cetera, "[e]xcept where the parties have otherwise agreed"); id. art. 74 (right to recover consequential damages). Moreover, the "winner-take-all" effect of the last shot rule is exacerbated by the absence of a provision in the Convention that would limit the effect of unreasonably harsh or unduly surprising standardized terms. As an issue relating to the "validity" of such terms as contemplated by article 4, the otherwise-applicable (and non-uniform) domestic law of the member states would govern the effect of harsh or surprising terms in standard forms. The UNIDROIT Principles of International Commercial Contracts nonetheless provide that a term in "standard terms" is not effective to the extent "that the other party could not reasonably have expected it." See UNIDROIT Principles, art. 2.20(1); supra note 20. In the absence of a corresponding agreement between the parties or until the principles attain a state of generally recognized usage of trade, this provision of the UNIDROIT Principles will only apply to the extent a national court finds such an application consistent with governing domestic law. See art. 7(2) (domestic law applies for a gap not resolved by the Convention's general principles); supra note 35. But see UNIDROIT Principles, pmbl. (suggesting that the Principles can be used "to interpret or supplement international uniform law instruments").

274. Within its sphere of application, once again, CISG's formation principles will apply *in the first instance* to determine whether the parties have agreed on an exclusion of the Convention. See supra notes 32-34 and accompanying text.

tory. This can hardly be the goal of a formation system which founds contractual obligation on the common intent of the parties.

3. *Potential Non-interpretive Justifications for the Traditional Approach*

The traditional "last shot" rule likewise is unlikely to find its justification beyond notions of the assumed intent of the parties alone. A recent article by Melvin Eisenberg addressing the rules governing the import of contractual expressions provides a useful structure for the analysis here.[275] Professor Eisenberg identifies three principal justifications for such rules, which he terms "policy," "administrative," and "coordinating" justifications.[276] None of these grounds provides an adequate justification for the fictional assent approach to the treatment of partial dissensus under the U.N. Sales Convention.

Policy justifications are founded decidedly on non-interpretive considerations and are of a normative nature. Proponents of the fictional assent approach seeking justification on this basis might argue, for example, that the rule promotes efficiency in the contract formation process,[277] or that normative considerations (not founded directly on an analysis of actual intent) mandate that the party making the last express declaration be given protection. In a milder form, supporters of the fictional assent rule could suggest that the Convention imposes a general obligation on international merchants to object to proposed terms.

In light of the discussion of the core formation values of the Convention in Part III above, this form of justification for the fictional assent rule barely survives its statement. Precisely because of the widely divergent cultural and legal perspectives of the various contracting states, the provisions and policies of the Conven-

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275. See Eisenberg, supra note 111.

276. Id. at 1143. The discussion in the text above addresses a fourth justification identified by Professor Eisenberg, "accuracy." Id. at 1142-43. The performance of perceived contractual obligations will carry a certain weight in the interpretive process. The fictional assent approach fails, however, to explain why this factor should always (or presumptively) trump other indicative factors, and of equal importance, why this approach is more likely to result in accurate determinations of intent than is a direct resort to the general interpretive rules of article 8 themselves. See id.

277. Professors Baird and Weisberg have suggested, for instance, that a strict rule giving effect to the last declaration will cause parties to sales transactions to revise their standard forms to accommodate more fairly the interests of the other party. Baird & Weisberg, supra note 75, at 1217. For a critical examination of the conclusions reached by Baird and Weisberg, see Avery Katz, The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation, 89 Mich. L. Rev. 215, 277-84 (1990).

tion reveal a definite hostility to normative solutions to issues of interpretation.[278] The resolution of the debate over the role of trade usages, for instance, carried with it a clear refusal to create a presumption of assent to the contents of a written confirmation of a purported agreement based on normative considerations of a duty to object to proposed terms.[279]

Possible administrative justifications for the fictional assent rule are equally problematic. Such justifications relate principally to considerations of legal certainty. A particular rule may be justified under this category by proof that it provides clarity to transactors in structuring their contractual relationship, and derivatively to adjudicators in resolving disputes. This is a proper concern of any system based on the rule of law. Indeed, such a justification may support the application of a particular rule where there is a concern that a casuistic resort to the general interpretive standards may lead to uncertain or random results.[280]

The problem here—even apart from the considerable question about whether the fictional assent rule would in fact contribute to certainty in international contracting[281]—is that such a justification tells us little about the proper *content* of a standard, only that it should be clear and easy to apply. Any other equally clear standard serves this justification equally well.[282] In such a case of competing standards of relatively equal clarity, the administrative justification merely leads the analysis back to the basic proposition

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278. See supra notes 193-204 and accompanying text.

279. See supra note 197.

280. Such a concern in fact militates in favor of adopting some form of an "agreement rule" to resolve a partial dissensus between the parties to a putative contract within the sphere of application of the U.N. Sales Convention. Simply relegating adjudicators, transactors, and practitioners to a casuistic application of the general interpretive standards of article 8 would directly frustrate the primary goal of the Convention of bringing uniformity to international sales law. See CISG, supra note 2, pmbl., para. 3; see also infra part IV.B.3.

281. Even if one is able to construe the counteroffer manufactured by article 19(1) as inviting acceptance by performance in the sense of article 18(3)—a big "if," insofar as under article 19(1) the reply must have "purport[ed] to be an *acceptance*" in the first place—the actual performance of the transaction will, in many cases, take place long after the expiration of the "reasonable time" for acceptance prescribed by article 18(2). See supra note 72 and accompanying text. As a result, the acceptance upon which the fictional assent rule is premised will not be effective to conclude a binding contract. Even the proponents of the fictional assent rule will thus have to rely on some form of an application of the principle of the primacy of party autonomy in order to find an effective contract formation. This is precisely the point of the consensus approach I advocate below.

282. Cf. Craswell, Reliance, supra note 111, at 548 (observing with regard to bright line rules that "[i]f all that matters is that the line be bright, then several possible rules will work more or less equally well").

that an interpretive standard must be judged by its degree of congruence with the relevant legal system's underlying interpretive values. As we have seen, this is precisely where the fictional assent approach is deficient.

Proponents of the fictional assent rule might finally argue that the rule serves a "coordinating" function, a notion that approximates what John Rawls has called "constitutive" rules.[283] The sum of this justification for a particular rule is that it serves to coordinate "contracting" behavior by making the rule itself an essential element of the contracting game. The common analogy here is to "rules of the road;" the common aphorism is that the very point of such rules "is that they exist, not that they are right."[284] The argument of the supporters of the fictional assent approach in this vein would thus be that they are not advocating a separate "rule" at all. Articles 14, 18, and 19 set forth the rules of the contracting game, they would likely argue, and define the very nature of a contract as solely the result of two formal declarations of intent with identical content. The fictional assent "approach" is not a formation rule in the strictest sense, therefore, but rather a mere observation about a necessary consequence of the offer-acceptance scheme.[285]

The flaw in this potential justification for the fictional assent approach is that it disregards the primacy of party autonomy.[286] Under this core principle of the Convention's hierarchy of norms, a common intent of the parties—even on the manner by which they create obligations in the first instance—must be given effect notwithstanding the Convention's express formation provisions. As a result, and as outlined below, the formation values of the Convention clearly embrace mutually-intended formation processes that do not track the formal offer-unconditional acceptance format.[287] And article 6 permits this determinative common intent of the parties to arise by implication as well,[288] an option

283. Rawls, supra note 252, at 24-25.

284. Eisenberg, supra note 111, at 1144; see also Katz, supra note 277, at 1218 (observing that a common approach to the rules of offer and acceptance is that "it is more important for the law to be settled than to be settled correctly"). But cf. Eisenberg, supra note 111, at 1143 (observing, in questioning the value of the administrative justification, that "disputes must be settled not only *easily*, but *properly*").

285. See supra note 249.

286. See supra part III.A.1.

287. See infra notes 332-38 and accompanying text.

288. See supra notes 149-51 and accompanying text.

articles 8(3) and 11 complement by mandating effectively unrestricted flexibility in identifying that intent.[289]

Similarly, the "coordination explanation" ignores the decisive role of the interpretive standards of the Convention. These standards govern as the final arbiter of whether, in fact, a party has "indicated" her assent to the imposition of contractual obligations. There may indeed be instances where a party's unqualified performance will alone sufficiently manifest her assent to the content of the last deviating "acceptance," such that a contract will be formed in accordance with the lock-step model of formal offer and formal acceptance.[290] That a "last shot" rule is an indispensable constitutive "rule of the game" does not follow from this observation, however. For the essential inquiry remains an interpretive one, and there is nothing in the mere structure of the Convention's formation provisions to suggest that the drafters sought to disregard its interpretive standards in such cases solely out of normative concerns about "coordinating" contracting behavior.

An examination of the fictional assent approach to the treatment of partial dissensus under the U.N. Sales Convention reveals, in sum, serious deficiencies. As a purported interpretive rule, this traditional approach contravenes, or at best disregards, the Convention's core goals of identifying actual intent, promoting flexibility in the related interpretive determinations, and protecting against the imposition of contractual obligation on the basis of normative fictions. The approach likewise fails to find compelling support in non-interpretive policy, administrative, or coordination justifications. Adjudicators, transactors, and practitioners understandably prefer certainty in the resolution of such important and common issues as a partial dissensus in the formation of contractual relationships. That the fictional assent rule arguably provides such certainty does not mean, however, that it represents the correct (or preferable) approach when the application of that certainty runs contrary to the values that underlie the recognition of contractual obligations in the first place.

289. See supra parts III.A.2. and 4.
290. See infra text accompanying note 310.

B. *The Solution: Identifying and Applying the Consensus*

1. An Alternative Approach to the Treatment of Partial Dissensus

In this Part I take to heart the admonition that one should not criticize a proposed solution to a problem without offering a better one in its stead. I argue below that a reasoned appreciation of the core formation values of the Convention requires the application of a standard for the treatment of a partial dissensus that gives effect to clearly expressed intent and does not arbitrarily favor the interests of one party based on inflexible assumptions about how transactors express their intent. That standard is one that identifies the scope of the agreement of the parties by the conformity between their respective express declarations of intent (in particular their respective standardized terms) and not by the fortuity of the chronology of the exchange of those declarations.[291]

In light of the premise of the fictional assent rule, a useful starting point for an analysis of partial dissensus is a reemphasis of the significance of the basic notion of party autonomy. As we have seen,[292] it is much more than a simple contract law truism under the Convention that contractual obligations are formed and defined by the agreement of the parties. The confluence of articles 6, 8, and 11 reveals not only a primary *goal* of searching out that actual agreement but also a mandate that this be accomplished with a flexible consideration of "*all* relevant circumstances."[293] Indeed, as should now be abundantly clear the agreement of the parties stands at the very top of the Convention's hierarchy of norms.[294]

This principle has both affirmative and negative implications. In the affirmative sense, the preeminence of party autonomy results in a relegation of even the express provisions of the Convention to

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291. Tentative suggestions in this direction can be found in the legal literature. See CISG Kommentar (Schlechtriem), supra note 32, at 166-67; Honnold, supra note 8, at 228-29; Piltz, supra note 41, at 15, 23-24; see also Moccia, supra note 119, at 674-75 (relying on principles of "good faith"); van der Velden, supra note 119, at 244-46 (also relying on principles of "good faith"). Even under the more traditional deviating acceptance rule of the Hague ULF, commentators suggested that in light of the principle of party autonomy the general terms routinely proposed by both parties should be given effect only to the extent "they are reconcilable with each other." U. Drobnig, Standard Forms and General Conditions in International Trade; Dutch, German and Uniform Law, in Hague-Zagreb Essays 4, 117, 124-25 (C.C.A. Voskuil & J.A. Wade eds., 1983).

292. See supra part III.A.

293. CISG, supra note 2, art. 8(3) (emphasis added).

294. See supra part III.A.1.

the background upon proof of a corresponding common intent. The negative sense of party autonomy results from the converse of the preceding sentence: As substantive values in themselves, the provisions of the Convention defining the rights and obligations of buyer and seller should only be displaced in the face of such a contrary common intent.[295]

The interpretive difficulty in the treatment of a partial dissensus is to identify precisely the contours of the common intent of the parties where—as a consequence of the increased flexibility in modern commercial relationships—the parties exchange standardized business terms as a matter of routine in the negotiation process. This common problem did not escape the attention of the drafters of the U.N. Sales Convention. The original report requested by the Working Group from the Secretary-General of UNCITRAL addressed the effect of standardized forms in the contract formation process, but included a provision that would have imposed a contract on the parties even in the case of *material* deviations between their respective "pre-printed forms."[296] For this reason, the Working Group did not include this proposed provision in the original draft of what is now article 19.[297]

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295. This observation also applies, of course, to the express formation provisions of the Convention. The problem here is that those provisions fail to define the appropriate resolution where the parties proceed to perform even though the declarations and expressive conduct of neither indicate the requisite assent to the formal declaration of the other. As I explain below, in this sense the principle of party autonomy does not operate to displace the contract formation provisions of the Convention, but rather merely to describe the relationship of the parties not formed by way of a formal acceptance of a formal offer (or counteroffer).

296. See Secretary-General Formation Report, supra note 82, proposed alternative art. 7. The proposal drew a distinction between such terms in "pre-printed forms" and "non-printed terms." Similar to the present version of article 19, conflicts between "material" non-printed terms would have precluded the formation of a contract:

> If the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree.

Id. proposed alternative art. 7(2)(b).

297. See Report on the Eighth Session, supra note 132, para. 110. The Working Group also rejected a rough proposal to treat references to general conditions of sale differently from other terms in an offer. See Report on the Ninth Session, supra note 57, paras. 276, 278.

A similarly directed proposal from the Belgian delegation at the Vienna Conference three years later sought in effect to disregard standardized conditions in their entirety in the contract formation process.[298] Although this proposal also failed to generate sufficient support, the debate on the proposal reveals that this failure resulted primarily from the complexity of the subject matter coupled with the advanced state of the drafting process and the absence of analysis by the Working Group prior to the 1980 Vienna Conference.[299]

The common element in each of these proposals (thus far largely disregarded in the discussion of the significance of their rejection) is that they sought to *impose* contractual obligations on the parties at the executory stage in their relationship even where their (mutual) intent to be bound remains unclear.[300] In light of the Convention's structural protection of the parties from the imposition of contractual obligations in such cases, the delegates simply were unwilling to *require* a contrary presumption about the parties' intent. By doing so, the delegates were able to avoid the criticism which was directed at U.C.C. § 2-207, that it "imposes a marriage on the parties while they are still fighting at the altar."[301] As a result, in absence of a contrary agreement of the parties the straightforward rule of article 19 (the deviating reply "*is* a rejection") will operate as a presumption at the executory stage of the

298. See First Committee Deliberations (10th Meeting), supra note 93, paras. 87-102 (debating this proposal).

299. See First Committee Deliberations (10th Meeting), supra note 93, paras. 93, 99 (comments of the German and Argentinean Delegations); see also Moccia, supra note 119, at 661; Schlechtriem, UN-Kaufrecht, supra note 106, at 43. The Belgian delegation to the Vienna Conference also proposed an amendment to article 16(1) which would have included within the definition of an "acceptance" conduct that indicated assent merely to the "material" terms of the offer. See First Committee Deliberations (10th Meeting), supra note 93, paras. 87-102. For similar reasons, the Belgian delegation likewise withdrew this proposal. See First Committee Deliberations (9th Meeting), supra note 93, paras. 72-80.

300. Notwithstanding its decision not to accept the original proposal of the Secretary-General, the Working Group found the proposal an "acceptable solution" to the "practical problem" of the collision of standard business terms. The Working Group simply was unwilling to impose contractual obligations on the parties where their declarations revealed continued disagreement over material terms. See Report on the Eighth Session, supra note 132, para. 110.

301. Farnsworth, Vienna Convention, supra note 7. For a Canadian perspective on this issue, see Errol P. Mendes, The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law, 8 J.L. & Com. 109, 132 (1988).

parties' relationship that the formal partial dissensus reveals an absence of the common intent necessary for contract formation.[302]

The essential, more problematic issue left unresolved under the Convention thus first presents itself when the parties nonetheless proceed to carry out their perceived "obligations." At an elementary level, this conduct of the parties reveals a clear—that is, even under the subsidiary standard of article 8(2), an "objective"—manifestation of an agreement that contractual obligations exist. What remains unclear, however, is the scope of that agreement. The simple performance alone is ambiguous on this score.[303] Once again, taken alone it is of expressive worth only on the fact of the common intent to conclude binding obligations, and not on the broader *content* of those obligations beyond the scope of the actual performance itself (type and quantity of goods, purchase price, and the like).

The determination of whether the performance expresses assent to more extensive obligations—specifically to the constructive counteroffer arising by operation of article 19(1)—will, therefore, require reference to other indicative circumstances that attend and thus illuminate the meaning of the conduct of the parties. A proper starting point in this analysis is what is often the most indicative factor in assessing the common intent of the parties,[304] their statements and conduct in the course of their pre-contractual relationship.[305] The one U.S. court that has addressed the effect of conduct in response to an offer under the U.N. Sales Convention in fact squarely concluded, on the basis of the flexibility inherent in article 8(3), that "the Court may consider previous relations between the parties in assessing whether a party's conduct constituted acceptance."[306]

By definition, a partial dissensus arises only where at least one of the parties proposes terms in the negotiation process over which

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302. See supra part II.A.3.a.

303. Actions, according to the old adage, may indeed speak *louder* than words. In light of the flexible interpretive standards of the Convention, the essential point here is that they do not necessarily speak more *clearly* than the actual words that attend such actions.

304. See CISG Kommentar (Junge), supra note 32, at 96.

305. See CISG, supra note 2, art. 8(3); supra note 167 and accompanying text.

306. Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2d Cir. 1993). The principal issue in this case was a motion for a stay pending arbitration. The court concluded that, in light of the prior dealings between the parties and the subsequent affirming statements and conduct of the party opposing the stay, there had been an agreement by the parties to arbitrate the matter in dispute. 789 F. Supp. at 1240-41.

they have failed to agree or have affirmatively disagreed.[307] In the typical case, both parties will contribute to this partial dissensus, the one by insisting on her terms (often, but by no means always, in the form of standardized business conditions) together with her initial declaration and the other by insisting on his standard terms preceding or as part of his reply. Alternatively, in the case of a less structured process the parties exchange a variety of substantive proposals during their negotiations or achieve a series of understandings during their relationship, in the course of which both will make reference to their desired "contractual" terms and conditions.[308]

Where the parties nonetheless proceed to perform, the formation values of the Convention discussed in detail in Part III above in my view require a more refined approach than a "one-size-fits-all" fiction of assent to the last declaration exchanged between them. Instead, these flexible formation values reveal that the meaning of the parties' respective conduct must be calibrated to the degree of clarity in the statements and expressive conduct preceding and attending that performance.[309]

At the one end of the spectrum, there may well be unproblematic cases in which the original offeror fails to raise any objection to contractual obligations on the basis of foreign terms either in the offer or otherwise prior to performance (which might be termed a "passive partial dissensus"). Suppose an offer merely includes a general reference to the offeror's standardized terms and that this general reference neither expressly insists on the exclusive application of those terms nor rejects deviating terms proposed by the other party. Suppose then that the reply for its part expressly insists on the application of different or additional terms. Such are the cases whose resolution is defined by articles 19(1) and 18(1). Here, the prior dealings between the parties give little indication that the original offeror objects to contractual obligations on the basis of the terms proposed by the other party. If the original

307. Where only one party has proposed terms, the argument that there was a dissensus notwithstanding performance is a much more difficult one to make. In such a case—in contrast to that of partial dissensus addressed in the text—there would be no external indications to call into question the assent of the other party.

308. For a discussion of the great variety of such flexible relationships in modern commerce, see supra part II.B.

309. See supra parts III.A. and C. Calibrating meaning to the facts of each specific case of course raises concerns that the approach I advocate here will frustrate the Convention's very purpose of bringing uniformity to international sales law. I address those concerns in part IV.B.3.

offeror then proceeds to perform in the face of the deviating terms in the reply to the offer and without objection to them, a "reasonable person" as contemplated by article 8(2) may well understand her unqualified conduct as assent to the (constructive) counteroffer arising from the deviating acceptance rule in article 19(1). In this way, the "objective" standard of article 8(2) will indeed result in the protection of the *reasonable* expectations of the other party.[310]

Where the declarations and expressive conduct of the original offeror prior to performance are not clouded by such ambiguity, however, an application of the interpretive values of the Convention militates in favor of a decidedly different conclusion. Consider the case in which the original offeror expressly and unambiguously insists—either as part of her original declaration or otherwise prior to performance—on the exclusive application of her own terms and/or objects in like fashion to contrary foreign terms (a state one might term an "affirmative partial dissensus"). Suppose that this express declaration of the offeror's intent also makes clear that it is of a continuing nature, that is, that it will continue to apply irrespective of the nature or legal effect of the reply of the other party. One might imagine a declaration in this respect in which the original offeror rejects in advance any terms that deviate from those in the offer and affirmatively states that any subsequent conduct should not be understood as assent to such terms.[311] If this express declaration of intent is made with sufficient clarity and prominence, the Convention's flexible interpretive values should preclude—absent further express communications between the parties—an assertion that the other party reasonably understood the subsequent conduct by the original offeror as reflecting a directly contrary implied assent to the constructive counteroffer arising from the operation of article 19(1).

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310. See Report on the Ninth Session, supra note 57, para. 22 (noting that where a party fails to express her intent clearly, the subsidiary standard of article 8(2) will operate to protect the reasonable expectations of the other party). If the original offeror nonetheless had a contrary subjective intent not revealed clearly by her declarations and conduct, she could, of course, seek to prove that the other party "knew or could not have been unaware" of that intent under the primary subjective standard of article 8(1).

311. A clause of this type might read roughly as follows: "We hereby object to the application of any terms that you have proposed or will propose (whether in your reply to this offer or at any other time) to the extent that such terms are in addition to or different from those set forth herein. This declaration of our express intent shall remain effective notwithstanding the terms or legal effect of any reply to this offer. Except in the case of a prior express written agreement signed by an authorized officer of this company, under no circumstances should you understand any conduct on our part as an implied assent to any such additional or different terms proposed in your reply to this offer or at any other time."

It bears emphasis here that the indicative value of such an express declaration of intent is *not* somehow nullified by the limited legal consequence of the rejection of the related formal "offer." Once again, the simple fact that the legal construct of "offer" is terminated does *not* mean that the content of the declaration ceases to be an "indication" of the original offeror's intent. Rather, in conformance with the flexible interpretive standards of article 8 such prior declarations in the course of the parties' negotiations continue to have indicative effect, including in the assessment of the meaning of the parties' subsequent conduct.[312]

The relative weight of this express declaration of intent is reinforced, moreover, by the factual context of the performance. As is clear from the language of article 19, that performance will occur following an indication of "acceptance" *by the original offeree* of the terms proposed *by the original offeror.* The rejection manufactured by article 19(1) of the formal offer results only where the reply "purports to be an acceptance." By definition, then, in a case originally governed by article 19(1) the original offeror will proceed to perform under circumstances in which she reasonably could conclude (as a factual matter) that the other party has assented at some level to the conclusion of a contract on the basis of her original offer.[313] Suppose then that the original offeror has also previously declared her *express* intent not to be bound to foreign contract terms. Even under the subsidiary objective standard there is little to support a fixed conclusion in such a case that a reasonable person would understand the content-neutral performance of the basic elements of the transaction as of a greater expressive weight in favor of a contrary *implied* intent.[314]

This conclusion should apply with particular vigor where the express declaration of intent of the original offeror occurs separate from her formal offer. Here, the argument that the rejection manufactured by article 19(1) of the formal offer somehow sweeps away the effect of the separate express declaration of intent is of

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312. See supra notes 260-62 and accompanying text. With regard to the issue of "continuing intent," see supra part IV.A.2.

313. In this sense, the common term "deviating acceptance" should be an oxymoron in the context of the U.N. Sales Convention. The result of the rule in article 19(1) is that a deviating "acceptance" does not, in fact, operate as an acceptance. Thus, such an "acceptance" is from its very nature ambiguous. In spite of this, the fictional assent approach holds that after a purported acceptance in this form the mere performance so clearly expresses the original offeror's unqualified assent that adjudicators should dispense with an analysis of the specific facts surrounding that performance.

314. See supra note 251 and accompanying text.

even less merit. Even proponents of the traditional "last shot" rule would (presumably) give this effect to the separate rejection of foreign contract terms if it occurred subsequent to the counteroffer created by article 19(1).[315] In light of the required consideration of *all* relevant circumstances under the flexible interpretive standards of article 8, there is no compelling reason to treat a subsequent declaration and a prior declaration as of such a qualitative difference that one is given dispositive effect and the other is disregarded in its entirety.

Finally, even if it is made as part of the original offer such an express declaration of intent should have near dispositive effect if it also extends to the authority of agents to indicate a contrary implied intent. If the original offeror *expressly* states, together with her declaration of an intent not to be bound to foreign terms, that the employees involved in the mere physical execution of the transaction *do not* have authority to preempt this declared intent, there is (absent other circumstances)[316] effectively no latitude for a blanket argument that those employees somehow had the *apparent* authority to do so nonetheless.[317] And, significantly, the simple rejection of the formal offer imposed by article 19(1) cannot, at least without a corresponding agreement between the parties,

315. Pursuant to article 17, the result of such a "rejection" would be a formal "termination" of the counteroffer. An interesting issue here is the proper treatment of such a *subsequent* insistence on the application of one's own terms that does not itself "purport to be an acceptance" in the sense of article 19(1), but also does not amount to a formal rejection of the previous constructive counteroffer (in the typical case neither party will even be aware of this counteroffer manufactured by article 19(1)). In such a case, both parties will have valid offers outstanding at the time of performance. Like the more common case of partial dissensus discussed in the text, it is precisely here that the principle of party autonomy assumes its appropriate function of defining the contours of the parties' relationship where neither has assented to the proposal of the other.

316. A contrary "party practice" in the sense of article 9(1)—for example, if through repeated conduct the original offeror had agreed to certain terms in prior dealings between the parties—may lead the determinative reasonable person (see article 8(2)) to conclude that she nonetheless agreed to be bound by the terms of the counteroffer manufactured by article 19(1). This observation, however, only leads the analysis back to the flexible interpretive standards that militate against the blanket conclusion of the fictional assent rule and in favor of the consensus approach advocated here.

317. With regard to the United States, see Property Advisory Group, Inc. v. Bevona, 718 F. Supp. 209, 213 (S.D.N.Y. 1989) ("A party claiming reliance on an agent's apparent authority must not fail to heed warnings or inconsistent circumstances."), citing General Overseas Films, Ltd. v. Robin Int'l, Inc., 542 F. Supp. 684, 695 (S.D.N.Y. 1982), aff'd without opinion, 718 F.2d 1085 (2d Cir. 1983).

affect the separate factual issue of the original offeror's internal allocation of authority.[318]

Indeed, this matter cannot even be resolved within uniform international sales law, for the U.N. Sales Convention defers to national law to resolve such issues of the authority of an agent to bind her principal.[319] The principal may indeed ratify the actions of her agents. But again, in light of the *express* declaration of intent the mere subsequent silence or inaction of the principal cannot reasonably be understood as expressing a contrary implied intent beyond the basic elements of the transaction actually performed by the parties.

As the better-reasoned approach leads to the conclusion that in the case of an affirmative partial dissensus the original offeror does not, simply through performance alone, assent to the counteroffer arising from a deviating acceptance, where does this leave the analysis of the parties' relationship? The sum of the above analysis is that the resolution of such a case of a partial dissensus cannot be found in a rigid application of the offer-acceptance scheme. The fundamental flaw with such an approach is that the statements and conduct of neither of the parties can be interpreted as the requisite "indication of assent" to the *formal* declaration of the other (the offer or constructive counteroffer). As a result, although through their performance the parties have manifested an agreement on the creation of binding obligations that is enforceable under the principle of party autonomy,[320] they have not done so by way of the formal acceptance of a formal offer on which the process assumptions of the Convention are based.

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318. In light of the express disavowal of authority by the principal, the actions of the employees themselves cannot create the predicate "agreement" of the principal necessary to give the employees the apparent authority to do so. See D & G Equip. Co. v. First Nat'l Bank of Greencastle, 764 F.2d 950, 954 (3d Cir. 1985) ("An agent cannot, simply by his own words, invest himself with apparent authority. Such authority emanates from the actions of the principal and not the agent."), quoting Jennings v. Pittsburgh Mercantile Co., 414 Pa. 641, 202 A.2d 51, 54 (1964); cf. Restatement (Second) of Agency § 168 (1958) ("A disclosed or partially disclosed principal is not thereby subject to liability because of untrue representations by an agent as to the existence or extent of his authority or the facts upon which it depends.").

319. See Honnold, supra note 8, at 116; CISG Kommentar (Schlechtriem), supra note 32, at 122; see also the Decision of the District Court of Hamburg, Germany, Sept. 26, 1990, case no. 5 0 543/88, reprinted in UNILEX, supra note 18, at 43-44.

320. See supra notes 242-44 and accompanying text. In so doing, the parties overcome the basic policy concerns that underlie article 19, and that led to a rejection of proposals during the drafting process for a more accommodating approach to the recognition of contractual obligations. See supra notes 296-302 and accompanying text.

It is precisely in such situations that the principle of party autonomy assumes its appropriate function in the hierarchy of norms of uniform international sales law. Because it is only the factual agreement of the parties in the form of their performance that establishes the contractual nature of their relationship,[321] the contours of the relationship are likewise appropriately constructed on the basis of—and, significantly, limited by—the scope of that actual common intent. The application of this basic principle of party autonomy will mean that the parties' respective rights and obligations will, as an initial proposition, be defined by the scope of the conformity between their respective prior—and for that matter subsequent[322]—declarations. In practical outcome, the result will be that the parties' contract will consist of the terms on which their writings (in particular their standardized business terms) are in agreement. For it is to that extent alone that the parties have achieved the requisite common intent in the sense of the principle of party autonomy.[323] In accordance with the flexibility of that principle itself,[324] each party may also attempt to prove a broader (or more limited) common intent on the basis of implied (or less formal express) agreements between them, including by reference to established party practices and usages of trade.[325]

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321. The recognition of a binding contract under the Convention will require that the determinative consensus of the parties extend to the essential elements of a sales transaction as identified by article 14(1) (that is, the goods, quantity, and price). Where, even without actual performance, there is an agreement on these essential terms and neither party makes formation contingent on assent to other terms, a contract is created on such an agreement alone. See Bianca & Bonell (Eörsi), supra note 14, at 138; cf. Murray, Convention, supra note 46, at 17 (arguing that if a reasonable person would conclude that the parties had a mutual intent to be bound notwithstanding an absence of agreement even on the price, a contract is formed under CISG).

322. Under article 29(1), the parties may effectively modify the terms of their contract by "mere agreement."

323. Traditionalists may suggest that this approach in its practical effect permits a "partial" acceptance of an offer, and that this runs contrary to the Convention's offer-acceptance scheme as supplemented by the policy of the practical "mirror image" rule of article 19(1). Such a suggestion would miss the point. The contract recognized under this approach is not formed by an acceptance of part of the counteroffer manufactured by article 19; it is, rather, the *absence* of an acceptance of the formal counteroffer that creates the legal situation on which the approach advocated here is based. The core of such a contract is instead defined by those matters on which the performance of the parties has actual expressive worth (goods, price, quantity, et cetera). The remainder of the contractual obligations of the parties is then shaped by the common intent revealed by their prior writings (with each party free to prove that the actual common intent is broader or more limited).

324. See supra part III.A.1.

325. See supra part III.A.3. (discussing the application of "party practices" and express and implied usages of trade).

Where gaps remain, the express "sale of goods" provisions in Part III of the Convention likewise assume their appropriate function in the Convention's hierarchy of norms. This function of defining the "background" to the parties' relationship carries with it two important implications for the contours of the parties' contractual obligations. First, as express provisions of the Convention, the substantive rights and obligations defined in Part III do not depend for their application on a corresponding agreement of the parties. The contrary proposition is worthy of equal emphasis: As important values in themselves, these express provisions, as the negative implication of the principle of party autonomy makes clear, must be given effect in absence of an actual, contrary, common intent of the parties.[326] In other words, in defining the contours of the parties' respective obligations the absence of a common intent between them on a particular matter is the sole necessary condition for the application of a substantive provision of the Convention governing that matter.

In this way, this approach—which I will refer to as the "consensus approach"—supports in a particular way the principles underlying the Convention's hierarchy of norms. In light of the increasingly common use of standardized business terms by parties in international commerce, together with the increasing ease and rapidity of their transmission,[327] a consequence of the rigid "winner-take-all" effect of the fictional assent rule is what can fairly be termed "unilaterally imposed default rules." Application of the consensus approach, in contrast, will result in a displacement of the Convention's substantive background rules only where one side can establish a corresponding actual agreement (or "consensus") between the parties (either on the basis of their writings or otherwise).[328]

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326. See supra notes 272-74 and accompanying text (explaining that the failure adequately to account for this important negative implication of the principle of party autonomy is one of the principal failings of the fictional assent rule). The application of that rule results in a wholesale displacement of the substantive provisions of the Convention in favor of the standard terms of one of the parties even where there is a clear affirmative dissensus between them over the effect of those terms.

327. See supra notes 109-12 and accompanying text.

328. With respect to the common use of the term "consensus," see supra note 43. Reasonable persons can disagree, of course, about the substantive merit of the particular background rules in the Convention. Nonetheless, their adoption by the drafters and subsequent ratification at the Vienna Conference reflect a policy determination that they should apply in absence of a contrary consensus of the parties.

The practical outcome of the consensus approach thus differs markedly from that under the traditional "last shot" rule. Where the parties continue to disagree over matters such as governing law and the extent of liability for implied warranties and consequential damages, the consensus approach does not arbitrarily choose the standard business terms of one party or the other. This approach likewise does not leave such significant issues as the forum and manner of dispute resolution solely to the timing of the last technical reference to a party's general conditions of sale or purchase. Instead, where the parties proceed to perform without achieving an agreement on these issues, their respective standard terms are given effect only to the extent of the overlap between them. If a seller's terms include an arbitration clause, for example, a binding agreement to arbitrate will arise only if the buyer's form contains a corresponding term. In the absence of such an agreement between the respective standard business terms, therefore, the substantive "background" provisions of the Convention will define the parties' rights and obligations as buyer and seller.

Finally, one German court has already interpreted the U.N. Sales Convention to require a practical conclusion similar to this consensus approach.[329] At issue in the case before it was the effectiveness of a choice-of-law provision contained in a German buyer's standard conditions of purchase. The court initially observed that if the Italian seller had responded to the buyer's order with its own standard terms (a disputed factual issue), this reply would have amounted to a counteroffer under the deviating acceptance rule of CISG article 19.[330] Although the parties nonetheless proceeded to perform, the court did not apply the traditional "last shot" approach to resolve the partial dissensus between them. Instead, the court concluded that through this performance the parties had manifested a fundamental consensus on the essential terms of the contract but had either "waived their claim to the application of their respective standard business terms or derogated from Art. 19 in exercise of their party autonomy under Art. 6." As a consequence, "[t]he contract would then have been concluded on the basis of the [background] rules of CISG."[331]

329. Decision of the Local Court of Kehl, Germany, No. C 925/93 (Oct. 6, 1995), reported in 1996 Neue Juristische Wochenschrift-RR [NJW-RR] 565.

330. NJW-RR, at 565.

331. NJW-RR, at 566 [trans. by author]. Interestingly, the court arrived at this conclusion without any analysis of the parties' prior declarations and conduct. In this case of a partial dissensus between the parties, the court instead simply disregarded the parties

2. *The Consensus Approach and a Preemptive Response to Traditionalists*

Traditionalists would likely argue that the consensus approach advocated above upsets the structure of the contract formation scheme under the Convention. They would likely assert that the Convention's formation provisions are premised exclusively on a formal offer and a subsequent, perfectly conforming acceptance, as the Convention's definition of when a contract is concluded[332] and the references in its drafting history to "two unilateral acts" would seem to reflect.[333] They would, moreover, likely point out the inability of the drafters of the Convention to agree on appropriate language for a provision that would have *expressly* recognized contracts formed without a clearly identified formal offer and formal acceptance (as is found in the Uniform Commercial Code in the United States).[334]

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respective standardized terms and applied the background rules of the Convention. Id. The court also concluded in the alternative that the buyer's standard terms would not have become part of the contract because they were in the German language and the negotiations between the parties had been conducted in Italian. Id.

332. See CISG, supra note 2, art. 23 ("A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.").

333. See Secretariat Commentary, supra note 15, para. 2, Official Records, at 24 (observing that for purposes of interpretation the Convention views even an integrated contract as a "product of two unilateral acts").

334. See U.C.C. § 2-207(3) (1987) (stating that conduct of the parties that "recognizes the existence of a contract is sufficient to establish a contract for sale" even though their formal written declarations do not otherwise do so); see also U.C.C. § 2-204(1) (explaining that a sales contract "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract"). The United Kingdom made a proposal to incorporate a similar provision in the U.N. Sales Convention late in the drafting process. A working group formed by the Commission to address the issue then proposed a provision that would have recognized a contract based on "the mutual assent of the parties to form it, even though it is not possible to establish an offer and an acceptance." See Formation Deliberations, supra note 83, paras. 99-104. The Commission discussed this proposal and subsequent revisions in its 192d, 193d, 195th, and 200th meetings, held in the period June 1-7, 1978. The "Summary Records" of those meetings are contained in U.N. Docs. A/CN.9/SR.192, 193, 195, and 200, respectively. Although there was support for the substance of the proposal, the records of the deliberations reveal that the delegates were simply unable to agree so late in the drafting process on the proper wording of a corresponding provision. See Summary Record of the 200th Meeting, U.N. Doc. A/CN.9/SR.200, at 5 (announcement of the United Kingdom representative "that his delegation was withdrawing its request for the inclusion of the additional article in order to spare the Commission further time and trouble"); Formation Deliberations, supra note 83, para. 104 ("The proposals were withdrawn because of the extreme difficulty of formulating an acceptable text."). The Working Group also failed to adopt a similar proposal by the Secretary-General early in the drafting process. See Secretary-General Formation Report, supra note 82, proposed alternative art. 6(4)(b). The

Such a rigid view of contracting under the Convention in my view misses the mark on at least two levels. First, the fictional assent rule seems to proceed from the premise that the process assumptions of the Convention are of such a prescriptive rigidity that they must be imposed on the parties even to the point of frustrating clearly expressed intent.[335] The core formation values of the Convention discussed above belie this premise.[336] There may indeed be circumstances in which the party disadvantaged by the fictional assent rule will fail to express her intent with sufficient clarity such that her unqualified performance may "reasonably" be viewed as assent to the entirety of the counteroffer manufactured by article 19(1). Neither this alone nor its conjunction with the offer-acceptance scheme in general justifies—much less requires—an approach that disregards the flexible interpretive values of the Convention in favor of stylized assumptions about how parties express their intent (particularly in light of the widely divergent cultural and legal systems[337] represented among the Convention's contracting states).[338]

Moreover, a mere structural observation about the necessity of two declarations of assent does little to illuminate the analysis of the partial dissensus issue. Of course, even the determinative consensus under article 6 requires that each party contribute an intent. And it would be a rare case indeed if one indication of intent did

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only explanation given for this decision was the cryptic statement that the provision was "unnecessary." See Report on the Eighth Session, supra note 132.

335. Although article 23 defines the moment of contract formation with reference to offers and acceptances, this provision does not operate to preclude the recognition of a contract concluded in a less formal manner. See Bianca & Bonell (Farnsworth), supra note 14, at 199; CISG Kommentar (Schlechtriem), supra note 32, at 195.

336. See supra part III.B.

337. Traditionalists may respond that the need to address this diversity provides a policy justification for requiring a rigid rule for the treatment of a partial dissensus. Such non-interpretive policy justifications are explored (and rejected) supra part IV.A.3. There is simply little to support—and much to refute—a suggestion that the elemental requirement of an "indication" of assent (as determined under the flexible interpretive standards of article 8) to the assumption of contractual obligations is to be disregarded in the case of a partial dissensus solely in the interests of "clarity." With respect to the role of uniformity under the consensus approach I advocate here, see infra part IV.B.3.

338. The relative clarity of certain indicative factors may, after sufficient time and experience with CISG's interpretive standards in international contracting, permit generalized statements about what will "often" or "typically" be revealed by the presence of those factors in a particular context. The diversity of cultures involved in international contracting coupled with the mandated flexibility in interpretive inquiries under the Convention counsels, however, against a hasty adoption of interpretive presumptions so rigid in their application that they cease being an aid and begin to be an independent impediment to ascertaining intent.

not precede the other in time. The approach I advocate above simply gives effect to the core agreement of the parties where neither of those separate indications of intent can be interpreted as an unqualified assent to the content of the other party's *formal* declaration (the offer or constructive counteroffer), but the parties nonetheless manifest a broader common understanding (a consensus) on the creation of binding obligations.[339]

In this sense, the consensus approach does not operate to displace the express formation provisions of the Convention. Rather, on the basis of the principle of the primacy of party autonomy it serves in this context merely to accommodate a relationship of the parties formed in a manner not embraced by a rigid application of the offer-acceptance scheme. Articles 14 through 24 are admittedly premised on "offers" and "acceptances." Nonetheless, as we have already seen, the drafters early on rejected attempts to structure the Convention on the basis of a policy of prescriptive, mandatory provisions. The compelling weight of authority thus correctly holds that the Convention's formation values are of sufficient flexibility as to embrace contractual relationships formed in a manner that does not track the offer-unconditional acceptance format.[340]

Even if one were to ignore party autonomy and read the Convention to *require* that the actions of the parties be reconstructed to fit a rigid model of formal offer and formal acceptance, the consensus approach would still be the preferable solution to the treat-

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339. If the original offeror's express objection to foreign terms were to occur subsequent to the receipt of the deviating acceptance, the counteroffer manufactured by article 19(1) would terminate by operation of article 17. If the parties nonetheless proceed with performance, traditionalists would presumably require that the performance be parsed into an offer by conduct and an acceptance by conduct, but that the content of the contract nonetheless be defined by the scope of the actual agreement of the parties. My thesis is that the same substantive outcome should obtain where the counteroffer manufactured by article 19(1) cannot be given effect for lack of a corresponding indication of assent by the original offeror (that is, where her mere performance cannot be interpreted as assent to the content of such counteroffer).

340. See Honnold, supra note 8, at 192 ("The Convention does not compel the stretching or amputation of a living understanding to fit the Procrustean bed of 'offer' and 'acceptance.'"); Rehbinder, supra note 32, at 166 (explaining that contract formations are possible under the Convention even in the absence of a clearly identified offer and acceptance if it is clear "that a material consensus was achieved and parties intended to be bound") (trans. by author); Piltz, supra note 41, at 15; cf. Summary Record of the 195th Meeting, U.N. Doc. A/CN.9/SR.195, at 3 (statement of E. Allan Farnsworth) (observing in connection with the proposal of the United Kingdom for a corresponding express provision "that all legal systems recognized the principle of offer and acceptance but were not so rigid as to preclude situations where that principle was not strictly applied").

ment of a partial dissensus. What is often overlooked in the analysis of the issue of performance notwithstanding a partial dissensus is that interpretation is required of the actions of *both* parties. That is, where the party making the "final" deviating declaration proceeds with performance (typically the seller shipping the goods) the meaning of that performance must likewise be subjected to the interpretive standards of article 8. The purpose of this exercise is to identify what this party is substantively proposing with respect to the creation of contractual obligations. Under the Convention, an intent to make a binding offer can arise solely from the conduct of the offeror,[341] including the shipment of goods by the seller, although the negotiations of the parties have not yet led to the creation of a binding contract.

In resolving this interpretive issue, it is important to observe that the meaning of this proposal must be determined according to the understanding of a reasonable person in the position of the *other party* (in this context the original offeror).[342] Though all of the factors discussed above in connection with the consensus approach will apply also in this interpretation,[343] two will be of particular significance: (1) the original responsive declaration of the party now beginning with performance will reflect neither a rejection nor a counteroffer but rather an "acceptance;"[344] and (2) in the common case of an affirmative partial dissensus the other party will already have insisted on the exclusive application of her own terms and/or rejected foreign terms prior to that performance.

In light of these considerations, the more compelling interpretation—if one were forced to reshape the transaction to fit stylized notions of "offer" and "acceptance"—of the content of the proposal arising from the initial performance is the following: that the parties proceed with performance on the basis of the express agreement thus far achieved on the essential terms of the transaction and that they disregard the partial dissensus between them.[345]

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341. Enderlein & Maskow, supra note 160, at 83.

342. See CISG, supra note 2, art. 8(2). Of course, the original offeree/counterofferor remains free to attempt to prove a contrary subjective intent of which the other party "knew or could not have been unaware" as contemplated by article 8(1).

343. See supra part IV.B.1.

344. The rule of article 19(1), once again, only applies where the reply to the original offer purports to be an acceptance.

345. Such an interpretation that accommodates the interests of both parties is particularly appropriate in the standard case in which the original offeree is the seller (it is the buyer that commonly marks the end of informal discussions by forwarding a purchase order and the seller that initiates performance through the shipment of the goods). If the

In other words, where the party beginning with performance has already received an unequivocal rejection of her proposed terms, but nonetheless proceeds to perform without clarifying the broader scope of the parties' relationship, the more principled interpretation is that this performance "indicates" an intent to ignore the lack of agreement over non-essential terms in favor of a binding relationship on the basis of the express agreement on the essential terms of the transaction.[346]

It will, of course, often be the case that the party beginning with performance will likewise have insisted on the exclusive application of her own terms. In this form of an affirmative partial dissensus, the consensus approach I advocate above should apply with particular force. Where the parties proceed with the performance of the contemplated transaction, notwithstanding such an obvious dissensus over the respective non-essential terms proposed by them, the appropriate resolution consonant with the formation values of the Convention and the reality of the mutual rejection of foreign terms is to construct the content of the parties' obligations on the basis of the actual conformity between their respective express declarations.[347]

Finally, the reasoning of the German Supreme Civil Court (known by its German acronym BGH)[348] with respect to the treatment of partial dissensus under domestic German law is illuminating on this score as well. The Civil Code in that country also prescribes a "mirror image rule" for the treatment of deviating

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parties *in fact* understand the deviating acceptance as a rejection (the premise of the fictional assent rule), no reasonable seller would undertake the expense and risk of shipping the goods to the buyer (particularly in light of the distances typically involved in international transactions) without a binding contractual relationship and at the same time propose terms so contrary to the buyer's interests that the buyer would be *compelled* to reject the proposed contract upon arrival of the goods. This commercially significant fact is certainly among the "relevant circumstances" that must be considered under the interpretive standards of article 8. See CISG, supra note 2, art. 8(3).

346. The burden of proving the content of the proposal will, pursuant to the structure of article 8, admittedly fall on this other party (the original offeror). Even where she fails to meet this burden, however, this does not necessarily lead to the conclusion that she has assented to the content of the counteroffer manufactured by article 19(1). The original offeree will have the burden on that score. As I discuss in part IV.A., if a contrary intent is clearly expressed in the original offer, this burden will often likewise not be satisfied. The only principled means remaining to define the content of such a relationship is the actual consensus of the parties.

347. See supra part IV.B.1.

348. Bundesgerichtshof.

acceptances.[349] In addition, the Code sets forth an express presumption that the parties lack an intent to be bound where they have failed to agree on *all* terms proposed by either of them in the negotiation process.[350] Notwithstanding these injunctions, the BGH recognized as early as the 1970s that a binding contract may be formed if, through performance or otherwise, the parties recognize the existence of a contract in spite of a clear partial dissensus arising from their formal declarations.[351]

The more instructive aspect of the German Supreme Civil Court's treatment of partial dissensus is the priority it accords express indications of intent over traditional notions of fictional assent. Where a party has *expressly* insisted on the exclusive application of its own terms and/or objected to foreign terms in a like manner, the BGH has refused to interpret the mere performance of the basic elements of the transaction as a contrary *implied* assent to the entire content of the other party's formal declaration, in particular the standardized terms referred to therein.[352] What is significant here is that the Court has given effect to such express indications of intent in spite of a traditional fictional assent rule that otherwise applies in Germany as well (where it is known as the "theory of the last word").[353]

Where the parties nonetheless proceed to perform, the consequence with respect to the content of the resulting contract is a straightforward one for the BGH. In application of the fundamen-

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349. Bürgerliches Gesetzbuch (BGB) § 150(2) (F.R.G.) ("An acceptance subject to additions, limitations or other deviations operates as a rejection coupled with a new offer.").

350. Id. § 154(1) ("In cases of doubt, no contract is concluded as long as the parties have not agreed on all terms of the contract on which, according to the declaration of even one of them, an agreement should be made.").

351. See, e.g., Judgment of Sept. 26, 1973, BGH (F.R.G.), Neue Juristische Wochenschrift [NJW] 2106; Judgment of Oct. 6, 1974, BGH (F.R.G.), Der Betriebsberater 1136.

352. See, e.g., Judgment of Mar. 20, 1985, BGH (F.R.G.), NJW 1838, 1839 (concluding that the decisive issue is the intent that emerges from an express objection to foreign terms in the formal declaration of the original offeror; absent additional contrary circumstances, a change from that intent "in particular cannot be seen in the fact that [she] did not object again to the standardized terms of [the other party] and accepted delivery of the goods without reservation").

353. The "theory of the last word" ("*Theorie des letzten Wortes*") is the German analog to the "last shot rule" in the United States. This approach governed in all cases in Germany as well until the modifications initiated by the BGH beginning in the 1970s. See Hermann Ebel, Die Kollision Allgemeiner Geschäftsbedingungen, NJW 1033; P. Ulmer et al., AGB-Gesetz § 2, at 181-83 (7th ed. 1993). For an English language discussion of this development in German law, see A.T. von Mehren, The 'Battle of the Forms': A Comparative View, 38 Am. J. Comp. L. 265, 290-96 (1990).

tal role of the *common* intent of the parties in the creation of contractual obligations, the content of the contract must be defined in terms of the conforming provisions of the parties' respective written forms:

> it emerges from the will of the parties that those terms . . . should be given effect that are contained in the parties' standardized forms[,] have the same content and thus are assented to by both parties.[354]

In absence of proof of an implied agreement on the subject, the substantive background law assumes its appropriate role, in the view of the BGH, of filling gaps in the parties' agreement.[355]

Although the BGH has not discussed in any detail the theoretical bases for its conclusions,[356] its reasoning is instructive for an analysis of this issue under the U.N. Sales Convention as well. As does the Convention, German law identifies an offer and its unqualified acceptance as the general "building blocks" of contracts.[357] Moreover, in contrast to the Convention the German Civil Code does not contain an express provision similar to article 6 of the Convention establishing the consensus of the parties as the prime norm in the recognition of contractual obligations.

The BGH has nonetheless arrived at a conclusion consonant with the consensus approach discussed above by rejecting fictional notions of implied assent where a party has made an express indication of an intent not to be bound to contractual obligations unilaterally proposed by the other party. Where—through their performance or otherwise—both parties recognize the existence of a contract without requiring agreement on the various terms previously proposed, the appropriate approach in the view of the BGH is to limit their contractual rights and obligations to the conformity

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354. Judgment of Mar. 20, 1985, BGH (F.R.G.), NJW at 1839.

355. Id.

356. Although the BGH has focused its analysis primarily on the treatment of the standardized terms routinely exchanged by the parties in modern commerce, it has not discussed the specific role of the offer-acceptance scheme defined for contract formation under German law. See Bürgerliches Gesetzbuch (BGB) §§ 145-53. As noted in the text, in the case of an express rejection of foreign terms by the original offeror the Court has structured its analysis on the basis of first principles by asking: First, do the statements and conduct of the parties establish a consensus on the creation of contractual obligations? Second, what is the consensus of the parties with respect to the content of those obligations? Whatever the specific role of the offer-acceptance scheme in this analysis, the BGH has not viewed that scheme to be of such a prescriptive rigidity that it must be applied even in frustration of the actual expressed intent of the parties.

357. See id. §§ 145-51.

between their prior declarations of intent. This reasoning applies with equal vigor to the U.N. Sales Convention.[358]

3. Accommodating the Needs of Uniformity

In advocating a "consensus approach" to the treatment of partial dissensus under the Convention I am cognizant of the possibility of an increased level of flexibility in the analysis as compared to the rigid fictional assent rule. In contrast to that traditional "one-size-fits-all" rule, the consensus approach analyzed above argues that the formation values of the Convention require a flexible interpretation of the performance of the original offeror that is calibrated to the degree of clarity in her prior express indications of intent. This level of flexibility directly implicates the admonition in article 7(1) that in the interpretation of the Convention itself, "regard . . . be had to its international character and to the need to promote uniformity in its application."[359]

In the development of a consensus approach to the treatment of partial dissensus under CISG, therefore, the interests of uniformity of application may well require courts to fashion appropriate, specific standards for the declaration of a party's unwillingness to be bound to foreign contract terms. These standards should at a minimum include the following: First, courts should demand that such an expression of intent be made conspicuously and/or outside of the party's standardized form. It should likewise be appropriate to insist that the expression include not only an explicit insistence on the exclusive application of one's own terms but also, and perhaps more important, an unequivocal objection to deviating terms proposed by the other party. Finally, the express declaration of intent should make clear that it is of a continuing nature, that is, that the rejection of contractual obligations on the basis of foreign terms

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358. Indeed, in contrast to the BGB, see § 154, para. 1, the Convention contains no express presumption that the parties lack an intent to be bound where they have failed to agree on all terms proposed by either of them in the negotiation process. A proposal to include such a presumption in the Convention was rejected as "unnecessary." See Report on the Ninth Session, supra note 57, para. 208; supra notes 234-35 and accompanying text.

359. For a discussion of the importance of a uniform application of the Convention, see John Honnold, The Sales Convention in Action—Uniform International Words: Uniform Application?, 8 J.L. & Com. 207 (1988). See V. Susanne Cook, Note, The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods, 50 U. Pitt. L. Rev. 197 (1988).

will continue to apply irrespective of the nature of the formal response of the other party.[360]

The articulation of such standards will ensure uniformity in the application of the consensus approach by national courts in transactions governed by the Convention. At the same time, these requirements of clarity in a party's rejection of foreign terms will address any concerns that the consensus approach will introduce unnecessary uncertainty to the formation process. An expression of intent that satisfies such standards will thus serve a marking function; that is, it will signal from the outset of the potential relationship of the parties that the mere subsequent performance by the original offeror following a deviating acceptance should not (without further inquiry) be interpreted as an unqualified assent to the counteroffer manufactured by article 19(1). In terms of the concept of "continuing intent" explored above,[361] such an unambiguous expression of intent will make clear that it is of such a broad and permanent nature that it will survive the termination of the formal legal construct of offer that is imposed on the parties by the interaction of article 19(1) and article 17.

An expression of intent that satisfies the defined standards of clarity and prominence will simultaneously preclude an application of the fiction of assent upon which the rigid traditional rule is based and create the foundation for the consensus approach I have advocated here. If, in spite of such a clear expression of continuing intent, the parties proceed with performance without clarifying the effect of the partial dissensus between them, the contours of their relationship are appropriately limited to the express consensus

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360. U.S. case law in this country on the necessary content of an "expressly made conditional" clause as contemplated by U.C.C. § 2-207(1) may prove instructive in the development of correlative standards under the U.N. Sales Convention. This clause of § 2-207(1) has the effect of precluding the formation of a contract, notwithstanding a "definite and seasonable expression of acceptance" as contemplated by the initial clause of the section. See J. White & R. Summers, The Uniform Commercial Code 41-42 (3d ed. 1988). The prevailing interpretation of the "expressly made conditional" clause of § 2-207(1) is a strict one. The seminal opinion in this area holds that an offeree satisfies the clause only if the reply to the offer "clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms." Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972). For a recent case discussing this clause, see Taft-Peirce Mfg. Co. v. Seagate Tech., Inc., 789 F. Supp. 1220, 1225-26 (D.R.I. 1992). Although § 2-207(1) addresses the responsive declaration as opposed to the original proposal that is the subject of the discussion in the text, the focus of the analysis is the same: whether a party has with sufficient clarity expressed its unwillingness to be bound to contractual obligations as proposed by the other party.

361. See supra part IV.A.2.

arising from the conformity between their respective standard contract terms. Where, in contrast, the expression of the original offeror fails to satisfy the standards of clarity articulated in the development of the consensus approach, her performance without reservation may reasonably be interpreted as assent to the content of the counteroffer resulting from the application of the deviating acceptance rule of article 19(1).

V. CONCLUSION

The United Nations Convention on Contracts for the International Sale of Goods presents for contract scholars a unique opportunity to reexamine the assumptions of traditional contract law and, where appropriate, cast off those assumptions that have cemented themselves into static rules detached from the interpretive values they purport to reflect. In the formation context, the Convention admittedly proceeds, at a structural level, from the traditional assumption that private actors express their assent to the creation of contractual obligations through a formal offer and a formal acceptance. Similar traditional notions are also to be found in the treatment of a deviating acceptance: The inability of the drafters of the Convention to agree on a comprehensive solution for this issue left only a narrow compromise that, in its practical effect, merely carries forward the traditional assumption that such a deviating acceptance amounts to a rejection of the offer coupled with a counteroffer.

The difficult issue comes in assessing the precise role of these process assumptions in the formation scheme of the Convention. Some commentators have concluded that the adherence to traditional notions reflects a prescriptive rigidity in the Convention's express formation provisions. The traditional constructs of "offer" and "acceptance" thus operate as the "atomic particles" of the formation process, as irreducible and indispensable elements in the formation of a contractual relationship. As a consequence, under this view the recognition of contractual obligations *requires* that in all cases the declarations and conduct of the parties be reconstructed to fit the lockstep offer-unconditional acceptance format.

The fallout from this rigid interpretation has also infected the received wisdom on the interpretation of the formation process where the parties proceed to perform notwithstanding a conflict between their formal declarations. Traditionalist scholars have argued that the Convention's formation scheme mandates in such situations that the last formal declaration exchanged between the

parties be given effect *in its entirety.* I have termed this approach the "fictional assent" rule, for it prescribes an inflexible conclusion of assent apparently irrespective of the clarity of the expressed intent of the parties. As the label implies, my examination of this traditional approach through the prism of the principles and policies of the Convention has found the fictional assent rule lacking.

The primary deficiency of that approach is that it fails adequately to accommodate a variety of more flexible and informal relationships in modern commerce that the law would nonetheless recognize as contractual in nature. It is often precisely because of these attributes of their relationship that the parties are unwilling or unable to assume the effort and/or incur the cost necessary to reach an express agreement on all of the details proposed in the course of their negotiations.

I have described this common state of affairs as a "dissensus" between the parties, specifically, a "partial dissensus." Not all cases of such a partial dissensus are the same. The dissensus between the parties over the respective terms proposed by them can range from an affirmative, express disagreement to a passive failure to agree. Where they nonetheless proceed to perform, the fictional assent rule would disregard the specific nature or degree of their partial dissensus and instead impose an apparently inflexible conclusion of mutual assent to the entirety of the last formal declaration exchanged between them.

The above analysis of the role of a partial dissensus in contract formation reveals that the appropriate resolution of this issue is to be found not in such a rigid application of the offer-acceptance structure, but rather in a deeper appreciation of the values that underlie the recognition of contractual obligations in the first place. These values include a heightened flexibility in the search for intent and meaning, a primacy of the common intent of the parties ("party autonomy") even in the face of express provisions of the Convention, and a hostility to normative solutions for intent-based interpretive issues.

The confluence of these flexible formation values makes clear that the treatment of a partial dissensus requires a more refined analysis than the traditional "last shot" rule. This traditional approach correctly recognizes that through their performance the parties have manifested an enforceable agreement creating contractual obligations. What is unclear is the content of that agreement. My thesis is that the meaning of the parties' performance on this score must be determined with reference to the nature of the

prior partial dissensus between them. Specifically, the interpretation of the expressive value of the performance of the party who has not made the "last declaration" must be calibrated to the degree of clarity in her prior express declarations of intent.

Where the party in this position has prominently, clearly, and expressly declared her continuing intent not to be bound to foreign terms and/or insisted in a like manner on the exclusive application of her own terms (a situation I have referred to as an "affirmative partial dissensus"), the mere performance of the basic aspects of the contemplated transaction should not—absent other, more compelling circumstances—be interpreted as an unqualified assent to the constructive counteroffer of the other party. The essential element here is the expression of a *continuing intent*, that is, an intent not to be bound to foreign terms irrespective of the nature of the response of the other party. Where this expression is of sufficient clarity and prominence, I argue that the interpretive values of the Convention require that this *express* manifestation of continuing intent prevail over assertions that the mere performance alone reflects a contrary *implied* intent.

The result that emerges in such a case is that the declarations and expressive conduct of neither party can be interpreted as assent to the formal declaration of the other (the offer or constructive counteroffer). It is here that the principle of party autonomy fulfills its essential function in the hierarchy of norms of uniform international sales law. In conformance with this prime formation value, the analysis in this Article demonstrates that the content of the parties' relationship in such a case is appropriately constructed on the basis of—and, significantly, limited by—the conformity between their prior express declarations. It is to that extent alone that the parties have manifested the common intent necessary for the definition of contractual obligations. In practical outcome, this will mean that the parties' respective standardized terms will become part of the contract only to the extent that the terms are in agreement. If one party is of the view that there are additional implied understandings, the burden remains with that party to prove the agreement on the subject. Where gaps remain, the express provisions of the Convention defining the substantive rights and obligations of buyer and seller likewise assume their appropriate function of defining the "background" to the parties' relationship.

In sum, the traditional inflexible, prescriptive approach to the treatment of a partial dissensus contradicts the values that underlie

the nature of contractual obligation under uniform international sales law. The better reasoned approach on this issue begins with first principles, and thus limits the contractual obligations of the parties in the first instance to the common intent that arises from the conformity between their express declarations of intent.