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The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s

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International Conflict of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s

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ABSTRACT

This Article emphasizes the importance of teaching transnational materials in the conflict of laws class. The rapid development of the "global village" has increased the importance and need for law students to understand how conflicts issues are resolved throughout the world. A failure to address transnational issues will leave students unprepared for the world, especially the legal marketplace, that they will enter after law school.

The author suggests that the traditional study of public international law, regarding the law governing relations between states, as well as the law between states and intergovernmental and nongovernmental organizations, is insufficient for contemporary law students. Law schools would assist their students significantly by encouraging them to look through the "second window" of private international law as well. Since the 1950s, a substantial body of private international law has developed to address transnational commercial activities.

Looking at trends in private international commercial law, this Article focuses on the 1994 Inter-American Convention on the Law Applicable to International Contracts. The author discusses United States concerns regarding the negotiation of

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* Executive Director, Secretary of State's Advisory Committee on Private International Law and attorney in the Office of the Legal Adviser of the U.S. Department of State (Department). The views expressed in this Article are the author's individual views and not necessarily those of the Department. I would like to express appreciation to those immersed in conflict of laws theory and practice who reviewed and commented on this Article; any errors and omissions that remain are, of course, mine alone.

this convention and examines its salient features, scope of application, and substantive provisions. The Article also examines similar developments in two United Nations conventions. Finally, the Article concludes by suggesting several trends and opportunities for the late 1990s in private international law.

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I. INTRODUCTION

Trends in United States conflict of laws theories and cases from time to time have played a role in the development of international conflicts law. The Office of the Legal Adviser of the United States State Department is responsible for representing U.S. interests before the principal international organizations that work to unify and to harmonize private law at the international level. The principal international organizations active in this field are the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Specialized Conferences on

Private International Law (CIDIPs) sponsored by the Organization of American States (OAS).[1] In this process, the Office of the Legal Adviser works closely with bar associations, academic centers, the Uniform State Law Commissioners, private sector businesses, and other groups to assess the bases upon which law can be effectively harmonized across national borders.[2]

Therefore, the purpose of the American Association of Law Schools panel on international conflict of laws—as outlined by the Chair, Professor Harold G. Maier—had it right. The developing "global village" or marketplace, as well as the increasing number of transborder contacts involving personal, family, and estate law, have made conflicts rules and choice of applicable law topics of prime importance. The growing potential for involvement in newer areas of transaction planning, contract drafting as well as litigation concerns, such as cross-border environmental law, make understanding the interrelationship between legal systems and their practices an area where legal judgment increasingly must be applied.

The scope of typical conflict of laws courses, however, may not have kept up with these developments. Unless that problem is corrected—by, *inter alia*, bringing the growing amount of transnational issues and materials into the standard conflicts curriculum—U.S. law graduates will not be adequately prepared to deal with the need to assess choices of law and their likely validity in transactions, whether commercial or personal.[3] This problem is not due to lack of commentary or cases. Practical international conflicts materials can be discussed with a backdrop of the abundant literature on competing visions of U.S. conflict rules.[4]

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1. *See* Peter Pfund & George Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1986); Peter Pfund, *Overview of the Codification Process*, 25 BROOK. J. INT'L L. 7 (1989); John Spanogle, *The Arrival of International Law*, 25 GEO. WASH. J. INT'L. L. & ECON. 477 (1991).

2. *See* Amelia Boss & Patricia Fry, *Divergent or Parallel Tracks: International Codification of Commercial Law*, 47 BUS. LAW. 1505 (1992); Peter Winship, *The National Conference of Commissioners and the International Unification of Private Law*, 13 U. PA. J. INT'L. L. 227 (1992).

3. While this problem may partly be one of student course selection and priorities, both law schools and the designers of legal curricula could do much more to ensure that conflict of laws is seen as a core topic.

4. While assessment of the competing theories of conflict rules is beyond the scope of this Article, for a current sample, see Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 WIS. L. REV. 465 (book review) (reviewing Professor Lee Brilmayer's book: *Conflict of Laws: Foundations and Future Directions*); Linda J. Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569 (1991); Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509 (1985).

What appears necessary is a broadening of the scope of materials and focus in conflicts courses to include the rapidly growing field of what is now often labeled as "private international law." This term, once largely confined to international conflict of laws,[5] has been used increasingly in the United States and other countries to cover a broad spectrum of "private" law, which is the subject of harmonization on the international level. In contrast, "public law" is essentially that body of rules or practices related to the inherent authorities and functions of governmental bodies. Public law is largely dependent on non-judicial governmental agencies for its application; it may secondarily involve private parties. In contrast, private law is that body of rules essentially applicable to particular transactions, the rights and obligations of which can be referred to and enforced by individual parties directly in courts or otherwise. In the United States, private law has traditionally been the province of state law.

II. DISTINGUISHING PRIVATE INTERNATIONAL LAW FROM PUBLIC INTERNATIONAL LAW: THE CONCEPT OF THE "SECOND WINDOW"

In order to bring the field of private international law into better focus, I have used the following analysis, which I have labeled the "second window theory," through which one can examine the interaction of different national legal systems, both academically and in practical application. The second window concept differs from the more traditional focus of public international law as the method by which to analyze the differences between legal cultures and to gauge their interaction. While public international law has remained generally within its traditional parameters, private international law has exhibited significant growth in the last several decades. Because of the increasing interaction of states in the field of private international law, that legal system can illustrate a different set of parameters within which states and their legal cultures will respond, and is of considerable practical application for transactional parties as well as analysts.

For an interesting vision of American conflicts laws by foreign commentators, see Bernard Audit, *A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles*, 27 AM. J. COMP. L. 589 (1979); Arthur T. von Mehren, Comment, 27 AM. J. COMP. L. 605 (1979); Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615 (1979).

5. *See, e.g.*, YVON LOUSSOUARN & PIERRRE BOUREL, DROIT INTERNATIONAL PRIVE (3d ed. 1988). Some commentators prefer the term "international private law." *See, e.g.*, Spanogle, *supra* note 1.

There are traditional distinctions in subject matter between public and private international law. Compare, for example, two maritime topics: the rights of navigation—a traditionally public law topic with important implications for coastal rights and naval passage, as well as commercial transportation and more recently the attempted regulation of deep-sea bed mining[6]—and carriage of goods by sea, a traditionally private law topic, which regards the rights of shippers, carriers, insurers, freight handlers, and consignees.[7] Other examples of private law topics with public law overtones are the judicial cooperation and litigation process treaties, such as the Hague Conventions on Service Abroad and the Taking of Evidence Abroad[8] and the OAS Inter-American Convention on Letters Rogatory.[9] While focused on procedures otherwise within the domain of the courts and their regulatory control of formal dispute systems, this type of treaty has traditionally been seen as—and negotiated along the lines of—a private law treaty. This perception has developed in part because the procedural rights established by these treaties are normally invoked in individual matters and enforced by private litigants.

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6. *See* Bernard Oxman, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L. L. 167 (1994); *Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI Upon Their Transmittal to the United States Senate for its Advice and Consent*, Special Supplement, 7 GEO. INT'L ENVTL. L. REV. 77 (1994). The primary dispute surrounding the earlier withdrawal of the United States from active participation in the negotiations arose over the provisions in the "grey zone" between public and private law, regarding the existence and regulation of international rights to extract deep-seabed mineral resources.

7. The primary international treaty texts are the Hague-Visby treaty rules. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 283, T.S. No. 931, 120 L.N.T.S. 155, 1931 Gr. Brit. T.S. No. 17 ("Hague Rules"), and Protocol to Amend the Int'l Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmd. 6944) (entered into force June 23, 1977) ("Visby Amendments"), and the competing UNCITRAL-prepared "Hamburg" rules, Int'l Law Ass'n Report of the 12th Conference, 165-68 (Hamburg Conf. 1885), both of which have been signed by the United States but neither of which has been submitted to the Senate for ratification, in view of the absence of consensus between shippers, carriers, cargo interests, and insurers. *See* Michael Sturley, *Legislative History of the Carriage of Goods by Sea Act (COGSA)*, 17 TUL. MAR. L.J. 365 (1993).

8. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, T.I.A.S. 6638, 20 U.S.T. 361; The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, T.I.A.S. 7444, 23 U.S.T. 2555 (entered into force for the United States on Oct. 7, 1972).

9. The 1975 Inter-American Convention on Letters Rogatory, as amended by its 1979 Protocol, 14 I.L.M. 339 (1975), 18 I.L.M. 1238 (1979).

A. *Public International Law*

In order to distinguish further between public and private international law, this Article focuses on international economic law, because it provides a more readily accessible set of comparative materials. The analysis would vary for application to tort, personal, or family law. For purposes of economic analysis, public international law involves application of legal rules or norms essentially by or between governmental and regulatory or administrative bodies; any private interests that are asserted are usually done so indirectly and through some applicable governmental mechanism. In the international economic law context, the system of public international law can be divided roughly into three categories:

> *Market structure*: primarily multilateral and regional agreements that establish trade and financial structures, such as agreements establishing the International Monetary Fund,[10] international regional development banks,[11] collective common markets, and regional customs unions.
>
> *Market access*: agreements that provide access to foreign markets either generally, based on nationality or other criteria, or by trade sectors, such as timber, cotton, and other goods.[12] This category ranges from broad multilateral systems, such as the new General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), to bilateral agreements, which include general rights of access under Friendship, Commerce and Navigation treaties (FCNs), which typically include "national treatment" and "most-favored-nation" approaches to market access,[13] as well as the new United

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10. For example, see the so-called Bretton Woods Agreements, T.I.A.S. 1501, 60 Stat. 1401 (entered into force Dec. 1945).

11. *See* Inter-American Development Bank, the African Development Bank and others in *Treaties in Force* as of Jan. 1, 1994. TREATIES IN FORCE 334-38 (prepared by the Office of Legal Adviser, Dept. of State, pub. 9433).

12. *See, e.g.*, the International Coffee Agreement, T.I.A.S. 11,095 (1983, 1985). Other international market agreements regard copper, wheat, and other commodities. Some agreements that previously sought to balance certain aspects of the market between producer and consumer states are not functioning effectively in the economic climate of the 1990s.

13. *See, e.g.*, Treaty of Friendship and Commerce between the United States and Pakistan, T.I.A.S. 4683, 12 U.S.T. 846 (entered into force Feb. 1961). This form of treaty regulating commercial access is one of the earliest types of treaties negotiated by the United States. *See, e.g.*, Treaty of Friendship, Commerce and Navigation between the United States and Argentina, 10 Stat. 1005 (entered into force Dec. 1854).

States-negotiated "bilateral investment treaties (BITs).[14]

Non-national territories: market-access regulation under multilateral agreements covering, for example, mining extraction under the law of the sea, the Antarctic, and space development, as well as fishing and related agreements covering international waters, economic zones, and in some cases straddling or migratory stock.[15]

B. *Private International Law*

In contrast, private international law agreements generally deal with topics traditionally not regulated by governmental bodies in a significant manner.[16] Therefore, private international law focuses carefully on and resolves differences between specific national laws and legal traditions.[17] Private international law is intended to create private rights and causes of action that can be applied to particular transactions and enforced by private parties in courts or by arbitration, without leave of, or the involvement of, governmental administrators.[18]

Traditionally, the private international law field has dealt

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14. *See, e.g.*, Bilateral Investment Guarantee Agreement with Hungary (in force as of Dec. 27, 1989); Bilateral Investment Guarantee Agreement with Venezuela (in force as of June 22, 1990). Because TIAS treaty prints are not yet available, copies can be obtained from the Office of Treaty Affairs of the Legal Adviser's Office, U.S. Department of State, Washington, DC 20520.

15. *E.g.*, Convention for the Conservation of Atlantic Tunas, T.I.A.S. 6767, 20 U.S.T. 2887 (entered into force March 1969).

16. An analytical difference can be drawn between regulations of the U.S. Securities and Exchange Commission, which in substantial measure regulate the conduct of private parties engaged in a particular market on the one hand, and the Uniform Commercial Code, which while governmentally legislated, provides a framework and default rules that passively apply unless varied by parties to a transaction (within permissible limits), or invoked by a party to a dispute.

17. Examples of conventions focused primarily on resolving differences between civil and common law traditions are the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition, *reprinted in* 23 I.L.M. 1388 (1984) (signed but not yet ratified by the United States), and the 1988 U.N. Convention on International Bills of Exchange and Promissory Notes, *reprinted in* 28 I.L.M. 170 (1989) (not yet in force for the United States).

18. The classic modern example is the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG), U.N. Doc. A/CONF./97/18 Annex I (1980), *reprinted in* 19 I.L.M. 668 (1980), which came into force for the United States on January 1, 1988, and which currently has over forty states parties. Its provisions are in some cases cited as reflecting international standards of commercial law. The United States in ratifying that convention expressly excluded conflict of laws rules as a basis for extending the scope of application of the Convention by making a declaration permitted under the Convention to that effect.

with contract and commercial law, family law, international arbitration, and judicial process with regard to civil litigation and enforcement of judgments and applicable law, including the conflict of laws. This Article focuses on the last topic, and within the conflicts field, specifically upon those rules or issues pertinent to commerce and trade. The quagmire of conflicts rules for torts and the adjustment of unanticipated loss, which has occupied much of conflicts literature—and indeed has been the principal battleground for significant changes in the approach of U.S. courts and the Restatements over the last decades—is beyond the scope of this Article.[19] Additionally, the debates that have arisen from efforts to seek greater extraterritorial reach for applicability of U.S. law, although a species of conflict of laws, is also beyond the scope of this Article.[20]

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19. While the conflicts factors in tort matters differ significantly from those involved in structuring commercial transactions (with some exceptions), the development of conflicts theories and decisional trends in the United States has largely been woven around torts and the American hybrid field of products liability. For instance, see the extensive commentary surrounding *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). *E.g.* Patrick Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993). Together with Professor Harold G. Maier and others, Professor Borchers reviewed *Babcock* and its progeny at the symposium giving rise to the Article. *See also* Piper Aircraft v. Reyno, 454 U.S. 235 (1981). *Piper* and cases cited therein give a useful picture of the balancing of interests and the significant contacts theories.

Multistate litigation arising from tort and products liability cases have also contributed much to the recent conflict of laws debates. *See, e.g.*, In re Agent Orange Product Liability Litigation, 454 U.S. 1128 (1981); 580 F.Supp. 690 (E.D.N.Y. 1984). *See also* John Austin, *A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation*, 58 J. AIR L. & COM. 913 (1993) (providing a detailed analysis of effects of possible rules, primarily on domestic cases).

20. *See, e.g.*, Jay Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71 (1990) (review essay); Westbrook's article reviews: A.D. NEALE AND M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION (1988). *See also* Gary Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L. BUS. 1 (1992).

III. CONFLICT OF LAWS AND CHOICE OF LAW IN TREATIES

A. *Overview*

The modern era of private international law can be said to have emerged after 1950, and in the following decades, a number of conventions were produced that focused on conflicts of law, applicable law, and related issues, either generally or with regard to particular legal topics. These conventions were prepared primarily at that time by two international bodies, the Hague Conference on Private International Law after 1950,[21] and the Organization of American States (OAS), through its periodic Specialized Conferences on Private International Law (CIDIPs), which resumed in 1975.[22] While some of these conventions have enjoyed moderate success, at least regionally, they have so far had little direct application to the United States, at least as black-letter law.

At the same time, these conventions form a body of internationally agreed-upon resolutions of legal problems arrived at between representatives of a number of countries, including many of our major trading partners, as well as countries with

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21. *See, e.g,* Convention on Conflicts between the Law of Nationality and the Law of Domicile (1955) (not presently in force); Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961) (in force for twenty-two countries); Convention on the Law Applicable to Products Liability (1973) (in force for nine European countries); Convention on Law Applicable to Maintenance Obligations (1973) (in force for ten countries); Convention on Recognition of and Law Applicable to Trusts (1985) (in force for Australia, Canada, Italy, and the United Kingdom, and expected to be ratified by the United States); Convention on Law Applicable to Estate Succession (1989) (not yet in force). The United States is not presently a party to any of these conventions. For a complete listing and status of the Hague Conventions, see *Information Concerning the Hague Conventions on Private International Law,* Vol. XLI, No. 2, NETH. INT'L L. REV. 201 (1994). For the texts of the conventions, see *Collection of Conventions 1951-1988,* with a guide to legislative history contained within Hague Conference reports, prepared by the Permanent Bureau.

22. While the United States is not a party to any of the conventions set out below, these conventions have achieved moderate success among the Latin American states of the OAS and have contributed to the harmonization of conflicts laws: the 1975 Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (in force for fourteen countries); the 1975 Inter-American Convention on Conflict of Laws Concerning Checks (in force for nine countries); the 1979 Inter-American Convention on Conflicts of Laws Concerning Commercial Companies (in force for seven countries); the 1979 Inter-American Convention on General Rules on Private International Law (in force for nine countries). See *Treaty Series No.9 Rev. 1993,* Section B, at 33-55, issued by the OAS General Secretariat, for a compilation of treaties and conventions together with declarations and reservations.

whom U.S. citizens have frequent contact. As such, these conventions are a source of transnational legal norms that may be applied directly in foreign jurisdictions or drawn upon by arbitrators and others. Thus, they offer guidance to students and practitioners alike as to differences in treatment they may expect, as well as how to see through the "second window." Given changes economically and politically in several regions of the world, including the Americas, resolution of applicable law issues may once again become a significant field upon which progress in harmonization of law may develop.

With regard to the perspective of the United States, the following list offers recent examples of how international conflicts issues have been, or are proposed to be, addressed. These include: (a) the recently completed OAS Inter-American Convention on Law Applicable to Contracts;[23] and (b) a comparison of the U.S. approach to applicable law provisions in the United Nations Convention on the Limitation Period in the International Sale of Goods,[24] which came into force for the United States on December 1, 1994, and the position adopted by the United States on the same applicable law issues in the draft United Nations Convention on Independent Guarantees. Both UN Conventions were prepared by UNCITRAL.

It is helpful to set out what a typical conflict of laws convention generally strives to achieve. Such treaties usually attempt to provide rules for, and the extent to which, choice of law may be made directly by parties involved. They also provide default rules to otherwise determine applicable law. Their scope

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23. Inter-American Convention on the Law Applicable to International Contracts, OAS Doc. OEA/Ser.K/XXI.5 (Mar. 17, 1994), *reprinted in* 33 I.L.M. 733 [hereinafter OAS Convention]. Note: The Spanish text in this document contains the final language modifications. The English text will require re-issuance with conforming changes; for the text of the English language corrections, see the official conference Report of the Rapporteur of Committee I, OAS Doc. CIDIP-V/Doc.32/94/rev.I, OEA/Ser.K/XXI.5 (Mar. 18, 1994). An unofficial corrected English text can be obtained from the Office of the Assistant Legal Adviser for Private International Law, U.S. Department of State, Washington DC, 20520. *See* Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparison*, 42 AM. J. COMP. L. 381 (1994) [hereinafter Juenger, *Highlights of the Inter-American Convention*]; Ronald Herbert, *La Convencion Interamericana Sobre Derecho Aplicable a los Contratos Internacionales*, REVISTA URUGUAYA DE DERECHO INTERNACIONAL PRIVADO 45 (1984). Both authors were delegates to the Conference. Harold Burman was co-head of the American delegation, along with his colleague Peter H. Pfund. Other members of the American delegation with respect to this Convention were Professors Friedrich K. Juenger and Boris Kozolchyk, Director of the National Law Center for Inter-American Free Trade (CIFT) at Tucson, Arizona, and Paul Herrup, Office of Foreign Litigation, Civil Division, U.S. Department of Justice. *See also infra* note 29.

24. *See infra* notes 37-38 and accompanying text.

of application may be confined to particular legal matters, such as contracts; they also usually set out the basis of "internationality," that is, the standard used to trigger the convention's application. Generally, their provisions will exclude specified types of contracts or legal issues.[25]

B. *The 1994 Inter-American Convention on the Law Applicable to International Contracts*

The most recent conflicts convention in which the United States actively participated, the Inter-American Convention on the Law Applicable to International Contracts (OAS Convention), was concluded at Mexico City in March 1994 at the Fifth Specialized Conference on Private International Law (CIDIP-V) sponsored by the OAS.[26] This Convention adopted as an initial model for many of its provisions the earlier Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention),[27] and to a lesser extent the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Hague Convention).[28] However, the OAS Convention concluded with several innovations that give it a distinctive position in this category of treaties. From the United States perspective, these distinctions result in more treaty support for validation of commercial undertakings and more market-based legal results than do its earlier, more European-law based counterparts.[29]

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25. *See* Gonzalo Parra-Aranguren, *General Course of Private International Law*, 210 RECUEIL DES COURS 1-215 (1988-III) (a comprehensive survey by a Venezuelan professor); *see also* OAS General Secretariat on *Choice of Law and Jurisdiction in International Contracts*, O.A.S. Doc. Ser.K/XXXI.5, CIDIP-V/doc.5/93, Oct.29, 1993 (a useful study).

26. OAS Convention, *supra* note 23.

27. Convention on the Law Applicable to Contractual Obligations, *opened for signature*, June 19, 1980, 1980 O.J. (L 266) (entered into force April 1, 1991 between seven states of the Common Market). For the text of the Convention, together with protocols, declarations, and joint interpretations, see 1991 UNIFORM L. REV. 65-113 (1991-II) (UNIDROIT publication).

28. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 (1980), *reprinted in* 19 I.L.M. 668 (1980). *See generally* Arthur von Mehren, *Explanatory Report on the final text*, Actes et documents, Proceedings of the diplomatic conference of October 1985, 711-57 (Neth. Govt. Printing Office, 1987). Professor von Mehren's report is a very useful review of issues confronted in the negotiation of this type of convention. For additional background, see *Report on the Law Applicable to International Sales of Goods*, written by Michel Pelichet of the Permanent Bureau. *Id.* at 17-95.

29. The previous OAS Specialized Conference on Private International Law (CIDIP-IV) in 1989 established the "bases" for preparation of a draft convention. The draft text was reviewed by the Inter-American Juridical Committee (IAJC) and

To begin with, the United States approach to the OAS Convention followed several general guidelines: (a) the provisions were to be based on trade and commercial contract concerns, rather than personal, labor, or other contracts; (b) rules were, when possible, intentionally to favor trade facilitation; (c) commercial predictability and trade usages were to receive higher priority than the neutral balancing of all parties' interests in possible litigation; (d) party autonomy as to choice of law was to receive maximum support; and (e) correlation was to be sought when appropriate with ongoing revisions in the Uniform Commercial Code. This last guideline was not formulated from the point of view of supporting U.S. state laws because of their national origin, but because both the process and content of law development of the Uniform Commercial Code (UCC) has led to an essentially non-theoretical code designed to facilitate commerce, taking closely into account both existing and developing practices in each area of commercial law specialty.[30]

In addition, two polar positions were rejected as models for United States positions. First, it became clear that models based on statutory or case law from "interest analysis" jurisdictions in the United States would fail to get sufficient support from U.S. manufacturers, distributors, import-export, and other trade interests seeking increased commercial predictability. Second, most other countries participating in the negotiations were not prepared to consider a convention with many special rules for particular types of contracts. In addition, "characteristic performance"[31] and similar concepts as determinants for applicable law were also later dropped because their relevance to a large enough circle of cases was in doubt.

All of these guidelines had to be seen through a prism of what was feasible in the context of almost twenty negotiating

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amended at a preparatory meeting in November 1993 in Tucson, Arizona, at the National Law Center for Inter-American Free Trade. For the initial text, together with a useful Explanatory Report by Jose Luis Siqueiros of Mexico, and other source documents, see *Background Document on the Topic: Draft Agenda for the Meeting of Experts on International Contractual Arrangements*, O.A.S. Doc. OEA/Ser.G, CF/CAJP-839/91 (Oct. 29, 1991). *See also* Antonio Boggiano, *International Contractual Arrangements*, OAS/Ser.K/XXI.5, CIDIP-V/Doc. 9/93, (Oct. 29, 1993) (comparative study of developments in conflicts laws and treaties prepared for the OAS).

30. Generally, as to the process involved in the on-going revision of the UCC, which in a historical sense followed virtually on the heels of its first widespread adoption by states in the United States after the mid-1960s, see the three-part symposia, *Is the UCC Dead, or Alive and Well?*, 26 LOY. L.A. L. REV. 535 (1993); 28 LOY. L.A. L. REV. 89 (1994). The third part of the series will be published later in 1995.

31. Juenger, *Highlights of the Inter-American Convention*, *supra* note 23, at 389.

states representing several major legal systems, including, *inter alia*, the common law (and its variations between UCC practice, English-speaking Canadian common-law jurisdictions, and the Caribbean common law states), the civil law of Latin American tradition, and the civil law of French tradition in Quebec.[32] The outcome was a compromise between traditions that nevertheless may result in significant change for some jurisdictions (especially those who currently provide minimal room for party autonomy), and in other respects may facilitate transborder commerce. Whatever degree of uncertainty remains in the compromise, it is preferable to the much wider disparity that now exists between laws and practice of the various states in the Western Hemisphere in the absence of such a convention.

1. Salient Features of the Convention

An assessment of the advantages and disadvantages of the OAS Convention for United States interests has not yet been undertaken; the OAS Convention requires ratification by the U.S. Senate. Nonetheless, United States trade and commercial interests have generally favored some type of convention if it can be applied to a reasonable number of cases and can increase, to any measurable extent, commercial predictability. These interests are more concerned with reasonable and incremental progress than with the ultimate resolution to all applicable law problems.

Some commentators have expressed concern about the lack of clarity in some provisions of the OAS Convention. Others, however, have noted that neither current case law in the United States nor the Second Restatement provide any greater clarity. The former commentators see the Convention's text as a starting point from which perhaps to begin another negotiation at some future time. The latter group of critics notes that the Convention's text, however imperfect, could improve predictability in the Western Hemisphere, especially in comparison to the current regime, which is typified by a wide disparity in existing conflicts rules and practice.

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32. The complexities facing harmonization in the same state between only two systems of law can be daunting. *See, e.g.*, Symeon Symeonides, *Exploring the "Dismal Swamp": Revising Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029 (1987).

2. Scope of Application

The OAS Convention would determine the law applicable to a wide range of international contracts, subject to the right of any state party at the time of ratification or accession to exclude categories of contracts. Significantly, while the same right of exclusion applies to contracts to which state agencies or entities are parties, the OAS Convention requires express exclusion for government contracts,[33] thus disallowing later efforts to assert implied exclusion on the basis of reference to other law. Closely related to the Convention's scope of application, Article 14 sets forth the types of issues that the Convention will resolve. It broadly covers contract breach and enforcement and includes prescription, as well as substantive law.

The Convention excludes by its own terms fewer categories of contracts than either the Rome or Hague Conventions. Article 5 of the OAS Convention excludes, *inter alia*, family and estate law matters, negotiable instruments, securities transactions, arbitration agreements, forum selection, and company law. While the remaining scope of the Convention's application would cover most commercial and business matters, it would also include, unless declared otherwise by a contracting state, labor contracts.[34]

Article 6 of the OAS Convention excludes contractual matters regulated by conventions in force between the states parties; when read together with Article 20, a state would nevertheless be required to declare which previous conventions on the same subject matter would remain in effect. The United States had sought the inclusion of Article 20 in order to ensure notice in the event of conflicting convention requirements.

3. Determination of Applicable Law

Several important innovations supported by the United States appear in the OAS Convention's provisions on determination of applicable law. First, party autonomy is given express sanction, which would be a significant change at least as to international contracts for a number of states in this hemisphere. Article 7 adopts a "no-nexus" rule, which the United States supported, notwithstanding the more restrictive approach of both the Second Restatement and the UCC, but is nonetheless consistent with trends in certain areas of modern conflicts law as

33. OAS Convention, *supra* note 23, art. 1, para. 3.

34. Certain types of labor contracts were expressly excluded by both the Rome and Hague Conventions.

it relates to particular commercial practices. Article 10, which applies to business usages and principles of international commercial law to determinations of applicable law, could be read so as to override an express choice by the parties under Article 7. That result, even should it obtain, was perceived as a reasonable balance for delegations of those Central and South American states whose present law largely does not permit party autonomy in choice of commercial law.

Article 10 itself was based on a U.S. proposal and is considered one of the more innovative approaches in this OAS Convention. Its purpose is to increase the extent to which the intentions of commercial parties and the development of business usages that are commonly recognized in international, if not in domestic, commerce would be recognized by the Convention. Thus, in drafting Article 10 and several others, such as Articles 13 (validity) and 15 (application of business usages to determinations of agency), the purpose was not to develop provisions that are neutral as to their economic or legal implication, but rather to establish provisions aimed at facilitating commerce by engaging through the Convention those business practices that underlie much of international trade.

Article 9 sets out the basic rules for determination of applicable law in the absence of a valid choice. The Convention adopts the commonly used "closest ties" formula and dropped the originally proposed "characteristic performance" test. An important innovation appears in Article 9, paragraph 2, which requires that "general principles of international commercial law recognized by international organizations" also be taken into account in determining the applicable law. Proposed by the United States, this language was intended to include, *inter alia*, the recently completed UNIDROIT Principles of International Commercial Contracts,[35] and the revised International Chamber of Commerce's Uniform Customs and Practice (UCP 500).[36]

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35. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994). After more than a decade of efforts to combine principles primarily from the common and civil law traditions, the Principles were promulgated. The Principles may represent a growing acceptance of the new *lex mercatoria*, when recognized by international bodies. *See generally* M. JOACHIM BONNELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (1994); *see id.* at 138 *et seq.* (discussing the potential for the UNIDROIT Principles to be accepted as international rules governing a contract). This process has already been apparent in the arbitration field. *See, e.g.*, JULIAN LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 315 (1978). *Cf.* John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278 (1989).

36. This provision could also be read so as to include international rules,

4. Existence and Validity of Contracts

Several provisions of the OAS Convention were intended to favor contract validation, such as Article 13, paragraph 2. When the parties are in different states at the time of conclusion of a contract, Article 13 provides three different options for state law, any one of which can be used to satisfy the requirement of validity as to form.

The Convention's rules, in Article 15, favor validity of contract in another area of practice. Cases involving challenges to contract validity, alleging absence of actual delegation or power of attorney, have disrupted transactions in certain countries. In an effort to bring transborder practice into closer harmonization, when agency must be determined, Article 15 permits business custom and principles of international commercial law to be applied. Under Article 12, paragraph 2, such cases may result in the application of a separate law to determine that issue.

5. Grounds for Non-Application

Article 11, regarding "mandatory" law, and Article 18, regarding public order, provide grounds to avoid application of the OAS Convention, except under Article 11 with regard to provisions on existence and validity of contract, scope of applicable law and certain other matters. These Articles allow avoidance respectively by permitting the mandatory law of the forum state to be applied instead, and by invoking public order. Article 11 also permits application of the mandatory law of a third state, at the discretion of the forum, when the contract has been determined to have close ties with that third state.

Whatever one may think of such exceptions, both of these grounds for non-application are common in the jurisprudence of most countries; they also have state law precedents in the United States. While the U.S. delegation sought to limit the reach of such provisions, it is unlikely that any country would in fact agree to ratify a convention that seriously limited the capacity of its courts to reject application on public order or similar grounds.

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such as the UNCITRAL-prepared UN Convention on Contracts for the International Sale of Goods (CISG), which has achieved widespread implementation. It may also arguably permit reference to international rules adopted by broad consensus, even prior to achieving substantial ratification, such as the UNIDROIT Conventions on International Factoring and Financial Leasing, adopted in 1988 at a diplomatic conference in Ottawa, in which over fifty countries, as well as a number of international organizations participated.

6. Exclusions upon Ratification

An important factor in assessing the OAS Convention from the United States perspective will undoubtedly be the consideration of which, if any, categories of contracts the United States would exclude from the Convention's coverage pursuant to Article 1. It may also be possible in the ratification process to add conditions to the coverage of particular contract categories, instead of simply excluding a category. This aspect of the treaty analysis is likely to focus on concerns of the industrial or commercial sector, especially with regard to incremental advantages in contract formation, execution, or risk exposure.

C. *United Nations Convention on the Limitation Period for the International Sales of Goods*

The United Nations Convention on the Limitation Period for the International Sales of Goods (UN Limitation Convention), which came into force for the United States on December 4, 1994, establishes international rules for statutes of limitation in commercial sales of goods cases.[37] The UN Limitation Convention's rules would apply to a covered transaction instead of both the UCC and the law of another state (because at least two states would be involved in order to invoke the Convention) unless the parties opt out of its coverage. The UN Limitation Convention was completed by the United Nations Commission on International Trade Law (UNCITRAL) in 1974, and then revised by a protocol in 1980 to align it with the UN Convention on Contracts for the International Sale of Goods (CISG or UN Sales Convention).

The significance of this newly ratified UN Limitation Convention is that the principal change brought about by the protocol was to expand the scope of application by including conflict of laws rules to determine when a particular contract would fall under the Convention's coverage. Under the protocol, even though both the buyer and seller may not have been located in separate contracting states, the Convention might still apply if the forum state's conflicts rules pointed to the law of another

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37. *See* Harold S. Burman, *Harmonization of International Commercial Law: U.S. Accession to the United Nations Limitations Convention*, 1995 Com. L. Ann. 227, 289 (Clark, Boardman, Callaghan, 1995). *See also* John Honnold & Peter Winship, *Report of the International Law Section accompanying a resolution of the American Bar Association endorsing the Convention for ratification*, ABA SEC. INT'L L. REP. 194B (Aug. 1989), *reprinted in* 24 INT'L LAW. 583 (1990). For the text of the Convention, see S. TREATY DOC. NO. 103-10 (Aug. 5, 1993).

contracting state.

The United States responded, however, as it had previously in connection with ratification of the UN Sales Convention, by declaring that it would not apply this new rule, and would instead retain the original rule—which expressly rejected conflicts rules as a means of determining scope of application. Why did the United States respond this way regarding conflicts rules? Both of these conventions apply to sales of goods cases, which often involve a number of commercial parties. The principal concern of many U.S. import-export and trade finance interests was to achieve "commercial predictability" first and foremost, so that on the face of documents or otherwise a party could determine with relative ease the likely application of the convention. To the extent this determination depended upon identification of the location of buyers and sellers, predictability could be readily achieved in many transactions. To the extent, on the other hand, that analysis of various countries' rules on conflict of laws would be required to determine when the convention would apply, it was considered that much greater uncertainty would result (one can readily see how the interests of counsel might have been quite the reverse).

D. *The Proposed United Nations Convention on Independent Guarantees*

The considerations involved in the rejection of conflicts rules as a means to determine a conventions' scope turned out to be short-lived, at least in certain circumstances. UNCITRAL recently completed its final negotiation on a proposed convention covering U.S.-style standby letters of credit and European-style direct demand bank guarantees.[38] This proposed United Nations Convention on Independent Guarantees (Proposed Guarantees Convention) could be finalized by the United Nations General Assembly as early as December 1995. The Proposed Guarantees Convention contains three sets of provisions directly related to conflicts and applicable law, two of which may be of particular interest.

The first is an identical provision to that referred to above with respect to the UN Limitations Convention. Unlike the earlier convention however, the United States did not raise objection to

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38. The final text will be reprinted in the forthcoming *Report of the Commissions' 28th Plenary Session, Annex I*, UN Doc. A/50/Supp.17 [hereinafter Proposed Guarantees Convention]. The final draft text appears, together with commentary on the conflicts provisions, in the *Report of the Working Group on International Contract Practices*, 23d Sess., UN Doc. A/CN.9/408 (Feb. 1995).

using conflicts rules as a means of expanding the scope of its application. Why the difference? First, standby letters of credit and bank guarantees are "commercial specialties," that is, areas of practice in which insular legal norms have developed on the basis of particularized industry practices, so that precedent is more focused, and in this case more amenable to applying conflicts rules. The law regarding sales of goods, on the other hand is far more general and diverse in its application, with much less predictability as to the likely results of conflicts rules. Moreover, the range of parties that may be involved are different. Determining who are the "buyers" and "sellers" can involve syndicated purchasing parties, factoring parties, multiple consignees, security interest parties with title, among others, with corresponding options as to which countries are involved, all of which could make predictability a difficult task.

In standby letter of credit practice, however, only two specific parties are normally involved, the guarantor/issuer (and possibly confirmers and counter-guarantors) and the beneficiary. Under the rule of the Proposed Guarantees Convention,[39] only the location of the guarantor/issuer is needed to determine applicability, thus making predictability relatively likely. In addition, unlike sales of goods cases, this rule is almost uniformly applied by countries with either statutory or case law precedent on point. Thus, commercial predictability, that is, the ability to readily ascertain when the convention would apply, is of even greater concern for banking law as applied to issuance of letters of credit than for sales of goods. Therefore, having to take into account conflicts rules under this Proposed Guarantees Convention is not expected to complicate the task unreasonably.

The second point of interest for conflicts law under this new convention is the broad effect proposed to be given to its rules on conflicts. Of particular interest is not the conflicts rules per se, which follow traditional lines.[40] Rather one's attention is drawn to the proposed rule in Article 1(3), which effectively creates a second "mini-convention" relating to conflicts rules, and which is an unusual treaty mechanism.

That provision would make the convention's conflicts rules apply in a contracting state to cases dealing with the particular commercial instruments involved, even if in a given case the convention's terms would not otherwise apply by virtue of the scope of application rule. Thus, for example, even if the place of

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39. Proposed Guarantees Convention, *supra* note 38, art. 1(1)(a).

40. *See id.* arts. 21, 22 (containing both choice of law and determination of applicable law rules).

business of a guarantor were not in a contracting state (a requirement for the substantive provisions of the convention to apply), a contracting state's court could still apply the convention's conflicts rules to cases involving independent guarantees, if they otherwise qualified as such under the definitions. Aside from the eventual outcome of this provision in this particular convention, and whether it is attractive or otherwise to potential ratifying countries, this approach represents a new and interesting method of harmonizing conflicts rules internationally.

IV. TRENDS AND OPPORTUNITIES FOR THE LATE 1990S

Trends are difficult to predict. Private law harmonization at the international level is subject to much greater impact of external factors, both political and economic, than is the case domestically, resulting in part from the number of countries involved, as well as regional developments that need to be taken into account. Some possible trends that might survive this analytical obstacle course are the following:

(a) economic interdependence may well encourage efforts to harmonize commercial practice in part through conflicts rules;

(b) this trend may become more pronounced among regional economic groupings of states;

(c) norms established through conflicts conventions will increasingly be applied in international commercial arbitration;

(d) negotiations on agreed conflicts standards will gain acceptability in more narrowly defined areas of application (such as in bills of lading);[41] and

(e) none of the above are likely to apply in those areas of law with high socio-political and regulatory content, such as transborder environmental regulation.

Finally, while not discernable as a trend (notwithstanding some headway in the recent OAS Inter-American Convention on Law Applicable to Contracts), real progress might lie along the

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41. Similar developments may also occur in newer areas of commercial law. For a discussion of the commercial uncertainty inherent in a conflicts analysis involving a developing area of law, see David A. Levy, *Financial Leasing Under the UNIDROIT Convention and the Uniform Commercial Code: A Comparative Analysis* (on file with author). *Cf.* Michel Pelichet, *Note on Conflicts of Laws Occasioned by Transfrontier Data Flows*, Permanent Bureau of the Hague Conference, Hague Prelim. Doc. No. 5 (Nov. 1987).

path of greater international acceptance of the capacity of parties to choose, and courts to apply as applicable law, international legal standards and rules developed by recognized international organizations in the field of private international law. States with market economies have remained the principal influence in assuring that internationally agreed-upon legal standards comport with practical and transactional necessities. Therefore, it is unlikely that such standards would apply to the disadvantage of U.S. interests or parties because of unexpected peculiarities in the rules.

Indeed, it is arguable with regard to international commerce that we are moving, though slowly, away from the concept that "applicable law" is inherently limited only to national laws (or that of subdivisions within), or those treaty provisions within formally ratified documents. Recognition and application of internationally approved norms can allow a modern *lex mercatoria* to develop more fully. This development can give greater import to the international process of harmonizing private law that the United States legal community has done much to facilitate.