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American Conflicts Scholarship and the New Law Merchant

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American Conflicts Scholarship and the New Law Merchant

Friedrich K. Juenger*

ABSTRACT

Professor Juenger argues that both the unilateralist and the multilateralist schools of thought share a fixation on the idea that law must emanate from the power of a sovereign state. The author points out that such a view of law is ahistoric; that, in the past, merchants relied on a substantive body of supranational rules that transcended national borders. This Article discusses the contemporary significance of the law merchant for law professors, law students, and practitioners.

The author explains how the practices of contemporary transnational commercial enterprises, as well as the opinions of contemporary scholars, support the idea that there is a substantive body of law, a new law merchant, that does not derive from sovereign states. The prevalence of arbitration as a means of dispute resolution buttresses this view, as do business customs and private codifications.

The author suggests that conflicts professors are wont to ignore the new law merchant in their teachings, in part because it threatens the very existence of their subject. The fact that private parties can emancipate their transactions from state and national law undermines the foundation on which choice-of-law theories rest. Moreover, the author argues that the new law merchant threatens theoreticians because it offers qualitatively superior solutions to transnational problems. Professor Juenger maintains that making room for the new law merchant in conflicts classes holds forth not only a threat but also a promise: it will benefit students and improve conflicts scholarship.

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I. INTRODUCTION

For over thirty years, the United States has been in the throes of a "conflicts revolution," whose most extreme manifestation is the forum-centered unilateralism advocated by Brainerd Currie.² Whereas the judiciary—although it does use the unilateralist vocabulary of "interests" and "policies"—seems to prefer the Second Restatement's³ eclectic approach, 4 Currie's teachings have captured the scholars' fancy.⁵ Some believe that his work caused a "Copernican revolution" that transformed the U.S. conflicts scene, substituting instrumentalism for conceptualism as the tool to resolve the problem of how to select the law governing interstate and international transactions.

Disagreeing with Currie on various specifics, most modern U.S. conflicts writers are nevertheless convinced that choice-of-law problems call for a process of construction and interpretation, which would deduce the spatial purport of rules of decision from

^{1.} Concerning this reorientation of American conflicts law, see generally FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 92-128 (1993).

See id. at 98-103, 131-39.

^{3.} RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

^{4.} See Patrick J. Borchers, The Choice-of-Law Revolution: An Empirical Study, 49 WASH. & LEE. L. REV. 357, 370-73 (1992).

^{5.} See Stewart E. Sterk, The Marginal Relevance of Choice of Law Theory, 142 U. PA. L. REV. 949, 956 (1994).

^{6.} Arthur T. von Mehren, Recent Trends in Choice-of-Law Methodology, 60 CORNELL L. REV. 927, 933 (1975).

^{7.} See Herma Hill Kay, A Defense of Currie's Governmental Interest Analysis, 215 RECUEIL DES COURS 9, 104-05, 108-16 (1989-III); Bruce Posnak, Choice of Law—Interest Analysis: They Still Don't Get It, 40 WAYNE L. REV. 1121, 1122-23, 1130-31 (1994).

their underlying policies and from the interests states are said to have in the vindication of these policies.⁸ By now, the classical multilateralist approach that Joseph Beale⁹ advocated and codified in the First Restatement¹⁰ is largely considered passé, the detritus of an earlier formalistic and unenlightened era.¹¹

II. MULTILATERALIST AND UNILATERALIST APPROACHES: BIRDS OF A FEATHER

The scholars' jubilation about the progress in conflict of laws theory from a mechanical approach to an instrumental one tends to obscure an important truth, namely that Beale and Currie are, in a sense, birds of a feather. Although they differ in a variety of ways, the starting point of reasoning for both multilateralists and unilateralists is the assumption that the notion of sovereignty is fundamental to the law of multistate transactions. 12 To be sure. multilateralists do not look at sovereignty in the same way as The vested rights doctrine, which Beale unilateralists. embraced,13 was invented to deal with the question—so puzzling to legal positivists-why a court, sworn to uphold the forum's laws and constitution, may apply foreign law. This dubious doctrine simply skirts the question by asserting that courts do not really apply foreign law but merely enforce rights that previously vested in some alien territory.14

Whereas the vested rights proponents looked at sovereignty as an obstacle to be overcome, Currie purported to derive solutions to choice-of-law problems by deferring to governmental prerogatives; that is, by enforcing laws in accordance with the sovereign's presumed intentions. Anthropomorphizing and psychoanalyzing states to divine their desires, he set out to

^{8.} See, e.g., ROBERT A. SEDLER, ACROSS STATE LINES 37-38 (1989); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 281-84 (3d ed. 1986).

^{9.} See 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1967-75 (1935).

^{10.} RESTATEMENT OF CONFLICT OF LAWS (1934).

^{11.} See, e.g., WEINTRAUB, supra note 8, at 2-4, 280-81, 326-27; Posnak, supra note 7, at 1161-64.

^{12.} Compare 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 6, 16, 43, 53, 60 (1935) with Brainerd Currie, Selected Essays on the Conflict of LAWS 123, 124, 138, 178-79, 182, 190 (1963). See JUENGER, supra note 1, at 159-60.

^{13.} See 3 BEALE, supra note 9, at 1974.

^{14.} See 1 BEALE, supra note 12, at 53.

^{15.} See CURRIE, supra note 12, at 53, 89, 94, 112, 447, 489, 717 (attributing to states such human characteristics as selfishness and altruism).

^{16.} See, e.g., id. at 85, 445, 446, 704.

vindicate their governmental interests.¹⁷ His devotion to the sovereign's wishes, as well as his prescription to resolve "true conflicts" in the forum state's favor,¹⁸ illustrates that Currie's mind-set was even more scrupulously positivistic than Beale's framework. Indeed, that mind-set caused Currie to take extreme positions, such as calling judges "undemocratic" for adjudicating multistate disputes in the multilateralist tradition.¹⁹

The manifold differences between multilateralist and unilateralist thinking tend to distract attention from the basic assumption the two traditional schools of thought have in common: both postulate that transactions that cross territorial boundaries must be governed by the laws laid down by a state or nation; neither countenances legal rules that are not rooted in some sovereign's command. In other words, unilateralists and multilateralists concur in rejecting, with Justice Holmes, the idea of a "transcendental body of law outside of any particular State..." Like Holmes, they believe that "law in the sense in which courts speak of it today does not exist without some definite authority behind it" and that "the authority and only authority is the State..."

III. LEGAL POSITIVISM AND THE LEX MERCATORIA

The assumption that rules and institutions cannot be called "law" unless they emanate from a sovereign is, of course, thoroughly ahistoric. Long before Jean Bodin promoted the notion of sovereignty²³ and John Austin espoused legal positivism,²⁴ there was law. In dealing with the "international" transactions of yore, decision-makers relied on rules they thought to be transcendental in nature. Thus, to adjudicate the legal relationships with and between non-Romans, the praetor peregrinus developed a ius gentium of universal purport.²⁵ Similarly, medieval commercial tribunals applied a universal law

^{17.} See, e.g., id. at 81-82, 116, 189, 446, 525, 592, 704.

^{18.} See id. at 117-20 and passim.

^{19.} See id. at 124, 179, 182.

^{20.} Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

^{21.} Id.

^{22.} Id. at 535.

^{23.} See JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE (Scientia Aalen 1961) 9-11 (1576); PRESTON KING, THE IDEOLOGY OF ORDER 73-84, 126-57 (1974).

^{24.} See 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. 1885); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 5-7 (2d ed. 1980).

^{25.} See JUENGER, supra note 1, at 8-9.

merchant to deal with the legal problems caused by a burgeoning commerce that did not respect the borders drawn by feudal lords.²⁶ The English admiralty courts relied on the best available sources, be they domestic or foreign, in elaborating what was to become a worldwide maritime law.²⁷ In other words, the original approach to what are now considered choice-of-law problems was neither unilateralist nor multilateralist, but rather substantive in nature.

As nation-states emerged, however, the idea of a universal law collided head-on with notions of legal positivism, an ideology implicit in the national commercial law codifications that encroached upon the supranational lex mercatoria.²⁸ These notions became the nineteenth century's conventional wisdom.²⁹ However, even during the heyday of fervent nationalism, the Dutch scholar Josephus Jitta called for an overarching substantive law that, instead of subjecting international transactions to what he called the "conflicts guillotine,"³⁰ would free them from the vagaries of national legislation.

Josephus Jitta's call has since been echoed by a growing number of legal writers. Arguing that no domestic law is adequate to cope with the exigencies of international commerce, the Uruguayan conflicts scholar Quintín Alfonsín hypothesized an "international private law" of contracts.³¹ More recently, the French comparativist René David took the position that frequently "justice requires that there be different rules for internal and for international trade."³² He scathingly remarked:

[T]he lawyer's idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have very largely freed themselves from it, by means of standard contracts and arbitration, and states will be abandoning neither sovereignty nor prerogatives if they open their

^{26.} See id. at 16, 23-24.

^{27.} See id. at 23-24, 165.

^{28.} See LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 24-25 (1983).

^{29.} See MORTON A. KAPLAN & NICHOLAS DE B. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 66-67 (1961); Friedrich K. Juenger, Remarks, 79 PROC. AM. SOC'Y INT'L L. 353, 354 (1985).

^{30.} See DANIÈL JOSEPHUS JITTA, LA MÉTHODE DU DROIT INTERNATIONAL PRIVÉ 44 (1890). See also id. at 50, 132, 221.

^{31.} See Quintín Alfonsín, Teoría del Derecho Internacional Privado 46-47 (1955); Quintín Alfonsín, Régimen Internacional de los Contratos 24, 53, 61, 85-86 (1950).

^{32.} René David, The International Unification of Private Law, in 2 INT'L ENCYCLOPEDIA COMP. L., ch. 5, at 11 (1971).

eyes to reality and lend themselves to the reconstruction of international law. $^{\mathbf{33}}$

As David suggests, enterprises engaged in international business manage to keep commercial disputes out of the courts and beyond the reach of unsatisfactory local rules. Their practices impugn the postulate that there can be no law in this world other than that ordained by a sovereign.

IV. THE LAW ARBITRATORS APPLY

The business community's large-scale recourse to arbitration effectively takes international commercial disputes out of state and national courtrooms, which poses the question whether the applicable to these disputes should not also denationalized. As the United States Supreme Court stated, "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states."34 Arbitral panels—whose members hale from different countries and which sit in places that may have no contacts whatsoever with the cases they adjudicate-are not inclined to "look at the world through national glasses."35 Awareness of their role as international decision-makers is bound to affect the arbitrators' selection of the rules of decision they apply to the disputes that come before them.

From the arbitrators' vantage point, the positivistic arguments multilateralists and unilateralists alike have advanced against party autonomy, ³⁶ for instance, look ludicrous. After all, arbitrators owe their very jobs to the individuals or enterprises who appointed them. If private parties can select the decision-maker, how could that decision-maker question their power to specify the rules he is to apply to the controversy they submitted to him? And if participants in international commerce have the authority to stipulate the law they wish to govern in the event of arbitration, why should that authority be lacking if they submit their disputes to a court of law rather than a non-judicial panel? No argument founded on reason, as opposed to what parades as

^{33.} Id. at 212. See also Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 INT'L REV. L. & ECON. 215 (1994).

^{34.} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985).

^{35.} FELIX DASSER, INTERNATIONALE SCHIEDSGERICHTE UND LEX MERCATORIA 26 (1989).

^{36.} Compare 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1079-80 (1935) with Joseph W. Singer, Real Conflicts, 69 B.U. L. REV. 1, 75-76 (1989).

political science, can explain why party autonomy should be objectionable.

But what if the parties to an international transaction failed to avail themselves of their power to stipulate the applicable law and there is no positive international body of rules, such as the International Sale of Goods Convention, to govern the dispute? Obviously, arbitral panels enjoy ample discretion to pick and choose appropriate rules of decision.³⁷ Even if the arbitrators feel bound to apply some positive choice-of-law rules—presumably not those of the lex fori, for there really is no "forum state"—the proper law approach that prevails in many parts³⁸ is sufficiently pliable and result-oriented to permit them to select any one of the laws with which the transaction they adjudicate has some Moreover, provisions such as the second plausible contact. sentence of Article 13(3) of the International Chamber of Commerce Arbitration Rules further broaden this discretionary margin by allowing arbitrators to pick whatever choice-of-law rule they wish.39

Other enactments go even farther. For example, the French Civil Procedure Code provides as follows:

The arbitrator shall decide the dispute in accordance with the rules of law the parties have chosen; in the absence of such a choice, in accordance with those which he considers appropriate. He shall, in all cases, take into account commercial customs.⁴⁰

This provision, and similar ones in the Mexican Commercial Code⁴¹ and in the second sentence of Article 29(1) of the American Arbitration Association's International Arbitration Rules, confers upon arbitrators the widest possible discretion. It

37. See David, supra note 32, at 64. David asks:

How do arbitrators decide in fact? It is difficult to say. Few awards are published, and, moreover, arbitrators avoid taking up positions that would be likely, in the present state of opinion, to result in their award being invalidated or to jeopardize its execution. Prudence requires them to refrain from saying plainly that they consider themselves free from such or such a national system of law.

Id.

^{38.} See, e.g., Convention on the Law Applicable to Contractual Obligations, opened for signature, June 19, 1980, art. 4(1), 1980 O.J. (L 266) 1, 2 (application of the law with which the contract is "most closely connected"); Swiss Bundesgesetz über das Internationale Privatrecht [Federal Statute on Private International Law] art. 117(1), 1988 I Bundesblatt [BB1] 5 translated in 37 AM. J. COMP. L. 193, 223 (1989) (same).

^{39.} See also UNCITRAL Arbitration Rules, art. 33(1), second sentence; UNCITRAL Model Law on International Commercial Arbitration, art. 26(2).

^{40.} C. PR. CIV. art. 1496 (author's translation).

^{41.} Cód. Com. art 1445(2).

enables them to choose the applicable law directly, without the pretext of resorting to some choice-of-law rule, in order to end up with the rules of decision they like. Provisions of this kind⁴² would seem to authorize arbitrators to choose rules of decision that are not part of any positive legal system, such as the UNIDROIT Principles of International Commercial Contracts.⁴³ In fact, reported cases show that even without the benefit of such enabling rules or statutes, arbitral panels have based awards on the *lex mercatoria*, and such awards have been judicially enforced.⁴⁴

V. CUSTOM AND PRIVATE CODIFICATIONS

International arbitral practices are not the only factor contributing to the evolution of a new law merchant. Customs developed in international trade and standard terms or clauses—such as the Incoterms⁴⁵—found in international contracts promote uniform practices that tend to solidify into law. Indeed, the process of codifying these practices has already begun.⁴⁶ By now, thirty-five countries have ratified the Vienna Convention on the International Sale of Goods.⁴⁷ Last year an even more ambitious effort came to fruition: the International Institute for the Unification of Private Law (UNIDROIT) completed the monumental task of drafting a set of "Principles of

^{42.} For arbitration rules that authorize the application of non-national law, see DASSER, supra note 35, at 132-35.

^{43.} INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES].

^{44.} See, e.g., Judgment of Oct. 22, 1991 (Companía Valenciana de Cementos Portland SA v. Sté. Primary Coal, Inc.), Cass. civ. 1re, 1991 Bull. Civ. I. No. 1354; Judgment of Dec. 9, 1981 (Banque du Proche-Orient v. Société Fougerolle) Cass. civ. 2e, 1983 D.S. Jur. 235 (decided pursuant to law in effect before the enactment of C. Pr. Civ. art. 1496 (France)); Judgment of Nov. 18, 1982 (Norsolor), 1984 Y.B. COM. ARB. 161 (Austria); Ole Lando, The Lex Mercatoria in International Commercial Arbitration, 34 INT'L & COMP. L.Q. 747, 747-8, 756-61 (1985).

^{45.} See FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 172-74 (1992).

^{46.} See Arthur Rosett, Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law, 40 AM. J. COMP. L. 683 (1992) (discussing various ways of giving the lex mercatoria tangible form).

^{47.} 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).

International Commercial Contracts."⁴⁸ This transnational contracts restatement can be expected to command an intellectual authority that vastly exceeds its ostensibly modest purpose of providing a stop-gap law obligatory only upon acceptance by the parties or legislatures.⁴⁹

Perhaps the most striking example of a body of rules created autonomously by merchants that binds world trade more tightly than any statute could is the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP). This private endeavor has guided domestic legislative pens. It has prompted the adoption of non-uniform versions of Article 5 of the Uniform Commercial Code in several states, and it informs the endeavors of those who are currently revising this Article. As Professor James J. White stated, "If one adopts Justice Holmes' definition of law—what influences courts—... the UCP are clearly law." His observation not only

49. The Preamble to the UNIDROIT Principles provides as follows:

These principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by "general principles of law," the "lex mercatoria" or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

UNIDROIT PRINCIPLES, supra note 43, at 1.

- 50. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 500, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993). See generally MATTI KURKELA, LETTERS OF CREDIT UNDER INTERNATIONAL TRADE LAW: UCC, UCP AND LAW MERCHANT (1985).
- 51. See Christopher Leon, Letters of Credit: A Primer, 45 MD. L. REV. 432, 439-40 (1986).
- 52. See James G. Barnes, Defining Good Faith Letter of Credit Practices, 28 LOY. L.A. L. REV. 101, 102 (1994); Donald J. Rapson, Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations, 28 LOY. L.A. L. REV. 249, 270 (1994).
- 53. James J. White (unpublished manuscript); see Alaska Textile Co. v. Chase Manhattan Bank, N.A., 982 F.2d 813, 816-17, 822 & n.4 (2d Cir. 1992); KURKELA, supra note 50, at 15.

^{48.} UNIDROIT PRINCIPLES, supra note 43. See MICHAEL JOACHIM BONNELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (1994); Joseph M. Perillo, UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review, 63 FORDHAM L. REV. 281 (1994); Eason-Weinmann Colloquium on International and Comparative Law, 3 Tul. J. INT'L & COMP. L. 45 (1995).

illustrates the assumption of normative power by private groups, but also tellingly reveals an inconsistency in Holmes' reasoning.

The exercise of lawmaking power by private interests is of course at odds with the conventional wisdom, which is rooted in Austinian notions of positivism. Not surprisingly, the clash of international practice with a firmly held dogma has fascinated many legal writers, especially European authors.⁵⁴ But while numerous books and articles dealing with the newly emerging law merchant have been published, the subject is rarely discussed in U.S. conflicts literature. Although the very existence of such a supranational body of law is still in doubt.55 one should expect that teachers in this field would at least consider-if only to reject—this possible alternative to the traditional approaches they Yet, with a few exceptions, 56 U.S. conflicts scholars—who, one should think, ought to be well equipped to deal with the subject of international transactions—tend to avoid it. One cannot help but wonder whether their neglect reflects a lack of interest or whether it is instinctive, or perhaps even deliberate.

^{54.} For a helpful overview and a guide through the massive literature on point, see DE LY, supra note 45, at 209-54. European scholars are of course not the only ones to discuss the phenomenon. See, e.g., OKEZIE CHUKWUMERIJE, INTERNATIONAL COMMERCIAL ARBITRATION (1994); HORACIO A. GRIGERA NAON, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1992); Ranee K.L. Panjabi, Economic Globalization: The Challenge for Arbitrators, 28 VAND. J. TRANSNAT'L L. 173 (1995) (review essay); Ruben Santos Belandro, La Lex Mercatoria en el Corazon de la Nueva Normativa en Materia de Contratación Internacional, 1995 REVISTA DE DERECHO COMERCIAL Y DE LA EMPRESA (Nos. 61-62) 37 (Uru.).

^{55.} For references to the *lex mercatoria*'s critics, see DE LY, *supra* note 45, at 219-20 (England); *id.* at 227-30 (France); *id.* at 231 (Switzerland); *id.* at 236-37 (Germany); *id.* at 239-40 (The Netherlands); *id.* at 242-45 (Belgium).

^{56.} Only two U.S. conflicts teachers contributed to an Eason-Weinmann Colloquium on the subject. See Friedrich K. Juenger, The Lex Mercatoria and the Conflict of Laws, in Lex Mercatoria and And Arbitration 213 (Thomas E. Carbonneau ed. 1990); Andreas F. Lowenfeld, Lex Mercatoria: An Arbitrator's View, in Lex Mercatoria And Arbitration, supra, at 37. The most recent discussions in U.S. publications are found in a book and an article by non-experts and in a student note. See UGO DRAETTA ET AL., BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS: AN INTRODUCTION TO LEX MERCATORIA (1992); John A. Spanogle, Jr., The Arrival of International Private Law, 25 GEO. WASH. J. INT'L L. & ECON. 477 (1991); Karyn S. Weinberg, Note, Equity in International Arbitration: How Fair is "Fair"?, 12 B.U. INT'L L.J. 227 (1994). See also Peter Winship, Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant, 26 INT'L LAW. 850 (1992) (book review).

VI. THE NEW LAW MERCHANT: THREAT AND PROMISE

There are, of course, good reasons for the conflicts teachers' reluctance to discuss the topic. The emergence of a supranational law undermines the very foundations on which their doctrines rest—the positivist notions Beale and Currie shared with Justice Holmes.⁵⁷ Preoccupied with the idea of sovereignty, U.S. traditionalists find it difficult enough to accept the principle of party autonomy,58 even though it is recognized by most advanced legal systems.⁵⁹ Those who question the parties' freedom to choose the law governing their contract are likely to feel even more uncomfortable about the emergence of rules that owe their existence to the realities of an international marketplace, rather than a sovereign's fiat. Such a law is inexplicable in their terms of reference; its "brooding omnipresence" of must be anathema to those who believe that the raison d'état must control international as well as purely domestic transactions. Interest analysts, in particular, ought to feel uneasy, for what interests are left to analyze if those that states and nations supposedly harbor do not matter?

Worse yet, the *lex mercatoria* threatens the very existence of the conflict of laws because once supranational norms emerge, choice-of-law rules and principles become superfluous. In addition, the new law merchant poses a challenge by virtue of its qualitative superiority. Merchants are, of course, interested in the quality of the rules that govern their transactions, whereas unilateralists and multilateralists alike take the position that substantive considerations should play no role in the choice of the applicable law. Even if the emerging supranational rules were confined to commercial matters, 61 the internationalization of this vitally important field should grieve those about whom René David said:

^{57.} See supra notes 20-22 and accompanying text.

^{58.} See supra note 36 and accompanying text; see also Patrick J. Borchers, The Internationalization of Contractual Conflicts Law, 28 VAND. J. TRANSNAT'L L. 421 (1995).

^{59.} See JUENGER, supra note 1, at 55, 219.

^{60.} Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

^{61.} Concerning the prospects of a broader ius gentium, see C. WILFRED JENKS, A NEW WORLD OF LAW? 128 (1969); PHILIP C. JESSUP, TRANSNATIONAL LAW 106-07 (1956); Friedrich K. Juenger, Private International Law or International Private Law?, 5 KING'S COLLEGE L.J. 45 (1994); Luther L. McDougal III, "Private International Law": Ius Gentium Versus Choice of Law Rules or Approaches, 38 AM. J. COMP. L. 521 (1990).

[T]hey have the greatest difficulty in conceiving that the theory of conflict of laws might not be the only suitable method of solving the problems posed by international legal relations. They cling to this method, seeking to perpetuate its use even in cases where it is manifestly bad: they are "conflictualists" not true "internationalists."

Yet, whether conflicts scholars like it or not, cases and statutory authority support the existence of such a law merchant. To be sure, *Erie R.R. v. Tompkins*⁶³ overruled *Swift v. Tyson*,⁶⁴ the case in which Justice Story hypothesized the existence of a supranational commercial law.⁶⁵ However, like the report of Mark Twain's death, the story of the *lex mercatoria*'s demise is an exaggeration. Thus, the drafters of the Uniform Commercial Code proclaimed their work product to be a modern law merchant,⁶⁶ whose continued existence Section 1-103 specifically confirms. Of course, the very idea of a *lex mercatoria* carries with it an element of supranationality. As a North Dakota court explained more than seventy years ago, the law merchant is a

system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.⁶⁷

In The Bremen v. Zapata Off-Shore Co.,⁶⁸ the landmark Supreme Court decision that, acknowledging the principle of party autonomy, upheld the selection of a neutral (and therefore "disinterested") foreign forum, Chief Justice Burger referred to

^{62.} David, *supra* note 32, at 25. Concerning the difficulties choice-of-law rules pose for arbitrators, see Lando, *supra* note 44, at 754.

^{63. 304} U.S. 64 (1938). For a recent critique of this case, see Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79 (1993).

^{64. 41} U.S. (16 Pet.) 1 (1842).

^{65.} *Id.* at 19 (stating that "[t]he law respecting negotiable instruments may be truly declared . . . to be in great measure, not the law of a single country only, but of the commercial world").

^{66.} According to UCC § 1-105 comment 3, the UCC is a "restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries." Courts still refer to the law merchant to decide questions left open by the UCC. See, e.g., Pribus v. Bush, 173 Cal. Rptr. 747, 749 (1981).

^{67.} Bank of Conway v. Stary, 200 N.W. 505, 508 (1924). See also Alaska Textile Co. v. Chase Manhattan Bank, N.A., 982 F.2d 813, 816 (letters of credit governed by the lex mercatoria); U.C.C. § 1-105 cmt. 2 (1987); Lando, supra note 44, at 752.

^{68. 407} U.S. 1 (1972).

"ancient concepts of freedom of contract" and characterized the maritime towing contract at bar as a "freely negotiated private international commercial agreement." This language, as well as the Chief Justice's criticism of the Fifth Circuit Court of Appeals' insistence "on a parochial concept that all disputes must be resolved under our laws and in our courts," suggests the Court's awareness of the need for a separate set of rules to govern international, as opposed to purely domestic, transactions.

The same awareness informs United States treaty practice. By ratifying the Vienna Convention on the International Sale of Goods, the United States implicitly recognized the desirability of emancipating the rules governing transnational sales agreements from the vagaries of state laws. That very realization also inspired the choice-of-law rules for international contracts the United States negotiated last year with other members of the Organization of American States. Article 9 of the Inter-American Convention on the Law Applicable to International Contracts⁷² provides as follows:

If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.

The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.⁷³

VII. CONCLUSION

As is apparent, important international trends contradict the conventional conflicts law wisdom, which is rooted in the notion of sovereignty. These trends are of particular importance at a time when U.S. conflicts literature has become thoroughly insular because, as Max Rheinstein once predicted, the scholars' fixation on sovereignty and governmental interests has led us into a dead-

^{69.} Id. at 11.

^{70.} Id. at 16.

^{71.} Id. at 9.

^{72.} 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.

^{73.} Id. at 735. See Friedrich K. Juenger, The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons, 42 AM. J. COMP. L. 381, 391 (1994) (discussing the genesis and import of this provision).

end alley.⁷⁴ The current parochialism is all the more deplorable considering that, since Story's days, an urbane and comparativist stance characterized the U.S. conflict of laws. Even Joseph Beale, the First Restatement's much maligned reporter, who purported to speak only for the common law,⁷⁵ paid due attention to foreign developments.⁷⁶ However, when Currie dethroned Beale, most U.S. teachers abandoned the effort to offer their students a "window on the legal world."⁷⁷ Out of touch and out of tune with the rest of the globe, U.S. conflicts scholarship has become myopic; the task of informing students about what is going on outside the United States has fallen to those who teach international business transactions.

To be sure, playing the games that conflicts scholars have played throughout the ages offers much titillation. Speculative minds like to ponder such questions as whether statutes are real or personal, where rights vest or legal relationships sit, what policies a sovereign wishes to pursue and what his interests may be, or how one should deal with the dreaded *renvoi*, true conflicts, unprovided-for cases and similar figments of the legal imagination. Engrossed in such whimsy, scholars tend to forget the great wide world outside their studies; instead of observing important international phenomena, they dedicate themselves to such obsolete home-spun problems as guest statutes⁷⁸ and slavery cases.⁷⁹

From its invention in the Middle Ages, ⁸⁰ the conflict of laws has been encumbered with scholasticism, which may explain its imperviousness to common sense and substantive values. Preoccupied as they may be with playing mind games and having angels dance on the head of a pin, law teachers can, however, hardly afford to overlook the *lex mercatoria*, if only because law graduates are bound to encounter it in practice. To withhold from their students information about this burgeoning new field of law, and the possibility of a different—arguably more sensible—approach to the resolution of multistate problems comes close to educational

^{74.} Max Rheinstein, How to Review a Festschrift, 11 AM. J. COMP. L. 632, 633 (1962).

^{75.} See 1 BEALE, supra note 12, at 12, 51-52.

^{76.} See 3 BEALE, supra note 9, at 1879-1975. See also JOSEPH H. BEALE, BARTOLUS ON THE CONFLICT OF LAWS (1914).

^{77.} WILLIS L. M. REESE ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS 3 (9th ed. 1990).

^{78.} See ROGER C. CRAMTON ET AL., CONFLICT OF LAWS vi (5th ed. 1993).

^{79.} See Harold W. Horowitz, Choice-of-Law Decisions Involving Slavery: "Interest Analysis" in the Early Nineteenth Century, 17 UCLA L. REV. 587 (1987); Note, American Slavery and the Conflict of Laws, 71 COLUM. L. REV. 74 (1971).

^{80.} See JUENGER, supra note 1, at 10-16.

malpractice. At the very least, those who publish treatises and casebooks ought to refer their readers to the literature about the law merchant. Once the professors pay attention to this important phenomenon, conflicts scholarship may begin to breathe a saner and urbaner spirit. Heeding Yogi Berra's sage advice that "you can observe a lot just by watching" may save the field from the mortal danger of becoming irrelevant.⁸¹

^{81.} Concerning this danger, see Sterk, *supra* note 5, at 951-52, 987, 992, 1030-31.

