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## Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law

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# Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law

*Francis A. Gabor\**

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## I. INTRODUCTION

A new *lex mercatoria* is emerging in the unification of the law of international trade. In analyzing this development, this Article will emphasize two points. First, international contracts are based essentially on national law, a feature of which is the lack of state involvement resulting in party autonomy. A party's freedom to contract is a uniformly recognized principle of contract law. Second, in recent times — particularly following World War II — a wide range of state governmental regulations have appeared which restrict parties' freedom to contract. Such restrictions include economic regulations promulgated by the modern state, plus considerable legislation intended to protect the rights of economically weaker parties such as consumers and employees.<sup>1</sup>

The essence of national contract law deals with comparable objectives, similar contingencies, and results in solutions which manifest a comparative basis. This basis can provide the foundation for the revitalization of an ancient *lex mercatoria* or law of the merchant. Private law experts of industrialized nations began this revitalization process approximately sixty years ago with the establishment of the International Institute for the Unification of Private Law ("UNIDROIT").<sup>2</sup> Headquartered in Rome, UNIDROIT worked diligently to draft uniform conventions and model legislation for the purpose of obtaining universal codification of selected substantive and procedural laws in areas where uniformity was essential.

Three conferences on private international law initiated a universal unification process of the law applicable to the international sale of goods. This unification was based on the comparative law heritage of most Western nations.<sup>3</sup> After more than thirty years of preparatory work by UNIDROIT, the Hague Conference adopted two crucial conventions in 1964 unifying the substantive rules of international sales contracts.<sup>4</sup> This substantive unification buttressed the prior unification of the conflict of laws rules applicable to the international sale of goods which the Hague Conference on Private International Law concluded in

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<sup>1</sup> THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 20 (C. Schmitthoff & N. Horn eds. 1982).

<sup>2</sup> *Id.* at 27.

<sup>3</sup> Lando, *Contracts*, in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 24-72 (1976).

<sup>4</sup> Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107; Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169. For a bibliography of writings on the uniform laws, see Bibliography, *International Sale of Goods*, 27 AM. J. COMP. L. 345 (1979).

1955.<sup>5</sup>

On October 30, 1985, after an extraordinary session held October 14-30, the Hague Conference on Private International Law adopted a Draft Convention on the Law Applicable to Contracts for the International Sale of Goods ("Hague Draft Convention").<sup>6</sup> The new convention will replace the Hague Convention on the Law Applicable to the International Sale of Goods of June 15, 1955 ("Hague Convention"),<sup>7</sup> currently in force in only nine states.<sup>8</sup> The new convention will also complement the substantive rules of the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna on April 11, 1980 ("UNCITRAL" or "Vienna Convention").<sup>9</sup>

This Article is a comparative assessment of the most recent revision of the Hague Convention. Analysis of the new Hague Draft Convention will focus necessarily on the earlier Hague Convention. Attention will also be paid to the more recent Rome Contractual Obligations Convention<sup>10</sup> (which provides a uniform set of conflict of laws rules within the European Economic Community), and the COMECON General Conditions of Delivery of 1985 (which provides uniform substantive rules for the international sale of goods between Soviet bloc nations).<sup>11</sup> The United States position, expressed in § 1-105 of the Uniform Commercial Code ("UCC"), will receive particular attention in the analysis of the relevant provisions of the Hague Draft Convention.<sup>12</sup>

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<sup>5</sup> Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 147 [hereinafter 1955 Hague Convention].

<sup>6</sup> Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, Oct. 30, 1985, *reprinted in* 24 INT'L LEGAL MATERIALS 1573 (1985) [hereinafter Hague Draft Convention].

<sup>7</sup> 1955 Hague Convention, *supra* note 5.

<sup>8</sup> *Id.* The convention entered into force on May 3, 1964, and is currently in force between: Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden, and Switzerland. *See also* Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979).

<sup>9</sup> United Nations Convention on Contracts for the International Sale of Goods, ST/LEG./SER.E/4/Add. 1, *reprinted in* 19 INT'L LEGAL MATERIALS 668 (concluded at Vienna on Apr. 11, 1980) (the convention will enter into force Jan. 1, 1988, in accordance with art. 99(1) of the Convention) [hereinafter Vienna Convention]. As of Jan. 1, 1987, the following nations ratified or acceded to the convention: Argentina, Egypt, France, Hungary, Lesotho, Syrian Arab Republic, Yugoslavia, Zambia, China, Italy, and the United States of America.

<sup>10</sup> Convention on the Law Applicable to Contractual Obligations (European Economic Communities), 23 O.J. EUR. COMM. (No. L266) (Oct. 1980) [hereinafter Rome Contractual Obligations Convention].

<sup>11</sup> *See infra* note 36.

<sup>12</sup> *See generally* Dore & DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L. L.J. 49, 52-56 (1982).

## II. RELATIONSHIP TO THE VIENNA CONVENTION

The significance of the Hague Draft Convention may be understood best by assessing its relationship to the Vienna Convention. The major purpose of the Vienna Convention was the achievement of a worldwide unification of substantive law governing the international sale of goods. The success of the Vienna Convention depends upon universal ratification of its relevant provisions. The drafting history offers the best assurance that worldwide adoption is quite likely. Previous attempts to attain this goal failed, as exemplified by the 1964 Hague Convention. This result was due to the biased and isolated drafting process in which only the countries of Western Europe participated. UNCITRAL was created in 1964 in order to achieve a much wider participation in the drafting process<sup>13</sup> and to represent a geographic and socioeconomic cross section of the world community. UNCITRAL also reconciled major differences between common law and civil law traditions. The Vienna Convention, signed in 1980, has a reasonable chance of becoming a universal uniform convention, thereby promoting legal certainty regarding the free flow of goods across national boundaries.<sup>14</sup>

One of the more controversial sections of the Vienna Convention relates to the sphere of its application. More specifically, the controversy concerns the definition of the convention's geographic scope in the light of Article 1.<sup>15</sup> There is a general understanding that Article 1(1)(a) provides for the application of the Vienna Convention if a contract for the sale of goods is concluded between parties whose places of business are in different states and if the states are both signatories to the Vienna Convention. This provision establishes the international character and scope of the Vienna Convention's application which the participants adopted in the drafting process. Subsequent signatories to the Vienna Convention have consented to this provision regarding its scope.<sup>16</sup>

While the signatory parties to the Vienna Convention generally understood and accepted Article 1(1)(a), Article 1(1)(b) raised a great deal of controversy concerning its geographic scope and application. Article 1(1)(b) extends the application of the Vienna Convention in instances "when the rules of private international law lead to the application of the

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<sup>13</sup> Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-1* (N. Galston & H. Smit eds. 1984) [hereinafter *INT'L SALES*].

<sup>14</sup> Dore & DeFranco, *supra* note 12, at 51.

<sup>15</sup> Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 *AM. J. INT'L L.* 521, 529-36 (1983).

<sup>16</sup> *Id.* at 532 n.62.

law of a contracting state.”<sup>17</sup> The drafters clearly intended to extend the Vienna Convention’s scope of application to a worldwide basis; Article 1(1)(b) should be viewed as an attempt to attain such an objective. The drafters of the Vienna Convention believed that, if universal unification of the substantive law applicable to international sales contracts could not be achieved through worldwide ratification, the same goal could be reached by the application of state private international law.<sup>18</sup> Unfortunately, this goal cannot be achieved unless there is some form of harmonization and eventual unification of the rules of private international law. As long as the approximately 185 members of the United Nations express their respective national sovereignty by enacting separate systems of private international law, the Vienna Convention’s reference to rules of private international law creates more uncertainty and leads to the unexpected application of the convention’s uniform law.<sup>19</sup>

It is not surprising that Article 1(1)(b) generated a great deal of controversy even in the drafting stage. Several countries expressed their intention to make a reservation to the application of Article 1(1)(b) as permitted by Article 95.<sup>20</sup> The United States took the opportunity to make a reservation to Article 1(1)(b) in its ratification of the Vienna Convention,<sup>21</sup> thereby expressing preference for the application of the UCC or the commercial law of a foreign contracting party in the event such party comes from a nonratifying state. Many other countries may follow the United States lead in expressing a reservation to Article 1(1)(b). If this occurs, it will limit the Vienna Convention’s geographic scope of application and consequently undermine the success of the unification of the law applicable to international sales contracts.<sup>22</sup> The question remains whether legal certainty and security can be balanced with the objective of universal unification of international sales law.

### III. A COMPARATIVE LAW ASSESSMENT OF UNIFICATION

The most reasonable approach to resolving the dilemma presented

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<sup>17</sup> Vienna Convention, *supra* note 9, art. 1(1)(b).

<sup>18</sup> Dore, *supra* note 15, at 541.

<sup>19</sup> Dore & DeFranco, *supra* note 12, at 55.

<sup>20</sup> *Id.*

<sup>21</sup> See *supra* note 9, an addendum to which provides that: in connection with the 1980 Convention on Contracts for Int’l Sale of Goods, the United Nations received: Approval by China with a declaration that China does not consider itself bound by sub-para. (b) of para. 1 of art. I, and art. II, as well as the provisions in the convention relating to the content of art. II; ratification by Italy; and ratification by the United States with a declaration that it will not be bound by sub-para. (1)(b) of art. I. As the entry into force conditions are now fulfilled, the convention will enter into force on Jan. 1, 1988, in accordance with art. 99(1).

<sup>22</sup> Dore & DeFranco, *supra* note 11, at 55-56.

by Article 1(1)(b) of the Vienna Convention is to extend its scope of application while attempting to achieve a sense of predictability and legal certainty. Such an approach raises the issue of divergent state rules of private international law governing international sales contracts.<sup>23</sup> A comparative survey of selected national systems shows a reasonable basis for harmonization and eventual unification of these conflicting rules.

A common core of rules governing international sales contracts can be traced to the legal heritage of most nations. This common core is based on the universal recognition of party autonomy: that contracting parties should enjoy the freedom to draft private contracts, selecting the substantive law of a national legal system to fill in gaps.<sup>24</sup> Party autonomy provides the best safeguard for protecting the parties' expectations and creating a universally recognized form of legal certainty in transactions cutting across national boundaries. Only the scope of parties' freedom to choose the applicable law and the limitation on this choice present a comparative law problem as national legal systems have certain well-defined differences in this regard.<sup>25</sup> Thus, unification of private international law governing international sales contracts should be based on the recognition of party autonomy. Such an approach has been taken by most of the national and international codifications of the law.<sup>26</sup>

If parties do not choose the applicable law for a contract, state private international law systems offer a variety of solutions. Traditionally, courts used objective, well-defined connecting factors to make choice of law decisions for parties which had failed to do so.<sup>27</sup> The most widely accepted factors were the place of contracting and the place of performance.<sup>28</sup> These rules provided the essential criteria of easy application, a

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<sup>23</sup> Lando, *supra* note 3, at 39.

<sup>24</sup> *Id.*

<sup>25</sup> 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 359-95 (1960).

<sup>26</sup> *Id.* at 370-86; *see also* Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 (1982) (an interesting analytical approach opposing party autonomy).

<sup>27</sup> 2 E. RABEL, *supra* note 25, at 447-64.

<sup>28</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934) [hereinafter FIRST RESTATEMENT]. Section 332 provides, in pertinent part:

sense of legal certainty, predictability, and uniformity.<sup>29</sup> At the same time, however, essential interests of contracting parties, the concern of the involved states, and a reasonable judicial reference to national contract laws were somewhat disregarded.<sup>30</sup> Thus, there was a movement toward replacing these traditional mechanical choice of law rules with more flexible, policy-oriented rules. This modern treatment of choice of law stems from a better understanding of parties' interests in international sales transactions.<sup>31</sup>

The position of contracting parties has come to be viewed in a contextual setting which places a greater reliance on the essential function of the transaction. Performance of contracts has been found to be the crucial and essential element of international sales transactions. The Swiss Federal Tribunals have developed a practical and convenient choice of law system, focusing on the performance of sellers who have the more demanding, more complex, and less precise obligations in performing a

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LAW GOVERNING VALIDITY OF CONTRACT.

The law of the place of contracting determines the validity and effect of a promise with respect to

- (a) capacity to make the contract;
- (b) the necessary form, if any, in which the promise must be made;
- (c) the mutual assent or consideration, if any, required to make a promise binding;
- (d) any other requirements for making a promise binding;
- (e) fraud, illegality, or any other circumstance which make a promise void or voidable;
- (f) except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound;
- (g) the time when and the place where the promise is by its terms to be performed;
- (h) the absolute or conditional character of the promise.

Section 358 provides, in pertinent part:

LAW GOVERNING PERFORMANCE.

The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to

- (a) the manner of performance;
- (b) the time and locality of performance;
- (c) the person or persons by whom or to whom performance shall be made or rendered;
- (d) the sufficiency of performance;
- (e) excuse for non-performance.

<sup>29</sup> For a comprehensive analysis, see Audit, *A Continental Lawyer Looks at Contemporary American Choice of Law Principles*, 27 AM. J. COMP. L. 589 (1979) (followed by Comments by von Mehren and Juenger).

<sup>30</sup> *Id.* at 595-98.

<sup>31</sup> See generally Currie, *The Verdict of Quiescent Years*, 28 U. CHI. L. REV. 258 (1961); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; see also 3 A. EHRENZWEIG & E. JAYME, *PRIVATE INTERNATIONAL LAW (SPECIAL PART)* (1977); Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615 (1979); Nadelmann, *Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. L. 1 (1976). But see Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in the Conflict of Laws?*, 44 U. COLO. L. REV. 283 (1973) (German version entitled *Zur Armut des internationalen Privatrechts an sozialen Werten*, 37 RABELSZEITSCHRIFT [RabelsZ] 435 (1973)).



contract.<sup>32</sup> In typical international sales contracts, sellers generally have a more complicated and less precise range of obligations, while buyers need only fulfill a pecuniary or monetary obligation in the course of performance. Several national codifications have recognized this dichotomy in international sales contracts.<sup>33</sup>

In a major regional unification of conflict of laws rules applicable to contracts, the Rome Contractual Obligations Convention<sup>34</sup> adopted this dichotomy between the performance of the two contracting parties in typical bilateral international sales contracts. Therefore, with respect to the Rome Contractual Obligations Convention, it is safe to conclude that the law of the seller's state would be viewed as determinative of the most characteristic performance.<sup>35</sup> Based on the empirical experience of the Swiss Federal Tribunals, the drafters of the Rome Contractual Obligations Convention, in Article 4, applied their own choice of law rules dealing with contracts. This solution is comparable to several national codifications, chiefly the Polish, Hungarian, Czechoslovakian, and most recent Austrian codification of private international law.<sup>36</sup>

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<sup>32</sup> Lipstein, *Characteristic Performance—A New Concept in the Conflict of Laws in Matters of Contract for the EEC*, 3 NW. J. INT'L L. & BUS. 402, 406-07 (1981).

<sup>33</sup> *Id.* at 411-13.

<sup>34</sup> Rome Contractual Obligations Convention, *supra* note 10.

<sup>35</sup> Williams, *The EEC Convention on the Law Applicable to Contractual Obligations*, 35 INT'L COMP. L. 1 (1986).

<sup>36</sup> A Swiss Draft was published in 10 BOTSCHAFT ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT, November 1982, BBl 82.072; the West German Draft was published in 5 Praxis des Internationalen Privat- und Verfahrensrecht [IPRax] (1983); and the Austrian Federal Statute on Private International Law was published in BUNDESGESETZ, vom. 15. Juni 1978 über das internationale Privatrecht, Bundesgesetzblatt No. 304 (1978) (translated in 28 AM. J. COMP. L. 222-34 (1980); see also Palmer, *The Austrian Codification of Conflicts Law*, 28 AM. J. COMP. L. 197 (1980)).

For the People's Republic of Hungary, see: A Magyar Népköztársaság Elnöki Tanácsának 1979. évi 13. számú törvényerejű rendelete a nemzetközi magánjogról (Law-Decree No. 13 of the Presidential Council of the Hungarian People's Republic on Private International Law), 33 MAGYAR KÖZLÖNY 495. The code is published in English in 55 TUL. L. REV. 88 (1980). See also Gabor, *A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation*, TUL. L. REV. 63 (1980).

For the Soviet Union, see Law of Dec. 8, 1961, Fundamental Principles of Civil Legislation of the USSR and of the Union Republics § 18, VEDOMOSTI VERKHOVNOGO SOVETA [VED. VERKH. SOV.] S.S.S.R. item no. 525; Law of June 27, 1968, Fundamental Principles of Legislation of the USSR and of the Union Republics on Marriage and the Family § 8, VED. VERKH. SOV. S.S.S.R. (see also Gabor & Mavi, *Harmonization of Private International Law in Soviet Union and Eastern Europe; Comparative Law Survey*, 10 REV. SOCIALIST L. (1984)); for Czechoslovakia, see CODE OF INTERNATIONAL TRADE (discussed in Glos, *The Czechoslovak Law of Sale*, 4 REV. SOCIALIST L. 107 (1978)); for Poland, see Law of Nov. 12, 1965, Concerning Private International Law, DZIENNIK USTAW POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ [DU] No. 46, item 290 (discussed in Lasok, *The Polish System of Private International Law*, 15 AM. J. COMP. L. 330 (1967); for the German Democratic Republic, see Law of Dec. 5, 1975, [1975] GESETZBLATT DER DDR [GBI.DDR] I 748 (discussed in Juenger, *The Conflicts Statute of the German Democratic Republic: An Introduction*

#### IV. THE CORE PROVISIONS OF THE DRAFT CONVENTION

##### A. Scope of the Convention

Chapter 1 (Articles 1-6) defines the scope of the Hague Draft Convention.<sup>37</sup> The relationship of the Vienna Convention to the Hague Draft Convention is apparent in this chapter's articles. The drafters of the new convention attempted to supplement UNCITRAL's provisions by providing uniform and clearly defined choice of law rules with comparable geographic applications.<sup>38</sup> The international character of a sales contract is determined by reference to the contracting parties' respective places of business, which must be in different states.<sup>39</sup> This criterion encountered practically no opposition and it is entirely compatible with the criteria set out in the Vienna Convention for determining the international character of a sales contract.

In contrast, Article 1(b) caused controversy in the drafting process.<sup>40</sup> The reason for the dispute is that the provisions extend the application of the Hague Draft Convention to all other cases involving a choice between the laws of different states, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration. Several delegations moved to delete this section as an unreasonable extension of the scope of application.<sup>41</sup> Representatives criticized Article 1(b) as creating uncertainty and deviating from the Vienna Convention's scope of application. The majority of the delegates, however, disagreed and relied on Article 1(b) to cover all other possible situations in which parties have their respective business establishments in different states. To omit this alternative would undermine the effective and broad application of both the Vienna Convention and the supplementary Hague Draft Convention.<sup>42</sup> Finally, Article 6, which provides that, "[t]he law determined under the convention applies whether or not it is the law of a contracting state," may be viewed as a logical consequence of extending the scope of applica-

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and Translation, 25 AM. J. COMP. L. 332 (1977). See generally F. MÁDL, FOREIGN TRADE MONOPOLY—PRIVATE INTERNATIONAL LAW 53 (1967); Roman, *Socialist Conflict of Laws Rules and Practice in East-West Trade Contracts*, 7 LAW & POL'Y INT'L BUS. 1113 (1975).

<sup>37</sup> For the authentic English text, see 24 INT'L LEGAL MATERIALS 1573.

<sup>38</sup> The drafting history of this chapter clearly discloses a strong effort to reconcile it with the comparable provisions of the Vienna Convention. See Hague Conference on Private International Law, Plenary Session, Minutes Nos. 1-3 (Oct. 1985); Hague Conference on Private International Law, Extraordinary Session, Minutes Nos. 1-3 of Commission I (Oct. 1985) [hereinafter Hague Conference Minutes].

<sup>39</sup> Winship, *supra* note 13, at 1-17 to 1-20.

<sup>40</sup> Hague Conference Minutes No. 1 of Commission I: Intervention Nos. 13-72.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

tion of the convention in Article 1.<sup>43</sup>

Generally, the drafting parties agreed that the material scope of the Hague Draft Convention should be comparable to the Vienna Convention. Thus, the most important subject, consumer sales transactions, was excluded. The parties agreed to avoid jeopardizing the adoption of the new convention by attempting to include this topic. In consumer sales transactions, each nation has developed its own protective legislation. A compromise in this area could not be reached easily, therefore, this topic was left for the drafting of a separate convention specifically to cover these transactions.<sup>44</sup>

## B. Choice of Law Provisions

Chapter 2 of the Convention (Articles 7-13) constitutes the heart of the Hague Draft Convention and provides for a determination of the applicable law by the parties or by the potential forum.<sup>45</sup> Through these provisions the drafters attempted to overcome the essential weakness of the 1955 Hague Convention which involved different conceptions of conflict of laws rules within various legal systems. According to one school of thought, if parties have not chosen an applicable law, an objective connecting factor must be ascertained to determine the choice of law.<sup>46</sup> Alternatively, a judge has the authority to evaluate each case individually and determine, in accordance with flexible criteria, which state's law should apply to the parties' relationship.

In the absence of choice of law by the parties, a judge will analyze various elements of the contract and the negotiations in order to discover the intention of the parties or determine which legal system has the closest or most significant relationship to the transaction. Sometimes, a judge will try to ascertain which state has the greatest interest in applying its law to a given situation.<sup>47</sup> The Hague Draft Convention attempts

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<sup>43</sup> *Id.*

<sup>44</sup> M. PELICHET, REPORT ON THE LAW APPLICABLE TO INTERNATIONAL SALES OF GOODS 85-91 (Prel. Doc. No. 1, Sept. 1982).

<sup>45</sup> Hague Draft Convention, *supra* note 6, arts. 7-13; for a comprehensive discussion of choice of law by the parties, see 3 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 51-93 (1964).

<sup>46</sup> *E.g.*, Obshchie usloviia postavok tovarov mezhdu organizatsiiani Stran-Chlenov SEV (General Conditions for the Delivery of Goods Between Organizations of Member Countries of the Council for Mutual Economic Assistance) § 110 (1968), in 1 SBORNIK NORMATIVNYKH MATERIALOV VOPROSAM VNESHNEI TORGOVLI S.S.S.R. (SELECTED DOCUMENTS RELATING TO THE FOREIGN TRADE OF THE U.S.S.R.) 217 (1970) (recent revision in 1984) [hereinafter Delivery Conditions § 110]; Rome Contractual Obligations Convention, *supra* note 10, arts. 3-4; Hague Convention of 1955, § 3. See also *supra* note 36.

<sup>47</sup> M. PELICHET, *supra* note 44, at 105-08.

to build a bridge between the two opposing views of contemporary choice of law rules. The resulting compromise is reflected in Articles 7 and 8 which are the core provisions for making choice of law determinations.<sup>48</sup>

### *1. Freedom of Choice*

Party autonomy is universally recognized today as a principle of private international law. This principle is reflected in Article 7(1) of the Hague Draft Convention which provides that:

A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be expressed or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.<sup>49</sup>

This threshold provision allows the parties complete freedom to choose the law applicable to their contract. At the outset, this article manifests the prevailing trend in the civil law countries. The same freedom can be found in Article 1(1) of the Rome Contractual Obligations Convention<sup>50</sup> and several recent national codifications.<sup>51</sup>

There are two alternative requirements in drafting the criteria for a proper choice of law provision. First, the choice of law should preferably be made expressly in the contract. Second, as an alternative, an implied choice of law by the parties is acceptable under the convention.<sup>52</sup> The proper definition and the specific criteria for the implied choice of law alternative created much controversy in the drafting process. Several delegates tried to limit the definition of an implied choice of law while others argued for the complete deletion of this alternative.

The Hague Draft Convention reflects a compromise comparable to Article 3(1) of the Rome Contractual Obligations Convention which relies on the terms of the contract and the conduct of the parties and views these two factors in their entirety. The restrictive drafting of the criteria for implied choice of law represented an attempt by the drafters to enhance security for party autonomy in transnational contracts.<sup>53</sup> Article 3(1) of the Rome Contractual Obligations Convention provides a slightly more flexible approach for the assessment of the parties' implied choice of law, stating that this implied choice must be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the

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<sup>48</sup> *Id.*

<sup>49</sup> Hague Draft Convention, *supra* note 6, art. 7(1).

<sup>50</sup> See also Rome Contractual Obligations Convention, *supra* note 10, art. 3(1).

<sup>51</sup> See *supra* note 36.

<sup>52</sup> Hague Conference Minutes No. 6 of Commission I: Intervention Nos. 45-65.

<sup>53</sup> *Id.*

case.<sup>54</sup>

In light of the ratification of the convention by the United States, a brief comparative analysis of the convention with § 1-105 of the UCC is warranted. The UCC recognizes the implied choice of law by the parties. Section 1-201 defines "agreement" as "the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing, or usage of trade, or course of performance as provided under the U.C.C."<sup>55</sup> The UCC provides for a greater and more flexible recognition of implicit choice of law by the parties. While § 1-105 clearly recognizes parties' freedom in choosing applicable law, the section also imposes a unique limitation by requiring a "reasonable relation" to the transaction.<sup>56</sup> Thus, § 1-105 codifies a two-tier test. First, the parties must agree on the governing law. Second, their transaction must bear a reasonable relation to the chosen law. The Official Comment to § 1-105 does not define the term "reasonable relation."<sup>57</sup> Subsequent case law has identified a number of relevant factors to be considered in determining whether a relation is reasonable. These include the location of the signing of the contract,<sup>58</sup> the parties' principal places of business,<sup>59</sup> the place where the greater part of performance occurred or was to have occurred,<sup>60</sup> and the location of any property sub-

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<sup>54</sup> See Rome Contractual Obligations Convention, *supra* note 10, art. 3(1).

<sup>55</sup> U.C.C. § 1-201(3).

<sup>56</sup> Dore & DeFranco, *supra* note 12, at 52-55.

<sup>57</sup> *Id.* at 54.

<sup>58</sup> *Structural Dyn. Res. Corp. v. Engineering Mech. Res. Corp.*, 401 F. Supp. 1102 (E.D. Mich. 1975). The reliance on the place of contracting obviously reflects the First Restatement approach to choice of law adopted by Michigan. The District Court for the Northern District of Georgia reached the opposite result under a modern approach where the parties executed the underlying contract in Georgia by a California corporation's sales agent located in Georgia. The merchandise was delivered to a Georgia corporation in that state and was located in a Georgia warehouse. The only contacts with California were the mailing and depositing of checks in the California bank account of the California corporation. According to the district court, that the parties executed the contract in California was not sufficient to warrant application of California law to the transaction. *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

<sup>59</sup> *Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20 (Tex. Ct. App. 1982); *Walker v. Associates Fin. Serv. Corp.*, 588 S.W.2d 416 (Tex. Civ. App. 1979) (out of state lender can stipulate to the laws of the state in which lender is licensed and regulated).

<sup>60</sup> *Cities Serv. Co. v. Gardinier, Inc.*, 344 A.2d 254 (Del. Super. Ct. 1975). In *Icelandic Airlines, Inc. (Lofteidir) v. Canadair, Ltd.*, 104 Misc.2d 239, 428 N.Y.S.2d 393 (N.Y. Sup. Ct. 1980), a New York Supreme Court addressed a truly transnational fact pattern. A foreign air carrier sued a Canadian manufacturer of aircraft, a New York manufacturer of an allegedly defective hydraulic control valve, and a firm which overhauled the valve. The plaintiff brought suit on theories of negligence, strict products liability, and breach of warranty to recover for the loss of an aircraft which crashed in Bangladesh. The court held that the substantive law of Quebec, Canada governed because the only contact with New York was the location of the valve manufacturer. In contrast, the valve specifications were prepared in Canada, the valve was installed there, and the aircraft purchase agreement stated that the agreement was to be governed by Quebec law.

ject to the contract.<sup>61</sup> In contrast, Article 7(1) of the Hague Draft Convention places no additional limitations or restrictions on the parties' freedom to choose the applicable law.

Article 7(1) is even more flexible than the comparable provision of the Rome Contractual Obligations Convention. That convention contains a crucial limitation on the parties' freedom by referring to foreign "International Mandatory Rules."<sup>62</sup> Articles 17 and 18 refer to both the traditional negative and the more recent positive form of public policy of the forum state as exercising control over the parties' choice of law freedom.<sup>63</sup> In § 1-105 of the UCC there is no direct reference to a limitation on choice of law freedom apart from the reasonable relationship requirement. However, such a reference is present in the general conflicts of law principles contained in § 337 of the Restatement First on Conflict of Laws and the comparable § 187 of the Restatement Second.<sup>64</sup> The prevailing United States approach recognized by the courts clearly provides a defense and escape from the parties' choice of law provisions based on the "fundamental policy of a state which has a materially greater interest than the chosen state . . . and which . . . would be the state of the applicable law in the absence of choice of law by the parties."<sup>65</sup>

Following generally recognized international practice, the Hague Draft Convention provides the freedom to choose the applicable law covering all or part of a contract.<sup>66</sup> Additional liberal provisions may be found in Article 7(2) which permits the contracting parties to exercise autonomy at any time, even during the course of litigation, as long as this would not prejudice the form or validity of the contract or the rights of a third party.<sup>67</sup>

## 2. *Applicable Law in the Absence of an Exercised Choice*

If parties to an international sales contract have not exercised their choice of law freedom, what law will a judge or arbitrator apply? In other words, what criteria will be used to connect an international sales contract to the law of a particular national legal system? The answer to this question, supplied by case law and statutes of different states, varies

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<sup>61</sup> See, e.g., *Tenn. Carolina Transp., Inc. v. Strick Corp.*, 16 N.C. App. 498, 192 S.E.2d 702, *rev'd on other grounds*, 283 N.C. 423, 196 S.E.2d 711 (1972).

<sup>62</sup> Rome Contractual Obligations Convention, *supra* note 10, art. 7.

<sup>63</sup> Hague Draft Convention, *supra* note 6, arts. 17-18.

<sup>64</sup> FIRST RESTATEMENT, *supra* note 27, § 337; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) [hereinafter SECOND RESTATEMENT].

<sup>65</sup> SECOND RESTATEMENT, *supra* note 64, § 187 & Reporter's Note to Comment g.

<sup>66</sup> Hague Draft Convention, *supra* note 6, art. 7(1).

<sup>67</sup> *Id.* § 7(2).

considerably. The answers range from the adoption of a single determinative connecting factor to the more flexible alternative of weighing the interests of the parties according to the content of the applicable laws.<sup>68</sup>

It is not surprising that the attempt to reach a compromise in this area proved difficult for the drafters. Two levels of potential conflict had to be reconciled. First, the socioeconomic interests of different countries had to be understood and taken into account in the drafting process. In this first joint undertaking of UNCITRAL and the Hague Conference there was a movement favoring a systematic application of the law of developing countries, regardless of the type and mode of contracts. Supporters of this movement considered the law of the buyer's state to be the law of the weaker party.<sup>69</sup> The tendency favoring the law of the buyer's state is reflected clearly in several crucial provisions of the recent Vienna Convention and the Hague Draft Convention. The socialist countries of Eastern Europe and the Soviet Union supported this position.<sup>70</sup> A compromise with this position is apparent in the complex sections of Article 8. It remains to be seen whether this compromise will be accepted in the course of the convention's final adoption.<sup>71</sup>

A more critical interest lies at the heart of Article 8. This interest is to find simple and clear rules which may be easily understood and used by merchants in international trade.<sup>72</sup> The drafters had to rely on the respective national heritages of the participating countries, each of which reflected divergent national solutions and approaches. There are two major schools of thought in which to determine the applicable choice of law rules: the Universalist and Particularist.<sup>73</sup> The Universalist position holds that conflicts rules should be framed to secure uniform results. The same conflicts rules should be applied to the same matter regardless of which state asserts jurisdiction. In order to achieve this uniformity, writers have attempted to formulate multilateral conflict of laws rules based on connecting factors giving foreign law and *lex fori* equal standing. In other words, uniformity is to be reached through equality.

The Particularist view holds that conflict rules should be framed in close harmony with the substantive law rules and general policies of fo-

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<sup>68</sup> M. PELICHET, *supra* note 44, at 119.

<sup>69</sup> *Id.* at 121.

<sup>70</sup> I. SZÁSZ, *UNIFORM LAW OF INTERNATIONAL SALES* 351-60 (1982).

<sup>71</sup> Naón, *The UN Convention on Contracts for the International Sale of Goods*, in 2 *STUDIES IN TRANSNATIONAL ECONOMIC LAW* 101-05 (N. Horn & C. Schmitthoff eds. 1982).

<sup>72</sup> *Id.* at 100-01.

<sup>73</sup> Lando, *New American Choice-of-Law Principles and the European Conflict of Laws of Contracts*, 30 *AM. J. COMP. L.* 19, 24-31 (1982). The Universalist endeavor has prevailed in the Hague Conferences.

rum states. The conflict rules of the forum state are part of the law of the state and should serve its policies. The social policies of the forum state should direct the application of its laws and determine the applicability of foreign law. Uniformity and equality are only secondary objectives in conflict of laws cases. The majority of authors, legislatures, and courts accept this point of view.

The Universalist approach has prevailed at the Hague Conferences. A threshold compromise is manifested in Article 8 of the Hague Draft Convention which attempts to reconcile conflicting objectives. These provisions support Universalist ideology favoring the socioeconomic interests of the potentially economically weaker party while, at the same time, providing well-defined choice of law rules.<sup>74</sup> To place the controversial and complex Article 8 in proper perspective, it is useful to make a brief comparative law assessment of similar choice of law solutions in national and international legislation.<sup>75</sup>

A diminishing number of writers and courts of several states consider the place of final acceptance of the contract to be the most justifiable connecting factor.<sup>76</sup> In support of this factor, it has been argued that the law of the state in which the contract was created is the more accessible forum for the parties. However, the favor accorded the *lex loci contractus* has been increasingly criticized. The place of conclusion of the contract is often fortuitous and bears no relation to the interests of the contracting parties. Merchants frequently meet to sign a contract in a neutral place, one which bears no relation to the places of business of the seller or buyer. Another difficulty arises when a contract is concluded over the telephone between parties who do not actually meet. In such cases it is difficult, if not impossible, to determine where the parties concluded the contract.<sup>77</sup>

While some jurisdictions continue to apply the *lex loci contractus* standard, it has been rejected in many states in favor of a connecting factor both more precise and relevant to international sales contracts. This approach focuses on the law of the place of residence or domicile of the seller.<sup>78</sup> The adoption of this connecting factor resulted from the creation of more precise conflicts rules emphasizing the nature of each party's contractual obligations, chiefly the law of the place of performance or place of characteristic performance.

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<sup>74</sup> M. PELICHET, *supra* note 44, at 123.

<sup>75</sup> See *supra* note 36.

<sup>76</sup> FIRST RESTATEMENT, *supra* note 28, § 337.

<sup>77</sup> See *supra* note 36.

<sup>78</sup> M. PELICHET, *supra* note 44, at 125-29.



Before discussing the adoption of the law of the seller's state as a connecting factor, it should be mentioned that Article 3(1) of the 1955 Hague Convention states that, in the absence of a choice by the parties, "a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order."<sup>79</sup> Several recent national codifications also follow this reasoning.<sup>80</sup> The law of the seller's state is imposed indirectly in the General Conditions of Delivery of Goods between organizations of COMECON member countries.<sup>81</sup> The law of the seller's state as a connecting factor has been indirectly adopted in other codifications, both national and international,<sup>82</sup> and in the case law of several countries through the application of the law dictated by the contract's center of gravity or place of performance.<sup>83</sup>

The Swiss Federal Tribunal developed the concept of the place of characteristic performance as the general conflicts rule for contracts. In order to provide more concrete rules, the tribunal attempted to define the "place of characteristic performance" for four different types of contracts. The tribunal decided that, for a sale, the place of characteristic performance was the residence of the seller; therefore, the law of the seller's habitual state of residence should be applied to the contract.<sup>84</sup> The Rome Contractual Obligations Convention basically adopted the

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<sup>79</sup> See 1955 Hague Convention, *supra* note 5, art. 3.

<sup>80</sup> See *supra* note 36.

<sup>81</sup> Delivery Conditions § 110, *supra* note 46. See also I. SZÁSZ, *supra* note 70, at 378. The general conditions only apply to intrabloc trading among the members of COMECON. Foreign trade with non-socialist countries is governed by each country's private international choice of law rules. For example, the Soviet legislation includes two conflict of laws rules relating to international sale of goods: A rule relating to export trade calls for the application of the law of the contract (art. 126 of the Fundamental Principles of Civil Legislation), while commerce between member countries is governed by the law of the seller.

<sup>82</sup> M. PELICHET, *supra* note 44, at 127.

<sup>83</sup> *Id.* at 129.

<sup>84</sup> This concept comes from Swiss law, where it was developed by Schnitzer and the case law of the Swiss Federal Tribunals. For a discussion of the Swiss doctrine of characteristic performance, see I. A. SCHNITZER, *HANDBUCH DES INTERNATIONALES PRIVATRECHTS* 52 and 2 A. SCHNITZER 639 (1957-58); F. VISCHER, *INTERNATIONALES VERTRAGSRECHT. DIE KOLLISIONSRECHTLICHEN REGELN DER ANKNÜPFUNG BEI INTERNATIONALEN VERTRÄGEN* 108 (1962) [hereinafter *INTERNATIONALES VERTRAGSRECHT*]; Vischer, *The Antagonism between Legal Security and the Search of Justice in the Field of Contracts*, 142 REC. COURS 3, 58 (1974). According to Vischer the law applicable under the principle of characteristic performance is the law of "social order of which the economical or sociologically most essential obligation is carried out." *INTERNATIONALES VERTRAGSRECHT*, *supra*, at 108. See also Law Dec. 4, 1963, Concerning Private International Law and the Rules of Procedure Relating thereto § 9, [1963] *Sbirka zákonů* [Sb.z.] No. 7 (Czech.), and Austrian statute of 1978, art. 36. In the absence of a contractual choice, both statutes specify the applicable law in accordance with the principle of characteristic performance. See also Swiss draft of 1978, *supra* note 35, arts. 120-21.

Swiss method of localizing international sales contracts even though it does not deal with particular types of contracts.<sup>85</sup>

### C. The Heart of the Convention: Article 8

Article 8 reflects an uneasy compromise reached in the course of extensive debates among the drafters. It is important to understand the conflicting interests reconciled in the course of drafting Article 8.<sup>86</sup> Notwithstanding this conflict, there was relatively little disagreement on the drafting of Article 8(1), which provides that:

To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the state where the seller has his place of business at the time of completion of the contract.<sup>87</sup>

The wording of this article expresses a clear preference for choice of law by the parties.<sup>88</sup> Contracting parties in a transnational contract look for a simple understanding and uniform solution to determine all aspects of the contractual relationship. Obviously, the best solution for this objective lies in the clear expression of the parties' autonomy by stipulating the law applicable to their contractual undertaking.

In the absence of choice of law by the parties, the overwhelming majority of national and international solutions point to the law of the

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<sup>85</sup> Rome Contractual Obligations Convention, *supra* note 10, art. 4. Study of the draft reports of this convention reveals that the law of the seller must be considered as the law of the party who has the characteristic performance in an international sales contract. The reporters emphasized that the party who has the more precise and simpler obligation is the buyer who only has a monetary obligation in the form of paying the purchase price or opening a letter of credit for the particular international sales transaction. This solution of the Rome Contractual Obligations Convention greatly simplifies the problem of determining the law applicable to a contract in the absence of choice by the parties. The place where the act was done becomes irrelevant. There is no longer any need to determine where the contract was concluded with all of the difficulties and problems of classification which that entails. Determining the place or places of performance and classifying them becomes irrelevant for each category of contract as it is the characteristic performance that is the relevant factor in determining the applicable law.

<sup>86</sup> Hague Conference Minutes No. 7 of Commission I.

<sup>87</sup> Hague Draft Convention, *supra* note 6, art. 8(1).

<sup>88</sup> Hague Conference Minutes No. 6 of Commission I. There was relatively little discussion on the drafting of art. 8, ¶ 1. The major controversy centered around the precise and effective definition of the principal place of business of the seller. The French delegate argued that the reference to the principal place of business of the seller could present practical problems in the case of multinational corporations which are operating subsidiary companies in many different countries. In the final draft, the principal place of business was changed and there was only reference to the place of the business of the seller as part of art. 8 choice of law rules. At the same time, art. 14(1) of the convention provided a solution for the case when contracting parties have more than one place of business. In this case the reference shall be made to the "place of business . . . which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." Hague Draft Convention, *supra* note 6, art. 14(1).

seller's state — in this instance, the law of the seller's principal place of business.<sup>89</sup> The rationale for this choice of law rule lies in the legal and socioeconomic foundations of the international sales contract.<sup>90</sup> In a typical case, the seller bears the more complex and demanding performance in the transaction. The seller's range of obligations are, in relative terms, less precisely defined. Moreover, the seller is faced with more uncertainty in the transnational environment in the course of fulfilling contractual obligations. Therefore, the seller's reliance on the seller's own legal system to govern all aspects of the transnational contract contributes a great deal toward certainty, uniformity, and a sense of legal security.<sup>91</sup> This basic rationale was well understood by the drafters of the convention and received almost unanimous adoption.<sup>92</sup> Yet, the *travaux préparatoires* disclosed a great deal of diversity and differences of opinion in drafting the exceptions to the general premise of Article 8(1).<sup>93</sup>

The exceptions to the basic premise of referring to the law of the seller's state form the core of the convention. The exceptions are so extensive that, for all practical purposes, they nearly dismantle the basic principle of reference to the law of the seller's state.<sup>94</sup> The major shift from the law of the seller's state to the application of the law of the buyer's state is found in Article 8(2). This provision states that:

[T]he contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if —

(a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or

(b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or

(c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).<sup>95</sup>

The three major exceptions in Article 8(2) reflect the legal and socioeconomic interests of buyers in international sales transactions. It is not surprising that most developing countries supported these exceptions for purposes of restoring the balance in favor of the potentially, economically weaker buyers.<sup>96</sup> The first exception was submitted by Mr. Wang

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<sup>89</sup> M. PELICHET, *supra* note 44, at 139-45; see also Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT'L & COMP. L.Q. 531 (1984).

<sup>90</sup> 2 E. RABEL, *supra* note 25, at 439-47.

<sup>91</sup> Lipstein, *supra* note 32, at 402-05.

<sup>92</sup> M. PELICHET, *supra* note 44, at 141-43.

<sup>93</sup> Hague Convention Minutes Nos. 7-9.

<sup>94</sup> Hague Draft Convention, *supra* note 6, arts. 8(2)-8(5); a step-by-step approach undermines the emphasis on the application of the law of the seller in the international sales contracts.

<sup>95</sup> *Id.* art. 8(2).

<sup>96</sup> Hague Convention Minutes Nos. 5-10.

Zhenpu, the delegate representing the People's Republic of China. The essence of his proposal received a wide range of support from other delegates.<sup>97</sup> It is easily understood that, if a seller enters into a buyer's legal sphere of interest and takes steps in initiation, negotiation, and finalization of the transaction in the buyer's state, such actions would shift the transaction's center of gravity to the buyer's state and would justify the application of the law of the buyer's state.<sup>98</sup>

The major controversy surrounded the proper drafting of this subsection to ensure a sense of certainty and clarity for the merchants of the world.<sup>99</sup> Some delegates raised doubts regarding the exact geographic location of negotiation and conclusion of complex international sales contracts when telex, telephone, and other electronic devices are utilized widely in negotiation and finalization of international sales transactions.<sup>100</sup> The negotiations for formation of an international sales contract might take place in different countries in different phases and steps. Thus, the drafters of the convention believed it essential to localize all the negotiations in the country of the buyer and supplement this criteria with a second condition that the contract also be concluded in the country of the buyer by and in the presence of the parties in order to justify the application of the law of the buyer's state.

Another uncertainty arises regarding the conclusion of the contract. This difficulty was emphasized by several delegates. There are diverse private international law approaches to defining and localizing the place of completion of international sales contracts.<sup>101</sup> The common law mailbox theory is quite different from the receipt requirement generally accepted by civil law countries and restated in the Vienna Convention.<sup>102</sup>

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<sup>97</sup> Hague Convention Minutes No. 8 of Commission I: Intervention No. 21. The Chinese proposal was adopted by a relatively wide margin: 28 delegates voted in favor of it, 8 delegates voted against it, and 7 delegates abstained from voting. The Austrian delegate offered an amendment to the Chinese proposal so that it would read: "The seller or his representative initiated the transaction in that state and negotiations were conducted and the contract concluded in that state." *Id.* Minutes No. 7: Intervention No. 67. This would, in effect, apply to cases where the seller entered the buyer's legal sphere and took steps in the buyer's state, which would provide a fair balance between the buyer's and the seller's laws. The Austrian amendment was not adopted in the final text of the convention. *Id.* Minutes No. 8: Intervention No. 6.

<sup>98</sup> Hague Convention Minutes No. 7: Intervention No. 67.

<sup>99</sup> *Id.* Minutes No. 7: Intervention Nos. 55, 61, 64.

<sup>100</sup> *Id.* Minutes No. 7: Intervention No. 53. Mr. Rebman, the Representative of the Federal Republic of Germany, was very skeptical about the practical feasibility of the Chinese proposal. He pointed out problems which would arise in deciding the place of negotiation or the place of conclusion of the contract where a sales contract was written, telexed, or made by telephone. Mr. Rebman concluded not only that these problems were without solution but also that the *lex loci contractus* rule would produce erroneous results.

<sup>101</sup> *Id.*

<sup>102</sup> Lando, *supra* note 3; Vienna Convention, *supra* note 9, art. 24.

The only way to overcome such uncertainty was to draft additional criteria in Article 8(2)(a) by requiring conclusion of the contract in the presence of the parties. Such language means the contract only becomes binding and effective when executed by and in the presence of the parties. The compromise reached in the precise drafting seems to be essential for the future success of the convention. As long as no unified system of decision making on disputes arising in the course of international sales contracts exists, and there are at least 185 national legal systems relying on their own form of judicial settlement of disputes or different forms of arbitration, this clear cut and relatively rigid drafting is the only way to assure certainty in the movement toward effective universal unification of the law of the international sale of goods.<sup>103</sup>

The delegates adopted by a wide margin the Chinese proposal establishing the exception to the application of the law of the seller's state. This exception dictates application of the law of the buyer's state in instances in which negotiations and the signing of the contract have taken place in the buyer's state. If either one of these elements is missing, it would not be possible to apply the law of the buyer's state.

The exception's narrow scope of application and restrictive drafting explains the high level of consensus in its adoption.<sup>104</sup> In the author's assessment, this section is almost self-defeating in terms of practical application because it disregards the realities of modern international trade. It is not realistic to assume that both the negotiations and the signing of the contract will take place in the buyer's state. Instead of relying on these two rigid and mechanical connecting factors, it would have been more practical to emphasize the relevant positions of the parties in the initiation and negotiation of the transactions.<sup>105</sup> It is widely recognized today that the place of contracting is often an irrelevant and fortuitous occurrence and cannot provide a solid and predictable basis for choice of law purposes. Thus, there is a definite probability that Article 8(2)(a) will not play an effective role as an exception to the application of the law of the seller's state in international sales contracts.

The second exception to the application of the law of the seller's

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<sup>103</sup> 2 E. RABEL, *supra* note 25, at 455-58; *see also* A. EHRENZWEIG, *supra* note 31, at 45.

<sup>104</sup> Hague Convention Minutes No. 8.

<sup>105</sup> FIRST RESTATEMENT, *supra* note 28, § 332. Exclusive reliance on rigid connecting factors such as the *lex loci contractus* has been strongly criticized by the weight of authority in both common law and civil law countries. The Second Restatement § 188, clearly abandoned the application of mechanical choice of law rules. SECOND RESTATEMENT, *supra* note 64, § 188. The same trend can be observed in more recent national codifications in civil law countries and in regional codification of the Rome Contractual Obligations Convention. *See also* M. PELICHET, *supra* note 44, at 139-47.

state was submitted by the Algerian delegation. The original proposal referred to the law of the state of principal residence of the buyer in instances where the characteristic performance of the contract is undertaken in that state pursuant to terms of the contract. Most of the delegates found this proposal to be a vague and confusing choice of law alternative which failed to reflect the practical realities of modern international trade.<sup>106</sup> First, the place of characteristic performance depends on the use of Incoterms (universally-recognized shipping terms published by the International Chamber of Commerce) which may point in several directions and not necessarily to the place of residence of the buyer. Second, determining the place of characteristic performance would require an analysis and understanding of the rules of private international law of the potential forum, thereby injecting additional uncertainty in the application of this proposed exception. Third, several delegates objected to the resurrection of the concept of the place of characteristic performance as a reversal of the agreed-upon application of the law of the seller's state and a return to application of the law of the buyer's state.<sup>107</sup>

The uncertainties inherent in the original Algerian proposal were unacceptable to the majority of the delegates. After a lengthy debate, the delegates reached an uneasy compromise by rewording the Algerian proposal to refer to the place where the seller delivers the goods according to the contract, instead of using the concept of the place of characteristic performance undertaken in the buyer's state.<sup>108</sup> It is important to note that most of the developing nations supported the final version of the Algerian proposal, which was adopted by only one vote.<sup>109</sup> While the second exception to the application of the law of the seller's state can be viewed as an attempt to restore the balance in the socioeconomic foundation of international sales transactions, the exception frustrated the pur-

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<sup>106</sup> Rome Contractual Obligations Convention, *supra* note 10, art. 4. See also Hague Convention Minutes No. 7 of Commission I: Intervention Nos. 13-18. Several delegates criticized the Algerian proposal for misusing the concept of characteristic performance. This concept was utilized in the Rome Contractual Obligations Convention leading precisely to the application of the law of the seller, whereas the use of this criteria in the Algerian proposal led to the application of the law of the buyer.

<sup>107</sup> Hague Convention Minutes No. 7: Intervention Nos. 20-21. The Algerian delegate explained that the place of characteristic performance should be taken to be the territory in which the goods were delivered. Then the Chairman of the Commission recommended and the Algerian delegate accepted the modification of the proposal stating: "The characteristic performance was to be effected to be the place where the seller delivered the goods according to the contract."

<sup>108</sup> Hague Convention Minutes No. 7: Intervention No. 27. In the final vote on the modified Algerian proposal seventeen delegates voted in favor of it, sixteen delegates voted against it, and fourteen delegates abstained from voting.

<sup>109</sup> Hague Convention Minutes No. 8: Interventions 46-68.

pose of and considerably reduced the attractiveness and potential for ratification of the Hague Draft Convention.

The most controversial provision of the Hague Draft Convention is Article 8(3), which established a general escape clause from the application of Articles 8(1) and 8(2). The section reads:

By way of exception, where, in the light of the circumstances as a whole, for instance, any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.<sup>110</sup>

Surprisingly, a type of superpower contest between the United States and the Soviet Union emerged in the course of a lengthy and exciting debate on the adoption of this general escape clause.<sup>111</sup>

The delegate for the United States emphasized that this general escape provision was critical to the interests of the United States and that the potential adoption of the convention by the United States depended upon the inclusion of this clause.<sup>112</sup> An alliance developed among the common law nations in support of the general escape clause. These nations felt strongly that their respective national heritages in dealing with private international law questions required the injection of flexibility into the convention's essential provisions. They also felt that by agreeing to Articles 8(1) and 8(2), they had made extensive concessions to the interests of developing countries by supporting the application of the law of the buyer's state. The common law nations, therefore, felt entitled to Article 8(3) as a compromise provision.<sup>113</sup>

An alliance also emerged between the socialist countries, developing nations, and several Western countries attempting to uphold their own civil law traditions in dealing with questions of private international law. The Soviet Union was the major proponent for the deletion of Article

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<sup>110</sup> Hague Draft Convention, *supra* note 10, at art. 8(3).

<sup>111</sup> *Id.* Minutes No. 8: Intervention No. 66. Professor Reese, one of the delegates for the United States, emphasized the significance of the adoption of art. 8, ¶ 3. He stated that "although certainty was important, justice was necessary too." *Id.* Therefore, the United States would find it far more difficult to ratify the Convention if this provision were deleted. See also SECOND RESTATEMENT, *supra* note 64, § 6 (referenced by §§ 188, 191) (while the place of delivery is the well-defined choice of law rule governing the validity of a contract for the sale of an interest in a chattel, at the same time the typical general escape clause can replace this rule if "to the particular issue, some other state has a more significant relationship under the principles stated in § 6.") The flexibility of the United States approach is obvious and it functions effectively within a coherent federal system. In the transnational legal environment, however, more certainty and predictability are needed.

<sup>112</sup> *Id.* Minutes No. 8: Intervention No. 66. See also Jaffey, *supra* note 89, at 531-44; Blom, *Choice of Law Methods in the Private International Law of Contract*, 18 CAN. Y.B. INT'L L. 171-92 (1980) (a comparative law overview of the common law approaches to choice of law in contracts).

<sup>113</sup> Hague Convention Minutes No. 8: Intervention Nos. 49, 67-68.

8(3). The Soviet delegate contended that Articles 8(1) and 8(2) covered the most difficult situations in which the law of the seller's or the buyer's state should apply and that the introduction of a general escape provision in Article 8(3) would defeat that work and prevent unification. The decisive issue, the Soviet delegate argued, was whether the convention would be oriented toward the interests of the business community or toward the courts and jurisprudential interests of different states. According to the Soviet position, Article 8(3) focused on the interests of the business community.<sup>114</sup>

There was a recognition of the practical realities of international trade reflected in the opposition to Article 8(3). This position took into account risks of uncertainty regarding the law to be applied to a particular case until a court or arbitrator decided, "in the light of the circumstances of the whole," which law is the most appropriate. If certainty and uniformity must be sacrificed in favor of flexibility, then the efficacy of the unification of choice of law rules applicable to the international sale of goods must be questioned, raising serious doubt about the future ratification of the convention.<sup>115</sup> The Soviet delegate and delegates from developing and civil law countries called for a reasonable compromise to eliminate the inherent uncertainties reflected in Article 8(3).

After a lengthy debate, it became obvious that no feasible compromise could be reached by redrafting Article 8(3). A vote was taken on the possible deletion of the controversial escape clause. This proposal failed by only two votes.<sup>116</sup> At this point, opponents of the escape clause attempted to reduce its scope of application by introducing a unilateral reservation. Accordingly, Article 8(3) was deemed not to apply where one party to a contract had a place of business in a state which had adopted a reservation to the application of Article 8(3).<sup>117</sup> While the Soviet delegate referred to this proposal as a good compromise, the

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<sup>114</sup> *Id.* Minutes No. 8: Interventions 49-54.

<sup>115</sup> *Id.* Minutes No. 8: Intervention No. 68. The deletion of art. 8(3) was put to vote. Seventeen delegates voted in favor of deletion of it, nineteen delegates voted against it, and five delegates abstained from voting. See also O. KAHN-FREUND, *GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW* 41 (1976) (a comprehensive study of sources of private international law as they relate to the process of unification. The author recognizes the significance of international legislation in the framework of the Hague Conference on Private International Law which should be connected with authoritative judicial and arbitral interpretation.).

<sup>116</sup> Hague Convention Minutes No. 8: Intervention No. 68.

<sup>117</sup> Hague Convention Minutes No. 9 of Commission I: Intervention No. 6. In his intervention, Mr. Lebedev, the Soviet delegate, presented the unilateral reservation option as a good compromise by providing that "paragraph three should not apply where one party to a contract had its place of business in a state that had adopted a reservation on the application of paragraph three." *Id.* Further, he noted that other delegates had asserted that ¶ 3 in practice would be applied only in exceptional circumstances under this compromise.



United States delegate and other common law state delegates strongly criticized and rejected it. They emphasized that this proposal would allow a state to avoid the operation of the escape clause against the will of other states adopting it.<sup>118</sup> The delegates voted again, and the unilateral reservation proposal failed by a margin of two votes.

In the final version of the Hague Draft Convention, Article 21 permits reservations to avoid the application of Article 8(3) only if *both* contracting parties have their places of business in a state which has made a reservation to application of Article 8(3).<sup>119</sup> Finally, the delegates reached a compromise providing that the general escape clause of Article 8(3) does not apply if the contracting parties have their respective places of business in different states, both of which are parties to the Vienna Convention.<sup>120</sup>

Undoubtedly, Article 8 can be considered the heart of the Hague Draft Convention. The delegates reached a reasonable level of compromise in drafting Articles 8(1) and 8(2). On the other hand, the drafting history, the extensive debate, and the voting pattern of the general escape clause in Article 8(3) disclosed the lack of real compromise and the near fatal clash of legal and socioeconomic values of states represented at the convention. The future success of the Hague Draft Convention will probably depend upon the effective interpretation of Article 8(3).

In the author's assessment, the most effective solution would have been a more precise and specific drafting of the controversial escape clause. In the decentralized, transnational legal environment, only clearly defined fact-law patterns can set the foundation for legal security. A comprehensive list of specific alternatives for the application of the escape clause should have been incorporated.<sup>121</sup> Providing only one vague example — the reference to the business relations between the parties — was not satisfactory.

At the same time, it was not feasible to attempt to cover all of the potential applications of this clause. Three step-by-step alternatives are suggested to encourage uniform and predictable interpretation of Article 8(3). First, the *travaux préparatoire* should be extended and published with this provision. Second, an international court or arbitral tribunal should be designated for the uniform and authoritative interpretation of the Vienna Convention and the Hague Draft Convention. Third, a com-

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<sup>118</sup> *Id.* Minutes No. 9: Intervention No. 9.

<sup>119</sup> Hague Draft Convention, *supra* note 6, art. 21(1)(b).

<sup>120</sup> Hague Convention Minutes No. 8: Intervention Nos. 46-48; the final text is included in art. 8(5).

<sup>121</sup> Hague Convention Minutes No. 8: Intervention Nos. 60-65.

prehensive digest should be published covering the application of the Vienna Convention and the Hague Draft Convention by national courts and arbitral tribunals, including the potential fact-law patterns arising under the escape clause.<sup>122</sup> Reliance on these alternatives might lead to genuine compromise and thus improve the number of future ratifications of the Hague Draft Convention.

The well-recognized principle of validation plays a significant role in determining the law applicable to the material and formal validity of international sales transactions. This principle, reflected in Articles 10 and 11 of the convention, provides flexible and clearly defined solutions to satisfy contracting parties' expectations for enforceable, valid international sales contracts.<sup>123</sup> The material validity of the consent of the parties is assessed in light of the parties' autonomy provided in Article 7. Only if the choice is found invalid under Article 7 is reference to be made to the general choice of law provisions outlined in Article 8.<sup>124</sup> Here again, a specific escape clause inserted in Article 10(3) states that "a party may rely on the law of the state where he has his place of business, if in the circumstances it is not reasonable to determine that issue under the law specified in the preceding paragraphs."<sup>125</sup> The circumstances which will make it reasonable to rely on this exception for determining the validity of consent at the conclusion of a sales contract will have to be interpreted by future courts and arbitral tribunals.

Article 11 also offers a list of alternative steps for validating international sales contracts and meeting the requirements of formality.<sup>126</sup> The contract will be treated as formally valid if it satisfies the requirements of the convention or the law of the place where it was finally concluded or, at least, the law of the state of one of the contracting parties.<sup>127</sup> At the same time, the contracting parties may rely on a reservation in Article 21(1)(c) by referring to the formal validity of their contract if one of the

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<sup>122</sup> Rome Contractual Obligations Convention, *supra* note 10, art.4(5). Rome Contractual Obligations Convention art. 4(5) covers a comparable but slightly different and less-precisely drafted escape clause. Providing "[p]aragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraph 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country." At the same time, the protocol attached to the Rome Contractual Obligations Convention eventually will provide a binding, authoritative interpretation function for the European Court of Justice which will lead to a more uniform and predictable application of this escape clause.

<sup>123</sup> Hague Convention Minutes No. 10 of Commission I: Intervention Nos. 3-96.

<sup>124</sup> *Id.*

<sup>125</sup> Hague Draft Convention, *supra* note 6, art. 10(3).

<sup>126</sup> Hague Draft Convention, *supra* note 6, art. 11; *cf.* Rome Contractual Obligations Convention, *supra* note 10, art. 9. Article 9 provides comparable alternatives for the implementation of the validation principle.

<sup>127</sup> Hague Draft Convention, *supra* note 6, art. 11(5).

parties at the time of the conclusion of the contract has its place of business in a state which made this particular reservation.<sup>128</sup> The effective and flexible implementation of the validation principle in light of Articles 10 and 11 will enhance the attractiveness of the Hague Draft Convention for merchants of the world.

#### D. The Scope of the Applicable Law

The drafting of Articles 12 and 13 which outline the scope of the applicable law under the convention involved considerably less controversy than the drafting of other articles.<sup>129</sup> At the outset, it is clear that the modern notion of *dépeçage* is rejected.<sup>130</sup> Thus, all relevant issues relating to the interpretation, the formal and substantive validity, and the performance of international sales contracts shall be governed under one substantive legal regime established under Articles 7, 8, or 9 of the convention.

Article 12 provides a comprehensive list of legal issues which are governed under the choice of law rules of the convention. The only controversy arises from the problem of characterization of certain issues. For instance, the problems of specific performance and damages are generally treated as procedural questions in many common law jurisdictions and are governed by the law of the forum. Overall, the civil law approach prevailed, characterizing both damages and the areas of prescription and statute of limitations as substantive matters and referring them to the choice of law rules under the convention.<sup>131</sup> Article 13 makes a separate

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<sup>128</sup> Hague Convention Minutes No. 10: Intervention Nos. 98-121; Minutes No. 11 of Commission I: Intervention No. 1-97.

<sup>129</sup> Vitta, *The Impact in Europe of the American "Conflicts Revolution,"* 30 AM. J. COMP. L. 9-18 (1982); see also Juenger, *Trends in European Conflicts Law*, 60 CORNELL L. REV. 969 (1975). While under all of the modern United States approaches to choice of law, the *dépeçage* is the starting point of the choice of law analysis, the prevailing civil law approaches generally reject the *dépeçage* and they prefer to treat legal relationships, particularly the contractual legal relationship, under the law of one legal system without separating legal issues within the relationship.

<sup>130</sup> Vitta, *supra* note 129.

<sup>131</sup> *Id.* Prescription consistently treated as a substantive question in the practice of civil law countries as reflected in the national codifications and in the framework of the Rome Contractual Obligations Convention, *supra* note 10, art. 10(1)(d). At the same time, the traditional United States approach treated the statute of limitation as a procedural question and there were only a limited number of exceptions under the state's borrowing statutes and under the so-called specificity test. Recently, a new tendency emerged which is treating the statute of limitations as a substantive legal issue, and is analyzing it under the regular choice of law approaches of the particular forum. See SECOND RESTATEMENT, *supra* note 64, § 142; American Law Institute's recent revisions provide that with rare exceptions, the limitations period of the forum will be applied if shorter than the alternative states. If longer, the forum statute will not be applied unless some distinct forum interest will be served. See also *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981).

See also Hague Convention Minutes No. 11 of Commission I: Intervention Nos. 97-105; see

provision for the law applicable to the problem of inspection of goods, referring to the law of the place where inspection takes place as governing the mode and procedure for such inspection.<sup>132</sup> This exception was generally well received because of its practical approach in dealing with details of one of the more essential elements of the performance of international sales contracts.

The scope of the applicable law under the Hague Draft Convention reflects a well-balanced compromise among the delegates. *Dépeçage* as a modern phenomenon was clearly rejected. In the interstate conflict of laws practice in the United States, *dépeçage* has become the starting point for modern choice of law analysis. In the less secure and more diversified transnational legal environment, the traditional jurisdiction selecting choice of law rules enhance predictability and uniformity in the choice of law analysis.<sup>133</sup> The convention follows the civil law tradition of establishing the scope of the applicable law, which is comparable to the approach taken by the Rome Contractual Obligations Convention.<sup>134</sup>

#### E. General Provisions

The general provisions of the Hague Draft Convention cover certain relatively well-settled threshold issues in the choice of law process. These provisions are relevant to the successful future application of the convention by diverse national legal systems. The general provisions are well-drafted and reflect the common understanding among the delegates regarding the problems of the choice of law process. However, these provisions do not cover all the relevant questions which judges or arbitrators must decide in making a choice of law decision.

One of the more controversial problems of contemporary private international law is the application of *renvoi*, a concept clearly rejected by the convention in Article 15. That section provides that, "In the Convention 'Law' means the law in force in a State other than its choice of law rules."<sup>135</sup> The wording of this provision involved a great deal of discussion.<sup>136</sup> The final text of this article properly refers to the substantive internal law of the referenced national legal system under the rules of the convention, while excluding the application of its choice of law rules. The exclusion of *renvoi* was based on a general agreement that the con-

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also Rome Contractual Obligations Convention, *supra* note 10, art. 10(2) (providing a comparable solution).

<sup>132</sup> Hague Convention Minutes No. 11: Intervention Nos. 97-105.

<sup>133</sup> Hague Convention Minutes No. 18 of Commission I: Intervention Nos. 1-13.

<sup>134</sup> Rome Contractual Obligations Convention, *supra* note 10, art. 10.

<sup>135</sup> Eörsi, *General Provisions*, in INT'L SALES, *supra* note 13, at 2-5 to 2-9.

<sup>136</sup> Hague Convention Minutes No. 18 of Commission I: Intervention Nos. 23-27.

troversial doctrine contributed more uncertainty and potential confusion than uniform results and prevention of forum shopping. This is particularly true in the area of international sales of goods where national choice of law rules are so diverse that application of *renvoi* would not serve any useful purpose.

Article 16 addresses one of the more significant threshold questions of effective interpretation, a key to the future success of the convention. Article 16 provides that, "[i]n the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application."<sup>137</sup> In a decentralized transnational legal environment, the decision makers in transnational conflicts disputes must rely on this provision in order to escape their respective national heritages and biases in interpreting transnational contracts. Thus, the emphasis is on recognizing the importance of the international character of transactions and the objective of uniformity in the construction of the convention. This guideline for interpretation nearly coincides with the basic guidelines provided in Article 8 of the Vienna Convention.<sup>138</sup>

The *ordre public* (public policy) defense recognized in the provisions of Articles 17 and 18 has both negative and positive applications. The law of a forum state may prevail if it reflects mandatory rules which must be given immediate application despite the convention's reference to other substantive laws. At the same time, the foreign law determined under the convention rules may also be rejected if such law is manifestly incompatible with the public policy of the forum state.<sup>139</sup> It has been recognized that public policy should be used only as a last resort for escaping the application of foreign substantive laws. The restrictive scope of applying the public policy exception perhaps should have been emphasized in the wording of the relevant provisions. The nature of the two types of public policy defenses will only be revealed in future judicial and arbitral application and interpretation of the convention.<sup>140</sup>

One of the more complicated issues in the adoption of any multilateral convention is the proper scope of the permissible reservations. In the Hague Draft Convention, the drafters tried to reach a compromise between the objectives of maximizing the number of states participating in the convention and preserving the integrity and sovereign consent of each participant.<sup>141</sup> As previously discussed, a limited number of reser-

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<sup>137</sup> Hague Draft Convention, *supra* note 6, art. 15.

<sup>138</sup> Hague Convention Minutes No. 18 of Commission I: Intervention Nos. 23-27.

<sup>139</sup> Hague Draft Convention, *supra* note 6, art. 16.

<sup>140</sup> *Id.* Minutes No. 18: Intervention Nos. 54-57.

<sup>141</sup> *Id.*

ventions were permitted to the more critical areas of the convention only after great controversy, such as Articles 21(1)(a), 21(1)(b), 21(1)(c), and 21(1)(d).<sup>142</sup> Reservations outside Article 21(1) are clearly prohibited by Article 21(2).

While the general provisions cover some of the most important threshold problems in the choice of law rules, they still do not touch upon many other practical and significant questions. These include the characterization or proof of foreign law, a problem which must be resolved under diverse national legal systems.<sup>143</sup> Yet, covering all the possible threshold questions would make the convention lengthy and would endanger its clarity. Thus, it would be quite practical to establish a digest for publication of relevant cases arising from future application of the Hague Draft Convention and the Vienna Convention in order to achieve a fair level of certainty and uniformity in this area.<sup>144</sup>

#### F. Final Clauses

The scope of the application of the Hague Draft Convention and its relationship to other relevant multilateral treaties was carefully drafted in light of Articles 22 and 23.<sup>145</sup> The drafters probably had in mind such significant regional unifications of international contracts rules as the Rome Contractual Obligations Convention and other future conventions on the same topic. Yet, there is a specific reference to the fact that the Vienna Convention will not be affected by the Hague Draft Convention or by any other conventions relating to UNICTRAL.<sup>146</sup> Finally, one of the more relevant final provisions of the convention is Article 28, which provides that:

For each State Party to the Convention on the law applicable to international sales of goods, done at The Hague on 15 June 1955, which has consented to be bound by this Convention and for which this Convention is in force, this Convention shall replace the said Convention of 1955.<sup>147</sup>

This closing article manifests a consensus by the parties to replace the 1955 Hague Convention with the new convention. As stated earlier, the 1955 Hague Convention, drafted by only one segment of the international legal community, essentially reflected the understanding and the interests of the developed countries of Western Europe and did not re-

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> E. SCOLES & P. HAY, CONFLICT OF LAWS 50-78 (1982).

<sup>145</sup> Hague Convention Minutes No. 18 of Commission I: Intervention Nos. 57-78.

<sup>146</sup> Hague Convention Minutes No. 1 and 3 of Commission II, Hague Conference on Private International Law, Extraordinary Session (Oct. 1985).

<sup>147</sup> Hague Draft Convention, *supra* note 6, art. 28.

ceive a wide reception by a majority of the countries.<sup>148</sup> Finally, the parties agreed that the Hague Draft Convention will enter into force after the deposit of the fifth instrument of ratification, acceptance, approval, or accession to the convention.<sup>149</sup>

## V. FINAL REMARKS

It may be said without exaggeration that the revitalization of the ancient *lex mercatoria* in the process of creating a new uniform commercial code for world trade should be recognized as a major accomplishment in this century. Effective unification of international commercial law may only be accomplished on a worldwide basis. UNCITRAL provided the organizational framework to build bridges between the socioeconomic and jurisprudential diversity in the world community. One of the most successful accomplishments of this legal process is the adoption of the United Nations Convention on Contracts for the International Sale of Goods. With the ratification of the United States, Italy, and the People's Republic of China, the convention will be in full force on January 1, 1988. Having learned from the frustrating experiences of previous attempts at unification, UNCITRAL focused on achieving a universal level of unification. Unfortunately, this objective was not completely realized in the Vienna Convention because of its reference to rules of private international law.

As long as private international law rules are diverse and unsettled, the effective extension of the application of the Vienna Convention cannot be achieved. The United States, along with several other ratifying countries, made a reservation to Article 1(1)(b), excluding the application of rules of private international law. Consequently, it became a critical goal for world trading nations to unify the rules of private international law applicable to the international sale of goods. This objective was realized in the course of a unique joint conference with the participation of UNCITRAL and the Hague Conference on Private International Law. The Hague Draft Convention is a remarkable achievement reflecting sophisticated compromises between diverse jurisprudential and socioeconomic views.

The scope and organization of the Hague Draft Convention attempts to supplement the Vienna Convention and thereby achieve a more universal degree of unification. Party autonomy was recognized as a basic principle in Article 7(1), giving effect to both express and implied

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* art. 27(1).

choices of law by the parties. This article expresses the drafters' strong preference for choice of law by the parties in transnational sales contracts. Neither "reasonable connection" nor "mandatory international rules" limit the parties' autonomy. Thus, more flexibility and freedom is provided the parties under the convention than under the UCC or the Rome Contractual Obligations Convention, a factor which should not impede the convention's potential adoption by the United States or countries of the European Economic Community. Only Articles 17 and 18 of the convention relate to the application of the forum state's public policy and establish a limitation on the parties' choice of law freedom.

The most controversial provision of the convention is Article 8 providing for the applicable law in the absence of the exercise of choice of law by the parties. This article is premised on the comparative legal tradition of the trading nations. Relying on the law of the place of seller's business is not an innovation of the drafters. A large number of national and international codifications of private international law have recognized that the seller is the party faced with the more complex, less-precisely defined obligations in international sales transactions and therefore should be able to rely on the certainty of the seller's own legal system. Unfortunately, this relatively simple and certain choice of law solution was not supported by the majority of the drafters of the convention. Thus, the exceptions to applying the law of the seller's state are the most controversial part of the convention. The exceptions shifting the balance in favor of the buyer's state law received only marginal support from the majority of delegates, indicating a lack of real compromise.

Inclusion of the general escape clause in Article 8(3) proved to be an even more divisive issue. The common law tradition of relying upon judicial lawmaking and its resulting flexibility collided with the traditional civil law preference for clearly defined choice of law rules. Again, close voting patterns following extensive debate indicate a lack of real compromise. In the author's assessment, the future success of the convention depends upon the effective interpretation of its core provisions. An ideal solution would be the creation of a protocol similar to the optional protocol of the Rome Contractual Obligations Convention including the designation of an internationally-recognized judicial or arbitral authority for consistent and binding interpretation of the convention. Another, perhaps more feasible, solution might be the publication of a comprehensive digest covering the application of both the Hague Draft Convention and the Vienna Convention by national courts and arbitral tribunals. Reliance on these approaches may lead to genuine compromise, thereby promoting additional future ratifications of the Hague Draft Convention.