THE ARRIVAL OF INTERNATIONAL PRIVATE LAW

JOHN A. SPANOGLE, JR.*

Two articles in this issue concern two facets of a single problem. That problem is the decreasing utility of the ancient and hallowed distinction between "public international law" and "private international law." Both articles agree that the distinction is now obsolete as an analytical tool, and that lawyers in either field ignore developments in the other at their peril. Professor Ralph Steinhardt examines the potential inroads of traditional "public international law" doctrines on subject matters usually conceived as "private law."[1] The public/private distinction is not a major doctrinal force in domestic common law, and even civil law analysts are beginning to recognize its shortcomings. Because there are different doctrines from different traditions, this distinction between public and private international law is likely to continue to be used as a descriptive term, even as its analytic use evaporates.

This article focuses on a different defect in the traditional distinction. The current terminology is not sufficient even to describe the rich variety of substantive international treaties, uniform laws, model rules, restatements, and legal guides available. The term "private international law" has traditionally been used in civil law countries to refer only to conflicts of law issues. This article proposes an additional concept, that of "international private law," to refer to attempts to create uniform international substantive law in areas considered to be "private law" within

* Professor of Law, The George Washington University National Law Center. B.S.E. 1957, Princeton University; J.D. 1960, University of Chicago. The author was the Chief U.S. Delegate to the United Nations Commission on International Trade Law Working Groups on International Negotiable Instruments and International Credit Transfers from 1982 to 1988. The author's experience as Chief U.S. Delegate was particularly significant to the creation of this article. The author would like to thank Professors Vicki Beyer and Ross Buckley of the Law Faculty of Bond University in Australia for their many constructive suggestions during the drafting of this article. Of course, they are not liable for any errors, opinions or conclusions set forth in this article, which are solely the responsibility of the author.

1. Ralph G. Steinhardt, *The Privatization of Public International Law*, 25 GEO. WASH. J. INT'L L. & ECON. 523 (1992).

civil law regimes.[2] As such, it is offered as a descriptive term, not an analytic one, and with full appreciation of the general contemporary attack on the public/private distinction as an analytic tool. Complementing the ideas in Professor Steinhardt's article, this article examines the extent to which treaties, once thought to be the province only of "private international law," are now being used to deal with subject matter that was never within anyone's concept of public international law.

I. Introduction

Today, there is an explosive proliferation of attempts to unify and harmonize international private law through the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law in Rome (UNIDROIT or the Rome Institute), and the Hague Conference on Private International Law (Hague Conference), supplemented by the efforts of many regional groups such as the European Community (EC), the Organization of American States (OAS), and mercantile organizations including the International Chamber of Commerce (ICC) and the Comité Maritime Internationale (CMI). For those not familiar with the current landscape, it is useful to take a look at the agenda of the 1990 meeting of the U.S. Secretary of State's Advisory Committee on Private International Law.[3] The range of conventions, proposed conventions, and proposed uniform and model laws and rules considered during that one meeting shows the scope and breadth of current and future international private law. The subject matter of these conventions ranges from commercial law and contracts to family law, and from wills and trusts to civil procedure and arbitration.

The agenda items for that meeting included twenty-one different international conventions, restatements, model laws, and rules on a wide variety of subject matters prepared by four differ-

2. In this article, the term "international private law" is used deliberately to establish that the article is not just about the conflicts-of-law concepts of "private international law." Even though that term is now often used to refer more broadly to international business law concepts, it has lost much of its analytic content. In this article, "international private law," refers to attempts to harmonize and unify the substantive law of different states in those subject matter areas that civil law countries categorize as "private law," including not only contracts and other commercial law topics, but also family law, donative transfers, intellectual property rights, and civil procedure.

3. *See* U.S. Secretary of State's Advisory Committee on Private International Law, U.S. Dep't of State, L/PIL Doc. Ac. 44/1, Summary Minutes of the 43d Meeting (1990).

ent international organizations. Some of these laws are currently effective; some await implementing legislation; some are proposed; and some are only in the drafting stage. These laws represent only part of the current efforts to create an international private law. Items from UNCITRAL included two conventions: one on Contracts for the International Sale of Goods (CISG)[4] and a second on International Bills of Exchange and International Promissory Notes (CIBN).[5] Additional UNCITRAL items included the proposed Convention on the Liability of Operators of Transport Terminals in International Trade;[6] the draft Model Law on Government Procurement;[7] the draft Legal Guide for International Countertrade Contracts;[8] the proposed Uniform Law on International Bank Guarantees and Standby Letters of Credit;[9] and the proposed Model Rules on International Credit Transfers.[10] The United States ratified the CISG in 1986 and has signed the CIBN.

Items from UNIDROIT included conventions providing for a Uniform Law on the Form of an International Will;[11] on International Factoring;[12] on International Financial Leasing;[13] and the proposed Restatement of General Principles on International

4. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I (1980), 19 I.L.M. 671 (entered into force Jan. 1, 1988) [hereinafter CISG].

5. United Nations Convention on International Bills of Exchange and International Promissory Notes, *opened for signature* Dec. 9, 1988, 28 I.L.M. 176 [hereinafter CIBN].

6. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, *opened for signature* Apr. 19, 1991, 30 I.L.M. 1503.

7. Model Law on Government Procurement, *in Procurement: Report of the Secretary-General*, [1989] 20 Y.B. Int'l Trade L. Comm'n 116, U.N. Doc. A/CN.9/WG.V/WP.22.

8. Legal Guide for International Countertrade Contracts, *in International Countertrade: Draft Outline of the Possible Content and Structure of a Legal Guide on Drawing Up International Countertrade Contracts: Report of the Secretary-General*, [1989] 20 Y.B. Int'l Trade L. Comm'n, U.N. Doc. A/CN.9/322.

9. Uniform Law on International Bank Guarantees and Standby Letters of Credit, *in Report of the Working Group on International Contract Practices on the Work of its Fourteenth Session*, U.N. Commission on International Trade Law, 24th Sess., U.N. Doc. A/CN.9/342 (1990) [hereinafter Uniform Law on International Bank Guarantees and Standby Letters of Credit].

10. Model Law on International Credit Transfers, *in Report of the Working Group on International Payments*, U.N. Commission on International Trade Law, 21st Sess., U.N. Doc. A/CN.9/341, Annex (1990) [hereinafter Model Law on International Credit Transfers].

11. Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, 12 I.L.M. 1302. The U.S. Senate advised and consented to ratification of this convention on August 2, 1991. 131 CONG. REC. S12,131 (daily ed. Aug. 2, 1991).

12. UNIDROIT Convention on International Factoring, May 28, 1988, 27 I.L.M. 943. The United States has signed this convention. *Id.*

Commercial Contracts.[14] At the time of the 1990 meeting, the first of these conventions was then waiting for U.S. Senate action. The United States has signed the second and third conventions.

Items from the Hague Conference included conventions on the Taking of Evidence Abroad in Civil or Commercial Matters;[15] on the Law Applicable to Trusts;[16] on the Law Applicable to Succession to the Estates of Deceased Persons;[17] on the Civil Aspects of International Child Abduction;[18] and the proposed Convention on Inter-Country Adoption.[19] The United States has ratified the first of these conventions and the Child Abduction Convention (entered into force for the United States July 1, 1988).

Items from the OAS included the Inter-American conventions on the Taking of Evidence Abroad;[20] on the Return of Children;[21] on Family Support Obligations;[22] on Contracts for the International Carriage of Goods by Road;[23] and International Commercial Arbitration.[24]

This outburst in international private law is particularly marked by the growth in number and scope of international commercial law conventions. Most recently, the CISG entered into force on January 1, 1988, and has been ratified by thirty coun-

---

13. UNIDROIT Convention on International Financial Leasing, May 28, 1988, 27 I.L.M. 931. The United States has signed this convention. *Id.*

14. Restatement of General Principles on International Commercial Contracts, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, Study L-Doc. 40 Rev. 5 (1990) [hereinafter International Commercial Contracts].

15. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force for the United States Oct. 7, 1972).

16. Convention on the Law Applicable to Trusts and on Their Recognition, *opened for signature* Oct. 20, 1984, 23 I.L.M. 1389.

17. Convention on the Law Applicable to Succession to the Estates of Deceased Persons, *adopted* Oct. 20, 1988, 28 I.L.M. 150.

18. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 19 I.L.M. 1501.

19. *See* Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1456.

20. Inter-American Convention on the Taking of Evidence Abroad, Jan. 30, 1975, 14 I.L.M. 328.

21. Inter-American Convention on the International Return of Children, July 15, 1989, 29 I.L.M. 66.

22. Inter-American Convention on Support Obligations, July 15, 1989, 29 I.L.M. 75.

23. Inter-American Convention on Contracts for the International Carriage of Goods by Road, July 15, 1989, 29 I.L.M. 83.

24. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336.

tries, including the United States.[25] At least four more international commercial law conventions—on negotiable instruments, financial leasing, factoring, and prescription periods[26]—have been signed by the United States or will go forward to the White House for ratification and to the U.S. Senate for advice and consent to ratification or accession.[27] Other parts of international commercial law, such as the proposed Model Law on International Credit Transfers and the Uniform Law on Bank Guarantees and Standby Letters of Credit, were approached later and are presently in the discussion phase.

The total effect of these activities concerning international commercial law is the creation of the equivalent of the provisions of the Uniform Commercial Code (UCC) contained in articles 2, 2A, 3, and parts of 7 and 9.[28] The later UNCITRAL proposals would cover the subject matter of articles 4A[29] and 5 of the UCC.[30] In other words, soon there could be the functional international private law equivalent to the entire UCC, available to govern international commercial transactions.

Each product coming out of the international private law discussions has a similar format. For example, none of the conventions attempts to displace domestic law on domestic transactions,

---

25. *See* U.N. COMM'N ON INT'L TRADE, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991); HOUSTON P. LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATION COMMERCIAL LAW AND ARBITRATION 14 (1991).

26. *See supra* notes 5, 12, 13 and accompanying text; United Nations Convention on the Limitation Period in the International Sale of Goods, *opened for signature* June 14, 1974, U.N. Doc. A/CONF.63/15 (1974).

27. Announcement at a Meeting of the U.S. Secretary of State's Advisory Council on Private International Law, Washington, D.C. (Oct. 4, 1991).

These conventions include the CIBN, *supra* note 5, 28 I.L.M. 176; the UNIDROIT Convention on International Financial Leasing, *supra* note 13, 27 I.L.M. 931; the UNIDROIT Convention on International Factoring, *supra* note 12, 27 I.L.M. 943; and the Convention on the Limitation Period in the International Sale of Goods, *supra* note 26. A diplomatic conference in New York had adopted the final text of the last convention in 1974, but the 1980 diplomatic conference that adopted the CISG also adopted a protocol to the 1974 text to conform the provisions of the two conventions. Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex II (1980). Other parts of international commercial law, such as the proposed Model Law on International Credit Transfers, *supra* note 10, and the proposed Uniform Law on International Bank Guarantees and Standby Letters of Credit, *supra* note 9, are now only in the discussion phase.

28. U.C.C. arts. 2, 2A, 3, 7, 9 (1990).

29. *See* Model Law on International Credit Transfers, *supra* note 10.

30. *See* Uniform Law on International Bank Guarantees and Standby Letters of Credit, *supra* note 9.

but instead governs only transactions which are international.[31] Even for international transactions, the conventions do not propose mandatory law, but instead allow the parties to choose the applicable legal regime: either the convention or an applicable domestic law.[32] Thus, the conventions are nonthreatening and the parties may either "opt in" or "opt out" of domestic law. In addition, many of these conventions concern the subject matter contained in the UCC of the United States or are considered to be private law in a civil law system.[33]

It is no secret that throughout the first half of the twentieth century the United States did not participate in most of these efforts. However, beginning with the work of UNCITRAL, the United States has taken an active interest in such efforts, with a genuinely sympathetic attitude. This article seeks to analyze the processes involved in the formation of this new international private law and, in particular, to explore two ideas.

The first idea is to examine why Americans react favorably to the current process of unification and harmonization of international commercial law, including an analysis of how we see an analogy between these international efforts and the efforts during the past century of the National Conference of Commissioners on Uniform State Laws (Uniform Commissioners or NCCUSL) to unify and harmonize U.S. domestic private law.[34] Analogies can be made as to subject matter chosen, the drafting process, the enactment process, and the selection of drafting personnel.

---

31. The goals of these international conventions are to unify and harmonize the commercial laws of the different nations and legal systems. However, to date they have not sought to change the domestic commercial law of any State. Instead, they have sought to create a new set of rules, applicable only to international transactions. Thus, each convention requires proof of the "internationality" of the transaction before the convention can apply. *See, e.g.*, CISG, *supra* note 4, art. 1, 19 I.L.M. at 672 (noting that the CISG applies to transactions between different nations); CIBN, *supra* note 5, art. 2, 28 I.L.M. at 177 (defining international bills of exchange). Even proof of "internationality" may not be sufficient, and a connection between the transaction and at least one Contracting State may be required before it can be governed by one of these conventions. *See id.* Thus, the conventions currently adopted seek to provide "uniform law" only for international transactions.

32. *See, e.g.*, CISG, *supra* note 4, art. 6, 19 I.L.M. at 673 (permitting parties to exclude or vary the effect of the CISG); CIBN, *supra* note 5, art. 1, 28 I.L.M. at 177 (denoting the circumstances under which the CIBN applies).

33. *Compare* CISG, *supra* note 4, 19 I.L.M. 671 (covering contracts for the sale of goods in the international context) *with* U.C.C. art. 2 (1990) (covering contracts for the sale of goods in the United States).

34. *See infra* text accompanying notes 72-81.

There are also some differences which must be noted and analyzed. The paragraph above describes the sympathy of Americans toward the *process*, not necessarily toward the *product*. The second idea is to consider why the favorable reaction by Americans to the process which creates this private international law does not always carry over to their subsequent evaluation of the product—the resulting international private law conventions.[35] There are difficulties that can arise in obtaining U.S. approval or enactment of the products. These difficulties parallel those in a number of other countries.

Finally, this article will consider some of the implications, both good and bad, of this analogy between the U.S. experience under the Uniform Commissioners and the current international efforts.[36] There are great strengths in the U.S. process, but there also exist weaknesses. Further, both the strengths and the weaknesses can be either magnified or attenuated in the international context.

II. The Process

A. *Competing Global and Regional Strategies*

There are two competing strategies in the harmonization of international private law on a worldwide basis; the competition is between the "global" conventions proposed by UNIDROIT, UNCITRAL and the Hague Conference, and regional agreements. The organizations that create global conventions, and the goals of these organizations, were indicated in the introduction.[37] The regional agreements arise out of a different set of organizations, such as the EC and the OAS.[38] As is explained below, the goals of such regional conventions often spring from quite different motivations, but often produce agreements that concern the same subject matter as the global conventions.[39]

---

35. *See infra* text accompanying notes 101-137.
36. *See infra* text accompanying notes 138-146.
37. *See supra* text accompanying notes 3-33.
38. Examples of efforts by such organizations include the OAS-sponsored Inter-American Conferences on Private International Law held at Panama in 1975, Montevideo in 1979, La Paz in 1984, and Montevideo in 1989; these conferences are usually known respectively as CIDIP 1, 2, 3, and 4. These conferences set up regional choice-of-law conventions and Inter-American treaty law arising out of commercial, trade, and social development concerns.
39. *See, e.g.*, Inter-American Convention on Conflicts of Laws Concerning Checks, *opened for signature* May 8, 1979, 18 I.L.M. 1220; Inter-American Convention on Conflicts of Laws Concerning Commercial Companies, *opened for signature* May 8, 1979, 18 I.L.M. 1222; Inter-American Convention on Conflict of Laws Concerning Bills of Exchange,

Numerous countries have formed regional agreements, from the EC to the Canada-United States Free Trade Agreement (Canada-U.S. FTA).[40] Those agreements that are successful seem to follow a similar developmental pattern. The participating nations start by reducing or eliminating tariffs, then realize that that is not sufficient. Unfair trading practices are prohibited in one country but not in others, or governmental supports are available to an industry in one country but not in others. Thus, harmonization of antidumping and subsidy laws becomes important. Subsequently, it is recognized that capital can be raised in one country more easily than in another, or that warranty or consumer protection laws are stronger in one country than in another, or that certain types or combinations of services are available in only one country.

Each of these differences in domestic business law creates a potential "competitive advantage" for entrepreneurs in one country or another. The process of harmonization of such laws is the attempt to eliminate many differences, so that entrepreneurs in one country do not have too great a "competitive advantage" over those in any other country encompassed by the regional economic agreement. This process continues to expand until it encompasses almost every topic under the title "business law." The Directives considered necessary by the EC to achieve its 1992 regional integration are an example of how complex this process can be, and of how far it can develop.

At the other end of this regional development spectrum, the United States and Canada (and maybe Mexico) are just beginning to walk down this path. Perhaps the earliest test of such development under the Canada-U.S. FTA is the committee that is supposed to design a method of harmonizing unfair trade practices and subsidies under section 1907 of the Canada-U.S. FTA.[41] The work of that committee, however, seems to be stalled. Thus, it is clear that harmonization, even between two nations with similar legal systems, will be a long and involved process.[42]

Promissory Notes, and Invoices, Jan. 30, 1975, 14 I.L.M. 332; Inter-American Convention on Conflict of Laws Concerning Checks, Jan. 30, 1975, 14 I.L.M. 334.

40. Canada-United States Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., — U.S.T. —, 27 I.L.M. 293 (1988) [hereinafter Canada-U.S. FTA]. The Canada-U.S. FTA has been implemented in U.S. law. 19 U.S.C.A. § 2112 note (West Supp. 1991).

41. *See* Canada-U.S. FTA, *supra* note 40, art. 1907, 27 I.L.M. at 390.

42. New Zealand and Australia seem to have proceeded somewhat further toward harmonization of business laws than have the United States and Canada. These coun-

In most debates about the relative merits of "global" versus regional strategies for the harmonization of international private law, tactical considerations predominate over philosophical ones. The philosophical issue is usually easy to answer in the abstract: would it be better to have worldwide harmonization of private law; or is it preferable to have several competing regional commercial and other private law systems, each harmonized between individual states within a particular geographic region? The response of those who favor regional development *at the present time* is that regional harmonization is all that is possible, that it is preferable to no development at all in harmonization, and that it can lead to later "global" harmonization or unification.

Choosing between these two approaches to development of international private law is comparable to trying to determine whether a global or regional approach is better to harmonize international trade law. The General Agreement on Tariffs and Trade (GATT) Uruguay Round may succeed in keeping such trade laws focused on global multilateral trade. However, these GATT negotiations are so complex and intense that they may fail, creating multiple trading regions. Should reduction of international trade law friction be sought through the more difficult GATT approach or through the seemingly easy and feasible regional integration? If regional integration of trade laws is sought, it is on tactical grounds.

---

tries first entered into a New Zealand-Australia Free Trade Agreement (NAFTA) in 1966. New Zealand-Australia Free Trade Agreement, Aug. 31, 1965, N.Z.-Austl., 554 U.N.T.S. 169 (entered into force Jan. 1, 1966). More recently, they entered into the Closer Economic Relations Trade Agreement (CER). Closer Economic Relations Trade Agreement, *done* Mar. 28, 1983, Austl.-N.Z., 22 I.L.M. 948. In 1988 under CER, they entered into a number of protocols: (1) Protocol to CER on Acceleration of Free Trade in Goods, Aug. 18, 1988, Austl.-N.Z., 1988 Austl. T.S. No. 18 [hereinafter Goods Protocol]; (2) Protocol to CER on Trade in Services, Aug. 18, 1988, Austl.-N.Z., 1988 Austl. T.S. No. 20 [hereinafter Services Protocol]; and (3) Memorandum of Understanding on Harmonization of Business Law [hereinafter MOU], *reprinted in* John H. Farrar, *Harmonization of Business Law Between Australia and New Zealand*, 19 VICTORIA U. WELLINGTON L. REV. 435 (1989).

The 1988 Goods Protocol seems to eliminate all antidumping actions concerning sales of goods between New Zealand and Australia but does not deal with subsidies. *See* Goods Protocol, *supra*, art. 4. The 1988 Services Protocol attempts to deal with export and other subsidies concerning the support of service industries in each country and attempts to prevent use of monopoly profits in one country to underwrite predatory pricing in another country. *See* Services Protocol, *supra*, arts. 11, 12. The MOU indicates that antidumping actions can now be eliminated because of "significant" harmonization on restrictive trade practices. It seeks further harmonization in several fields, including registration of charges on companies, consumer protection and consumer credit laws, and sales of goods. *See* MOU, *supra* , *reprinted in* Farrar, *supra*, at 442.

There is no certain answer to the tactical problems raised by the advocates of regional harmonization of international private law. However, the success of the CISG and other effective global conventions is an indication that the worldwide approach to harmonization may not be as impossible as it is sometimes represented. Even with all its difficulties, this global approach will continue to be pursued, and further examination of the process of creating uniform international private law will concentrate on the global approach. Further, it is quite likely that a successful law-drafting process will have similar attributes, whether it arises under a global strategy or a regional one.

B. *Approaches to Harmonization of International Private Law*

There are several possible ways to harmonize international private law.[43] First, all States of the world might adopt a uniform substantive law for a particular subject matter, either for application only to international transactions or to both domestic and international transactions. Second, these same States might adopt uniform choice-of-law rules, thereby assuring parties that one national domestic law will govern regardless of the forum location in which the dispute is considered. Third, courts and arbitral tribunals might recognize and enforce a supranational "law merchant" (sometimes referred to as *lex mercatoria*) incorporating principles and rules of private law tailored for international trade. Finally, international traders themselves might develop standard form contracts or general conditions for incorporation into their agreements. These techniques are not necessarily mutually exclusive or incompatible with each other. International organizations concerned with harmonization of international private law, however, usually specialize in only a few of these techniques.

1. Uniform Substantive Law

UNIDROIT and UNCITRAL tend to specialize in drafting uniform substantive laws. For example, in the area of international sales law, UNIDROIT began work in 1929 on preparation of uniform substantive legal rules to govern international sales. After a lengthy debate, UNIDROIT restricted the proposed unification

43. For further discussion of the harmonization of international private law, see Peter Winship & John A. Spanogle, Transnational Sales Contracts: Course Materials (1991) (unpublished manuscript, on file with *The George Washington Journal of International Law and Economics*).

to a law governing only international sales, rather than attempting to apply its proposed law to both domestic and international sales. A 1964 diplomatic conference at the Hague used this work to promulgate two international conventions: the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[44] UNCITRAL built upon the foundation of these 1964 conventions by creating a 1978 proposed convention on international sales but added many basic common law concepts to the earlier UNIDROIT attempts.[45] This UNCITRAL proposed draft was, in turn, adopted with very little change in 1980 by a diplomatic conference in Vienna as the CISG.[46]

Regional efforts to unify sales law have also been successful. Early in this century, the Scandinavian countries adopted a uniform sales law, and they recently amended their regional law to conform with the sales law, but not the contract law, of the CISG.[47] While it was still effective, the Council for Mutual Economic Assistance (CMEA) adopted the General Conditions of Delivery of Goods between Organizations of the Member Countries of the CMEA to govern contracts between agencies of member socialist States.[48]

There are two primary disadvantages to this approach that uses

---

44. Convention Relating to a Uniform Law on the International Sale of Goods, Aug. 18, 1972, 834 U.N.T.S. 107 [hereinafter ULIS]; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Aug. 23, 1972, 834 U.N.T.S. 169 [hereinafter ULF]. The following States are parties to these conventions: Belgium, Gambia, Israel, The Netherlands, San Marino, and the United Kingdom (Italy and the former Federal Republic of Germany were parties to the conventions but denounced them when they ratified the CISG). *See* ULIS, *supra*, 834 U.N.T.S. at 109; ULF, *supra*, 834 U.N.T.S. at 171. These conventions and their appended uniform laws deal respectively with the substantive rights and obligations of parties to international sales contracts and with the formation of such contracts.

45. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 1, 5 (2d ed. 1991); C.M. BIANCA & M.J. BOUELL, COMMENTARY ON THE INTERNATIONAL SALES LAW—THE 1980 VIENNA SALES CONVENTION (Dott A. Guiffrè ed., 1987).

46. *See* HONNOLD, *supra* note 45, at 5. For the final version, see CISG, *supra* note 4, 19 I.L.M. 671.

47. *See* Swedish Act of June 20, 1905, Relating to the Purchase and Exchange of Goods, *translated in* 1961 UNIDROIT Unification of Law Y.B. 203. For a discussion on the revision of domestic sales laws in light of the CISG, see Leif Sevón, *The New Scandinavian Codification on the Sale of Goods and the 1980 Convention on Contracts for the International Sale of Goods*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 343, 349-57 (Peter Schlechtriem ed., 1987).

48. General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, Jan. 1, 1969, *reprinted in* 1

international substantive law to achieve uniformity and harmonization. One disadvantage is the length of time that is required to reach the compromises necessary to draft such substantive law, especially if the law spans different legal cultures. For example, CISG took twelve years, from 1968 to 1980, to develop within UNCITRAL,[49] and those developments rested on the foundation of twenty-two years of work by UNIDROIT in formulating ULIS and ULF.[50] The CIBN, with no such foundation available, took nineteen years, from 1968 to 1987, to develop.[51] Such a lengthy process can be discouraging, not only to the participants in an ongoing project, but also to those who make the determination whether to imitate such a process.

The second disadvantage of this approach that uses international substantive law is the perceived quality of the resulting product. The production of such substantive law, especially if it covers different legal cultures, requires an infinite number of compromises. Some compromises involve taking half a loaf from one legal culture and giving only half a loaf to another. Both cultures can easily perceive the result as a "less preferable" provision, and therefore "lacking in quality" in relation to the domestic law of each. This article contends, however, that such perceptions are not always correct, as will be discussed in detail below.[52]

2. Uniform Choice-of-Law Rules

In contrast to a focus on uniform substantive law, the Hague Conference, in the past, has tended to specialize in uniform choice-of-law rules. In the same subject matter area of international sales, the Hague Conference began work in the late 1920s on a proposal to unify choice-of-law rules for international sales. These efforts led to both a 1955 convention,[53] which had only limited success, and the 1986 Convention on the Law Applicable

---

REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 72 (United Nations ed., 1971).

49. *See* HONNOLD, *supra* note 45, at 5.

50. *See supra* text accompanying notes 43-44.

51. Gerold Hermann, *Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes*, 10 U. PA. J. INT'L BUS. L. 517, 518 (1988).

52. *See infra* text accompanying notes 112-133.

53. Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 149. Although adopted in 1951 at the Seventh Session of the Hague Conference on Private International Law, the Convention was first signed in 1955 and therefore bears that official date. The following States are parties to this convention:

to Contracts for the International Sale of Goods, which will probably never enter into force.[54] A more successful example of a choice-of-law treaty is the regional EC Convention on the Law Applicable to Contractual Obligations.[55]

Unlike the conventions produced by UNIDROIT and UNCITRAL, many of the Hague conventions are not designed to produce their own substantive rules. Instead, they are designed *only* to determine conflicts-of-law issues. Thus, instead of stating a specific substantive rule of law to apply to a particular aspect of international transactions, this style of convention determines that the substantive law of a particular state will apply to that particular aspect of the international transaction.

For example, in an international business transaction between the United States and Brazil, a choice-of-law rule may be fine, provided that: (a) an attorney or a business person outside Brazil can find the Brazilian statute; (b) they are able to read it; and (c) their interpretation and understanding of it is approximately the same as that of a Brazilian. If, for example, a multinational transaction runs from the United States to Brazil to Argentina, the understanding of the Brazilian law by a party in the United States must be approximately the same as that of the Argentinean. There seem to be some limitations on this approach, and they should be considered very carefully. Although a convention based on this approach eliminates one aspect of the legal uncertainty of the trans-border transaction, it leaves other aspects very uncertain. The major difficulties in determining the rights of the parties have not been solved, and harmonization can be obtained only by a return to the drafting exercise.

Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden, and Switzerland. *See id.*

54. Convention on the Law Applicable to Contracts for the International Sale of Goods, Oct. 30, 1985, 24 I.L.M. 1575 [hereinafter 1986 Sales Convention]. The Convention was adopted at the 1985 extraordinary session of the Hague Conference; however, the Convention was signed in 1986 and therefore bears the later date. *See id.*; *see also* Ole Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, *in* 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 60 (Bernhard Aubin et al. eds., 1987) (reviewing the scope of the 1986 Sales Convention); Campbell McLachlan, *The New Hague Sales Convention and the Limits of the Choice of Law Process*, 102 LAW Q. REV. 591 (1986) (arguing that conflict-of-law rules must respond to an international context); Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487 (1988) (exploring the evolution of the CISG and other uniform laws on the sale of goods).

55. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, *reprinted in* Council Directive 80/984, 1980 O.J. (L 266) 1. The Convention entered into force April 1, 1991, following ratification by the United Kingdom.

3. *Lex Mercatoria*

A very different approach has arisen out of articles by European legal writers during the past thirty years. These writers have expressed great interest in the development of what they describe as a new "law merchant" or *lex mercatoria*.[56] Relying especially on evidence in arbitral awards that arbitrators look to general principles of law for the resolution of contract disputes, these writers argue that there is now a body of supranational legal principles and rules that govern international contracts.[57] Relying on this background, UNIDROIT has worked on General Principles for International Commercial Contracts,[58] which, although not in the form of an international convention, might serve as the basis of a supranational restatement of the *lex mercatoria*.

On the other hand, it is equally arguable that the preferable basis for any *lex mercatoria* is now the CISG, which has been drafted by UNCITRAL, a United Nations Commission whose deliberations are open to all Member States, adopted by a widely-attended diplomatic conference, and ratified or acceded to by over thirty states.[59] One source of *lex mercatoria* arises from the work of scholars in the field; the other derives from accredited representatives of sovereign states. To date, the provisions of the CISG and the General Principles for International Commercial Contracts are usually similar, but that may not continue. Thus, one major problem with the *lex mercatoria* approach is that there may be competing foundations for such an international law merchant, resulting in a lack of harmony.

4. Standard Form Contracts

One other approach to harmonization of international sales law is the use of standard contracts and general conditions. In

56. *See* LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 1 (1983); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984); Berthold Goldman, *Lex Mercatoria*, 3 F. INT'L 1 (1983); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985).

57. *See, e.g.*, Clive M. Schmitthoff, *The Codification of the Law of International Trade*, 1985 J. BUS. L. 34 (discussing whether codification of international private law should occur); Gerald T. McLaughlin et al., *Symposium: The Codification of International Commercial Law: Toward a New Law Merchant*, 15 BROOK. J. INT'L L. 1 (1989) (providing an overview of the codification process, the CISG, and other efforts related to the development of a new law merchant); *supra* note 55.

58. International Commercial Contracts, *supra* note 14.

59. *See supra* note 4 and accompanying text.

many lines of international business, the active traders have developed standard contracts or conditions to govern all sales within that line of business. Those standard conditions are then used by most traders who enter into sales of such goods. The Grain and Feed Trade Association, for example, has developed such standard contracts, and they are widely used in the sale abroad of North American grain.[60] Some trades have developed usages of trade that can be codified and expressly incorporated in sales contracts, but the usages of other trades are not expressed so formally, even though they are still recognized by the parties.[61]

Governments often do not have any role in the development and enforcement of these standard contracts, except by making their courts available for the enforcement of contracts or arbitral awards.[62] Thus, these standard contracts are not drafted for the purpose of providing an entire legal regime, but only to resolve those issues that have arisen in practice within a given trade or were within the contemplation of the drafters. Further, those who are active in the drafting process often tend to represent only one side of a transaction. Even if both sides of a transaction are represented, other more general interests of society as a whole may simply be overlooked.

One example of these disadvantages is the ICC's Uniform Cus-

---

60. *See* Contract for Canadian and United States of America Grain in Bulk, No. 30, *reprinted in* 1 ANDREAS F. LOWENFELD, INTERNATIONAL PRIVATE TRADE DS-30 (rev. 2d ed. 1988); *see also* ALBERT SLABOTZKY, GRAIN CONTRACTS AND ARBITRATION FOR SHIPMENTS FROM THE UNITED STATES AND CANADA 1, 9 (1984) (noting that the contracts provided by the Grain and Feed Trade Association are the worldwide standard).

61. Other well-known examples of standard clauses include the ICC's Uniform Customs and Practice for Documentary Credits (UCP), ICC Publ. No. 400 (1983), and Incoterms, ICC Publ. No. 460 (1990), and the CMI's Rules for Electronic Bills of Lading (1990). For an interesting study of usages and standard terms in the international oil trade, see TRAKMAN, *supra* note 56, at 45-60 (assessing the interdependence between commercial practice and commercial law in multinational oil transactions).

62. International organizations have attempted to develop this approach. In the 1950s, the United Nations Economic Commission for Europe prepared a great number of standard form contracts and general conditions for particular types of sales or for particular industries. *See* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR EXPORT No. 574, *reprinted in* LOWENFELD, *supra* note 60, at DS-53; Peter Benjamin, *The ECE General Conditions of Sale and Standard Forms of Contract*, 1961 J. BUS. L. 119.

After its creation in 1966, UNCITRAL also studied ways to encourage general conditions of sale and standard contracts. *See Report of the Secretary-General: The Feasibility of Developing General Conditions of Sale Embracing a Wide Scope of Commodities*, [1974] 4 Y.B. Int'l Trade L. Comm'n 80, U.N. Doc. A/CN.9/78.

toms and Practice for Documentary Credits (UCP).[63] The UCP is invariably incorporated into international letters of credit, often through clauses which refer to them as "governing law." However, it is not "law"[64] and does not purport to set forth a complete legal regime.[65] Instead, the UCP is a set of carefully drafted trade customs, reduced to writing, which can be, and often are, incorporated by reference as contract clauses in letters of credit. As such, a committee of bankers and bank lawyers drafted the UCP to resolve issues which arise between them clearly and fairly. However, bank customers did not have the same representation in the drafting process, so less attention could be paid to their legitimate interests, and resolution of bank-customer issues may not be as clear or as fair.

Thus, when cases arose involving fraud on a bank customer in a letter of credit transaction, the English courts found that the UCP had no provisions to deal with this issue.[66] The courts could have found that the omission was deliberate and that the parties by incorporating the UCP had agreed that fraud did not affect the rights of any party to the letter of credit.[67] Instead, the

63. The UCP was first drafted and adopted by the ICC in 1930 and regularly amended thereafter. The current revision is the 1983 revision. *See* JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT 1, 4-22 (2d ed. 1991). That version is itself under examination with a view toward further revision. *See infra* note 69 and accompanying text.

64. *See* DOLAN, *supra* note 63, at 4-22 to 4-23. However, the UCP may be law in New York State, where the state legislature, at the behest of the banks and bar, enacted a nonuniform amendment to article 5 of the UCC. N.Y. [U.C.C.] LAW § 5-102(4) (McKinney 1991). The statute states that "[u]nless otherwise agreed, this Article 5 does not apply to a letter of credit if by its terms or by agreement . . . [the letter of credit] is subject in whole or in part to the [UCP]." *Id.* Alabama, Arizona, and Missouri have similar nonuniform amendments to the UCC. *See* ALA. CODE § 7-5-102(4) (1984); ARIZ. REV. STAT. ANN. § 47-5102[D] (1988); MO. ANN. STAT. § 400.5-102(4) (Vernon 1991). Arguably, the UCP provisions were enacted as "law" through this legislative process, but a sounder analysis is that this legislation still only recognizes the parties' power to vary the discretionary provisions of the UCC by contract, and that the applicable law becomes the pre-UCC New York case law. In any event, it shows that sophisticated bankers and knowledgeable counsel can become confused by the power of written trade usages.

65. For an elaborate example of the inability of the UCP to provide a complete legal regime, see RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 156 (2d ed. 1991) (exploring the UCP's lack of basic rules on contract formation, excuse for mistake, authority of agents, and liability for inadvertent errors).

66. *See* United City Merchants (Investments) Ltd. v. Royal Bank of Canada, 2 All E.R. 720 (C.A. 1982); Edward Owen Eng'g Ltd. v. Barclays Bank Int'l Ltd., 1 All E.R. 976 (C.A. 1977); Discount Records Ltd. v. Barclays Bank Ltd., 1 All E.R. 1071 (Ch. 1974).

67. It is possible that the ICC drafters believed that they could prevent use of the fraud doctrine by omission. The omission could not have been completely inadvertent

courts' analyses identified the omission as a point not likely to be covered in an industry-drafted trade usage, and therefore consulted the actual underlying legal regime to determine whether fraud defenses were available to the contracting parties.[68]

The current draft of the UCP is under consideration for revision, and there is a possibility that it may be redrafted to expressly exclude the fraud defense.[69] Even if this approach is attempted, the courts have ample authority to invalidate an attempted waiver of tort defenses through contract clauses.[70] Such an additional series of analytical steps would once again show the weakness of relying on standardized contracts and general conditions—their provisions are not entirely reliable, and may be upset by concepts in the underlying legal regime.

In analyzing the four different approaches to harmonization of international private law, it is clear that the greatest potential benefits are available from use of international uniform substan-

---

because in 1983 the drafters were aware of the fraud provision in section 5-114 of the UCC and of U.S. cases using that fraud provision. *See, e.g.*, United Bank Ltd. v. Cambridge Sporting Goods Corp., 360 N.E.2d 943, 947-49 (N.Y. App. Div. 1976) (discussing "fraud in the transaction" in the context of both section 5-114 of the UCC and the UCP).

68. The English courts did this without any statutory provisions to assist them. *See United City Merchants (Investments) Ltd.*, 2 All E.R. at 721-22; *Edward Owen Eng'g Ltd.*, 1 All E.R. at 976; *Discount Records Ltd.*, 1 All E.R. at 1071.

69. All of the rules in the letter of credit area are under reconsideration. The rules are being reconsidered primarily because of the creation of the standby letter of credit and attempts to apply the current rules to standbys. These attempts often create inappropriate results, thereby creating the pressure for reconsideration. The ICC has another committee currently redrafting the 1983 edition of the UCP. Further, UNCITRAL has a Working Group considering a uniform law on guarantees and standby letters of credit. *Report of the Working Group on International Contract Principles on the Work of its Thirteenth Session*, U.N. Commission on International Trade Law, 23d Sess., U.N. Doc. A/CN.9/330 (1990). The Uniform Commissioners have also appointed a committee to redraft article 5 of the UCC, which concerns letters of credit. Although these groups have some common members and track the others' work, they may not create the same solutions to the known problems because they represent very different interests. One should not expect major changes in the rules governing documentary letters of credit or the basic rules for standbys, but the UCC and UCP will now be expressly designed to cover them.

70. *See, e.g.*, Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964) (holding that a retail car dealer could not disclaim tort liability via its disclaimer of warranty); Girard v. Anderson, 257 N.W.2d 400, 401-02 (Iowa 1934) (holding invalid a clause in a conditional sales contract purporting to authorize a seller's entry into the property to repossess); Alger v. Abele Tractor & Equip. Co., 460 N.Y.S.2d 202, 203 (N.Y. App. Div. 1983) (holding that a disclaimer of warranty does not disclaim tort liability); Hileman v. Harter Bank & Trust Co., 186 N.E.2d 853, 854-55 (Ohio 1962) (holding invalid a clause in a mortgage permitting the mortgagee to take possession of property by force, upon default of the mortgagor); RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965) (noting that courts have used a warranty theory of strict liability).

tive law. Both international choice-of-law conventions and standardized contracts are subject to the vagaries and interpretation of the underlying legal regimes. On the other hand, *lex mercatoria* is subject to ambiguities, not only within its own provisions, but also as to its fundamental sources and foundation. Only international conventions on uniform substantive law can provide the requisite certainty as to the provisions and legal regime.

However, such substantive international conventions are also subject to the greatest risks. Their development requires an enormous investment in time and talent, a significant delay between recognition of need and delivery of a final product, a significant risk of nonadoption after development, and a risk that the provisions developed may not be the best available for the international community. Even after they are drafted and enter into force, their provisions may be subjected to nonuniform interpretation by courts having different legal conditions.[71] The remainder of this article will attempt to evaluate these risks to determine whether they are so great that this uniform substantive law approach should be abandoned.

C. *Drafting and Enactment of International Conventions on Substantive Law*

1. The UCC Drafting Process

The people of the United States usually react favorably to the UNCITRAL and UNIDROIT processes for creating international private law because these processes are remarkably similar to the process used in the United States by the Uniform Commissioners to create and enact the UCC and other uniform laws.[72] For

71. *See infra* note 140 and accompanying text.

72. See the Uniform Laws Annotated for a full list of uniform laws that the Uniform Commissioners have adopted and the states that have enacted each uniform law. *See, e.g.*, U.C.C., 1 U.L.A. 1-2 (1989) (listing the jurisdictions that have adopted the UCC).

There were, and still are, two principal routes used to obtain enactment of uniform rules within the United States. One is through the enactment of a federal statute which would preempt all state law on the subject. However, that would increase the power of the federal government, both in the area of the statute, and generally, *vis á vis* the state. The second route is through cooperation between the states—drafting legislation which is widely, politically acceptable, and then enacting it on a state-by-state basis from coast to coast. This was the method chosen for unification in the commercial and many other civil law areas.

In the United States, the basic principle is that commercial law is state law, even though there are some exceptions to this basic principle. Thus, there is not *one* U.S. jurisdiction for the creation of domestic commercial law, but *fifty* different jurisdictions, one for each state, and each is *capable* of creating its own distinct commercial law. If this

example, the NCCUSL drafting is done by attorneys who are primarily technicians and not professional politicians. Their goal is to draft a document that is workable and based on practical solutions to perceived commercial problems and not derived solely from basic theories or legal doctrines.

The process of enacting international conventions is also similar to that used by the Uniform Commissioners. The Uniform Commissioners took the UCC to each individual state legislature for state-by-state enactment, not to the federal Congress. Likewise, the delegates to UNCITRAL took the CISG to their States for State-by-State ratification, not to a supranational body. They will pursue equivalent strategies for other UNCITRAL and UNIDROIT conventions.

To accomplish a drafting process that is acceptable for State-by-State adoption, a group of skilled draftsmen is needed which is politically sensitive, very flexible, and not necessarily tied to the law of their own individual States. It is difficult for government officials, executive or legislative, elected or appointed, to participate in drafting new legislation with its many compromises without feeling that their governments are somewhat obligated to support the final product.

Thus, in the United States in 1891, when the state governors decided to create the NCCUSL, they created a group in which each state would be represented by three *private* persons, whom the states appointed.[73] These state representatives are appointed

---

statement appears farfetched, it is significant to consider, for example, how different the basic jurisprudence of Louisiana is from that of New York.

At one time there was some advocacy of federal enactment of the UCC. *See* Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100 (1951). The U.S. Congress did enact the UCC for the District of Columbia, but not otherwise. Act of Dec. 30, 1963, Pub. L. No. 88-243, 77 Stat. 631 (current version at D.C. CODE ANN. §§ 28:1-101 to 28:11-108 (1991)).

73. Not only do the states have the capacity to go their separate ways in developing a distinct commercial law, but also they used that capacity during most of the nineteenth century. Thus, by the end of the nineteenth century, U.S. commercial law rules and concepts diverged widely. In part, this was a divergence in case law decisions, because, for example, New York court decisions are not binding precedent on Texas courts. New York decisions may be persuasive, but on many arguable issues there are always persuasive precedents on both sides of the issue. However, not all of the divergence was due to conflicting case law decisions. By 1890, every state in the United States had at least one statute on negotiable instruments, and they too all differed. In other words, there was no uniformity, or even harmonization.

A similar, but less diverse, situation still exists today in the U.S. law of contracts. Professor Willem C. Vis, who taught in law schools in The Netherlands for many years before he began teaching at Pace University Law School in the United States, notes that teaching a contracts course covering only domestic U.S. contracts law is the equivalent

as "wise men," without instructions from their appointing state authority, and they are allowed to use their own best judgment in drafting uniform legislation. Because they are private persons serving as volunteers without instructions, they are not authorized to commit their state to any action.

When the Uniform Commissioners have completed the drafting of a proposed statute, the political persons, the legislators, and representatives of the executive branch of each individual state can make an independent political decision whether to accept and enact the proposed statute. In sum, it was an ingenious device to establish a group of private persons operating without official instructions from their states to serve the quasi-official functions of draftsmen and negotiators of a proposed text of a statute, which would later be enacted without significant change in all fifty states.

The history of the drafting efforts of the Uniform Commissioners in U.S. domestic commercial law, ending with their drafting of the UCC and its subsequent enactment in all states except Louisiana,[74] is quite remarkable.[75] However, this effort was not an overnight success. Beginning in 1896 and continuing during the first half of this century, the Uniform Commissioners had drafted a whole set of commercial statutes before they undertook the drafting of the UCC.[76] Some of these uniform commercial laws met with wide success, while others were not successful. The Uniform Negotiable Instruments Law (NIL), adopted in 1896, was enacted in all states by 1924; the Uniform Sales Act (USA), adopted in 1906, was enacted in thirty-seven states, but

---

of teaching a comparative contracts law course in most European law schools, since there is about the same amount and depth of diversity in the contract law concepts in the fifty U.S. states as there are in the contract law concepts of different civil law jurisdictions. He believes that this comparison is still valid today, after several decades of effort by commentators to improve uniformity through the various editions of the restatements and by bringing concepts over from the UCC into general contract law.

74. Louisiana has enacted some of the nine articles of the UCC.

75. There had been previous U.S. efforts at unification. For example, Mr. Field had drafted a comprehensive codification of state law, and seven states had enacted comprehensive codification (but they were not uniform); it took an enormous amount of effort to codify all the areas covered by state law.

76. Within the NCCUSL, there was agreement that, if unification were to develop, it would develop within a narrow subject matter area—and it would have to be in an area where the business community desired uniformity enough to surrender some of the comfort and the privileges granted by their current local law. For that reason, it was also clear that the law to be unified could not be a law that regulated mercantile conduct but would concern the subject matter which would come under the civil or commercial code of a civil law system.

many of the enactments were very late.[77] However, the Uniform Bills of Lading Act (UBLA), adopted in 1909, the Uniform Stock Transfer Act (USTA), adopted in 1909, and the Uniform Conditional Sales Act (UCSA), adopted in 1918, did not find similar success in obtaining widespread enactment.[78]

The UCC, therefore, was the second try of the Uniform Commissioners.[79] There is general agreement that the prior experience of the Uniform Commissioners in drafting these early statutes, such as the NIL and USA, was a necessary prerequisite to their later success with the UCC. Likewise, it is not a coincidence that their greatest successes in the first round of uniform commercial laws came in those areas where there was previous British experience in drafting statutes—the British Bills of Exchange Act of 1882[80] and the Sale of Goods Act of 1893.[81]

2. Current Development in International Commercial Law

How does all of this compare to the current activities in international commercial law? Currently, many of the same condi-

77. *See* ROBERT BRAUCHER & ARTHUR SUTHERLAND, COMMERCIAL TRANSACTIONS, SELECTED STATUTES x-xi (4th ed. 1968).

78. *See id.*

79. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). The UCC was an attempt to package the USA, NIL, Uniform Warehouse Receipts Act, UBLA, UCSA, and the Uniform Trust Receipts Act together in one comprehensive commercial law code. *Id.* at 2. In addition, the UCC introduced a "new idea" (actually very rare in the law) in article 9. It introduced the idea of a security interest as a "unifying concept" for chattel mortgages, conditional sales, trust receipts, accounts receivable financing, pledges, and factoring. *See* U.C.C. art. 9 (1990). Actually, when the Uniform Commissioners adopted use of the security interest concept, they were very fearful of it, and such unifying concepts had not been a major part of their endeavors. However, it is probable that the security interest concept was the most powerful force behind the widespread acceptance and enactment of the UCC.

80. Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61 (Eng.).

81. Sale of Goods Act, 1893, 56 & 57 Vict., ch. 71 (Eng.). All of the U.S. efforts were different from the British Acts, however. The British Acts were intended to be a restatement of the current law of commercial paper or sales in England, within a unitary hierarchical system. But a single restatement could not be achieved in the United States, with its fifty jurisdictions of equal stature. Instead, even if the NIL was primarily a restatement of current law, many splits of authority had to be reviewed and resolved. Further, the Uniform Commissioners often found that the best resolution of a split of authority on one issue affected other issues and required a reevaluation of the current law. After a certain amount of experience, the Uniform Commissioners believed that resolutions designed to create practical solutions to marketplace problems were more successful than theoretical solutions to doctrinal problems. *See* Schnader, *supra* note 79, at 4. This has been their hallmark approach in commercial law statutes. After drafting a certain number of statutes, the NCCUSL had developed an expertise in draftsmanship, and legislatures could generally rely on the technical quality of their products.

tions exist in relation to a global market that the United States had in relation to a national market in 1890. There are many different legal concepts in commercial law among many different legal jurisdictions. This diversity arises not only out of case law concepts, but also, and primarily, out of different statutory approaches to the issues. In addition, approximately two decades have passed since people in the United States began to realize that we are entering a global market.[82] As more and more of our business community participates in this global market, the participants encounter the problems caused by the different legal systems. As a result, these problems are now becoming a significant source of inefficiencies. The potential application of different legal systems, with resulting different obligations on the participants in a transaction, requires either an expensive study of the substance of each legal system or a conscious taking of unknown legal risks. It is still not known, however, whether the inefficiencies are perceived as enough of a cost to induce the business community in each nation (including the United States) to give up the special privileges and the comfort of the current familiarity of its local law.

The process adopted by UNCITRAL often commences with the convening of a "group of experts" which meets over a long period of time in a Study Group to do initial investigation of issues. Then, representatives of States meet in a Working Group to draft the proposed convention—again over a long period of time. The UNIDROIT process is similar, beginning with a Committee of Experts. The process employed by the Hague Conference works similarly, beginning with a Special Commission appointed to create the initial draft on a topic. Many, but not all, of these representatives are legal experts in the field concerned. In the Study and Working Groups, and in the Committees of Experts and Special Commissions, the individuals who represent individual States are primarily technicians and generally eschew

82. *See* DAVID HALBERSTAM, THE RECKONING 13 (1986). It is significant to contrast the current global situation to the U.S. market in 1890. Although some commerce in the United States has always been based on a national market, before our Civil War, commerce based on local markets was predominant. After our Civil War, with the advent of transcontinental railroad and telegraph, markets that had been primarily local gradually began to grow into regional, then national, markets. As long as markets were primarily local, the diversity of state commercial law was not particularly bothersome to the mercantile community. However, the development of regional and national markets exposed the differences in the state laws as a significant irritant in doing business, which the business community then sought to eliminate. These events set the stage for the unification and harmonization efforts of the Uniform Commissioners.

dialectic argument. The members of the drafting groups are usually specialists in the field; some are professors, some are civil servants, and some are bank attorneys or bankers. When the discussion is going well, it sounds like a good faculty meeting. When it is going poorly, it sounds like a bad faculty meeting.

The analytical and consensus-building process may be aided greatly by the fact that, by tradition, *no votes* are taken at UNCITRAL, which is quite different from the process of the Uniform Commissioners. All progress and all agreements are based on reaching a "consensus"—not unanimity, but close to it.[83] That is a second reason why "political," or dialectic, arguments are not made—they are counterproductive. Use of a debater's tactics to "win" a point will not help build a consensus, but instead is likely to make any opposition "dig in its heels." In order to make progress, one must either persuade others or arrange compromises with them. However, it must be realized that such a process takes an enormous amount of time.[84] Most delegates have enough flexibility under their general instructions to react to persuasive arguments contrary to their positions and to seek a resolution that accommodates the vital interests of all concerned.[85]

When these technical and legal experts have completed their

---

83. *See* Willem C. Vis, *Unification of the Law of Negotiable Instruments: The Legislative Process*, 27 AM. J. COMP. L. 507, 513 (1979).

UNCITRAL has 36 Member States. They include the five permanent members of the Security Council and 31 others selected on a regional basis. These 31 Member States represent all geographic regions and all economic and legal systems, including capitalist and socialist, developed and developing, common law, civil law, socialist law, and Moslem law. However, at any UNCITRAL meeting, there are far more than 36 delegations present and participating—usually there are around 50. In addition, any nation that is not a member and any international organization may participate as an "observer" and may have a full voice in the proceedings.

Because UNCITRAL does not take votes, but instead seeks "consensus," an observer with voice is a full participant. For example, from 1982 to 1988, Canada was "merely" an observer. However, the Canadian delegation has had at least as much impact on UNCITRAL Working Group deliberations as any other delegation.

84. For example, the CISG took 12 years to develop, and the CIBN took 19 years to develop. *See* HONNOLD, *supra* note 45, at 5; Hermann, *supra* note 51, at 518. Thus, a substantive law convention, if properly done, is not likely to be finalized at a single conference but is drafted, debated, and revised over a very long period. Compare the approach taken by the OAS at CIDIP 1, 2, 3, and 4. *See supra* note 38 and accompanying text.

85. The United States sometimes gives its delegation general instructions and sometimes gives its delegates the input from a broadly based Study Group. Before a UNCITRAL Working Group meeting, the Study Group will meet and react to prior work and foreseeable proposals. From such meetings, the delegate can get a "feeling" from the group of what are crucial provisions to be sought vigorously, and what are desirable, but not crucial, provisions.

work, the proposed draft convention must then be considered by delegations including representatives of States who are more "political types;" these representatives are not necessarily elected representatives, but diplomats or other appointed persons who are not necessarily specialists in the field and are appointed to represent their governments. Final consideration by the organization of the proposed draft occurs either in a Plenary Session of UNCITRAL or a meeting of the governing council of UNIDROIT. The draft proposed by the international organization, such as UNCITRAL or UNIDROIT, or by a Special Commission of the Hague Conference, is then usually considered at a diplomatic conference where votes will be taken among the national delegations. Such conference may adopt the proposed convention, with or without amendment. Conventions adopted by the Hague Conference or one of its quadrennial sessions are adopted in that form and do not need separate consideration by another diplomatic conference.

After all of this drafting, and the adoption by an international organization and then a diplomatic conference, the proposed convention must still be ratified [enacted] by individual States, subject only to permitted reservations [amendments] only. Only after ratification or accession by the requisite minimum number of States specified in its final clauses, will the convention enter into force and become effective law for certain types of international transactions within the concepts of private international law or conflicts-of-law doctrines.

3. A Comparison of the Development of the UCC and the International Process

From this review of the processes used in the creation of international private law, it is apparent that those who would create a uniform substantive international private law have made several choices. Many of these choices are the same as those that the American states made in creating the NCCUSL. That conclusion explains why the United States looks upon the *process* as a familiar one and feels sympathetic toward its goals.

The choice of subject matter is the first example. In each convention, the subject matter is narrow and often directly concerns the mercantile community. Further, the subject matter is within the scope of what is termed "private law" within the civil law tradition. The initial projects of UNCITRAL concerned the same subject matter on which, initially, work was done by the Uniform

Commissioners;[86] for example, UNCITRAL's first projects dealt with sales of goods, commercial paper, and bills of lading.[87] UNIDROIT's contribution to the subject matter includes parts of secured financing.[88] Both the ICC and UNCITRAL are working on letters of credit.[89] After UNCITRAL had completed its work on sales, commercial paper, and bills of lading, it began to work on Model Rules on International Credit Transfers,[90] just as the Uniform Commissioners added new article 4A to the UCC after the original articles were completed and accepted. Use of all of this subject matter for the purpose of exploring unification seems familiar and comfortable to the U.S. attorney or legislator.

The second pertinent choice is the use by many nations of delegates who are often private persons appointed by governments, usually without specific detailed instruction by the government, and who therefore have flexibility in resolving issues and drafting.[91] There is no confusion that the delegates to UNCITRAL have any authority to commit their government to any action. Nor are these delegates usually under any obligation to defend their own national law or to ensure that the international convention under debate follows their own national law.[92]

The third choice concerns the length of time used to draft and redraft a convention. Anyone familiar with the NCCUSL is aware of the lengthy gestation period for most of the adopted uniform laws. Thus, the twelve years for development of the CISG and the nineteen years for CIBN may be sources of reassurance.[93]

Fourth, there are similarities in the timing between the initial

---

86. The subject matter first covered by the Uniform Commissioners was encompassed in the NIL, USA, and UBLA, and later in articles 2, 3, 5, 7, and 9 of the UCC. *See supra* text accompanying notes 75-78.

87. *See supra* text accompanying notes 4-5; United Nations Convention on the Limitation Period in the International Sale of Goods, *supra* note 26; United Nations Convention on the Carriage of Goods by Sea, Mar. 30, 1978, U.N. Doc. A/CONF.89/13, Annex I (1978), 17 I.L.M. 608 (not yet in force) [hereinafter Hamburg Rules].

88. *See* UNIDROIT Convention on International Factoring, *supra* note 12, 27 I.L.M. 943; UNIDROIT Convention on International Financial Leasing, *supra* note 13, 27 I.L.M. 931.

89. *See* Uniform Law on International Bank Guarantees and Standby Letters of Credit, *supra* note 9; *supra* note 69 and accompanying text.

90. *See* Model Law on International Credit Transfers, *supra* note 10.

91. *See supra* text accompanying notes 84-85.

92. This statement is subject to at least two qualifications. One relates to a proper concern by any delegate that the convention rules be compatible with his own legal regime; the other concerns the natural human preference for the familiar, especially the attorney's preference for the familiar details of his own law. For a discussion of these qualifications, see *infra* text accompanying notes 96-99.

93. *See supra* text accompanying notes 49-51.

work of the NCCUSL at the turn of the century and the current work of international organizations. The NIL was adopted in 1896, about two decades after the railroad and telegraph had begun to transform the United States into a truly national market.[94] Currently, two decades have passed since the onslaught of Japanese imported automobiles caused Americans to perceive the arrival of a global market.[95] There may be some reaction period necessary for commercial lawyers and their clients to begin to perceive the difficulties that arise from continuously dealing with different legal regimes. Alternatively, in the case of UNCITRAL, this reaction period simply may be the delay period underlying the drafting of a multilateral private law convention.

The final significant choice concerns the method used to accomplish enactment of the new international private law. None of this proposed international legislation attempts to use a supranational government to enact the unifying legislation created by these international organizations. The role of the United Nations or other international organizations is usually limited to technical assistance, such as drafting. Even when the United Nations has been the agency under whose auspices the convention has been adopted, its action has only opened the convention for signature and ratification by Member States.[96] In contrast, the participants in this process have chosen to pursue cooperation among nations in drafting proposed legislation and then to enact that legislation, through ratification of conventions, on a State-by-State basis. This State-by-State approach to enactment of uniform legislation on a global basis is analogous to the basic approach used by the NCCUSL in enacting uniform legislation on a nationwide basis in the United States; this similarity probably provides a great comfort factor for the U.S. attorney or legislator.

There are, however, some notable differences between the processes in the NCCUSL and in the international organizations. The international organizations encounter problems in drafting that the Uniform Commissioners never had to face. First, discussions and negotiations are carried on in two to six languages with simultaneous translation by interpreters who may not be lawyers. Second, the discussions and negotiations are carried on in a for-

94. *See supra* note 82 and accompanying text.

95. *See supra* text accompanying note 82.

96. *See, e.g.*, CIBN, *supra* note 5, 28 I.L.M. 176 (opening the CIBN for signature and calling on governments to become parties to the convention).

mal style, whereby each speaker is recognized by the chair and in the order in which they seek recognition.[97] An informal style of debate, which allows immediate confrontation and rebuttal, is not usually possible in this formal, multi-lingual format.

Third, the conceptual differences are much larger in any international context than the differences among states of the United States, with their common law backgrounds and capitalist, developed economies. Fourth, literal translations of "legal terms of art" can be misleading, and the translators (and many delegates) are not often aware of this.

The fifth difference, and one crucial weakness in the process of the international organizations, is the turnover of delegates. Many delegates to Study and Working Groups serve for many years, but many do not. This is in contrast to the Uniform Commissioners who are usually available for a long term and thereby gain expertise. Developing countries often cannot afford to maintain this continuity of representation, but many developed countries also send a new delegate to each meeting. Such States may send one person as their delegate one year, a second person to the next meeting, no one to the third meeting, and a third person a year later. Alternatively, a State may send a civil servant trained in the law, who is not an expert in the field, and induce reduced efforts by instructing him not to spend any working hours gaining expertise on the subject, even though many delegates in this position gain expertise on their own time.

This turnover of delegates and lack of continuity have at least three bad effects. First, there is no opportunity for expert analysis of how the domestic mercantile-legal system of the sporadically-represented State and the proposed international private law will fit together. If there are peculiar legal provisions or commercial practices in that State that might be helpful in dealing with a generic problem, they are not likely to come to light. More commonly, however, peculiar legal provisions or commercial practices of that State would not be compatible with the system being developed by an international body. Such problems can often be resolved by simple adjustments if raised early enough in the drafting process. Yet, the non-expert delegate is not likely to be aware of the peculiarities, and the first-time delegate is less able to raise the problem effectively.

97. *But see* John Honnold, *The United Nations Commission on International Trade Law*, 27 AM. J. COMP. L. 201, 210 (1979) (describing an earlier, informal UNCITRAL decision-making process).

The second problem of this high turnover concerns the ability of the delegates to approach the problems of uniformity and harmonization through an international perspective, rather than directly from a domestic law perspective. Almost all human beings, including delegates, have an affection and affinity for familiar ideas, including their own legal systems and jurisprudence. For example, at the initial meeting of a drafting session of an international organization, almost all delegates come with the idea that their law is good and should be adopted by everyone else. Thereafter, it takes another meeting or two, if the international group is fortunate, before the delegates realize that everyone else has the same belief, that other approaches have merit, and that compromise is needed if there is to be any agreement. Only then do they begin to look at the process as a group process and try to assist it. The State that routinely sends new delegates to each drafting session impedes the work of the international organization. Because their delegates never get beyond the first meeting reaction pattern, they rarely contribute to the process and often hinder discussion.

Finally, high delegate turnover results in a lack of a core of expertise from these sporadic delegates when the international private law convention is to be considered for ratification within the State that sent them. Thus, that State may not have any great understanding of the background problems, the different legal approaches currently in use, or how the convention structure operates and improves the status quo. In other words, the State will have no effective assistance in evaluating the convention; it is, therefore, more likely to take the easy route by simply ignoring it rather than ratifying it.

In one respect the task of the international organizations is easier than that of the Uniform Commissioners. This is because there are major differences between the goals of the international organizations and those of the Uniform Commissioners. The Uniform Commissioners do not seek merely to make uniform the law concerning interstate transactions; they seek to have their work products govern both interstate and intrastate transactions, unless preempted by federal legislation.[98] Thus, they almost always seek to disturb the status quo within one or more jurisdictions, and that is a politically difficult job. The international

98. *See* SELECTED COMMERCIAL STATUTES 18 (West Publishing Co. ed., 1991) (noting that "[u]niformity throughout American jurisdictions is one of the main objectives of the UCC").

organizations, on the other hand, seek a goal which is politically less difficult. They do not seek to disturb the status quo *where it is settled*—i.e., in the domestic transaction—but seek to provide a set of rules for international transactions only. In international transactions, the applicable law is neither clear nor settled because it is subject to the vagaries of private international law, with its differing and ambiguous concepts of choice-of-law rules.[99]

III. The Product

Although the people of the United States react favorably to the UNCITRAL and UNIDROIT processes for creating international private law, they are less likely to greet conventions, which are the product of these processes, with such enthusiasm.[100] At least three reasons explain the more muted reaction to the product. First, the substance is different from U.S. domestic law, and attorneys react emotionally to that difference. Second, the style of drafting is different from the style to which the Uniform Commissioners have accustomed the United States. Third, concern exists about the substantive law itself and the quality of the compromises struck in drafting the international private law conventions. This article maintains that the first two differences are a normal part of any legislative drafting process and should be, although are not always, expected. As to the third reason, a single article cannot offer an analysis of all provisions in all of the international private law conventions. This article will examine examples of the different ways in which compromises are struck during the drafting of such conventions.

A. *Reaction to Different Law*

One major source of the negative reaction to the product of the international private law process is the commonly-held belief that, "my State's law is the best that can be designed by the mind of man, and anything different from it is second-rate." As was

99. Compare, for example, the different results that would be obtained in a simple European-American transnational sale of goods: (1) from an American court using section 1-105 of the UCC, U.C.C. § 1-105 (1990); (2) from an American court using sections 6 and 188 of the Restatement (Second) of Conflicts Law (1971); and (3) from a German court using the EC Convention on the Law Applicable to Contractual Obligations, *supra* note 55, at 1.

100. This reduced enthusiasm has not, however, prevented ratification of international private law conventions by the United States. *See supra* text accompanying notes 4-24.

stated earlier, most delegates go to their first drafting session with this belief, and only gradually do most of them begin to understand the nature of the group processes and join them.[101] It may take several sessions before most delegates propose compromises for the purpose of trying to improve the joint effort, rather than to push that effort closer to the delegate's own domestic law. As a result, the delegate has been through a learning process and has adjusted his initial views to cooperate with the views of other delegates.

However, when the final, compromise product is brought home by the delegates, all the people at home who were not involved in this learning process look at the final product and say, "Good Grief! You sold us out!" They react this way because they still believe, as the delegates once did, that "my State's law is the best that can be designed by the minds of man, and anything different from it is second-rate." Further, it is difficult to recreate the learning process without the other delegates.

A recent example of this occurred when UNCITRAL considered model rules on international funds transfers. The Working Group looked at new article 4A of the UCC,[102] which concerns domestic funds transfers and was relevant to their project. However, the UNCITRAL delegates had different concerns and approaches to the problems of funds transfers and preferred to develop their own provisions. They were not willing to accept the law of any one jurisdiction, even as a foundation, without a *de novo* examination of the subject. The delegates made this decision even though article 4A of the UCC was, at that time, the only relevant statute on the subject matter that had been drafted, completed, and adopted by a national group as powerful as the Uniform Commissioners. The U.S. delegates, who had been involved in drafting article 4A of the UCC, persuaded and obtained amendments that they believed made the UNCITRAL draft and article 4A of the UCC relatively compatible. When a new draft covering such transfers came out and was read by non-delegates in the United States, these non-delegates said, "Good Grief! You sold us out!" They concentrated on the differences rather than the amendments or the similarities.

101. *See supra* text accompanying notes 86-90.
102. *See* U.C.C. art. 4A (1990).

B. *Different Styles of Drafting*

A second major source of the negative reaction concerns the difference between the use of language in the drafting styles of statutes in common law and civil law jurisdictions. The difference is easily perceived by comparing a statute enacted in a common law state with one enacted in a civil law state.[103] An overdramatized, but illustrative, comparison would be: the civil law product will be shorter and contain fewer definitions, more ambiguities that have been left for solution by judicial construction, and statements of general application which overlap and contain conflicts that have no formal resolution.[104] The common law product will begin with a multitude of formal definitions and then state a great number of long and detailed specific provisions including rules that are restricted so that there is no intentional conflict, although unintentional conflicts may remain.[105]

There are at least two underlying reasons for these differences: one conceptual and one arising out of the typical drafting process. Conceptually, the twentieth century statutes in both common law and civil law jurisdictions rest on a foundation of nineteenth century law. But the foundations are different, common law being composed of case law and civil law of a very general civil code. The civil code covers, from a modern perspective, very limited subject matter, and supplementation is expected. Case law, however, grows by analogy and is infinitely expansive as to subject matter.

When a twentieth century, or any other, statute is used to supplement common law case law, this addition is an alien growth on the foundation, and its "differentness" is expected to be emphasized. Thus, most statutes in a common law jurisdiction are drafted to stand alone. Such statutes can restate existing decisions, as far as the drafters understand them, or contradict them and even preempt future decisions; there is no need for them to

103. One of the most striking contrasts is a comparison of UCC article 3 with the Uniform Law on Bills of Exchange and Promissory Notes, 1934, 143 L.N.T.S. 275 [hereinafter Geneva ULB].

104. *See* Geneva ULB, *supra* note 103, 143 L.N.T.S. 275.

105. The type of error likely to arise in this common law style of drafting is exemplified by section 2-702(3) of the UCC as presented in the 1958 draft of the UCC. U.C.C. § 2-702(3) (1958). That version provided for reclamation of goods by the seller upon discovery of the buyer's insolvency, subject to the rights of other good faith purchasers or *lien creditors*. Thus, in some states, the seller's rights were subsidiary to those of lien creditors, and the right to reclamation was rendered "illusory." *See id.* § 2-702 edit. note. In 1966, the section was amended to remove the words lien creditor, although the problem was perceived much earlier.

"fit" the current case law doctrines. However, if statutes do contradict or even preempt case law doctrines, they must do so with exquisite clarity. In the past, any statute considered "in derogation of the common law" was construed "strictly." Thus, the statute drafters must specify those provisions that may contradict or modify case law concepts with so much clarity that the common law courts *cannot* "misconstrue" the intended result. Such a drafting technique requires concreteness of expression and great precision—which, in turn, requires great detail. On the other hand, the drafter has great flexibility, can easily use totally new concepts, and may seek the precise result desired.

The civil law statute, whether arising out of the French or German tradition, is expected to fit harmoniously with the foundation civil code and the other more basic codes. To be successful, it must not be alien to its foundation but must look like a new branch of the same tree—venturing into new areas, but utilizing the same methodology, and attempting to avoid any contradiction of well-settled rules.[106] Thus, it is always preferable to take a known concept from other subject matter areas and modify it to furnish basic provisions than to create a new concept that might conflict with prior accepted doctrine. Further, the style of the new statute will replicate that of the civil code, with concentration on general statements that overlap and with no formal resolution of the resulting conflicts. This system of drafting, using general statements of basic doctrines, allows courts to use the whole body of civil law to resolve clashes of competing interests.

This conceptual basis for different drafting styles is buttressed by the differences in the typical processes of drafting statutes practiced in the different types of jurisdictions. The common law "ideal"[107] is to sit two dozen attorneys around a table, each one representing a different set of interests, and have them negotiate until all conflicts are resolved. They are expected to do this on an issue-by-issue basis and to concentrate on what result is desired in practical problem situations which are likely to arise. All resulting compromise decisions should be spelled out in complete detail, leaving as little as possible to discretionary decision by the court.

---

106. Such avoidance can be a major undertaking especially when, as in the French civil code, there are pocket parts to the code provisions that include case reports.

107. These common law and civil law "ideals" have been deliberately overdramatized and are not necessarily accomplished in practice for either system, but they should help to illustrate the differences as to how drafters perceive that statutes should be drafted.

In contrast, the civil law ideal, again overdramatized, is for one most acclaimed professor of law to draft a set of general legal principles to govern the development of the law of the new subject matter. This should be done without receiving briefs or drafts from advocates representing any of the private interests that will be affected by the new statute. The primary concern is to ensure that the provisions of the statute are extensions of the doctrine of prior codes and that the statute provides general guidance to courts and laymen, not that it foresees and forestalls the machinations that might be practiced by the devious in actual commerce. Skillful interpretation by the courts, not always literal, of the entire body of codified law is expected to deal with such machinations.

The substantive international private law conventions produced by the international organizations are a compromise between these two drafting styles. The first draft, usually produced by the Secretariat, will often resemble the civil law drafting style, but with one significant difference. Such drafts are usually drafted with a concentration on what result is desired in practical problem situations that are likely to arise; that difference from civil law drafting practice will never be lost. Because the proposed convention will be expected to fit into the context of many, widely-varying legal regimes, extensions of current doctrines cannot be its primary concern. In fact, drafts of such conventions are more likely to adopt totally new doctrines and language to signify that their concepts are not derived from the doctrines of any particular legal system.[108] These conventions adopt new legal concepts, and the common law drafting style is initially more suited to handling the introduction of new doctrines.

The drafting process itself has the impact of pushing the drafting style of the conventions even further toward the common law standard of drafting. As the delegates debate the specific issues

108. For example, in article 79 of the CISG, the drafters deliberately used the requirement of "impediment beyond his control" for excuse of a failure to perform, rather than any of the known terminology, such as "frustration," *imprevision*, "failure of presupposed conditions," or "impracticable," in common usage in different domestic law provisions. *See* CISG, *supra* note 4, art. 79, 19 I.L.M. at 689-90; Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Nina M. Galston & Hans Smith eds., 1984); HONNOLD, *supra* note 45, at 430-42. Another example of this drafting technique is UNCITRAL's use of "protected holder" in article 29 of the CIBN, *supra* note 5, 28 I.L.M. at 187, rather than either the common law "holder in due course" or the civil law "holder." *See infra* note 116 and accompanying text.

raised by a provision, they will reach a series of compromises concerning them, each with a set of details.[109] These issues are normally debated in the context of developing a preferred result to a series of practical problem situations, so the details are set forth with clarity to reflect accurately the distinctions recognized in striking the compromises.[110] The addition of such details reflects the common law approach to drafting, setting forth determinations issue by issue and assuming that the statute must stand alone. Thus, the longer a convention is in the drafting process, the more its drafting style is likely to reflect common law techniques.[111]

C. *Quality of the Resulting Compromises*

What is the quality of the compromises produced by this process? As one would expect, they run the gamut. Many are uninspired, but serviceable, and a few are not as good as the current doctrine they would replace. However, many are necessary to persuade one legal regime or another to abandon obsolete concepts and be dragged into the twentieth century, while a few are inspired and make the resulting international private law provide a better resolution to a particular issue than any current domestic law.

One example of the "everybody gets half a loaf," straightforward compromise is the CISG provision on the revocability of unaccepted offers.[112] The common law approach provides that such offers are revocable at will, unless supported by consideration, such as through the use of an option.[113] On the other hand,

---

109. *See* Schnader, *supra* note 79, at 4-5.

110. *See id.*

111. An example of this effect can easily be seen by comparing the 1982 and 1988 drafts of CIBN. *See Report of the United Nations Commission on International Trade Law on the Work of its Fourteenth Session*, U.N. Commission on International Trade Law, 23d Sess., U.N. Doc. A/CN.9/211 (1982); CIBN, *supra* note 5, 28 I.L.M. 176.

It should be noted that the drafting style of many *modern* civil law statutes—especially in the fields of taxation and environmental law—more closely resembles its common law counterparts. However, these are not private law statutes, but public law, and therefore are drafted, at some point in the process, by representatives of different interests negotiating specific issues and striking compromises. These compromises, in turn, are presented through concrete and detailed language. This public law process indicates that statutes in civil law jurisdictions can and will be drafted with the detailed style of common law statutes if they are drafted by a group that acknowledges that it includes representatives of different competing interests.

112. *See* CISG, *supra* note 4, art. 16, 19 I.L.M. at 675.

113. *But see* U.C.C. § 2-205 (1990) (requiring both a signed writing and an assurance of nonrevocation but written expressly to overcome the common law doctrine).

German civil law does not permit such offers to be revoked at all, unless expressly stated to be revocable.[114] The CISG takes a position midway between these two principles, making such an offer revocable, unless "it indicates" that it is not revocable.[115] An example of a similar process and result from CIBN is the "protected holder," which has characteristics and protections that are half of the way between those of the common law "holder in due course" and the civil law "holder."[116] These compromises, while perhaps mechanical and uninspired, will work well and create no great surprises parallel to any of the domestic legal systems.

The more important "compromises" arise in situations where one legal system or the other was able to abandon obsolete doctrines to conform to those of the other system *and* promote commercial utility at the same time. In the CISG, for the delegates representing common law jurisdictions, those compromises certainly included the decision not to require "consideration" as a requisite to contract formation[117] and probably the abandonment

---

114. *See* 1 BUSINESS TRANSACTIONS IN GERMANY § 10.02 (Bernd Rüster ed., 1983).

115. CISG, *supra* note 4, art. 16, 19 I.L.M. at 675. The result is quite similar to section 2-205 of the UCC, U.C.C. § 2-205 (1990), but does not require a signed writing. A CISG offer can also become irrevocable through reasonable reliance by the offeree, which may introduce promissory estoppel concepts. CISG, *supra* note 4, art. 16(2)(b), 19 I.L.M. at 675.

116. The common law developed the concept of the "holder in due course," which is now enshrined in section 3-302 of the UCC, U.C.C. § 3-302 (1990); some of the special rights of the "holder in due course" are detailed in section 3-305. *Id.* § 3-305. The Geneva ULB system never adopted this person, but instead concentrated on "the holder," Geneva ULB, *supra* note 103, arts. 16, 17, 143 L.N.T.S. at 280-81, sometimes called a "lawful holder," but not more. The Geneva ULB "holder" actually receives greater protection in cutting off defenses of prior parties than does the UCC "holder in due course," and the Geneva ULB holder who "has knowingly acted to the detriment of the debtor" receives significantly greater protection from such defenses than does a UCC mere "holder." *See id.* art. 17, 143 L.N.T.S. at 281; U.C.C. § 3-306 (1990).

The UCC "holder in due course" is essentially a holder who is a bona fide purchaser for value without notice. The CIBN "protected holder" is essentially a purchaser without knowledge of a claim to, or defense upon, the instrument at the time of purchase. CIBN, *supra* note 5, art. 29, 28 I.L.M. at 187. This "protected holder" has more protection than the UCC "holder in due course," but less than the holder under the Geneva ULB. *See id.* art. 30, 28 I.L.M. at 188. Further, the unprotected "holder" under CIBN has greater protection than a UCC holder, but less than the Geneva ULB holder who "has knowingly acted to the detriment of the debtor." *See id.* art. 28, 28 I.L.M. at 186-87.

For an analysis of the different meanings attached to the phrase "knowingly acted to the detriment" in different Geneva jurisdictions, see Bruno H. Greene, *Personal Defenses under the Geneva Uniform Law on Bills of Exchange and Promissory Notes: A Comparison*, 46 MARQ. L. REV. 281 (1962-63).

117. *See* CISG, *supra* note 4, art. 23, 19 I.L.M. at 676. Although all students of com-

of the statute of frauds as well.[118] For the delegates representing civil law jurisdictions in the CISG, the ability to have valid "open price" sales contracts is a step forward,[119] as is the clear separation of passage of title and passage of risk of loss,[120] as well as the ability of a party to recover damages without proving "fault."[121] In CIBN, where the Geneva ULB[122] is more dated than UCC article 3, the ability to have negotiable installment notes and to use facsimile signatures are both major steps forward in making legitimate current international commercial practice.[123] These compromises allow one system or the other to leave obsolete doctrines behind for international transactions and develop needed, modern concepts.

---

mon law learn that contract formation requires offer, acceptance, and consideration, under civil law there is no such concept; consideration is not necessary for a valid contract to be formed. But consideration is rarely a problem in commercial contracts for the sale of goods between merchants. The CISG excludes sales to consumers, even if international. *Id.* art 2(a), 19 I.L.M. 672. Thus, the elimination was considered sound.

118. *Id.* art. 11, 19 I.L.M. at 674. *But see id.* arts. 12, 96, 19 I.L.M. at 674, 693-94 (permitting, in Contracting States with a statute of frauds, a declaration that such statute is applicable to contracts of sale in that State). Article 96 allows any State, whose laws require a contract to be in writing, to make a declaration by overriding provisions of articles 11 or 29 or part II of the CISG that allow otherwise. *Id.* art. 96, 19 I.L.M. at 693-94. Article 12 establishes that any provision of articles 11 or 29 or part II of the CISG that "allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing" does not apply when a declaration has been made under article 96. *Id.* art. 12, 19 I.L.M. at 674. The United States has not made this declaration.

119. *Id.* art. 14, 19 I.L.M. at 674-75. Article 14 requires an offer to be sufficiently definite, so that it "indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." *Id.* This provision is more restrictive than section 2-305 of the UCC, U.C.C. § 2-305 (1990), and was intended to be so. The CISG provision should be, however, broad enough to authorize most forms of flexible-pricing, even though many civil law systems do not recognize any such contracts. Open price contracts with clauses in which either the price follows an index or escalator clause or is set by a third party should be valid under the CISG. Article 55 of the CISG may seem to be helpful, by establishing a price for the contract in the absence of an express or implied provision, but it is available only if a contract is already "validly concluded." CISG, *supra* note 4, art. 55, 19 I.L.M. at 684.

120. Under CISG article 4(b), the effect of the contract and events thereunder on the title or ownership is left to local law. CISG, *supra* note 4, art. 4(b), 19 I.L.M. at 673. However, CISG article 67 does provide rules on risk of loss which are not title-dependent. *Id.* art. 67, 19 I.L.M. at 686-87. Thus, manipulation of title through negotiable bills of lading or other documents of title is irrelevant to transfer of risk of loss.

121. *Id.* arts. 74-78, 19 I.L.M. at 688-89. Both direct and consequential damages are recoverable with no prerequisite of any proof of "fault." *Id.*

122. *See* Geneva ULB, *supra* note 103, 143 L.N.T.S. 275.

123. As to installment notes, see *id.* arts. 33, 77, 143 L.N.T.S. at 285, 305; CIBN, *supra* note 5, art. 9(3)(c)-(d), 28 I.L.M. at 181. The CIBN defines signature to include a facsimile signature even though some European nations require an original handwritten signature for authentication. CIBN, *supra* note 5, art. 5(k), 28 I.L.M. at 179.

Sometimes a compromise cannot be reached, providing a result that is less useful than the law available under most domestic regimes. The CISG answer to "the battle of the forms" probably falls into this category.[124] Sometimes, however, the ambiguities in international private law merely reflect the imprecision of the underlying concepts in both civil and common law; this concept may well explain the CISG provisions on excuse for failure to perform.[125] More often, the failure to reach a compromise leads to the provision of alternatives to the commercial world. For example, an aggrieved party to an international sales contract can seek either specific performance as the primary remedy before a civil law court or damages as the primary remedy before a common law court.[126]

On some issues, this ability to provide alternatives permits the establishment of better provisions than those available under any one domestic legal regime. CIBN has provisions which allow a third party to a negotiable instrument to accept the liability of either a common law "guarantor" or a civil law "aval" by use of appropriate language.[127] There is commercial utility in the use

124. CISG, *supra* note 4, arts. 17-19, 19 I.L.M. at 675-76. "The battle of the forms" is the "term used to describe the effect of the multitude of forms used by buyers and sellers to accept and to confirm terms expressed in other forms." The CISG version may be one example of the conservative "lowest common denominator" approach, in which the only agreement that can be reached is one involving traditional 19th century principles. Most modern legal regimes have some provisions for dealing with "the battle of the forms." *See* U.C.C. § 2-207 (1990); 1 BUSINESS TRANSACTIONS IN GERMANY, *supra* note 114, § 10.02. However, these provisions vary so widely in their theoretical foundation that the drafters found no method of amalgamating them, and thus none of the new theories was incorporated into the CISG. The result was the retention of the "mirror image" and "last shot" doctrines with no amelioration.

125. CISG, *supra* note 4, art. 79, 19 I.L.M. at 689-90; *see supra* note 108 and accompanying text. As to the imprecision of the underlying concepts in current domestic and foreign law, see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 155-62 (3d ed. 1988); Michael G. Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551 (1980).

126. CISG article 46 gives an aggrieved buyer a right to specific performance unless he has sought an inconsistent remedy. CISG, *supra* note 4, art. 46, 19 I.L.M. at 682. However, CISG article 28 states that a court may provide an alternative remedy if it would not grant specific performance in a sales contract governed by its domestic law—i.e., a common law court. *See id.* art. 28, 19 I.L.M. at 677; U.C.C. § 2-716(1) (1990). It should be noted that, in the first instance, the aggrieved buyer has the choice of remedy even in civil law courts. Nothing in CISG article 46 compels a request for specific performance, and damages are often preferred where "cover" is easily available. *See* CISG, *supra* note 4, art. 46, 19 I.L.M. at 682.

127. CIBN, *supra* note 5, arts. 46, 47, 28 I.L.M. at 192-94. At common law, a "guarantor" only guarantees the creditworthiness of his principal and promises that payment will be made if due from his principal. If the principal can assert defenses against a holder, including an unauthorized signature, so can the guarantor. U.C.C. §§ 3-416, 3-

of each status, and there was no reason to prohibit the use of either one. The resulting provisions allow a wider range of options than is available under any current law. Perhaps most important, however, is the demonstration that the half a loaf mechanical compromise between systems is not used when there is commercial utility in arranging other options.

On other issues, the international organizations are able to use their result-oriented approach to present improvements over any current system, without involving compromises between legal systems. One example of this is the modern instrument denominated in units of account, payable in Special Drawing Rights (SDR) and European Currency Units (ECU), with a variable interest rate, such as interest at the London Interbank Offering Rate (LIBOR). Although many credit transactions included the use of pieces of paper which had such terms and looked like negotiable instruments, such instruments were not negotiable, until very recently, under any applicable law.[128] The drafters of CIBN realized that such instruments comprised a significant portion of the commercial paper outstanding in international commerce. They decided early to include those payable in units of account,[129] and later to include those with variable interest rates.[130] These steps were taken because the commercial necessity demanded it and not because any domestic legal system pro-

---

419 (1990). At civil law, a guarantor is called an "aval" or "avaliste" and takes on primary liability and cannot assert any defenses. The "avaliste" is bound to pay even if the principal did not sign, could not sign (capacity), or had no authority to sign, even if the "avaliste" signs before the principal. Geneva ULB, *supra* note 103, arts. 18, 32, 143 L.N.T.S. at 281, 285. Both of these types of guarantors have commercial utility, and there is no reason to prohibit the use of either one. Most importantly, there seems to be no commercial utility to the creation of a mechanical compromise, producing a UNCITRAL guarantor with some of the powers of an "aval" and some of the obligations of the common law guarantor. Instead, the parties may create either type of liability—common law, by using the word "guarantor," or civil law, by using the word "aval."

128. Promissory notes with variable interest rates were not considered to state a "sum certain" for payment and therefore were not negotiable under the statutes of any of the major legal systems. *See* Geneva ULB, *supra* note 103, art. 5, 143 L.N.T.S. at 277; U.C.C. § 3-106(1)(a) (1990); Northern Trust Co. v. E.T. Clancy Export Corp., 612 F. Supp. 712, 715 (N.D. Ill. 1985); Farmers Prod. Credit Ass'n v. Arena, 481 A.2d 1064, 1065 (Vt. 1984). The revised article 3, adopted by the Uniform Commissioners in 1990, does permit variable rate notes to be negotiable. U.C.C. § 3-112(b) (1990).

Section 1-201(24) of the UCC, which defines "money," previously included only currency authorized by a foreign government. *Id.* § 1-201(24). In 1990, the definition was revised to include "units of account." *See id.*; *infra* note 131 and accompanying text.

129. CIBN, *supra* note 5, art. 5(l), 28 I.L.M. at 179. This definition was adopted by 1982.

130. *Id.*, art. 8(6)-(7), 28 I.L.M. at 180. These provisions were added after 1982, but before the issuance of the revised UCC article 3 in 1980.

vided the impetus.[131]

A second example arises out of forged endorsements, in which CIBN allows endorsees and holders to acquire an instrument without concern for remote prior endorsers. In contrast to the Geneva ULB,[132] CIBN does require that the endorser or holder know the identity of any immediate endorser.[133] In contrast to the UCC, however, CIBN gives a cause of action to the person injured, which may be used directly against the person who took from the forger,[134] rather than the circuitous multiparty litigation imposed by the UCC.[135] Thus, by not following the doctrines of either the Geneva ULB or the UCC in drafting the CIBN system, UNCITRAL has produced provisions that avoid disadvantages in both of the other systems.

Many of the resulting international private law provisions are necessary, including those that are not available under domestic law; others range from good to pedestrian but serviceable to poor. That is the quality one would expect from any drafting body, domestic or international. From the drafting style, one gets fewer details than the common law attorney wants, but many more than the civil law attorney wants, and the provisions are designed to provide practical solutions to perceived commercial problems. The product still looks different from current U.S. law and in fact is different, whether better or worse, than current U.S. law.

Such comparisons, however, are both misleading and counterproductive. The most relevant question may *not* be, "Is this international convention better, or more understandable, than the UCC?" Instead, the more pertinent questions may be, "Is this convention better than the law of, for example, Argentina or China?" and "Is this convention better than the uncertainties of conflicts of laws litigation?" These may be the practical issues facing the U.S. attorney or business.

---

131. In the only known interaction by an international private law convention on the drafting of the UCC, the UCC definition of "money" in section 1-201(24) was changed deliberately to conform to CIBN, thanks primarily to the efforts of Mr. Houston Lowry at the 1990 Annual Meeting of the American Law Institute.

132. Geneva ULB, *supra* note 103, art. 16, 143 L.N.T.S. at 279.

133. CIBN, *supra* note 5, arts. 15, 25(1), 26(1), 28 I.L.M. at 183, 185-186.

134. *Id.*, arts. 25(1), 26(1), 28 I.L.M. at 185-186.

135. U.C.C. §§ 3-419(1)(c), 3-417(1)(a), 3-417(2)(a) (1990). This circuitous series of actions is continued under revised article 3. *See id.* §§ 3-420(a), 3-417(a)(1), 3-416(a)(1)-(2). For a complete discussion of all aspects of these issues, see Carl Felsenfeld, *Forged Endorsements Under the United Nations Negotiable Instruments Convention: A Compromise between Common and Civil Law*, 45 BUS. LAW. 397 (1989).

Americans have a deep-seated belief in the power of party autonomy and an attachment to the concept that a clause stating that "this contract shall be governed by New York law" solves every problem. This is not necessarily true because too many countries use the concept of mandatory law to insist on the application of their own legal doctrines to contracts which involve their nationals and territory.[136] The parties may not have autonomy to choose whether U.S. or foreign law will govern all facets of an international transaction. Thus, widespread acceptance of international private law conventions may be the alternative to learning foreign law.[137]

IV. Some Important Potential Problems

There are potential problems in the approaches used by the NCCUSL and the international organizations. What problems do these future drafters face? In particular, are there any developments within the context of the NCCUSL process that should forewarn future international participants of potential problems? It should be noted that the most appropriate comparison between the two processes is found in the activities of the NCCUSL during the 1896 to 1918 period, rather than to its later, 1940 to 1960 activities in drafting the UCC[138] or its current activities in revising the UCC. Thus, the effort to draft the CISG should be likened to that of the USA, and the effort to draft CIBN to that of the NIL.[139] Similarly, the Conventions on International Financial Leasing and International Factoring should be compared to the UCSA. There are many potential problems for future drafters, but this article will concentrate on three that seem most important.

One problem relates to the sharing of experiences under the conventions—developing a multilingual case reporting system for gathering, translating, and reporting international private law

136. *See* The Transnational Law of International Commercial Transactions 9-11 (Norbert Horn & Clive M. Scmitthoff eds., 1982).

137. The most divisive split in the drafting of CIBN was not between representatives of common law and civil law regimes. Instead, the most divisive split was between those delegates who regarded their law of commercial paper to be "mandatory law" and those delegates who regarded such rules to be subject to party autonomy. It is likely that the latter identifies a "fault line" that will be increasingly difficult to bridge for future drafters of international private law.

138. For a more detailed development of this historical concept, see *supra* text accompanying notes 73-78.

139. *See supra* text accompanying note 77.

cases from all the Contracting States to practitioners in all the Contracting States. As the UCC Reporter has shown, private enterprise may handle this task best; but so far no publisher has shown the requisite interest. The UNCITRAL Secretariat has undertaken to arrange for a limited, headnotes only, version of such reporting, provided that each Contracting State appoints a national correspondent.[140] To provide the requisite continuity, such a reporter should be an institution, not a person. A law library, or a law student journal, or a combination of both would be the preferable situs for such a reporter.

A second problem is that multilateral treaties and conventions are treated a bit like blocks of concrete—no one wants to modify them slightly, or even replace them. Thus, the concept of replacing the currently available conventions with newly drafted ones sixty years from now must seem very strange to anyone steeped in the traditions of public interest law. Enacting amendments which seem necessary due to experience or changes in the commercial world would seem even stranger. But, as every commercial law practitioner or teacher is well aware, the history of commercial law is dynamic. Commercial practice adapts to changes in commercial law, and the law must adapt to changes in commercial practice.

Thus, international private law must create a different set of traditions as to amendments, modifications, and replacements of prior efforts. In order to accomplish this, it may be necessary for the international organization which created the convention to establish a process or structure to facilitate its amendment or modification. The Uniform Commissioners have indicated one such potential mechanism by establishing the Permanent Editorial Board for the UCC.[141] Amendment or replacement of such conventions may be very difficult,[142] but it was also difficult to

---

140. The UNCITRAL Secretariat has proposed to collect from "national correspondents" decisions interpreting the CISG, creating abstracts of such decisions in the six official U.N. languages and placing them in a CISG-based reference system. Compilations of these abstracts would be released from time to time and sent to U.N. Member States. This is intended to promote greater uniformity of interpretation as is also sought by article 7(1) of the CISG. *See* CISG, *supra* note 4, art. 7(1), 19 I.L.M. at 673.

141. *See* STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955, 1 STUDY OF THE UNIFORM COMMERCIAL CODE 74-93 (1955); William A. Schnader, *The Permanent Editorial Board of the Uniform Commercial Code: Can It Accomplish Its Object?*, 3 AM. BUS. L.J. 137 (1965).

142. The true difficulties of amending and replacing even international private law conventions is perhaps shown by the three conventions that concern bills of lading, known as the Hague, Hague-Visby, and Hamburg Rules. International Convention for

amend the UCC in the face of the Uniform Commissioners' pleas to resist change "in the name of uniformity," as the U.S. timber industry can testify.[143]

A third potential problem concerns the quality of the delegations to international organizations, and whether they may be co-opted by one set of interests or one party to a transaction. The standard advice at meetings of the NCCUSL or the American Law Institute is to "leave your clients at the door," meaning that commissioners should not represent the interests of their clients during their participation in the formulation of Uniform Laws. But it is difficult to eschew making arguments in the NCCUSL that one has already made in other venues, and a public debate is now beginning on this topic in light of the recent UCC revisions.[144]

The international organizations may find that their present procedures exacerbate any tendency in this direction. Currently, each national delegation is supposed to speak with one voice. Depending on how that delegation is instructed, it can be dominated by only one perception of proper policy results and, therefore, lack proper balance. The Uniform Commissioners have

---

the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules]; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968 [hereinafter Visby Rules], *reprinted in* 6 BENEDICT ON ADMIRALTY Doc. 1-2 (Michael M. Cohen ed., 7th rev. ed. 1991); *see* Hamburg Rules, *supra* note 87, 17 I.L.M. 608.

The Hague Rules were widely adopted but, by the 1960s, were regarded as outdated. The Visby Rules consist of a series of amendments to the Hague Rules, so that the total package creates the Hague-Visby Rules. However, this legal area is not currently harmonized because it has two competing sets of rules, each with significant adherents. Amendment or modification is therefore sometimes a trap without an international consensus.

The difficulties of replacement are shown by the fate of the 1978 Hamburg Rules, which are not yet in force. If they ever enter into force, they will present a third competing set of rules, which should create enough disharmony to induce another diplomatic conference and a fourth set of rules.

143. For the saga of the "constructive severance" doctrine under the UCC, it is useful to compare the different versions of the definition of "goods" in section 2-107(2) before and after the 1972 amendment to that section. The Permanent Editorial Board's initial reaction to the amendments made by timber-producing states to articles 2 and 9 was negative, and they opposed such changes. However, the weight of nonuniform amendments, as well as their sources, finally led to a recommendation that states adopt the 1972 amendment. *See* U.C.C. § 2-107 official reasons for 1972 change (1990).

144. The debate is presented in Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405 (1991); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991). This debate was continued at the 1992 Annual Meeting of the Association of American Law Schools, where the Section on Commercial and Related Consumer Law featured both Rubin and Miller as speakers, and is likely to continue in the future.

ameliorated this problem by having three appointees from each state but have still not avoided the problem altogether.

The international organizations may face difficult choices in dealing with this problem, none of which solves the problem without creating worse problems. To do nothing entrusts to chance that all interests will be fairly represented if enough different delegations attend; statistically, that is unlikely to occur in all cases. Balance could be obtained by allowing the Secretariat to represent any unrepresented interests and by increasing its participation. But that compromises the neutrality of the organization among its members and can produce an "us-them" syndrome, which no organization wishes to foster deliberately. The international organization could seek to increase the balance projected by every delegation by seeking more elaborate instructions for each delegation. That approach, however, would damage one of the great strengths of the current process—the fact that most delegates can be flexible, so that the members of the group can persuade and interact.[145] Finally, it could adopt the approach of the NCCUSL and allow each member to send multiple delegations, each representing different interests. In view of the predictable increase in costs and the current high turnover of delegates,[146] the alternative of multiple delegates seems unrealistic.

Thus, the potential for this problem is likely to persist. There are at least two facets of the current process that afford protection. One is the diversity of the individual delegates—practicing attorneys, corporate employees, government bureaucrats, and professors. As long as none of these groups dominates the proceedings, it is likely that all of the competing interests will be at least somewhat represented. The second facet arises in those organizations that have a tradition of approval by consensus, which allows a minority to resist more fully if it feels it is being pushed rather than persuaded.

Just as with the UCC, sixty years from now other attorneys will look at these first attempts at unification and harmonization of international private law from UNCITRAL and UNIDROIT and say, "How could those people have possibly drafted them that way?" They will redraft it with great improvements, just as the drafters of the UCC did, and present a second round of conven-

145. *See supra* text accompanying notes 83-85.

146. *See supra* text accompanying notes 97-98.

tions to the legal world. Hopefully, they will be as successful as the UCC drafters.

Just as significantly, those future drafters will build upon the conventions presently available or being drafted, on the experience of using those conventions for sixty years, and, most importantly, on the trust that arises from the common experiences of using common provisions for sixty years. At present, there is neither this experience nor this trust, and both are needed. This process of creating international private law is a continuing process, and the international organizations necessary to maintain the process are available.

V. Conclusion

International organizations are currently creating a *substantive* international private law, which is quite distinct from what has been known as "private international law," i.e., conflicts-of-law doctrines. This international private law covers not only commercial and contract doctrines, but also trusts and estates, family law, arbitration, and civil procedure. To date, these international law conventions are applicable only to international transactions and have been careful to state very precise criteria to determine when a transaction is an international one to which international private law may apply. Thus, the conventions have not affected purely domestic legal transactions or laws, and they have applied international private law as a parallel legal regime to govern international transactions. This article has examined several of the strategies and tactics for creating such law.

The differences between creating global private law or creating regional private law primarily concern questions of present tactics, rather than ultimate goals, and reasonable persons can always differ on preferable tactics. Further, the processes used in each approach to formulate law need not vary.

The more crucial difference is among strategies that involve substantive international private law, international choice-of-law rules, and *lex mercatoria*. Each of these strategies is currently being pursued, and each has its supporters. The use of substantive international private law involves a high-risk, high-reward strategy. To be effective, the use of international choice-of-law rules requires attorneys and businesses to find, read, and reach a common interpretation and understanding of foreign law rules, which is unlikely in practice. *Lex mercatoria*, on the other hand,

can now be derived from several sources and therefore has built-in ambiguities.

Americans seem to react favorably to the processes that are being used to formulate the substantive international private law conventions because of their similarity to the processes of the NCCUSL. Both processes concern the same private law subject matter, and work on one narrow subject at a time, rather than a whole code. The delegates are often private persons, often technical experts in the field, who usually receive no detailed instructions from their governments and interact as individuals open to persuasion. However, the process takes an extraordinarily long time, and one of the weaknesses of the international organization process is the high turnover of delegates from some countries. The end of the process is State-by-State adoption of the proposed convention, not enactment by any supranational body.

The American empathy for the process of the international organization does not always carry over to its product—the international private law convention. In part, this is due to stylistic differences in the art of drafting statutes. Even though the international conventions rest upon a foundation of problem-specific provisions, and civil law attorneys find them too explicit, U.S. attorneys find many familiar details omitted. With detail work omitted, they tend to suspect a "lack of quality" rather than what actually happened—a genuine compromise between civil law and common law drafting styles. The rules themselves are also unfamiliar and thus also suspect; but further examination shows that the decisions made and compromises struck within the international drafting bodies are the equivalent in quality to those of national domestic legislatures. Many are mechanical and uninspired, but quite workable; others are commercially necessary and allow one legal system or the other to abandon obsolete legal doctrines. Some are better than that available under any domestic law; some are bad. That is not a bad batting average in drafting legislation.

Currently, too many U.S. attorneys believe that the only comparison is between U.S. domestic law and the international conventions, but that is short-sighted. It is hoped that they will realize that international private law cannot always look like U.S. domestic legislation, despite the utility of U.S. law in some applications. The necessary comparison may be between the international conventions and the law of Argentina or China, and not

the law of the United States. Viewed against such alternatives, the international conventions may look very good, indeed.

The ability of foreign governments to make their law a "mandatory law" for international transactions can also make the comparison to Argentine or Chinese law even more relevant. If the new movement toward international private law conventions does not continue to grow, a problem could arise for international transactions from those States that impose mandatory use of their domestic law and do not allow party autonomy as to choice of private law concepts. Unification of private law through international conventions may be the appropriate safeguard for international transactions so long as nations continue to use the mandatory law approach.

There are, however, some important problems facing this movement toward the continuing growth of international private law. This movement will need judicial interpretations of the conventions to be reported across national borders, linguistic barriers, and legal systems in order to preserve uniformity of the meaning of the conventions as their concepts develop concreteness and detail. It will also need the ability to modify, or even replace, the current conventions, as commercial practices and conditions continue to develop and change. The NCCUSL has also faced some of these problems, although in a somewhat different context, and perhaps its approaches to these problems will suggest partial solutions that could be employed by the international organizations. Finally, every organization that drafts legislation encounters the problem of assuring that all points of view are fairly represented. The best safeguards available to the international organizations may be the present diversity among the delegates and the use of consensus in decision making.