The Conflict of Laws and International Trade

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I. INTRODUCTION

In this day and age we have grown accustomed to the cry of "crisis." There is a "crisis" in Southeast Asia, a "crisis" in Berlin, and the astute observer will take note of countless less dramatic but surely no less important "crises" on the home front. Without at all questioning the urgency of these confrontations, it is possible to view them as focal points of political and social unrest, evidence of the contact and friction which are produced whenever ideas and forces compete for favor.

The law is no exception. Neither the law, nor the men who enact it, enforce it, administer it, practice it, or try to change it, are immune from the currents of change which are motivating peoples in every corner of the globe. People are in ferment, and that means the fermentation of the legal principles according to which they regulate their affairs. The law and its institutions are changing swiftly before our eyes. In the past decade alone we have paid our last respects to one rule of law after another. Some were afforded solemn and dignified burial rights; others rudely interred without even a perfunctory gratuitous salvo.

Concededly, one of the most dynamic areas in legal science is represented by the field of conflict of laws. In the United States as well as abroad, conflicts rules are being reexamined in light of pressing social and economic needs. So thoroughgoing has been this reexamination that it is now difficult to conceive of conflict of laws as an existing body of rules possessing formal and binding authority. It would be more accurate to refer to an approach, a method, a process, of attacking a conflicts problem.¹

Personalities representing approaches are playing an important

¹ There may be madness in the methods, but systematization would seem to offer the best hope for an improved conflict of laws. As the late Professor Brainerd Currie pointed out: "What American conflict-of-laws theory needs most at this stage is a real joinder of issues by the proponents of the new methodologies." See his article The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 755 (1963).
role in the shaping of conflicts doctrine. This is what we would expect in Europe, with its long tradition of respect for the opinions of the scholar. But even in our own country, with its realistic attitude that "law is what goes on in the courts," leading conflicts scholars find themselves in the vanguard of social change.

The recent history of conflict of laws in the United States has witnessed a series of vigorous attacks on the broad vested rights theories embodied in Beale's 1934 *Restatement of Conflict of Laws*. In general, all critics, however they may individually quarrel with one another, are agreed that the old *Restatement* rules are overly simple, dogmatic and superficial. In formulating new principles, it is deemed essential that due regard be given to the policy considerations implicit in any conflicts situation, and that increased emphasis be placed on the application of the *lex fori*.

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2 It was Judge Goodrich, a conflicts scholar himself, who once remarked: "The law teacher is the accepted scholarly author of today. He writes or advises in the writing of the *Restatement of the Law* by the American Law Institute and every other scholarly activity of that body." Goodrich, *The Role of the Law School in a Democratic Society*, 1956 U. ILL. L.F. 253, 259. Justice Roger J. Traynor, another member of the judiciary who is sincerely concerned about the future of conflict of laws, called on the academic community to help the judge to travel through the terrible thicket of conflicts doctrine: "He [the judge] has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths. If they have not, he must chop his own way through, however asymmetrically, and hope that scholars will speed their reinforcements to the job in hand." *Law and Social Change in Democratic Society*, 1956 U. ILL. L.F. 230, 234.

3 The story of the devastation wrought by United States commentators on Bealism is more than a twice-told tale. For an incisive analysis, which relates the American development to the comity doctrine of the Dutch, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

4 The "forum faction," to borrow an expression from Professor Gerhard Kegel (cf. Kegel, *The Crisis of Conflict of Laws*, 111 RECHERCHES CIVILS 95 (1964)), is well represented in the United States. Professor Albert A. Ehrenzweig considers the *lex fori* as the basic rule to be applied even in the area of substantive conflict of laws. Indeed, it may be, as Professor Geoffrey C. Hazard has suggested in his review of Ehrenzweig's *Conflict of Laws, Part One*, that the author regards "conflicts . . . not so much a 'subject' with subdivisions relating the various bodies of substantive law as . . . a series of subdivisions of particular bodies of substantive law." 24 MO. L. REV. 406 (1959). The late Professor Brainerd Currie, a bold innovator who argued in favor of a "governmental interest" theory, would completely abandon traditional conflict of laws rules. In their stead the forum was urged to reach a prudent determination of its policy and interest based on a construction and interpretation of the substantive law. It is not surprising that in most cases the court, playing the game by Currie's rules, opted for the *lex fori*. For example, see the tables illustrating how Currie would apply his approach to the issues posed in Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), in CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 147 et seq. (Durham: Duke University Press, 1963).

Professor Willis L. M. Reese, although in essential agreement with Ehrenzweig and Currie that the forum should apply its own law in absence of a good reason for not doing so, offers to the courts, as well as to those who would follow him down the rocky road to a second restatement of the law of conflict of laws, some ten "policies"
It is not the intention of this writer to review, either critically or approvingly, the new prescriptions for domestic conflict of laws which have been written out by our contemporary scholars. Rather, this paper will concern itself with conflict of laws on an international level, probing the relationship of traditional, or even revised, rules of conflict of laws to foreign trade disputes.

II. TRADE OR FADE

The United States is the world's largest trading nation. It would seem to be in the national interest, therefore, that the legal environment in which our foreign trade is conducted be as free from friction as possible. This is not to overlook the fact that foreign trade, although largely in private hands in the United States and other countries of the Atlantic Community, is also an instrument of policy and, as such, is affected with a public interest. The United States Constitution guides their efforts. See his article Conflict of Laws and the Restatement Second, 28 LAW & CONTEMP. PROB. 679 (1963). To be sure, Reese recognizes but revels in the real rough riding ahead: "One of the frustrating, but at the same time fascinating, aspects of conflict of laws is that so many of its areas are as yet comparatively unexplored." Reese, Power of Parties to Choose Law Governing Their Contract, 54 AM. SOC'y INT'L L. PROC. 49, 55 (1960). In the same vein his statement: "Conflict of laws is an uncertain and fluid area where the principal product of increasing knowledge is a greater awareness of inherent difficulties. Many segments of this area remain unexplored, and authority in point is frequently conflicting." Reese, The Ninth Session of the Hague Conference on Private International Law, 55 AM. J. INT'L L. 447, 448 (1961). Ehrenzweig, Currie and Reese have had their share of criticism in U.S. legal literature.

Professor Edwin W. Briggs, in An Institutional Approach to Conflict of Laws: "Law and Reason" versus Professor Ehrenzweig, 12 U.C.L.A. L. REV. 29 (1964), sets out his own theory in a 49 page attack on Ehrenzweig, to which Ehrenzweig replied with a 4½ page rebuttal in Savigny and the Lex Fori, Story and Jurisdiction: A Reply to Professor Briggs, 53 CALIF. L. REV. 355 (1965). Currie was castigated by Professor Alfred Hill in Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. CHI. L. REV. 463 (1960). Reese and his determination to restate now, by capitalizing on the increased store of knowledge which is currently available to conflicts scholars, have been scolded by Ehrenzweig on several occasions; cf. THE CONFLICT OF LAWS 12, 13 (St. Paul: West Publishing Co., 1962); Ehrenzweig, The "Most Significant Relationship" in the Conflicts Law of Torts, 28 LAW & CONTEMP. PROB. 700 (1963); Ehrenzweig, The Second Conflicts Restatement: A Last Appeal For Its Withdrawal, 113 U. PA. L. REV. 1230 (1965). The references cited above represent only a sampling of the currents and cross currents through which United States courts must navigate in order to avoid the Scylla of inequitable results based on the logical and literal application of dogmatic hornbook rules, and the Charybdis of uncertainty and unpredictability which inevitably result when the courts, although somehow reaching equitable results, bottom them on ad hoc rulings bordering on the arbitrary.

As Professor Wolfgang Friedmann has noted, foreign trade has largely become an instrument of national policy in all countries of the world: "... so powerful and varied is the armoury of control mechanisms now at the disposal of the so-called free-trading states that, in times of war or grave emergency, a complete control over foreign trade in all its aspects can be imposed, without any need for socialisation..."
tion gives Congress the power to regulate foreign commerce, and our private traders are well aware of the existence of a whole series of federal laws and regulations which operate to stimulate or discourage trade in accordance with national policy. This is so, despite a noted decline of protectionist sentiment in many countries, primarily because sensitive sectors of the national economy still exist, and the demands of national security necessitate a considerable measure of governmental control over exports and imports.

It is clear that legal scholarship is powerless to remove obstacles to an expansion of foreign commerce where these obstacles are directly attributable to international tension. Just as language precedes grammar, so also must a modicum of mutual trust exist before legal problems can be solved. Only in an atmosphere of cooperation can the labors of international legal scholarship be carried to fruition.

Are the times auspicious for an increase in foreign trade based on a multilateral desire for improved international relations? Quite likely, yes. Although the military involvement of the United States


6 The Commerce Clause of the United States Constitution, so effectively employed by Congress to implement social welfare legislation on the domestic front, is found in article I, section 8: “The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ” as found in Dowling & Gunther, Constitutional Law, Cases and Materials 4 (Brooklyn: Foundation Press, 1965).


9 In this regard, witness the remarkable results that were achieved by determined delegates at the Hague in April, 1964, when the Uniform Law of International Sales was rushed through. See Nadelmann, The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio, 74 Yale L.J. 449 (1965).
in Southeast Asia clouds the picture, the prospects for an expansion of United States trade, even with the uncommitted and Communist countries, are real. In 1964 the United States Secretary of State, acting together with the Senate Committee on Foreign Relations, surveyed the attitudes of 125 businessmen on the question of whether or not trade with Communist nations should be increased. Of those polled, 109 were in favor of an increase in East-West trade, while only 9 were against it. This represents in all probability a fairly accurate cross section of business thinking. Once the government indicates that there are no strong political objections, the taboo surrounding “trading with the enemy” tends to disappear and the private trader feels free to express his interest in personal financial gain. Such was the pattern which this writer observed in conversations with West German businessmen in 1963-1964.

It coincides, moreover, with some widely scattered national sentiments of frustration and jealousy. There is frustration because of the obvious failure of our policy of discouraging other nations, ostensibly our allies, from trading in strategic goods with countries we consider unfriendly. Our allies are almost unanimous in their opinion that they will trade with whom they wish, if that happens to be in their national, as opposed to the community's collective, interest. United States businessmen have stood by and watched as their European and Commonwealth competitors, motivated by such a philosophy, opened up and pursued commercial arrangements with the Sino-

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10 As Professor A. A. Fatouros has noted in his perceptive study of the impact which the uncommitted nations are having on traditional concepts of international law, these nations "are today the chief sources of raw materials necessary to the economies of the developed nations." International Law and the Third World, 50 VA. L. REV. 783, 795 (1964). Concerning trade with the Soviet Union, Professor Harold J. Berman hopefully suggests "that it would help to integrate the Soviet economy into the world economy," thus creating that interdependence which is essential for world peace and order. See his article, A Reappraisal of U.S.—U.S.S.R. Trade Policy, 42 HARV. BUS. REV. 139 (1964).

11 East-West Trade, A Compilation of Views, found in Haight, supra note 7, at 364.


In October, 1966, President Johnson removed more than 400 items, including textiles, metals, chemicals and machinery, from the Export Control license list. Explaining the change in United States East trade attitudes to a group of businessmen in Bonn, United States Secretary of Commerce John T. Connor said that the United States is moving "slowly but deliberately" toward a separation of trade and politics. "We would rather discuss contracts than contrasts," said Connor. "We do not foresee dramatic results from this effort in the near future, particularly because of the ramifications of Viet Nam. But we have hopes of building some fairly strong bridges as time goes on." Cf. Time, Nov. 18, 1966, p. 112.
At a time when deficit spending at home has become almost inevitable, when the best economic minds grapple with the problem of the balance of payments, it is only natural that enlightened self-interest, coupled with a tint of jealousy, should prompt the thoroughgoing reexamination of United States policy on East-West trade which is presently underway.\textsuperscript{4}

How does conflict of laws fit in? Surely frustration and jealousy have no place in the psychological armor of the conflicts scholar. We hope not. But is it not true that there exists today a worldwide tendency to solve problems of conflict of laws, especially in foreign trade, by avoiding them?\textsuperscript{15} Will such juridical techniques as arbitration,\textsuperscript{16} uniform legislation,\textsuperscript{17} standardized contract forms\textsuperscript{18} and an


\textsuperscript{14} The fear that lost profits will be lost forever is by no means a view shared only by U.S. businessmen. Somewhere, a beginning was made by a firm which valued its own individual profit higher than the collective security. Firms in other countries learned of this and began to pressure their governments to permit them to do likewise. Typical is the attitude expressed by Clive M. Schmitthoff in \textit{A New Approach to East-West Trade}, 1958 J. Bus. L. 141, 149: “If the British exporter lets the Eastern export markets go by default, our friends on the other side of the Atlantic and our competitors in Europe will take his place without the slightest compunction.”

\textsuperscript{15} In 1956, Law and Contemporary Problems devoted an issue to the theme of conflicts avoidance. See, in particular, the contributions of Schmitthoff, \textit{Conflict Avoidance in Practice and Theory}, 21 LAW & CONTEMP. PROB. 429 (1956). See also, Batiffol, \textit{Conflict Avoidance in European Law}, 21 LAW & CONTEMP. PROB. 571 (1956).

\textsuperscript{16} The foremost authority on international commercial arbitration is Martin Domke. See his article, \textit{The Settlement of Disputes in International Trade}, 1959 U. ILL. L.F. 402.

\textsuperscript{17} The rather pessimistic outlook expressed by Philip W. Amram in 1960 in his article \textit{Uniform Legislation as an Effective Alternative to the Treaty Technique}, 54 AM. SOC’Y INT’L L. PROC. 52 (1960) must be considered in light of the recent decision by the United States Government to send official delegates to participate in the work of international unification conferences. For a later survey, see Steiner, \textit{The Development of Private International Law by International Organizations}, 59 AM. SOC’Y INT’L L. PROC. 38 (1965), where the author, although aware of the “pale” achievements in this area, sees objective factors arguing in favor of a greater measure of success in the future.

\textsuperscript{18} In order to facilitate contractual relations between Soviet export-import combines and foreign firms, the Ministry of Foreign Trade of the U.S.S.R. has drawn up form contracts covering those features deemed by Soviet traders to be most necessary for the successful fulfillment of the transaction. For an example of a sample contract form used by the Soviet All-Union Combine “Stanko-import,” see Shevchenko & Svetlova, \textit{Vneshnetaorgovliaia Korrespondentshia i Dokumentatsia} 175 (Moscow: Izdatel’stvo IMO, 1961). But when Soviet traders encounter large Western firms which employ standardized contracts, such as the West German firm Höchst, a chemical dye firm, they complain that the principle of party autonomy has been violated. \textit{Cf.} Gen'kin, \textit{Prawovoe Regulirovanie Vneshnej Torgovli} SSSR 480 (Moscow: Vneshtorgizdat, 1961).
increased emphasis on the *lex voluntatis* succeed in relegating conflict of laws to the settlement of noncommercial disputes containing a foreign contact?

III. CONFLICT OF LAWS AND PRIVATE INTERNATIONAL LAW

Before turning to these questions, it should be pointed out that conflict of laws, as the expression goes, is not a happy choice for a field of law which is concerned with international contacts. On the European Continent, where jurisdictions are small in comparison to the United States, foreign contacts are more likely to be international rather than interstate. Geographical proximity has contributed to the development of a law of conflict of laws in Europe that bears another name—private international law. Even in the Federal Republic of Germany, one of the few federal democracies in the world, the field of conflict of laws has long been codified by statutory provisions which have nation-wide validity.

All of this should not be surprising, but differences in name have provoked searches for suitable explanations. Professor Elliott E. Cheatham has suggested that the difference in terminology may be attributable to a difference in emphasis:

"Private International Law" indicates the scope of the subject, that is, private cases in the international arena. "Conflict of Laws" lays stress on the diversity and, it may be, the opposition of the laws and tribunals of the political entities.

Professor Ehrenzweig feels that the names reflect "the deeply

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20 Cf. Articles 7 to 31 inclusive, of the Introductory Statute to the German Civil Code, in PALANDT & LAUTERBACH, BÜRGERLICHES GESETZBUCH, 1710 et seq. (München und Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1962). This is not to ignore the importance of court decisions in the development of private international law, even in such a civil law country as the Federal Republic of Germany. Nor should the conflicts problems which have arisen as a result of the military defeat and subsequent division of Germany be overlooked. Although both Germanys, the Federal Republic of Germany and the German Democratic Republic, have retained the German Civil Code (BGB) and continue to apply it, varying and conflicting interpretations of the same paragraph are being handed down by West and East German courts. This presents a problem of "interstate" conflicts of a sort, sometimes referred to as "interlocal" (interlokal) in German legal literature. Cf. Drobnig, *Die entsprechende Anwendung des Internationalen Privatrechts auf das interzonale Recht Deutschlands*, 2 JAHRBUCH FÜR OSTRECHT 31 (1961).

problematical character of our subject." No doubt the subject matter embraced within the terms "private international law" and "conflict of laws" has contributed to the problematical nature of the beast. As Professor George W. Stumberg has pointed out, the subject of private international law on the European Continent includes such matters as citizenship and the rights of foreigners, areas which are usually dealt with in the United States by public international law (Völkerrecht). Professors Arthur von Mehren and Donald Trautman, satisfied with neither name, have recently suggested a new one—the Law of Multistate Problems, with "multi-state" defined to refer to both states within a federal system as well as to independent nations.

Have von Mehren and Trautman offered us a happy solution? Is there anything about domestic conflict of laws problems which necessitates their reference to a body of rules different from that which is needed to resolve international conflicts? Writing in 1933, Armand B. DuBois argued in favor of a body of conflict norms that would be applicable to both domestic and international contacts. Finding little historical basis for any distinction between the two, DuBois felt that once good conflict of laws rules were formulated for domestic affairs, they could be applied without further ado on the international level—"an inspiring spectacle."

No one bothered to challenge DuBois' conclusions until 1957, when Ehrenzweig, concerned about the possibility that the proposed Second Restatement would be embraced abroad as an expression of United States law governing international transactions, pleaded for segregation. In Ehrenzweig's view, it was obvious that different policies must be applied in solving an international conflict of laws problem. There is, after all, no United States constitutional requirement to give full faith and credit to the laws or judicial decisions of a foreign country. Nor is "forum shopping" a problem of any significance in international conflicts. Moreover, a clear-cut segrega-

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tion of domestic from international conflicts law might prove to serve as a stimulus to a greater exercise of the treaty power by the United States, thus bringing the nation into step with the dynamics of the unification movement abroad.

Despite the agreement which seemed to have been reached at that time (1957) between Ehrenzweig and Reese, who was then and still is Reporter for the Second Restatement,27 the American Law Institute, in proceeding with its work, declared in Section 5a that the Restatement rules were to be applicable to "international Conflict of Laws cases unless the factors in the particular case call for a result different from that which would be reached in an interstate case."28 The Institute's stand would seem to be compatible with the position taken by von Mehren and Trautman:

The greater sense of unity and community that normally attend sister-state—as distinguished from international—relations can, of course, affect the results reached in each class of situations. However, in our judgment the process of analysis remains the same; differences in result . . . merely reflect the degree to which experience has developed a sense of community and an understanding of the sister state's institutions and rules.29

Where does that leave the legal community? Faced with this conflict of scholars on conflict of laws, are we to maintain our emotional equilibrium with a casual shrug of the shoulders, recalling Professor Robert A. Leflar's words as he warned us that conflict of laws was "nothing but an unmitigated nuisance"?30 A nuisance perhaps, that on a question of such import there should be such a divergence of views.

It would seem to this writer that our domestic conflict of laws, developing as it has been within the framework of a federal democracy composed of several sister states possessing regional peculiarities but with a common culture under one national constitution, represents a body of law whose vocabulary, doctrine and content have been geared traditionally to a single legal system. To attempt to graft this arm of our total jurisprudential structure onto the body of international intercourse would be to render a disservice to the scholars, courts and practitioners who have labored so long to improve its effectiveness.

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27 Id. at 717, n.4.
28 Ehrenzweig, supra note 4, at 1233 & n.21.
29 von Mehren & Trautman, op. cit. supra note 24, at 4.
It is especially here that reference to terminology may prove to be useful. In explaining the differences between the terms "Conflict of Laws" and "Private International Law," we have noted that in Europe, and in England as well, the very name employed to describe the field reveals its international character. Rules of conflict of laws in Europe were hammered out on the anvil of international, rather than intrafederal, conflicts problems. Principles were formulated to determine the rights and duties of persons in their private international dealings. Professor Gerhard Kegel, the most outstanding conflicts scholar in the Federal Republic of Germany, has defined private international law as "the totality of rules which indicate which state's private law is applicable." A reference by a German court to the law of another state means to the law of another country. Although the problems in interstate and international conflicts may seem at first blush to be the same, rules drawn up to solve problems in one arena may prove to work inequitable or inadequate results when applied in another. We in the United States should take advantage of the opportunity to exploit the growing field of comparative law in order to formulate rules of conflict of laws to cover those cases which Section 5a of the Second Restatement refers to as "calling for a different result."

IV. PRIVATE INTERNATIONAL LAW AND PUBLIC INTERNATIONAL LAW

It is a phenomenon of contemporary life that a great variety of international activities, formerly assumed to be in the sphere of private international relations, have taken on a public international character. As nations, acting either directly or through instrumentalities, have expanded their extragovernmental activities, it has become more and more difficult for scholars to draw nice theoretical distinctions between public and private law.

Governments, which were once content to concern themselves with such necessities as national defense, internal police, and the administration of justice, have assumed the responsibility of providing for a whole variety of services involving the social and economic welfare...

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of their peoples. This development has proceeded apace on both the national and international levels.\footnote{33}

What has been the impact of this expansion of the governmental and public interest on private international law? To what extent is it now possible to speak of this field as "private"? As Professor Max Rheinstein has rightly noted, the very phrasing of the term private international law indicates that the field was once regarded as a part of public international law.\footnote{34} It was Justice Joseph Story whose 1834 Commentaries first popularized the view in this country that the principles of private international law may be derived from the higher principles of a system standing above the nations, a system of Natural Law or the Law of Nations.\footnote{35} Story greatly influenced Savigny (1799-1861), who was perhaps Germany’s greatest jurist.\footnote{36} Writing in the nineteenth century, when foreign commerce was organized and conducted in accordance with almost universally recognized economic principles, Savigny viewed world trade, together with the ideology of Christianity, as potential unifying factors arguing objectively in favor of the equal adjudication of conflicts cases, regardless of where the forum was convened. Under Savigny’s theory, the law applicable to a legal relationship involving foreign elements would be the law of the territory to which this relationship belonged or to which it is subjected, namely, to the law of its principal sphere of activity (Schwerpunkt), called by Savigny its seat (Sitz). The canons of private international law thus enunciated were to find their ultimate source in the Law of Nations.\footnote{37}

Utilizing this approach, Savigny allocated each case to a given territory whose conflicts rules would, in turn, indicate which law was applicable. The implications of this rationale for international relations and world trade were obvious. The objectivity and impartiality contained therein tended throughout to foster increased

\footnote{33} The interrelationship between the social needs which have prompted the increase of governmental activities, and the concepts of private law which were altered in response thereto, have been analysed by Wolfgang Friedmann, LAW IN A CHANGING SOCIETY (Berkeley and Los Angeles: University of California Press, 1959).


\footnote{36} On Savigny’s role in the founding of an historical school of jurisprudence in Germany, see Dahm, Deutsches Recht 118-124 (Stuttgart: W. Kohlhammer Verlag, 1963).

\footnote{37} Cf. Savigny, System des Heutigen Römischen Rechts (Berlin: Bei Diet und Comp., 1840).
confidence in the uniformity and security of international commercial transactions, a positive imperative in an era of expanded trade and a search for overseas markets among the then developing nations of the Western world.\(^{38}\)

Savigny's ideas, which contemplated equal treatment of foreigners and nationals, were developed further in the German-speaking world by Ernst Zitelmann\(^{39}\) and Karl von Bar\(^{40}\) and in the Anglo-American common law system by those great exponents of the vested rights theory, A. V. Dicey\(^{41}\) and Joseph Beale.\(^{42}\)

In time a sharp reaction to the universalist thinking of Story and Savigny set in.\(^ {43}\) The realities of nationalism were simply incompatible with such an exaggerated belief in the potency of private international law founded on the myth of monism. The conviction spread that the rules of private international law, unless codified by treaty, were to be determined by the domestic law alone. A pluralist, particularist, nationalistic doctrine was proclaimed, according to which each country was free to adopt its own rules of private international law. Leading the attack against the universalist, internationalist doctrine were Franz Kahn\(^{44}\) and Theodor Niemeyer\(^ {45}\) in Germany, M. I. Brun\(^ {46}\) in prerevolutionary Russia, and G. C. Cheshire\(^{47}\) and Walter

\(^{38}\) The competitive struggle for foreign markets is traced, from a Marxian point of view, by Vladimir Lenin in *Imperialism, Kak Vysshaya Stadiia Kapitalizma, POLNOE SOBRANIE SOCHINENII* vol. 27, 299-426 (Moscow: Gosizdatpolit, 1962).

\(^{39}\) Cf. ZITELMANN, *INTERNATIONALES PRIVATRECHT* (Leipzig: Verlag von Duncker & Humblot, 1897).


\(^ {43}\) For a review of the development of positivism in private international law see KEGEL, *op. cit. supra* note 32, at 6.

\(^{44}\) Cf. KAHN, *ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT* (München: Duncker & Humblot, 1928).

\(^{45}\) Cf. NIEMEYER, *INTERNATIONALES RECHT UND NATIONALES INTERESSE* (Kiel: Lipsius & Tischer, 1907).

\(^ {46}\) According to a recent Soviet text, the term "private international law" first appeared in Russia in a work published by Ivanov, in *Osnovaniia Chastnoi Mezhdunarodnoi Iurisdiktsii* (Kazan, 1865). Cf. PERETSKII & KRYLOV, *MEZHDUNARODNOE CHASTNIIE PRAVO* 15 (Moscow: Gosudarstvennoe Izdatel'stvo IUrlicheskoi Literatury, 1959). For a bibliographical listing of the contributions of Brun, Ivanov and other prerevolutionary Russian conflicts scholars, see GRABAR, *MATERIALEY ISTORII LITERATURY MEZHDUNARODNOGO PRAVA* v ROSSI 352, 470-71 (Moscow: Izdatel'stvo AN SSSR, 1958).

Wheeler Cook in the Anglo-American world. Typical of the thinking of the particularist-positive jurist is this passage from Niemeyer, written in 1907 when he assumed office as rector of the University of Kiel:

The new international law is earth-born and positive. It finds its origin in the consent of states. Only the modern strengthening of national thought based on national fundamentals, together with the corresponding policy of pursuing one's real interests, have forced states along the path of international federation.

So sharp was the distinction thought to be between private international law and public international law that scholars felt compelled to break lances in a struggle to delineate ever more exactly the respective spheres of activity for each discipline. Yet a changing world was bound to change the fundamentals of legal conceptualism. Recent times have witnessed a tendency for the lines dividing private international law from public international law to become blurred. Writing in 1952, Cheshire could say: "There is, of course, no affinity between private and public international law," yet five years later qualify this unqualified conclusion by explaining that:

It would, of course, be a fallacy to regard public and private international law as totally unrelated. Some principles of law, such as the maxim *audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of private international law, as for example the doctrine of the "proper law" of a contract, are adopted by a court in the settlement of a dispute between sovereign states;

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48 Cf. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge: Harvard University Press, 1942), which was a collection of the author's prior law review articles, the most dramatic of which was undoubtedly that appearing in 33 Yale L.J. 457 (1924), where he demolished the then well-accepted "territorial" and "vested rights" theories.

49 Niemeyer, *op. cit. supra* note 45, at 8.

50 To be sure, the *Begriffsjurisprudenz* tended to give away to an *Interessenjurisprudenz*, but conflicts academicians were still busily occupied with formal and analytical tasks. Peretersky and Krylov see all this theorizing as an attempt by bourgeois scholars to mould private international law into a goal-oriented formula. Cf. Peretersky & Krylov, *op. cit. supra* note 46, at 16-19 for an ideological critique of the class character of Western conflicts law. Ehrenzweig would have us look past the incantation of this "party line" ritual to the essence of Soviet private international law, which appears to Ehrenzweig to be a reaffirmation in practice of the lex fori. Cf. Ehrenzweig, *Conflict of Laws, Part One* 325 (St. Paul: West Publishing Co., 1959).


equally, some rules of public international law are applied by a municipal court when seised of a case containing a foreign element.\textsuperscript{53}

Without reviewing at length the theoretical question of the nature of the formal jurisprudential relationship between public international law and private international law, suffice it to say that the two are nowhere near so autonomous as some theorists would have us believe they are.\textsuperscript{64} Indeed, the safest approach would seem to involve an acknowledgement of the fact that some aspects of private international law are closely related to public international law (commercial agreements in foreign trade; international loans and investments), while others may have no appreciable connection therewith (marriage and divorce; will and intestate succession).\textsuperscript{65}

V. PRIVATE INTERNATIONAL LAW AND INTERNATIONAL COMMERCIAL LAW

We have already had occasion to refer to the increased scope of governmental activity in both the domestic and international affairs of businessmen. Our twentieth century industrial society, which is characterized to a great extent by extreme inequalities of bargaining power, has produced extensive legislation calling for greater governmental supervision and compulsory control over private commercial transactions.\textsuperscript{58} The dynamics of contemporary commerce defy cozy

\textsuperscript{53} Id. at 5th ed. (1957). Cheshire’s 6th edition repeats the same qualification as has been here cited in his 5th.

\textsuperscript{64} Professor Ben A. Wortley, in his lectures at the Hague in 1954, after referring to von Bar’s warning that it is dangerous to regard private international law as “only the domestic law of each separate state,” goes on to tell us “that modern private international law rules are not rules applied solely by national courts. They may indeed even come to be adopted by international tribunals dealing with disputes between states or other entities of public international law, and may thus become part of the case-law of public international law.” The Interaction of Public and Private International Law Today, 85(1) Recueil des Cours 245, 299 (1954). Judge Philip C. Jessup would group private international law and public international law, as well as “other rules which do not wholly fit into such standard categories” into the concept of “transnational law,” defined by him to mean “all law which regulates actions or events that transcend national frontiers”; cf. Jessup, Transnational Law 2 (New Haven: Yale University Press, 1956).

\textsuperscript{58} Such differences as do exist should be explored by scholars unencumbered by pre-existing definitional concepts. See the effort made by Edvard Hambro, current Norwegian ambassador to the United Nations, in Relations Between International Law and Conflict Law, 105(1) Recueil des Cours 7 (1962).

\textsuperscript{65} Cf. Sereni, International Economic Institutions and the Municipal Law of States, 96(1) Recueil des Cours 135, 136 (1959), for the author’s considered opinion, made with reference to Beze and Means’ pioneering work, that large private entrepreneurial activities conducted by corporations are not private at all: “By reason of the tremendous power which they wield and of their dominant position in a nation’s eco-
categorizations. What was once private has now become imbued with a public character and function. Areas which dedicated theorists have attempted to make autonomous reveal the presence of unexpected, if not unwanted, intruders. Commercial transactions, especially in foreign trade, present a bewildering array of public controls over private activity. The respective interests of trader and statesman are nowhere better observed than in the interrelationship between international commercial law and private international law.\footnote{Not every commentator feels compelled to treat the public aspects of international trade. In a recent handbook, KELSO, INTERNATIONAL LAW OF COMMERCE (Buffalo: Dennis & Co., 1961), it is stated on page 7 of the introduction: "Public law, that involving the relationship of the state with individuals or with other states, will be excluded generally and the private law, that governing relationships of individuals among each other, will be studied."}

Indeed, it would be difficult to conceive of a transaction more laden with collision possibilities than that of the average transaction in foreign trade. In a given situation, the buyer is a United States corporation with branches in most of the developed countries of the world; the seller is a West German firm incorporated to do business under the laws of the State of New York; the goods are located in Switzerland, but must be processed in England before shipment to the United States consignee. Which country’s law will govern the capacity of the parties to contract? Which law determines the formal validity of the contract; the essential validity? Which law applies to the contract of carriage; to the insurance? How far can the contracting parties go in determining for themselves the proper law of the contract?\footnote{Faced with the complexity of such questions, and confident that they can be solved satisfactorily by conflicts avoidance, Sundström in International Sales and the Conflict of Laws, 1966 J. Bus. L. 122, has subscribed to the view that "the phenomenon of conflict of law rules in the law of international sales appears to be a transient feature." Whether a pronounced shift in the direction of party autonomy will eliminate the need for rules of conflict of laws is problematical, however. As Judge Gunnar Lagergren has pointed out, allowing the parties freedom to choose their own rules, at least in form contracts, is far from satisfactory, since "the parties concerned very often ignore the terms of the voluminous and particularised contracts they sign." Cf. Lagergren, A Uniform Law of International Sales of Goods, 1958 J. Bus. L. 131. See also Lagergren, The Limits of Party Autonomy, in SCHMITTOFF, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 201-24 (New York: Praeger, 1964).}

If these and other questions were left entirely to the individual forum to decide in accordance with municipal concepts of private international law, the risk of uncertainty would be great indeed. Businessmen would certainly go out of business if they were forced
to wait for formal legal adjudication of their problems. There exists a universal need for certainty and uniformity in international commercial affairs. For this reason medieval Europe gave birth to a unified mercantile law. By experimenting with new commercial practices and accepting as obligatory those that seemed to be best fitted to meet their needs, merchants in those days put together a generally accepted body of customary commercial law (lex mercantoria), sometimes referred to as the common law merchant. This corpus of commercial custom was developed and promoted by the mercantile corporations and came to fall within the jurisdiction of the commercial courts of the large trading cities and great markets and fairs.69

With the rise of the nation-state at the end of the Middle Ages, commercial law was gradually absorbed by the increasing judicial and legislative power of the state. National sovereignty made its imprint on the international law of commerce. The nation, basking in the glory of its free and independent status as a member of the community of nations, incorporated and integrated business law into its general system of administering justice.

In England, this development took place under the guidance of Lord Mansfield, that great jurist and student of the civil law. By his systematic use in a commercial dispute of a special jury of merchants who were familiar with commercial custom, Mansfield was able to get verdicts on specific questions of commercial practice and in time to build up a case law that corresponded to actual trade practice.60 In the United States, after a period of hopeful rationalism reflected in Story's cosmopolitan willingness to accept international commercial practice, state law eventually came to prevail, a victory of the particular over the general, or in United States constitutional terms, of states' rights over federal power.61 In Germany, where

69 See generally THORNDIKE, THE HISTORY OF MEDIEVAL EUROPE 319-20 (Boston: Houghton Mifflin Co., 1949). It has been noted that "even in the earliest periods of international trade, merchants understood the utility of specifying by contract the most important conditions that would govern the mutual obligations of the parties to an international commercial transaction pending its final performance. In the absence of an agreed text, even minor disagreements over contractual rights and obligations would involve the parties in particularly complicated problems of conflict of laws. But as the general conditions annexed to and forming integral parts of international contracts became increasingly extensive, the evidence of disputes requiring resort to authoritative procedures for their settlement dwindled." Cf. Kopelman, The Settlement of Disputes in International Trade, 61 COLUM. L. REV. 384, 386-87 (1961).


61 Justice Story's opinion in the landmark case of Swift v. Tyson, 41 U.S. 1,19
national political unification came late, the Allgemeine Deutsche Wechsel-Ordnung of 1848 and the Allgemeines Deutsches Handels-gesetzbuch of 1861 had to wait until the proclamation of the Reich in 1871 before they assumed validity throughout all of Germany.62

The period of national codification in Europe, viewed in relationship to the decision in the United States to permit the various States to apply their own rules of conflict of laws to commercial transactions, served to complicate the picture for the foreign trader. Particularism led to the creation of nationally based legal concepts, the interpretation of which had the effect of dividing the law of international commerce into so many jurisdictional entities, thus underscoring the need for a system of conflict norms.63

Nationalism, even in those countries which have experienced fantastic losses in human and material resources in the aggressive advancement of nationalistic goals, is still very much alive.64 The various national legal codes are still in force, but there is also evidence of a certain uneasiness within the internationally oriented business and academic community. It is possible to discern the outlines of an autonomous law of international trade, a new lex mercantoria that is founded on universally accepted standards of business conduct.65

(1842), wherein he cited Cicero and Lord Mansfield as authority, was later overturned in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Professor Edwin D. Dickinson, in reviewing these and other relevant cases, felt that "the Supreme Court has written finis also to the eighteenth century premise upon which Swift v. Tyson was once securely based." The Law of Nations as Part of the National Law of the United States, II, 101 U. PA. L. REV. 792, 803 (1953). 52 Ernst von Caemmerer, The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries, in SCHMITTOFF, op. cit supra note 58, at 90. See also RADBRUCH & ZWEIGERT, EINFUHRING IN DIE RECHTSSWISSENSCHAFT 111 (Stuttgart: K. F. Koehler Verlag, 1961); DAHM, op. cit supra note 36, at 133.

63 As Hessel E. Yntema observed, the very "existence of these national codes, despite their basic similarities, has sharpened the distinctions and differences among the national laws and in consequence obscured the international community of law on which Story and Savigny hoped to establish a common international private law." Yntema, The Historic Bases of Private International Law, 2 AM. J. COMP. L. 297, 298 (1953).


65 The movement is not at all confined to the Western world. In 1958, the Comecon member nations adopted the "General Conditions of Delivery"; Cf. Berman, Unification of Contract Clauses in Trade Between Member Countries of the Council for Mutual Economic Aid, 7 INT'L & COMP. L.Q. 659 (1958). Since this time further steps
As the movement in favor of a contemporary law merchant grows, we are witnessing the emergence of a new era in the law of foreign commerce; one which, to cite one of its foremost advocates, is characterized by "the relative independence of the law of international trade from municipal commercial law." Not only does this development tend to free foreign traders from the application of municipal commercial law, but it also envisages the avoidance of municipal conflict of laws rules.

The trend toward internationalization, motivated as it is by objective factors of supranational validity, manifests itself in a variety of undertakings, all designed to foreclose, to the greatest degree possible, application of both the substantive and conflicts law of an undesirable municipal forum.

The first and perhaps most dramatic of these undertakings is the movement to unify international commercial law by treaty and convention. On April 29, 1930 the governing body of the Rome International Institute for the Unification of Private Law, at that time an organ of the League of Nations, appointed a committee chaired by Sir Cecil J. B. Hurst of Great Britain to draft a uniform law on the international sale of goods. Representatives of various legal systems took part in the work of the committee, which included, inter alia, Professors Karl N. Llewellyn of Columbia University, H. C. Gutteridge of Cambridge, and Ernst Rabel of the University of Berlin.

have been taken indicating that the East Bloc nations are determined to pursue the possibilities of a supranational commercial law for both intra-Bloc and extra-Bloc trade. Cf. Drucker, Code of International Trade, 13 INT'L & COMP. L.Q. 671 (1964); Kalensky, The New Czechoslovak International Trade Code, 1966 J. Bus. L. 179. These are outward external signs of agreement, at least on methodology, between Communist and non-Communist nations on the legal aspects of international commercial intercourse. For a recent account of intra-Bloc collaboration on these and related legal matters, see Hazard, Unity and Diversity in Socialist Law, 30 L. & CONTEMP. PROB. 270 (1965). Schmitt-Hoff, op. cit. supra note 58, at 5.


Other members of the committee included Judge Algot Bagge (Sweden); Professor Henri Capitant (France); Professor Martin Fehr (Sweden); and Professor Joseph Hamel (France).
Rabel had already been at work on a report on this theme at his Kaiser Wilhelm (now Max Planck) Institut für ausländisches und internationales Privatrecht.60 By 1935 the committee had a draft ready to submit to the League of Nations for consideration by the governments of the member nations of the Rome Institute. Acting on the comments made by the member governments, the committee prepared a revised draft of 105 articles, which became available in 1939.70 Before any further action could be taken, World War II forced a postponement of the activities of those interested in international cooperation.

In 1951 the Netherlands government, which had always played a leading role in furthering the efforts of those striving to unify private law, took the initiative of summoning an international conference to discuss a possible revision of the 1939 draft. Some twenty nations responded,71 sending diplomatic representatives to the Hague, where the project was approved and further improvements on the draft were suggested. By 1956, a new committee under the chairmanship of M. Pilotti of Italy had completed a revised draft consisting of 113 articles and a supporting statement.72 After comments were elicited from thirteen governments, the committee further refined its draft, completing a "final" revised version in 1963. This 1963 revision of the draft was circulated to governments for their perusal prior to the diplomatic conference at the Hague in 1964.

The April 1964 diplomatic conference at the Hague gave birth to two Conventions. The first would implement the Uniform Law
on the International Sale of Goods, the end product of the labors discussed above; \(^73\) while the other would establish a Uniform Law on the Formation of Contracts for the International Sale of Goods. \(^74\) Both Conventions are of prime importance for the future development of the law of international trade.

The United States, the largest trader in the world, took no part in the preparatory work which went into the two Conventions. This was not because United States scholars lacked interest, but rather because the United States Government, in accordance with the wishes of the people, never bothered to join the Rome Institute, the sponsoring organization. \(^75\) The result was that the final draft was essentially a European product, despite the efforts of its authors to take into consideration some Anglo-American peculiarities in the law of sales. \(^76\)

To date a number of states have signed, but not yet ratified, the Conventions. \(^77\) Although it will probably take another two or three years before they assume formal binding validity, the Conventions represent a contribution to the internationalization of commercial law, the significance of which can scarcely be overestimated. \(^78\)

\(^73\) An English version of the Convention and Uniform Law may be found at 13 AM. J. COMP. L. 453-77 (1964).

\(^74\) Cf. Farnsworth, supra note 67, at 327-28 for a translation by Professor B. A. Wortley of the Rome draft.

\(^75\) Deference to the doctrine of states' rights within the United States constitutional scheme of federalism was undoubtedly decisive here. While neither domestic political party can question the power of the federal government to conduct foreign affairs and to regulate foreign trade, it is deemed expedient, as a general rule, to seek solutions to private law problems without resort to the treaty power, although such an approach has been used in the past, and has been sanctioned by the courts. Cf. Hauenstein v. Lynham, 100 U.S. 483 (1880). For a recent case where the United States Supreme Court declined to invoke the treaty power of Congress in order to uphold the constitutionality of federal legislation, see Katzenbach v. Morgan, 384 U.S. 641 (1966), at the Court's own footnote No. 5. For constitutional reasons, therefore, the traditional United States approach toward the unification of private law in the international arena has been an extension of the method employed at home—legislative adoption of a proposed uniform code. Cf. Nadelmann & Reese, The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws, 7 AM. J. COMP. L. 239 (1958).


\(^77\) Signatory states are as follows: Greece, Netherlands, United Kingdom (sale of goods only), Italy, San Marino and Vatican City. The Conventions become effective, where they have been ratified, six months after the deposit of the fifth instrument of ratification. Cf. Farnsworth, supra note 76, at 228.

\(^78\) Despite the fact that the Conventions were rushed through at the April 1964 Hague Conference, they should be regarded as a positive step along the road toward increased international cooperation. Professor John Honnold sees the Uniform Law on
Other measures are contemplated in order to reduce the uncertainties and frustrations inherent in a trading world characterized by a multiplicity of municipal legal systems. Corporations which engage in foreign trade on a large scale have developed detailed form contracts which strive to resolve points on which the municipal law may be unsettled or in conflict with that of another forum. With regard to certain commodities in foreign commerce, transactions may be effected by referral to standard contracts drafted by internationally recognized trade associations. An example of such a contract has already been noted earlier in reference to the practice of a Soviet All-Union Combine, but detailed standard contracts are by no means peculiar to East Bloc traders. Under the aegis of the United Nations Economic Commission for Europe, detailed standard contracts have been drawn up for the international sale of lumber, citrus fruit, cereals, and machinery. Moreover, many terms of trade have assumed universal validity among businessmen all over the world. Such expressions as c.i.f., f.a.s. and f.o.b. form part of the terminological stock-in-trade of foreign traders everywhere.

In addition to the standardization of contracts and contract terminology, traders are encouraged to decide for themselves, and in advance of any actual dispute, important questions of choice-of-law and choice-of-forum. Reliance on the lex voluntatis has its limita-

the International Sale of Goods as an improvement over "the sorry legal situation confronting trade, which must cope with national laws antique and unsuited to international transactions, unintelligible to traders from different legal and linguistic backgrounds and subject to the vagaries of conflict of laws." The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, 30 L. & CONTEMP. PROB. 326, 331-32 (1965).

Standard forms of contract also are intended to obviate the difficulties of obtaining evidence on a system of foreign law. Cf. Benjamin, The ECE General Conditions of Sale and Standard Forms of Contracts, 1961 J. BUS. L. 113, 114. Ideally, the standardized contract should operate to codify trade usages and offset the inequities inherent in a situation where the contracting parties possess unequal bargaining power. In practice, however, they may have just the opposite effect. Cf. FRIEDMANN, LEGAL THEORY 492-93 (London: Stevens & Sons, 1960).

The success of individual firms with the standardized contract often precedes its adoption by the trade organization, leading in a four-step development to some sort of international recognition. Cf. Goldstaja, International Conventions and Standard Contracts as Means of Escaping From the Application of Municipal Law, in SCHMITTHOFF, op. cit. supra note 58, at 115-16.

SHEVCHENKO & SVETLOVA, op. cit. supra note 18.

Cf. Benjamin, supra note 79, at 120-22.


The field of contracts is probably the most confused and uncertain area in private international law. Counsel is faced with the perplexing problem of which country's law to choose in advance, not knowing fully the real consequences of his choice. As Lester
Arbitration must also be mentioned. Quite frequently an agreement to arbitrate differences in international transactions is placed in the original contract between the parties. Ideally, the arbitration clause should accurately reflect the agreement of the parties as to what issues are to be submitted to arbitration, e.g., only some disputes, such as the quality of the commodities to be traded, or all disputes. Precise agreement must also be reached as to where the arbitration is to take place, and what rules that arbitration tribunal is bound to observe.

Nurick has indicated in his article, *Choice-of-Law Clauses and International Contracts*, 54 Am. Soc'y Int'l L. Proc. 56-61 (1960), counsel has four alternatives open to him in drafting an international contract: (1) provide that U.S. law applies; (2) provide that foreign law applies; (3) provide that U.S. law applies in part; foreign law in part; (4) say nothing at all. From his experience as a practitioner in New York, Carlyle E. Maw tries to gain acceptance of a clause pointing to the tried-and-true local law, e.g., "This Agreement shall be construed and the legal relations between the parties determined in accordance with the laws of the State of New York." Cf. Reese, *International Contracts: Choice of Law and Language* 23 (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1962).

It is problematical, however, whether skill of counsel can convince a court to apply the law of a jurisdiction which has no reasonable relationship to the contract, either because of lack of connection with some element in the execution of the contract, or because of lack of a rational basis for the forum chosen. Cf. Reese, *Power of Parties to Choose Law Governing Their Contract*, 54 Am. Soc'y Int'l L. Proc. 49-51 (1960). In Soviet private international law, the principle of party autonomy contains similar limitations. Cf. Genkin, *op. cit. supra* note 18, at 481. According to Genkin, the outstanding Soviet authority on the law of foreign trade, "the so-called 'splitting' of a contract is not permitted. The obligations of both buyer and seller must be governed by one and the same law." For a contrary view of the Soviet practice, see Pisar, *Soviet Conflict of Laws in International Commercial Transactions*, 70 Harv. L. Rev. 593, 630 n.120 (1957).


The groundwork for agreement on these points may be laid in international commercial agreements, as in the 1925 German-Soviet Trade Treaty, *Vertrag Zwischen dem Deutschen Reich und der Union der Sozialistischen Sowjet- Republiken vom 12. Oktober 1925, Part II. 1 Reichsgesetzblatt* 2 (1926); the 1958 Agreement on Gen-
All these measures, whether viewed individually or cumulatively, represent mighty efforts by dedicated men to solve inevitable collision problems in international commercial intercourse. Those who have toiled deserve recognition, encouragement and gratitude. The world will hopefully be a better one therefor. But with all due respect to those whose labors have preceded us, it is necessary to emphasize that only the first steps have been taken. A worldwide trade system needs the support of a unified legal framework. The 1964 Hague Conventions have placed the trading nations of the world on notice that the time is ripe for theoretical exchanges to cease, and for serious experimentation to commence. The provisions of the uniform laws in the Conventions are not perfect, and already even unification enthusiasts have begun to discover flaws in their jurisdictional aspects. What is important is that the work is proceeding, and that the United States is now formally participating in the cooperative efforts of many nations to unify private law.

But do all these signs point to the beginning of the end for the rules of conflict of laws in international commerce? Article 2 of the 1964 Draft Uniform Law on the International Sale of Goods expressly excludes the application of rules of private international law for the purpose of the Uniform Law: “Rules of private international law shall be excluded for the purposes of the application of the present law...” This article was not inserted in the Uniform Law on the International Sale of Goods by accident or oversight. It was deliberately and consciously included at a fairly early stage in the drafting process and was resolutely defended at subsequent diplomatic conferences as an indispensable means of broadening the coverage of the Convention and avoiding the supposed disorder of conflict of laws. It must be examined as pari materia with the provisions of Section 1 of the Uniform Law:

89 Nadelmann, supra note 9.
The present Law shall apply to contracts of sale entered into by parties whose place of business are in the territories of different States, in each of the following cases:

(a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;

(c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

Read together, Sections 1 and 2 of the Uniform Law on the International Sale of Goods exclude the application of the rules of private international law and make the provisions of the Uniform Law mandatory, even where the countries of both contracting parties have not become parties to the Convention, providing one of the three conditions in Section 1 (a) (b) (c) is met, and jurisdiction can be obtained over the defendant in a country which has ratified the Convention. This is conceivable if the defendant trader has assets within the forum's jurisdiction. The prospect of a United States trader, who has assets in the Netherlands, being sued in a Dutch court for breach of a contract to sell machinery to a West German firm, when neither the United States nor the Federal Republic of Germany has ratified the Convention, has caused even the most outspoken proponents of unification to take alarm. Assuming that the Netherlands has ratified the Convention, the Dutch court would have to apply the supposedly superior rules of the Uniform Law even if the traditional rules of conflict of laws of both the United States and the Federal Republic of Germany would call for the application of the law of a single country other than that of the Netherlands.

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91 Id. at 456-57.
93 The argument of the drafters of the Uniform Law in favor of "superior rules" recalls the furor surrounding the original version of the conflicts provision in the Uniform Commercial Code. The 1952 version of Section 1-105 of the U.C.C., which would have extended the application of the Code beyond the traditional limits of conflict of laws, may be found in Burton, supra note 19, at 461. See also Goodrich, Conflicts Nice- ties and Commercial Necessities, 1952 Wis. L. Rev. 199.
Such a possibility might very well encourage "forum-shopping" in the international arena, something which heretofore has been mainly a phenomenon of United States conflicts law. Not only would it tend to open the door to bad faith declarations at the time of trial by the complaining party, but jurisdictionally it would deny what we in the United States call due process of law.\(^4\)

Supporters of the Uniform Law on the International Sale of Goods answer these objections by pointing to Article 3 of the Law, which states: "The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be expressed or implied."\(^5\) To be sure, international traders enjoy a large measure of freedom to mould their contractual relationships. It is not only in the field of substantive law that this autonomy exists, but also in the conflicts area itself.\(^6\) Conceding the argument that traders may avoid the Uniform Law if they so desire, it is scarcely in keeping with the spirit of international cooperation and collaboration that reliance must be placed on the lex voluntatis in order to remedy the deficiencies of a major piece of unification law.

It is also important to point out that the provisions of the Uniform Law on the International Sale of Goods, directing the courts of adopting states to exclude otherwise appropriate rules of private international law, are inconsistent with the rules of the Convention

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\(^4\) For a convincing criticism of the Uniform Law, embracing these and other shortcomings, see Nadelmann, supra note 9, at 456-63. The substantive sales law aspects are examined by Berman, The Uniform Law on International Sale of Goods: A Constructive Critique, 30 L. \\& CONTEMP. PROB. 354 (1965).

\(^5\) Cf. 13 AM. J. COMP. L. 457 (1964). As a practical matter, "it would be quite simple for the practitioner to defeat the application of the Uniform Law in any case where the negotiating position of his client makes it possible for him to designate another law, for example the U.C.C., as the governing law of the contract." Cf. Daw, Some Comments From the Practitioner's Point of View, 14 AM. J. COMP. L. 242 (1965). Wide-spread use of this exclusionary device would have the effect of frustrating the efforts of the framing fathers of the Uniform Law on the International Sale of Goods. When one considers the unbending attitude of the drafters when criticism was directed at Article 2, it is not difficult to understand Professor Nadelmann's reference to the exclusionary clause "as an appropriate memorial to a short-sighted attempt to impose upon the world a uniform law not agreed upon by its principal trading nations." Nadelmann, supra note 9, at 462.

on the Law Applicable to the International Sale of Goods.\(^{97}\) This Convention, which has been ratified by Italy, Belgium, France, Denmark, Norway, and Sweden, went into effect on September 1, 1964.\(^{98}\) It represents the culmination of a movement, begun in 1924, to unify the conflicts rules applicable to international sales.

In order to reconcile the inconsistencies between the provisions of the Uniform Law and the rules of the Convention on the Law Applicable, Article IV of the Convention Relating to a Uniform Law on the International Sale of Goods states:

\[
\text{Any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires the application of the Uniform Law.}^{99}
\]

It is clear that the above cited provision permits such a reservation only for a country which has already ratified the Convention on the Law Applicable. Where the country first adopts the Uniform Law, it would appear that it may not subsequently ratify the Convention on the Law Applicable.\(^{100}\)

Other possibilities exist for the deactivation of the explosive potential of the conflicts provisions of the Uniform Law on the International Sale of Goods. They are taken up in the following paragraphs.

VI. CONCLUSION

From the foregoing it is apparent that the law of Conflict of Laws is not so easily banished from the realm of foreign trade. Those who have placed their complete faith in the healing powers radiating from a unified substantive international law of commerce have experienced little of the expected relief. In their quest for certainty and stability, the substantivists have gone far to demonstrate that their superior

\(^{97}\) For example, Article 3 of the Convention on the Law Applicable provides that, where the parties have not otherwise stipulated, "a sale is governed by the internal law of the country where the vendor has his habitual residence at the time when he receives the order." See the translation in Nadelmann, supra note 9, at 463.

\(^{98}\) Id. at 452. See also Honnold, supra note 78, at 334 n.25.


\(^{100}\) Honnold, supra note 78, at 334 n.25.
grasp of international sales law is not matched by a well-developed sensitivity to conflicts justice.\textsuperscript{101}

Even in the unlikely event that the Uniform Law on the International Sale of Goods were to be adopted in every country of the world, this circumstance would still not obviate the need for rules of conflict of laws. In the absence of a supranational, unified court possessing the power to command execution of its mandates, interpretations of the Uniform Law will vary from country to country, not to mention the variations from case to case within the same country. Diverse patterns of judicial reasoning and varying styles in judicial opinion writing will tend to produce a national gloss to the Uniform Law. Moreover, those areas of international commercial law not covered by the Uniform Law, and there are many, remain within the province of national law, subject to further development by municipal courts.\textsuperscript{102} Wherever the provisions of the Uniform Law are inapplicable or subject to different jurisdictional interpretations, the once banished conflicts problem will suddenly reappear! Conflicts surgeons will have to be called in for emergency clinical treatment.

This does not mean that those who are striving to eliminate conflicts problems, especially in the field of international commercial law, have embarked upon a thankless voyage. The avoidance of conflicts problems by the unification of substantive law is absolutely necessary, and this movement can only be viewed as a positive step in the development of a universal jurisprudence. The search for a common vocabulary — a way of legal thinking and reasoning that

\textsuperscript{101} The problem of choice-of-goals in law gives rise to an eternal quest for a “correct” solution which, in the last analysis, must involve a basic value judgment. In his article, \textit{Legal Certainty Versus Equity in the Conflict of Laws}, 28 L. & CONTEMP. PROB. 795, 797 (1963), Dr. Paul Heinrich Neuhaus sees “a significant tendency in favor of certainty” in contemporary European jurisprudence. The late Hessel E. Yntema, writing in 1928, saw the special task of United States conflicts scholars to be the formulation of rules which will bring a certain amount of certainty and predictability into the conflicts arena. Yntema, \textit{The Hornbook Method and the Conflict of Laws}, 37 YALE L.J. 468, 483 (1928). Regardless of whether international commerce needs more certainty and predictability or more equity in the solution of its legal disputes, it would be well to recall the advice which Professor Paul A. Freund gave some years ago: “... uniformity must be preceded by wisdom, and wisdom by an understanding of objectives and a realization that in both objectives and method conflict of laws is not the least subtle and complex phase of the law.” Freund, \textit{Chief Justice Stone and the Conflict of Laws}, 59 HARV. L. REV. 1210, 1236 (1946).

\textsuperscript{102} Professor Harold J. Berman, in examining the Uniform Law on the International Sale of Goods, found the provisions therein to be too generalized, affording little guidance for the merchant, lawyer or judge seeking “answers to the questions that cause special difficulty in the drafting of international sales contracts.” Berman, \textit{supra} note 94, at 356.
succeeds, despite linguistic and cultural differences, in bringing minds together to agree on the acceptance of a rule of law — this is the ultimate goal of international legal science.

Granted the need for a “dual-track” approach to solving collision possibilities in international commerce, we must turn our attention to the methods which are available in order to achieve this bifilar goal of both improved rules of private international law as well as a unified workable substantive law which eliminates the need for conflicts norms.

First of all, it is necessary for the United States Government to lend its enthusiastic support to the movement for the international codification of private law.\textsuperscript{103} In the past, whatever our governmental initiative might have been in international political, military and economic ventures, we have been reluctant to participate officially in the work of scholars of other countries seeking to unify important areas of private law. Remnants of isolationist thinking may have contributed to the formulation of such a policy. Moreover, there has been a widespread belief in the myth that Congress lacks power under the United States Constitution to legislate in the areas of private international law and foreign commerce.\textsuperscript{104} There also has been evidence of a myopic attitude, in the Continent and in England as well as here in the United States, that the common law and civil law systems are so far apart that no meaningful cooperation in the sphere of private law can be achieved between them.\textsuperscript{105} These beliefs

\textsuperscript{103} The history of the changing U.S. attitudes toward the international unification of private law is well narrated by Nadelmann, supra note 9, at 697-709.

\textsuperscript{104} The power of Congress to regulate foreign commerce is an express power found in article I, section 8 of the United States Constitution. See materials cited note 6 supra. The grant is “complete” and “plenary” and therefore federal legislation embracing a code of private law rules for the conduct of foreign trade could easily be construed by the United States Supreme Court as constitutional. The power of Congress over foreign affairs, whether derived from treaties or viewed as a “necessary concomitant of nationality” (United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)) could be construed to empower Congress to pass legislation governing the rights and duties of private persons in their personal status relationships with foreign juridical personalities, and this regardless of whether the relationship be commercial or otherwise. To be sure, successful legislation in these areas would have to be framed so as not to infringe upon individual rights.

\textsuperscript{105} One of the most widely accepted myths is that in Continental Europe the accused is presumed guilty. Like the admonition which we learned as children that it was wrong to turn the hands of a clock counter-clockwise, this one is likely to stay with us indefinitely. Cf. 1 COHN, MANUAL OF GERMAN LAW 1 (2 vols., London: His Majesty’s Stationery Office, 1950); Mueller, Lessons of Comparative Criminal Procedure, 15 AM. U.L. REV. 341, 349 (1966). For the observation of a man whose study and experience revealed the sweeping similarities in the common and civil law systems, see Rabel, Deutsches und Amerikanisches Recht, 16 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 340 (1951).
of another day have no place in contemporary United States policy. They are founded on fear and ignorance, and fit not at all into the positive image of open-mindedness, confidence and optimism which we project to other peoples of the world.

Congress has now acted to authorize United States membership in both the Rome Institute and The Hague Conference on Private International Law. An Advisory Committee on Private International Law has been established by the Secretary of State in order to aid the United States Government in planning its new relationship with these bodies. Thus, the first steps have been taken. It remains for the United States to subject the Uniform Law on the International Sale of Goods, as well as the Convention on the Law Applicable to the International Sale of Goods, to intensive study in order to make United States views known to the international academic community. For this purpose, the Advisory Committee on Private International Law could be expanded and set up on a permanent, full-time basis. Its task could be the unification of the rules of private international law as well as the unification of the substantive law of international commerce. The combination of both activities under one roof would prevent the possibility that unification efforts in these interrelated and interdependent areas would be proceeding at cross-purposes. By setting the tasks of the Committee at the international level, a clear line would be drawn between problems of international, as opposed to interstate, conflicts. It would thus be possible to ground a discipline in this country whose vocabulary, doctrine and mentality would be geared to that of our foreign colleagues.

The Committee would be directed to explore two avenues toward the unification of private law. One, of course, is the method of adherence to an international convention by ratification and adoption, followed by implementing congressional legislation where necessary. The other would be the method of adopting uniform

107 Nadelmann, supra note 9, at 328.
108 Recognizing the need for a jurisprudence de-emphasizing local law stare decisis, Nicholas deB. Katzenbach, now United States Under Secretary of State, remarked: "A vocabulary and doctrine geared to a single legal system are strained beyond their capacity, or utility, when employed in a context of multiple sovereignties." Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 YALE L.J. 1087, 1095 (1956).
109 In United States constitutional law, there is a doctrine of the enlargement of congressional power through treaties. Although Missouri v. Holland, 252 U.S. 416 (1920), is commonly cited in this connection, the vast scope of the treaty power was established as early as 1796 in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), which
legislation, a technique with which we have had considerably more experience. Both approaches would keep in intimate contact with the activities of the Rome Institute and the Hague Conferences, at the same time preparing the drafts of (1) a national code on private international law; and (2) a national code on international commercial law.

By reason of the liaison between the efforts of both drafting sections, the final versions would reflect a harmonious consensus of what our most enlightened and informed scholars feel would represent the best United States position in light of the plans and aspirations of those outside the United States, who will ultimately be asked to accept these products as binding codifications of international law.

decided that the treaty of peace with England prevented a state from wiping out debts to British subjects.

The movement toward unification of domestic United States law has proceeded, slowly but surely, along these lines. Cf. Dunham, A History of the National Conference of Commissioners on Uniform State Laws, 30 L. & Contemp. Prob. 233 (1965); Amram, supra note 17.


For commentary on the new Czech code of international trade, see the articles by Kalensky and Drucker, supra note 65. The Czechs have gone to some efforts in order to draft separate codes for private international law and international trade, realizing that the rules in each must be complementary, not conflicting. The U.S.S.R. has to date been content to regulate its foreign trade by a series of scattered statutes, some of which were collected, translated and published by the late Professor Vladimir Gsovski (Soviet Civil Law (2 vols., Ann Arbor: University of Michigan Press, 1948, 1949)), and which have since been supplemented by the Fundamental Principles of Civil Legislation, Osnovy Grazhdanskogo Zakonodatelstva SSSR i Soiuznikh Respublik, 1 Sovetskoe Gosudarstvo i Prawo 139 (1962). See also Hazard, Soviet Socialism and the Conflict of Laws, 1963 Mil. L. Rev. 69, in which the author concludes that the Soviet hope for unification of law is based on a unification of morals.

Such a goal could hardly be achieved in five or ten years. Plans should be made to prepare our young legal talent for work in comparative law, which should receive more attention in the law school curriculum. See the foreword by Hessel E. Yntema to Lawson, A Common Lawyer Looks at the Civil Law vii-xvii (Ann Arbor: University of Michigan Law School, 1953). Despite the great strides which have been made in this area since World War II, much remains undone. As Professor Nadelmann rightly noted, "transformation of the results of comparative law research into action on the international level is still in its infancy." Supra note 67, at 709. We must take this problem-child now and seriously work on it so that future generations will be able to enjoy the fruits of our planning and sacrifice. Not by crash programs can the young law student gain any meaningful knowledge of another legal system. Patient years of care and training must be invested before the techniques of comparative methodology can be transferred usefully to the drafting and negotiation table. As Clive Schmitthoff remarked in connection with the international trade colloquium
As a supplement to the activities of the Committee, a national professional periodical devoted especially to the publication of scholarly comment on the problems of unification of law could be founded. At present, we lack such a national review, despite the stimulating symposiums which appear from time to time in our general law reviews. By liberally accepting contributions from foreign scholars, the review could quickly gain recognition as a real international barometer of scholarly opinion.\textsuperscript{114}

Whether or not these suggestions be adopted, in time it will become apparent that the need for certainty and stability in foreign commerce will be served only by a combined and concerted effort by unification substantivists and loyal international conflicts specialists. Faith in both doctrines, coupled with a spirited supply of good humor, should stock our cadres with the psychological weapons necessary to fight their way through the parochial paranoia of indifference and hostility.

\textsuperscript{114} Our professional reviews devoted to international and comparative law, the American Journal of International Law and the American Journal of Comparative Law, together with the reviews by law student groups at Harvard, Columbia, Yale and Virginia, contain much that is of vital concern to those interested in the unification movement. But as Dr. Neuhaus has pointed out, "even the best-equipped law library on the European Continent cannot subscribe to all American law reviews that publish articles dealing with the conflict of laws . . . ." \textit{Supra} note 101, at 807.