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Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective Symposium: Reflections on the International Unfication of Sales Law

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I. INTRODUCTION

On December 11, 1986, at the United Nations Headquarters in New York, the United States deposited its instrument of ratification of the 1980 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 became effective on January 1, 1988. While this culmination of a century-long effort by legal experts

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and merchants of the world community revitalizes the ancient *lex mercatoria* (law of the merchant), it also presents the challenge of its implementation in transnational legal practice.

It is anticipated that the ratification by the United States will accelerate acceptance of the Sales Convention by other nations. The large number of signatories and the drafting history, reflecting sophisticated compromises between diverse jurisprudential and socioeconomic views, are also encouraging signs for worldwide ratification.[1] Despite an optimistic prognosis for the Convention's future, however, it is quite likely that a substantial number of countries will not join it in the next decade. Private international law,[2] therefore, will still be needed for guidance in a decentralized transnational legal environment and will continue to be relevant in achieving unification and legal security.

Article 1(1)(b) of the Sales Convention relies on the rules of private international law of the potential forum in an attempt to extend its scope of application. The United States (along with several other countries) ratified the Convention subject to a reservation to Article 1(1)(b), adopting the position that the Sales Convention applies only if both contracting parties have their places of business in countries that ratified the Convention. The unsettled and unpredictable status of private international law prompted this limitation. Private international law rules of a non-signatory nation cannot lead to application of the Sales Convention when a United States citizen is a party to a transnational contract with a citizen from a non-signatory nation.[3] Under United States law, therefore, either the Uniform Commercial Code ("U.C.C."), or the relevant foreign commercial law apply in a sales context, unless both contracting parties are from Convention states.

Due to the United States limitation, a critical goal remained even after ratification of the Sales Convention: unification of the choice of law rules applicable to the international sale of goods. This objective was achieved in a unique joint conference of the United Nations Commission on Unification of International Trade Law ("UNCITRAL") and the

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1 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 INTERNATIONAL SALES].

2 Private international law refers—in United States terms—to international conflict of laws. This term includes: 1) judicial jurisdiction; 2) recognition and enforcement of foreign judgments; and 3) choice of law to be used in resolving a transnational legal conflict.

3 The major purpose of this reservation is to prevent the unexpected application of the Sales Convention. For example, the choice of law rules of the forum can refer to the application even if only one of the contracting merchants or neither of them have their business establishment in a State which ratified the Sales Convention. This would occur if the law of a contracting state were chosen as controlling, and the law of that nation accessed the Sales Convention.

Hague Conference on Private International Law. The joint conference prepared the Hague Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, which takes great strides toward resolving legal and socioeconomic differences among the world's trading nations.[4]

This Article briefly assesses the potential implementation of the Hague Draft Convention from the standpoint of the United States interest in the worldwide unification of international trade law and concludes that United States interests would be well served by adoption of the Hague Draft Convention.

II. Lack of Separate Private International Law in the United States

Private international law developed in Europe as a result of the gradual disintegration of the *ius commune* founded on the Roman law.[5] As private laws gradually became "nationalized" by emerging nation-states, and finally codified, private international law became a unique guiding and harmonizing legal force through its uniform Roman law heritage. The principle of national sovereignty set the foundation for the creation of rules of private international law, and a unique body of domestic laws developed which provided solutions for international jurisdiction and choice of law problems.

It is not surprising that the founder of United States conflict of laws, Justice Joseph Story, relied on the well-developed European traditions of private international law in his *Commentaries on Conflict of Laws*,[6] which transplanted the European tradition to United States soil. As the complex federal system developed in the nineteenth and early twentieth centuries, conflict of laws primarily served the interests of the United States interstate system; the truly international cases and problems suffered relative neglect.[7]

In the present era, the absence of one well-developed body of private international law engenders substantial uncertainty and legal insecurity for both United States and foreign citizens contemplating transnational legal relationships.[8] The lack of a separate body of private international law in the United States presents a major issue in attempts at international unification of laws applicable to the international sale of goods.

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4 The Hague Draft Convention is reprinted as an appendix to this Article.

5 *See generally* 1 E. Rabel, The Conflict of Laws: A Comparative Study 1-48 (1960).

6 J. Story, Commentaries on the Conflict of Laws (8th ed. 1883).

7 *See* E. Scoles & P. Hay, Conflict of Laws 8-34 (1982).

8 *Id.*

Since the United States ratified the Sales Convention subject to reservation, implementation in the United States will begin with a restrictive approach. Rules of private international law will be disregarded as a source leading to the application of uniform law. At this time, it is critical for United States interests to reassess the significance of a unique separate body of private international law applicable to international sales of goods.

It is well recognized that in the United States, the international conflict of laws basically includes: 1) judicial jurisdiction over foreign defendants; 2) choice of law; 3) international judicial assistance and cooperation; and 4) questions of recognition and enforcement of foreign country judgments. Lack of a uniform and separate body of laws governing international conflict of laws problems has inhibited United States ability to participate effectively in the international unification process thus far. The ratification of the Sales Convention presents a fresh opportunity for progress in internal unification of United States rules of private international law.[9]

One of the most burning problems for the United States in this decade is its sliding performance on the world markets. The staggering trade deficit calls for effective legislation by the United States Congress to secure greater protection for, and performance of, United States industries within the legal framework of the General Agreement of Tariffs and Trade.[10] While this work is progressing on the domestic law and public international law levels, the private transactional aspects of international trade should not be neglected. The unsettled status of international law on the level of the private transaction acts as a unique "non-tariff barrier" to international trade. Thus, it is critical that the United States make significant progress toward the harmonization and eventual unification of private laws and in particular, private international law governing the international sale of goods. The United States ratification of the Sales Convention signifies progress in this direction.

III. RECOGNITION OF PARTY AUTONOMY

As long as the United States does not have a separate codified or harmonized body of rules dealing with private international law, the most effective legal safeguard for United States transnational contracts

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[9] Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Convention on Private International Law*, 7 NW. J. INT'L L. & BUS. 696, 699-700 (1986).

[10] For an excellent and comprehensive discussion by leading authorities, see Symposium, *U.S. Trade Policy: Problems and Options*, 18 N.Y.U.J. INT'L L. & POL. 1075 (1986).

lies in the nearly universally recognized principle of party autonomy. Contracting parties' control their transactions through choice of law and choice of forum—two levels of party autonomy closely related to each other.

A. Freedom of Choice of Law

In a transnational contract, a properly drafted choice of law provision effectively reduces risk in the transnational legal environment. A survey of national codifications and the prevailing common law approaches in the United States, United Kingdom, and other Commonwealth jurisdictions, as well as the most recent international codification of conflict of law rules, leads to the conclusion that the principle of choice of law freedom of the parties is almost universally recognized at the present time.[11] The essential differences lie in determining the criteria, limitations, and general perimeters for the parties' exercise of choice of law freedom. This determination is made under the private international law of the forum.

The U.C.C. adopts a modern and liberal approach to party autonomy in Section 1-105, providing "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."[12] Thus, Section 1-105 codifies a two-tier test. First, the parties must agree on the governing law. Second, the transaction must bear a reasonable relation to the state of the chosen law. The Official Comment to Section 1-105 does not define the term "reasonable relation." Subsequent case law, however, has identified a number of relevant factors to be considered in the determination. The factors include: 1) the location of the signing of the contract; 2) the parties' principal places of business; 3) the place where the greater part of performance occurred or was to have occurred; and 4) the location of any property subject to the contract.[13]

In United States conflict rules, therefore, U.C.C. Section 1-105 offers a flexible framework for the parties' choice of law freedom which has been refined by judicial decisions.[14] The *Restatement of Conflict of Laws*

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[11] Gabor, *supra* note 9, at 706-08 (for the United States). *See* M. PELICHET, REPORT ON THE LAW APPLICABLE TO INTERNATIONAL SALES OF GOODS, 95-119 (Prel. Doc. No. 1, Sept. 1982). *See also* Johnston, *Party Autonomy in Contracts Specifying Foreign Law*, 7 WM. & MARY L. REV. 37 (1966).

[12] U.C.C. § 1-105. *See also* Leflar, *Conflict of Laws Under the U.C.C.*, 35 ARK. L. REV. 91-100 (1981).

[13] Leflar, *supra* note 12, at 91-100.

[14] One annotation of the U.C.C. illustrates this point:

("*Restatement*") did not provide choice of law freedom for the contracting parties on theoretical grounds that denied the parties' rights to become legislators in their private contract.[15] Judicial practice, even in states holding this traditional approach to conflict of laws, gradually recognized party autonomy in choice of law.[16]

Today most of the states follow the modern approach of *Restatement (Second) of Conflict of Laws* ("*Restatement (Second)*").[17] Section 187 of *Restatement (Second)* provides a more refined premise for the parties' choice of law decisions.[18] Here the "reasonable relations" requirement of the U.C.C. is replaced by the requirement of "substantial relationship" to the parties or the transaction; alternatively, there must be a "reasonable basis" for the recognition of parties' choice of law. The parties' choice of law freedom also can control any particular issue. Section 187 therefore recognizes the concept of "dépaçage," initially by isolating the legal issues and then the applying a separate choice of law

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Where a loan agreement between Venezuelan corporate borrower and Swiss corporate lender contained choice of law clause naming New York law as governing, and there were considerable contacts with New York, New York law governed.

Where a Venezuelan corporation borrowed money from Swiss corporation with principal place of business in New York, notes were delivered to lender in New York. New York was the place where lender paid to guarantor the guarantor's commission on guarantees, and prior loan agreement between parties provided New York law would govern, New York law governed second loan agreement, which contained no choice-of-law provision. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080.

1 U.L.A. 15 (1986)

15 *See* Note, *Effectiveness of Choice of Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination*, 82 COLUM. L. REV. 1661 (1982).

16 *See* Pritchard v. Norton, 106 U.S. 124 (1882) ("presumed intention"); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955). A more recent case, Goodwin Brothers Leasing, Inc. v. H & B, Inc., 597 S.W.2d 303 (Tenn. 1980), retained the traditional approach of the RESTATEMENT OF CONFLICTS OF LAW § 332 (1934) [hereinafter RESTATEMENT]. In this case, the corporate parties stipulated the law of a state which permitted the extraction of a higher rate of interest on loans than did the law of the other interested state. The Tennessee Supreme Court relied on Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927), in recognizing the validation principle in contracts. As long as the contract has a substantial natural relationship with the law of the validating state, and the difference between the two interest rates is not substantial, the parties' expectation shall be given effect. The Tennessee Supreme Court further referred to U.C.C. § 1-105 as the uniform foundation for the parties' autonomy. It is interesting that leading provisions of RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971) [hereinafter RESTATEMENT (SECOND)], Chapter 6, and Chapter 8 §§ 186, 203, were also analyzed and relied on in making the proper evaluation of the parties' autonomy. *See also* James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT L. REV. 34 (1959); Levin, *Party Autonomy: Choice of Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260 (1958); Weinberger, *Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis*, 4 HOFSTRA L. REV. 605 (1976); Comment, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553 (1957); Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949).

17 R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 369-77 (3d ed. 1986).

18 *See* Note, *supra* note 15 (an interesting analytical approach opposing party autonomy).

analysis to each of them.[19] If the substantial relationship test is not satisfied, the reasonable basis alternative can be satisfied by a properly drafted choice of forum clause.[20]

A major additional limitation on parties' choice of law freedom is 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."[21] In practical terms, effective choice of law clauses should be drafted by referring to the conflicts rules of the potential forum, and determining which state having contact with the contractual relation has the materially greater interest under these rules. This is a complicated and demanding requirement for party autonomy.

In comparison to the relatively restrictive United States approach to party autonomy, civil law countries provide more freedom of the parties' choice of law.[22] Generally, civil law countries do not require a "reason-

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19 *See infra* text accompanying note 58.

20 For a comprehensive overview, see Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1 (1976).

21 Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023 (4th Cir. 1983) (a restrictive covenant is found to violate fundamental state policy). *See also* Southern Int'l Sales Co. v. Potter & Brumfield Div. of AMF, Inc., 410 F. Supp. 1339 (S.D.N.Y. 1976) (invalidating a clause permitting termination at will of a dealer's contract and choosing Indiana law as controlling, because the clause was enforceable and the defendant's operations were based in Indiana. Plaintiff, a Puerto Rican corporation, successfully relied on a Commonwealth statute protecting against unilateral termination clauses to override the choice of law).

22 A Swiss Draft was published in 10 BOTSCHAFT ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT BB1 82.072(1982). The Federal Republic of Germany Draft was published in 5 PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHT (1983). The Austrian Federal Statute on Private International Law is found in 15 BUNDESGESETZ (June 1978), Bundesgestzblatt No. 304, *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 approach to conflicts, see A Magyar Népköztársaság Elnöki Tanácsának 1979. évi 13. számú törvényerejü rendelete a nezetközi magánjogról (Law-Decree No. 13 of the Presidential Council of the Hungarian People's Republic on Private International Law), 33 MAGYAR KÖKZLÖNY 495 (1979), *translated in* Gabor, *A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation*, TUL. L. REV. 63, 80 (1980).

For the USSR approach, see Fundamental Principles of Civil Legislation of the USSR and of the Union Republics, Law of Dec. 8, 1961, 18 VED. VERKH. SOV. SSSR no. 525; Fundamental Principles of Legislation of the USSR and of the Union Republics on Marriage and the Family, Law of June 27, 1968, 8 VED. VERKH. SOV. SSSR. *See also* Gabor & Mavi, *Harmonization of Private International Law in the Soviet Union and Eastern Europe: Comparative Law Survey*, 10 REV. SOCIALIST L. 97 (1984). For Czechoslovakia's approach to private international law, see CODE OF INTERNATIONAL TRADE, *discussed in* Glos, *The Czechoslavak Law of Sale*, 4 REV. SOCIALIST L. 107 (1978). For the Polish approach, see Law of Nov. 12, 1965, Concerning Private International Law, 46 DZIENNIK USTAW POLSKIEJ RZECRYPOSPOLITEJ LUDOWEJ item 290, *discussed in* Lasok, *The Polish System of Private International Law*, 15 AM. J. COMP. L. 330 (1967). For the German Democratic Republic's private international law, see Law of Dec. 5, 1975, [1975] GESETZBLATT DER DDR I 748, *discussed in* Juenger, *The Conflicts Statute of the German Democratic Republic: An*

able" or "substantial" nexus between the chosen law and the essential elements of the transaction or the contracting parties. The parties may choose any law.

The Sales Convention recognizes the parties' autonomy in the flexible language of Article 6: "The parties may exclude the application of this Convention, . . . derogate from it or vary the effect of any of its provisions."[23] Article 7(1) of the Hague Draft Convention supplements this relatively general and vague provision by providing more specifically 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.[24]

This threshold provision allows the parties complete freedom to choose the law applicable to their contract. There are two alternative requirements in drafting the criteria for the proper choice of law provisions according to the Hague Draft Convention. First, the choice of law should be made expressly in the contract. Alternatively, an implied choice of law by the parties is acceptable under the Hague Draft Convention.[25] It is obvious that no further requirement for the parties' choice of law (in particular, no nexus between the law and the parties or the transaction) need be met. On the other hand, Articles 17 and 18 of the Hague Draft Convention refer to both the traditional negative and more recent positive form of the forum state public policy exeception to the parties' choice of law freedom.[26]

In sum, the parties' choice of law provisions of the Hague Draft Convention and the U.C.C. can be reconciled in future United States judicial practice. Both Article 7 of the Hague Convention and Section 1-105 of the U.C.C. reflect the need for flexibility in international commerce. The essential difference lies in the U.C.C.'s requirement of a "reasonable relationship." In practice, however, the public policy of the forum and other closely interested and related states can also effectively limit the parties' autonomy. Thus, the reasonable relationship test may become superfluous.

Introduction 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 L. & POL'Y INT'L BUS. 1113 (1975).

23 Sales Convention, art. 6.

24 Gabor, *supra* note 9, at 706-08. *See also* Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 529-36 (1983).

25 *See* Travaux Préparatoire, in HAGUE CONVENTION MINUTES NO. 6 OF COMMISSION I: INTERVENTION NOS. 45-65 (1985).

26 *Id.*

B. Forum Selection Clauses

The revitalized *lex mercatoria* of the Sales Convention and the Hague Draft Convention will be applied by national courts and arbitration tribunals. It is an unavoidable reality that the legal and cultural background of each decisionmaker will influence particular implementations of the uniform laws. For this reason, both Article 8 of the Sales Convention and Article 16 of the Hague Draft Convention address the problem of effective interpretation. These provisions may be considered a key to the future success of the two conventions. Accordingly, interpretation should be based on the international character of the conventions and on the need to promote uniformity in their application.[27] An ideal solution to more effective interpretation of the new *lex mercatoria* is the designation of an internationally recognized judicial or arbitration authority, for consistent and binding interpretation of the relevant law.[28]

For the immediate future, however, the pragmatic implementation of uniform commercial laws can be based on the contracting parties' autonomy in controlling the perimeters of dispute settlement. It is an encouraging development that forum selection or prorogation clauses[29] and arbitration clauses are almost universally recognized by the world trading nations.[30] While forum selection clauses are universally recognized, the actual criteria and requirements for their recognition show significant differences. International unification of forum selection clauses would serve a very useful purpose. Unfortunately, the Hague Convention on the Unification of Choice of Forum Clauses did not receive wide support and has not received a sufficient number of ratifications to become effective at the present time.[31]

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27 Gabor, *supra* note 9, at 723. Article 16 of the Hague Draft Convention 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 [Hague Draft] Convention, regard is to be had to its international character and to the need to promote uniformity in its application." In a decentralized transnational legal environment, the decisionmakers in 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 Hague Draft Convention. This guideline for interpretation coincides with the basic guidelines provided in Article 8 of the Sales Convention.

28 *Id.* at 726.

29 Prorogation clauses are contractual clauses which extend a court's jurisdiction in civil law countries. For a comprehensive discussion of prorogation, see Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements"*, 15 RUTGERS L. REV. 414 (1961).

30 *See* Farquharson, *Choice of Forum Clauses: Brief Survey of Anglo-American Law* 8 INT'L LAW. 83, 91-93 (1974); Shuz, *Controlling Forum Shopping*, 35 INT'L & COMP. L.Q. 374, 377 (1986).

31 David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 145-48 (1976).

Traditionally, United States courts have expressed hostility toward forum selection clauses. The courts believed that this type of clause could deprive the court of its legitimate jurisdictional power; in many cases they were rejected as violating the public policy of the available forum.[32] In 1972 the United States Supreme Court, in the landmark decision of *Bremen v. Zapata Off-Shore Company*,[33] adopted a new approach to forum selection clauses in transnational contracts. In this case, Zapata, a Houston-based United States corporation, contracted with a West German corporation, Unterweser, to tow a drilling rig from Louisiana to Italy. The contract provided that "any dispute arising must be treated before the London Court of Justice."[34] In addition, the contract contained two clauses exculpating Unterweser from liability for damage done to the drilling rig. As a result of damages suffered to the drilling rig, law suits were filed in United States and United Kingdom courts.[35]

The United Kingdom Court of Appeals refused to stay the United Kingdom action, stating that Zapata had failed to show the strong reasons necessary to overcome the prima facie presumption that forum selection clauses are valid.[36] Zapata had argued that some of the witnesses were United States citizens and that evidence was located in the United States. However, Justice Willmer observed that a number of the witnesses, the tug, and the crew were all West German. The fact that the majority of the witnesses were in United States was insufficient to stay the United Kingdom action. As the contract between the parties pro-

32 This traditional judicial hostility has been changing, as reflected in RESTATEMENT (SECOND), *supra* note 16, § 80. Today, choice-of-forum agreements have been enforced except when it is "unfair or unreasonable" to do so. *See* Model Choice of Forum Act (a uniform law adopted by four states and withdrawn in 1975), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 351 (1976)).

33 407 U.S. 1 (1972).

34 *The Chaparral/Bremen Litigation: Two Commentaries*, 22 INT'L COMP. L. Q. 329 (1973). *See also* Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49 (1972); Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124 (1973); Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530 (1973).

35 *Bremen*, 407 U.S. at 2.

36 Today an English court would apply the European Economic Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 15 J.O. COMM. EUR. (No. 299) 32 (1972) (*entered into force* for original member states Feb. 1, 1973), *translated in* 3 Common Mkt. Rep. (CCH) 6003 (1977) [hereinafter Brussels Convention]. One of the parties to the agreement, Unterweser, was domiciled in the Federal Republic of Germany, a country which ratified the Brussel Convention; the forum selected, England, was also a party to this Convention. Thus, Article 17 of the Brussels Convention would apply and the English courts would be required to enforce this forum selection clause. This result was achieved by the English Court of Appeals which considered this case. Unterweser Reederei G.M.L.H. v. Zapata Off-Shore Co., 2 Lloyd's Rep. 158 (C.A. 1968). *See also* Giardina, *The European Court and the Brussels Convention on Jurisdiction and Judgments*, 27 INT'L & COMP. L.Q. 263-76 (1978).

vided for the application of the United Kingdom law, the court did not have to consider the effect of applying a foreign law.[37]

Meanwhile, in the United States, suit had been brought in the United States District Court in Tampa, Florida. Unterweser's attempt to dismiss this action eventually reached the United States Supreme Court.[38] The Supreme Court adopted the United Kingdom view and announced the prima facie presumption in favor of the validity and enforceability of choice of forum clauses. This presumption, the Court stated, was merely the reverse of the one recognized in *National Equipment Rental Ltd. v. Szukhent*.[39] In *Szukhent* the Court held that parties to a contract may agree in advance to submit to the jurisdiction of a given court. As a result of the presumption in *Bremen*, the party bringing the suit in a court other than the contracted forum bears a "heavy burden" of proof. The parties resisting the forum provision have the burden of clearly showing either: 1) the clause is invalid because of fraud or overreaching; or 2) that enforcement of the clause will be unreasonable or unjust under the particular circumstances of the case.[40] In these circumstances the court found no evidence of fraud or overreaching. The United Kingdom was held not to be an unreasonable forum, due to its neutrality, and due to the London court's expertise in admiralty cases. In addition, litigating in the United Kingdom would not place an unreasonable burden on Zapata.[41]

The Supreme Court indicated in *Bremen* that a contracted choice of forum may not be enforceable if enforcement would contravene "a strong public policy" of the forum in which the action is brought.[42] Zapata had argued that exculpation clauses contravene public policy. Since these were enforceable in England, the forum selection clause should not be enforced. The United States Supreme Court found, however, that the exculpation clauses in international towage contracts did not violate public policy.[43] On the other hand, if a contracted choice of forum provision would result in the violation of a binding federal regulation, public policy would be violated and the provision would not be enforced.

Although *Bremen* was an admiralty case involving a foreign forum, its holding is not limited to admiralty cases. It applies to all federal court cases involving forum selection clauses, even if a domestic forum is cho-

37 *Zapata*, 2 Lloyd's Rep. at 160-61.
38 *Bremen*, 407 U.S. 1 (1972).
39 375 U.S. 311 (1964).
40 *Bremen*, 407 U.S. at 15.
41 *Id.*
42 *Id.*
43 *Id.*

sen and the action is between parties of different states.[44] Moreover, a number of states have adopted the *Bremen* decision.[45]

One of the most important regional developments in the recognition of party autonomy over dispute settlement choices is the ratification of the Brussels Convention on Jurisdiction and Judgment ("Brussels Convention") by most of the European Economic Community.[46] Article 17 of the Brussels Convention allows the contracting parties to confer jurisdiction on the courts of the member's state by agreement. Agreement to confer jurisdiction overrides all other bases of jurisdiction, except in those matters in which a court has exclusive jurisdiction.[47] The requirements for drafting a valid prorogation clause under the Brussels Convention are strictly construed by leading cases of the European Court of Justice.[48] The forum selection clause must be in writing and must designate precisely the jurisdiction of the court and reflect a valid agreement by both parties.

The essential criteria for evaluation of the Brussels Convention parties' choice of forum clause is comparable to the United States approach outlined in *Bremen*. The court will examine the agreement for overreaching, unequal bargaining positions of the parties, or any other illegality in the consent which would invalidate the choice of forum. As long

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44 *See* Juenger, *supra* note 34, at 59. The *Bremen* rationale was adopted by the United States Supreme Court in Sherk v. Alberto Culver Co., 417 U.S. 506 (1973), to enforce a contract clause providing for settlement of disputes by arbitration before the International Chamber of Commerce in Paris, France. Despite this clause, the United States party to the agreement brought suit in the Third District Court in Illinois. The Supreme Court held that an agreement to arbitrate before a specified tribunal is, in effect, a specialized forum selection clause that designates not only the site of the suit, but the procedure to be used in resolving the dispute as well. *Id.* at 519.

45 Mannrique v. Fabbri, 493 So. 2d 437, 439, 439 n.3 (Fla. Sup. Ct. 1986).

46 *Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968, on Jurisdiction and the Enforcement of Civil and Commercial Judgments*, June 3, 1971, art. 17, 4 BULL. EUR. COMM. 720 (Apr. 1971 supp.), *translated in* 3 Common Mkt. Rep. (CCH) ¶ 6082 (1971) [hereinafter Brussels Convention]. The 10 member states are: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, and the United Kingdom. *See generally* Note, *Future Interpretations of Article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in the European Communities*, 70 CORNELL L. REV. 289-315 (1985) (comprehensive discussion on choice of forum clauses under the Brussels Convention).

47 *See* Note, *supra* note 46, at 296.

48 Estasis Salotli di Colzani Aimo e Gianmario Colzani v. RUWA GmbH, 1976 E. COMM. CT. J. REP. 1831, 1977 [1] COMM. MKT. L. R. 345. A West German company filed a suit against an Italian firm in the local court of the Federal Republic of Germany, as designated in a choice-of-forum clause printed on the back of the signed contract. The European Court of Justice provided an independent interpretation of the requirements for Article 17 of the Brussels Convention. The court looked primarily to the writing requirement's purpose of insuring that the clause conferring jurisdiction was the result of a true consensus between the parties. The court held that a clause printed on the back of a contract among general conditions of sale, fulfilled the requirement of Article 17 conferring jurisdiction, only if the contract itself contained an express reference to those conditions.

as the parties manifest a valid consent in writing, however, European courts will not go further in scrutinizing the potential hardship on one of the parties or the possibility of violation of public policy of the otherwise available forum.

Arbitration provides a more internationally accepted form of dispute settlement in transnational contract disputes. In 1970 the United States became a party to the 1958 United Nation Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("Arbitration Convention").[49] In light of this globally adopted agreement, arbitration presently offers a more uniform method of dispute settlement in a transnational contract. The major advantage of arbitration from the United States perspective is the internationally assured recognition of arbitration awards under the Arbitration Convention and the well-established bilateral treaty network of the United States in this area.[50] At the same time, the has no international treaty relationship on recognition and enforcement of its judicial judgments abroad or vice versa. This lack presents one of the most unsettled and disturbing areas of United States private international law; the effective exercise of party autonomy should also extend to the planning of the recognition and enforcement of the final judgments in courts of law.

In sum, the most effective implementation of the Sales Convention from the United States perspective lies in the full recognition and refined application of the contracting parties' autonomy. The relatively unsettled state of private international law governing transnational contracts places a greater responsibility on international legal counsel in drafting an enforceable choice of law and forum selection provision in every major transnational contract. The exercise of party autonomy should be based on the following steps toward drafting an effective and enforceable choice of law provision: 1) a solid understanding of the newly revitalized *lex mercatoria* of the Sales Convention and other related conventions; 2) a comparative law assessment of the commercial law heritage of the countries of the parties involved in the transnational contract; 3) selection of a forum for dispute settlement which is recognized both by the country of the seller and the buyer, as well as other interested countries; and 4) assessment of the private international law rules of the selected forum and the other connected states (at least the private international law system of the state of the seller and the buyer).

Even experienced international legal counsel faces considerable diffi-

[49] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *approved* Sept. 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

[50] *See* INT'L CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION (1984).

culty in following this step-by-step analysis in drafting an effective choice of forum clause. Publication of a comprehensive digest covering the relevant municipal and transnational legislative and judicial sources, with authoritative scholarly interpretation on the effective exercise of the contractual party autonomy, would provide a useful guide. Such a publication might also aid in achieving early uniformity in such provisions.[51]

IV. Applicable Law in the Absence of an Exercised Choice

It is best if the contracting parties exercise their autonomy and stipulate effective forum selection and choice of law clauses in their contract. Both national and international codifications of private international law strongly prefer and rely on the exercise of the parties' contractual autonomy. In the absence of choice of law by the parties, national laws provide more or less comparable directions for the applicable law. This Article now turns to a comparison of the prevailing United States approaches set out in the U.C.C. and *Restatement (Second)* with the most recent conflict of law rules applicable to international sale of goods set out in the Hague Draft Convention.[52]

The 1972 official text of the U.C.C. provides only a very brief choice of law rule to govern in the absence of the contractual choice of the parties. Section 1-105 of the U.C.C. provides: "Except as provided hereafter . . . the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state." The major objective of this section is to extend the scope of the U.C.C.'s application as far as possible. The U.C.C.'s permanent editorial board and leading legal scholars believe that the U.C.C.'s application should be extended. They justify this belief by a number of factors, including the U.C.C.'s comprehensive nature and uniformity, its reformulation and restatement of *lex mercatoria*, and its role in furthering the understanding of transnational business contracts.[53]

The U.C.C. truly became the uniform substantive law within the United States by the middle of the 1970s, and as a result, interstate conflict of law problems diminished. At the same time, the very simple and misleadingly straightforward language of Section 1-105 and its "appropriate relation" test did not seem to be sufficient to cover the complexities

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51 There are several multi-volume publications covering transnational commercial laws, such as DIGEST OF COMMERCIAL LAWS OF THE WORLD (G. Kohlik ed. 1985). This proposal would focus on the private international law aspects of the transnational contracts.

52 RESTATEMENT (SECOND), *supra* note 16, §§ 188-221.

53 *See, e.g.*, Leflar, *supra* note 12, at 100-03.

of transnational contracts. Appropriate relation is determined under the choice of law system of the particular forum. Thus, an unsettled and diverse choice of law system of fifty states determines choice of law in the area of transnational contracts.

Jurisdictions following the *Restatement* still retain the relatively simple, jurisdiction-selecting "connecting factors."[54] Accordingly, all questions relating to the substantive validity of the contract are determined by the law of the place of acceptance, while the subsequent legal questions concerning the performance of the contract are referred to the designated place of performance.[55] In addition to these two prevailing rules, most of the courts following the *Restatement* also give some recognition to the parties' implied or tacit choice of law via the principle of validation.[56]

The *Restatement (Second)* is gradually becoming the controlling source of authority in most of the United States jurisdictions.[57] It was

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[54] RESTATEMENT, *supra* note 16, § 332:

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:

LAW GOVERNING PERFORMANCE

The duty of the performance of which a party to a contract is bound will be discharged by compliance with the law of the lace 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 whom or to whom performance shall be made or rendered;
(d) the sufficiency of performance;
(e) excuse for non-performance.

[55] *See supra* note 54. Exclusive reliance on rigid connecting factors, such as *lex loci contractus* (law of the place of the contract), has been strongly criticized by most authorities in both common and civil law countries. Section 188 of RESTATEMENT (SECOND) clearly abandoned the application of mechanical choice of law rules. RESTATEMENT (SECOND), *supra* note 16, § 188. *Cf.* Convention on the Law Applicable to Contractual Obligations (European Economic Communities), 23 O.J. EUR. COMM. (No. L 266)1(Oct. 1980) (abandonment of mechanical choice of law rules in regional codification) [hereinafter Rome Contractual Obligations Treaty].

[56] *E.g.*, Pritchard v. Norton, 106 U.S. 124 (1882) ("presumed intention" as a basis for validation of interstate commercial contracts). *See generally* 3 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICT OF LAW 15-33 (1977).

[57] Cases relying heavily on the RESTATEMENT (SECOND) include: Bankers Trust Co. v. Crawford, 781 F.2d 39 (3d Cir. 1986) (holder in due course rights governed by law of place of transfer of cashier's check); Partrederiet Treasure Saga Co. v. Joy Mfg. Co., 804 F.2d 308 (5th Cir. 1986)

published in 1971, just a year before the publication of the most recent version of the U.C.C. *Restatement (Second)* analysis relies on the modern policy-oriented approach, whose starting point is the identification, isolation, and analysis of the relevant legal issue. This new method is called "dépaçage," and is an innovative United States method of resolving choice of law problems.[58] Unfortunately, the same analysis governs both interstate and international problems. For instance, the starting point for determining the relevant legal issues related to the validity of a contract for the sale of interest in movable property (chattels) is found in the presumptive rule of Article 191 of the *Restatement (Second)*.

> The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Article 6 to the transaction and the parties, in which event the local law of the other state will apply.

Under the appropriate relation test of the U.C.C., the core of Article 191 refers to the place of delivery by the seller. Section 2-401 of the U.C.C. determines the place of performance as the place where the seller "completes his performance with reference to the physical delivery" of the chattel.[59] In the case of F.O.B. or C.I.F. contracts,[60] for instance, the place of delivery generally will be where the seller surrenders the physical possession and control of the goods and delivers them to the carrier or other intermediary for final shipment to the buyer.[61] The relatively simple solution of Article 191 is a presumptive choice of law rule, which always can be replaced if the particular issue has a more significant relationship to another state under the general principles of Articles 6 and 188. The comments of the *Restatement (Second)* following Article 191,

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(forum non conveniens case, § 145.2); Syndicate 420 at Lloyd's London v. Early Am. Ins., 796 F.2d 821 (5th Cir. 1986) (forum non conveniens case, § 188); Kashfi v. Phibro-Salomon, Inc., No. 83-4358 (S.D.N.Y. 1986) (forum non conveniens case, § 202); Johnson v. Ronamy Consumer Credit Corp., 515 A.2d 682 (Del. 1986) (§ 194); Webb v. Dessert Seed Co. Inc., 718 P.2d 1057 (Colo. 1986) (§ 191); Nationwide Ins. Co. v. Ferrin, 487 N.E.2d 568 (Ohio 1986) (§ 188).

RESTATEMENT (SECOND) § 191 was also used to inject meaning into the "appropriate relationship" test contained in U.C.C. § 1-105(2). Alpert & Wolfman v. Thomas, 643 F. Supp. 1406 (Vt. 1986). Moreover, RESTATEMENT (SECOND) is becoming the standard of reference in most cases using the "modern" approach, not just those which explicitly adopt it, and there is an increasing tendency to use its presumptions as localizing factors. *See* Kozyris, *Choice of Law Cases in 1986*, A.B.A. SEC. CONFLICT OF LAWS NEWSL. (Dec. 1987).

58 *See supra* text accompanying note 19.

59 U.C.C. § 2-401. *See also* RESTATEMENT (SECOND) *supra* note 16, § 191 comment d.

60 For an explanation of an F.O.B. ("free on board") contract, see U.C.C. § 2-319. For an explanation of a C.I.F. ("cost, insurance, freight") contract, see U.C.C. § 2-320.

61 RESTATEMENT (SECOND), *supra* note 16, § 191 comment d.

however, recognize that in the majority of the cases, the place of delivery will be the state where the seller has its domicile or principal place of business. Therefore, Article 191 frequently leads to the application of the seller's law. On the other hand, the law of the buyer's domicile or place of business will usually be applied, in the absence of an effective choice of law by the parties, if the delivery of the contract takes place in that state.[62]

The most important question for analysis is whether the prevailing United States approach to choice of law in the international sale of goods manifested in Article 191 and Article 188 of the *Restatement (Second)* can be effectively reconciled with the unification rule set out in Article 8 of the Hague Draft Convention. Article 8 contains a sophisticated compromise at its core: "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."[63] Accordingly, in the absence of choice of law by the parties, the law of the seller's principal place of business shall govern.

The rationale for this choice of law rule lies in the legal and socio-economic foundations of the international sales contract. 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 faces 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 towards certainty, uniformity, and a sense of legal security.[64]

The prevailing United States approach under the *Restatement (Second)* does not distinguish between domestic and transnational contracts. The majority of United States cases nonetheless reach a result comparable to that of Article 8(1) of the Hague Draft Convention, favoring the law of the seller. On the other hand, the exceptions to the basic premise form the core of the Hague Draft Convention. 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):

> The contract is governed by the law of the State where the buyer has

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62 *Id.* comment f and illustrations.

63 Hague Draft Convention, art. 8(1).

64 M. PELICHET, *supra* note 8, at 85-91. *See also* Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT'L & COMP. L.Q. 531 (1984); Lipstein, *Characteristic Performance—A New Concept in the Conflict of Laws in Matters of Contracts for the EEC*, 3 NW. J. INTL L. & BUS. 402, 406-07 (1981).

> his place of business at the time of conclusion of the contract, if—(a) the 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).[65]

The three major exceptions in Article 8(2) reflect the legal and socioeconomic interests of buyers in international sales transactions. Most of the developing countries supported these exceptions in order to shift the balance in favor of the possibly economically weaker buyer.[66] The first exception has a narrow scope of application. It disregards to some extent the realities of modern international trade in since both negotiation and signing of the contract do not typically take place in the buyer's state.

The second exception is more controversial, and its impact more substantial. It refers to the law of the place where the seller delivers the goods according to the terms of the contract. This exception requires characterization of the essential elements of contract performance by the potential forum and, as long as there are no uniform laws in effect on this point, this exception creates uncertainties in the application of the Hague Draft Convention.[67]

The most controversial provision of the Hague Draft Convention, however, lies in Article 8(3), which establishes the general "escape clause" from the application of Articles 8(1) and 8(2).

> By way of exception, where in light of the circumstances as a whole, for instance, any business relations between the parties, the contract is manifestly more closely connected with the 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.[68]

The adoption of this clause generated heated debate among the delegates to the Hague Draft Convention. Many of the civil law countries, including the socialist countries, strongly opposed this clause, emphasizing that it would create an inherent and dangerous uncertainty in the effective application of the Hague Convention. The delegates of the civil law countries, relying on their legal heritage, emphasized the need for clearly

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65 Hague Draft Convention, art. 8(2).

66 Hague Convention Minutes, *supra* note 25, INTERVENTION NOS. 5-10.

67 *See* Travaux Prepartoire, in HAGUE CONVENTION MINUTES NO. 7 OF COMMISSION I: INTERVENTION NOS. 20-21 (1985). The final vote reflected a lack of compromise on this exception as seventeen delegates voted in favor of it, sixteen delegates voted against it, and fourteen delegates abstained from voting.

68 Hague Draft Convention, art. 8(3).

defined a priori choice of law rules as the basic foundation for creating international legal security in this area.

At the same time, most of the common law countries, including the United States, placed more weight on the need for practical flexibility in determining the private international law governing the sale of goods. The delegates from common law countries insisted that a general escape clause, such as Article 8(3), forms a necessary part of the overall compromise to work out effective and uniformly recognized choice of law rules dealing with the international sale of goods.[69]

The Article 8(3) escape clause of the Hague Draft Convention clearly expresses the United States interest manifested under the *Restatement (Second)* and other modern approaches to conflict of laws.[70] It is well recognized in the United States that Article 191 of the *Restatement (Second)* is a presumptive choice of law rule only, which can be replaced by application of a policy-oriented analysis under the general principles of Article 188. The most significant relationship test of the *Restatement (Second)* can thus be viewed as a discretionary escape for United States judges. Thus, the general escape clause of the Hague Convention is quite consistent with the modern United States choice of law methodology; it can be easily adopted by the United States. The crucial question remaining, however, is whether the United States choice of law system *effectively* governs interstate legal relationships in its constitutionally coordinated federal system, where the semi-sovereign states share common legal traditions. The federal system permits and necessitates legal flexibility. On the other hand, the decentralized transnational legal environment has 185 sovereign legal systems each relying on its own unique national legal traditions. Whether the same level of flexibility and uncertainty can be easily adopted in this diverse landscape, remains uncertain.

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69 *See* Gabor, *supra* note 9, at 718-19.

70 *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; 3 A. EHRENSWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW (spec. pt. 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) (This article was published in German as *Zur Armut des internationalen Privatrechts an sozialen Werten*, 37 RABELSZEITSCHRIFT 435 (1973)).

V. Proposal for Implementation of International Uniform Laws

A. The Sales Convention

Revitalization of the ancient *lex mercatoria* is one of the major achievements of our century. The creation of a uniform substantive law applicable to the international sale of goods eliminates a major non-tariff barrier to the free flow of goods and services across national boundaries. The United States has a vital interest in becoming an active participant of this process, as evidenced by its ratification of the Sales Convention. The next phase of the unification of international trade law is the challenge of implementing the new rules on international and national levels. On the international level, the most important United States interest lies in the promotion of global participation in unification. The present signs are quite encouraging. The drafting history and the large number of signatory states point to a potential worldwide ratification of the Sales Convention.[71] A major stumbling block for effective implementation lies in the unsettled status of private international law, caused in part by the United States and other countries' reservations to the Sales Convention.[72]

The effective implementation of uniform laws should be based on consistent interpretation of their essential provisions. The most effective measure to achieve this goal is the creation of a central authority for interpretation of the new uniform laws. One successful example of this method is provided in the protocol adopted to the Brussels Convention on Jurisdiction and Judgments,[73] which gave jurisdiction to the European Court of Justice over interpretation. A similar protocol is attached to the new Rome Contractual Obligations Convention,[74] establishing uniform choice of law rules for contracts among citizens of the member states of the European Economic Community. A similar central authority obviously cannot be easily established in the more diversified world-

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71 *See* Winship, *supra* note 1, at 8-10.

72 Sales Convention, U.S. reservation to art. 1(1)(6).

73 Brussels Convention, *supra* note 46.

74 The Rome Contractual Obligations Treaty, *supra* note 55, incorporates a joint declaration providing:

> The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, On signing the Convention on the law applicable to contractual obligations; Desiring to ensure that the Convention is applied as effectively as possible; Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect;
>
> Declared themselves ready:
>
> 1) to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;
>
> 2) to arrange meetings at regular intervals between their representatives.

wide community of nations. Perhaps a more reasonable approach would be designation of a court or arbitration tribunal for potential binding, or at least advisory interpretive authority over the Sales Convention.

A more feasible alternative would be to establish a digest for the regular publication of leading national court and arbitration decisions relating to the Sales Convention. Such a publication would promote consistent national implementation and interpretation of the Convention. A status table of the relevant ratifications with reservations and the significant scholarly and expert assessments of the leading provisions and cases could also be included in this comprehensive digest.[75]

On a national level of implementation of the new *lex mercatoria*, the United States should focus on its complex federal system. The Sales Convention was ratified by the United States as an international treaty; therefore, under Article VI of the United States Constitution it is the binding law of the land. The Sales Convention is a self-executing treaty which does not require further legislative enactment.[76] Accordingly, it is to be hoped that United States courts and arbitration tribunals will give a consistent interpretation of this convention and that the leading cases will be published in an appropriate form.

B. The Hague Draft Convention

At the same time, United States private international law applicable to the international sale of goods requires prompt action on federal and state levels. The long-term United States interest would be best served by federal legislation in this area. Congress has the constitutional power to enact such legislation under the enabling legislation section of article IV, paragraph 1, of the full faith and credit clause, but has never utilized its power in this area. The overwhelming majority of conflict of law problems have been left for the individual states in the federal system. At this stage of international unification of commercial law, however, it is critical that the United States "speak in one language" with the rest of the world. Reliance on the conflict of law systems of fifty states creates a sense of uncertainty and confusion in transnational commercial relationships. The *Restatement (Second)*'s modern policy-oriented approaches to judicial and legislative jurisdiction can function effectively within a federal system where the Constitution and the common legal heritage present a strong cohesive force among the member states. The same rules and approaches, however, can be self-defeating and confusing if applied

75 Gabor, *supra* note 9, at 726.

76 *See generally* M. McDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1972).

in a transnational context. Thus, the creation of order in the form of a federal unification is an essential step forward in the effective implementation of the new *lex mercatoria* in the United States.

If a federal level of unification of international conflict of laws cannot be accomplished in the immediate future, another alternative for harmonization at the state level could be explored. The National Conference on Uniform State Laws can be used as an effective vehicle to implement unification of private international law. The commissioners of uniform state laws can draft model legislation on subjects where state legislation might help implement international treaties of the United States, or where world unification would be desirable.[77]

The Hague Draft Convention could serve as an acceptable basis for legislation extending the application of U.C.C. Section 1-105. Article 26 of the Hague Draft Convention particularly takes into consideration the interest of federal systems,[78] and uniform legislation is the preferred form of implementation of the Hague Convention in the United States. Such legislation might take several years of experimentation on the state level before being universally adopted, but the United States is free under Articles 26 and 29 of the Hague Draft Convention to make selective reservations and suggest revisions based on experience in its federal system. The U.C.C.'s Permanent Editorial Board should carefully consider and analyze the Hague Draft Convention for adoption as model legislation. Realistic national unification through this vehicle can contribute to the elimination of the non-tariff trade barrier of legal diversity, and promote our free competition on the world market.[79]

VI. CONCLUSION

In sum, United States interests would be well served by its legal adoption of the Hague Draft Convention, thus far a neglected stepchild of the new *lex mercatoria*. The core choice of law provisions of the Hague Draft Convention can be reconciled with the prevailing United States judicial and arbitration practices under the U.C.C. and the *Restatement (Second)*. The scope of U.C.C. Section 1-105 could be extended to uniformly implement the Hague Draft Convention in the United States.

It is premature to assess the future international reception of the

77 *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-SECOND YEAR 220-47 (1983).

78 Hague Draft Convention, art. 26.

79 Lando, *Contracts*, in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3-8 (1976).

Hague Draft Convention, however. The widespread ratification of the Sales Convention will significantly influence this process. In the meantime, national choice of law solutions will be applied, which, according to Professor Reese's comment on this Article,[80] quite frequently will lead to comparable substantive results. Thus, the common underlying principles of different national approaches may lead the world trading nations to accept the unavoidable compromises manifested in the Hague Draft Convention.

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[80] Reese, *Commentary*, 8 NW. J. INT'L L. & BUS. 570 (1988).

APPENDIX

FINAL ACT OF THE DIPLOMATIC CONFERENCE

The undersigned, Delegates of the Governments of Algeria, Argentina, Australia, Austria, Belgium, Bulgaria, Burundi, Canada, Cape Verde, Chile, China, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, Guinea, Honduras, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Republic of Korea, Lebanon, Luxembourg, Malta, Mexico, Mozambique, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire, and the Representatives of the Governments of Brazil, Ecuador, Indonesia, Nigeria, Pakistan, the Vatican City participating as Observers, convened at The Hague on the 14th October 1985, at the invitation of the Government of the Kingdom of the Netherlands, in the Extraordinary Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments—

The following draft Convention—

CONVENTION ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The States Parties to the present Convention,

Desiring to unify the choice of law rules relating to contracts for the international sale of goods,

Bearing in mind the United Nations Convention on contracts for the international sale of goods, concluded at Vienna on 11 April 1980,

Have agreed upon the following provisions—

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

This Convention determines the law applicable to contracts of sale of goods—

a between parties having their places of business in different States;

b in 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.

Article 2

The Convention does not apply to—

a sales by way of execution or otherwise by authority of law;

b sales of stocks, shares, investment securities, negotiable instruments or money; it does, however, apply to the sale of goods based on documents;

c sales of goods bought for personal, family or household use; it does, however, apply if the seller at the time of the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use.

Article 3

For the purposes of the Convention, 'goods' includes—

a ships, vessels, boats, hovercraft and aircraft;

b electricity.

Article 4

1 Contracts for the supply of goods to be manufactured or produced are to be considered contracts of sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

2 Contracts in which the preponderant part of the obligations of the party who furnishes goods consists of the supply of labour or other services are not to be considered contracts of sale.

Article 5

The Convention does not determine the law applicable to—

a the capacity of the parties or the consequences of nullity or invalidity of the contract resulting from the incapacity of a party;

b the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate;

c the transfer of ownership; nevertheless, the issues specifically mentioned in Article 12 are governed by the law applicable to the contract under the Convention;

d the effect of the sale in respect of any person other than the parties;

e agreements on arbitration or on choice of court, even if such an agreement is embodied in the contract of sale.

Article 6

The law determined under the Convention applies whether or not it is the law of a Contracting State.

CHAPTER II APPLICABLE LAW

Section 1—Determination of the applicable law

Article 7

1 A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express 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.

2 The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.

Article 8

1 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 conclusion of the contract.

2 However, the 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).

3 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.

4 Paragraph 3 does not apply if, at the time of the conclusion of the contract, the seller and the buyer have their places of business in States having made the reservation under Article 21 paragraph 1 subparagraph *b*.

5 Paragraph 3 does not apply in respect of issues regulated in the

United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980) where, at the time of the conclusion of the contract, the seller and the buyer have their places of business in different States both of which are Parties to that Convention.

Article 9

A sale by auction or on a commodity or other exchange is governed by the law chosen by the parties in accordance with Article 7 to the extent to which the law of the State where the auction takes place or the exchange is located does not prohibit such choice. Failing a choice by the parties, or to the extent that such choice is prohibited, the law of the State where the auction takes place or the exchange is located shall apply.

Article 10

1 Issues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law are determined, where the choice satisfies the requirements of Article 7, by the law chosen. If under that law the choice is invalid, the law governing the contract is determined under Article 8.

2 The existence and material validity of a contract of sale, or of any term thereof, are determined by the law which under the Convention would govern the contract or term if it were valid.

3 Nevertheless, to establish that he did not consent to the choice of law, to the contract itself, or to any term thereof, 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.

Article 11

1 A contract of sale concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of the State where it is concluded.

2 A contract of sale concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of one of those States.

3 Where the contract is concluded by an agent, the State in which the agent acts is the relevant State for the purposes of the preceding paragraphs.

4 An act intended to have legal effect relating to an existing or contemplated contract of sale is formally valid if it satisfies the requirements either of the law which under the Convention governs or would govern the contract, or of the law of the State where the act was done.

5 The Convention does not apply to the formal validity of a contract of sale where one of the parties to the contract has, at the time of its conclusion, his place of business in a State which has made the reservation provided for in Article 21 paragraph 1 sub-paragraph *c*.

Section 2—Scope of the applicable law

Article 12

The law applicable to a contract of sale by virtue of Articles 7, 8 or 9 governs in particular—

a interpretation of the contract;
b the rights and obligations of the parties and performance of the contract;
c the time at which the buyer becomes entitled to the products, fruits and income deriving from the goods;
d the time from which the buyer bears the risk with respect to the goods;
e the validity and effect as between the parties of clauses reserving title to the goods;
f the consequences of non-performance of the contract, including the categories of loss for which compensation may be recovered, but without prejudice to the procedural law of the forum;
g the various ways of extinguishing obligations, as well as prescription and limitation of actions;
h the consequences of nullity or invalidity of the contract.

Article 13

In the absence of an express clause to the contrary, the law of the State where inspection of the goods takes place applies to the modalities and procedural requirements for such inspection.

CHAPTER III—GENERAL PROVISIONS

Article 14

1 If a party has more than one place of business, the relevant place of business is that 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.

2 If a party does not have a place of business, reference is to be made to his habitual residence.

Article 15

In the Convention 'law' means the law in force in a State other than its choice of law rules.

Article 16

In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 17

The Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.

Article 18

The application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*).

Article 19

For the purpose of identifying the law applicable under the Convention, where a State comprises several territorial units each of which has its own system of law or its own rules of law in respect of contracts for the sale of goods, any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question.

Article 20

A State within which different territorial units have their own systems of law or their own rules of law in respect of contracts of sale is not bound to apply the Convention to conflicts between the laws in force in such units.

Article 21

1 Any State may, at the time of signature, ratification, acceptance, approval or accession make any of the following reservations—

a that it will not apply the Convention in the cases covered by sub-paragraph *b* of Article 1;

b that it will not apply paragraph 3 of Article 8, except where neither party to the contract has his place of business in a State which has made a reservation provided for under this sub-paragraph;

c that, for cases where its legislation requires contracts of sale to be con-

cluded in or evidenced by writing, it will not apply the Convention to the formal validity of the contract, where any party has his place of business in its territory at the time of conclusion of the contract;

d that it will not apply sub-paragraph *g* of Article 12 in so far as that sub-paragraph relates to prescription and limitation of actions.

2 No other reservation shall be permitted.

3 Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the month following the expiration of three months after notification of the withdrawal.

Article 22

1 This Convention does not prevail over any convention or other international agreement which has been or may be entered into and which contains provisions determining the law applicable to contracts of sale, provided that such instrument applies only if the seller and buyer have their places of business in States Parties to that instrument.

2 This Convention does not prevail over any international convention to which a Contracting State is, or becomes, a Party, regulating the choice of law in regard to any particular category of contracts of sale within the scope of this Convention.

Article 23

This Convention does not prejudice the application—

a of the *United Nations Convention on contracts for the international sale of goods* (Vienna, 11 April 1980);

b of the *Convention on the limitation period in the international sale of goods* (New York, 14 June 1974), or the *Protocol* amending that Convention (Vienna, 11 April 1980).

Article 24

The Convention applies in a Contracting State to contracts of sale concluded after its entry into force for that State.

CHAPTER IV—FINAL CLAUSES

Article 25

1 The Convention is open for signature by all States.

2 The Convention is subject to ratification, acceptance or approval by the signatory States.

3 The Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4 Instruments of ratification, acceptance, approval and accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26

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

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 27

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the fifth instrument of ratification, acceptance, approval or accession referred to in Article 25.

2 Thereafter the Convention shall enter into force—

a for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b for a territorial unit to which the Convention has been extended in conformity with Article 26 on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 28

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.

Article 29

Any State which becomes a Party to this Convention after the entry into force of an instrument revising it shall be considered to be a Party to the Convention as revised.

Article 30

1 A State Party to this Convention may denounce it by a notification in writing addressed to the depositary.

2 The denunciation takes effect on the first day of the month following the expiration of three months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 31

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have signed, ratified, accepted, approved or acceded in accordance with Article 25, of the following—

a the signatures and ratifications, acceptances, approvals and accessions referred to in Article 25;
b the date on which the Convention enters into force in accordance with Article 27;
c the declarations referred to in Article 26;
d the reservations and the withdrawals of reservations referred to in Article 21;
e the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the .... day of ..... 19. ., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law as of the date of its Extraordinary Session of October 1985, and to each State which participated in that Session.

Done at The Hague, on the 30th day of October nineteen hundred and eighty-five, in a single copy which shall be deposited in the archives of the Permanent Bureau, and of which a certified copy shall be sent to each of the States Members of the Hague Conference on Private International Law as of the date of the Extraordinary Session of October 1985, and to each State which participated in that Session, as well as to the Secretary General of the United Nations.