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The *Lex Mercatoria* and Private International Law

Friedrich K. Juenger*

I. CONFLICTUALISM AND INTERNATIONALISM

At first blush, the title of this article appears to be paradoxical because private international law (a term used here in to connote choice-of-law rules applied to international transactions) and the *lex mercatoria*¹ represent radically different approaches to the same problem. Whereas private international law submits these transactions to the law of a particular state or nation, the *lex mercatoria*, a concept that connotes a set of transnational norms,² would govern them directly, without the intervention of choice-of-law rules. To link these divergent approaches with the conjunctive "and" may look odd given the abyss that, in the opinion of representatives of these two approaches, separates their respective schools of thought.

There are, on the one side, the internationalists, such as the late Berthold Goldman³ and, on the other, the "conflictualists,"⁴ such as the late Francis A. Mann.⁵ The scholars found in one camp have little use for the views of those from the other and sometimes mince no words when expressing their mutual disdain, witness the following observation of the late comparativist René David:

[T]he lawyer's idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have largely freed themselves from it, by means of standard contracts and arbitration, and states will be abandoning neither sovereignty nor prerogatives, if they open their eyes to reality and lend themselves to the reconstruction of international law.⁶

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1. The literature on the emerging new law merchant is vast. For an introduction to the subject and further references see Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999); Filip De Ly, *International Business Law and Lex Mercatoria* (1992); *Lex Mercatoria and Arbitration* (Thomas E. Carbonneau ed., rev'd ed. 1998).

2. On terminology see generally Berger, *supra* note 1, at 37-43.

3. For a succinct statement reflecting the fundamental views of the *lex mercatoria*'s eminent French advocate, see *Lex Mercatoria and Arbitration*, *supra* note 1, at xvii.

4. A term coined by René David, *The International Unification of Private Law*, in 2 *International Encyclopedia of Comparative Law*, ch. 5, 25 (1969).

5. For a succinct statement of his views see *Lex Mercatoria and Arbitration*, *supra* note 1, at xxiii.

6. David, *supra* note 4, at 212.

No less scathingly, Mann rejected the notion of a non-national law merchant, saying that the *lex mercatoria* "is as obscure as the equally unfortunate word 'transnational.'"⁷ These remarks suggest that private international law and the *lex mercatoria* are incompatible notions, between which there cannot be any common ground. How, indeed, should it be possible to reconcile the internationalists' idea to submit transactions that transcend national frontiers to an overarching law merchant, and the conflictualists' insistence that one or the other domestic law must of needs govern because such a body of transnational law simply does not exist?

Wherever one's sympathies lie, however, neither of these two approaches is indefensible and both of them have long been used in practice. The idea of a legal order specifically designed for transfrontier transactions is the older one. It dates back to the *ius gentium* developed by the *praetor peregrinus*, who devised rules that had a universal purport to govern disputes with and between non-Romans.⁸ It can of course be argued that these were in fact domestic Roman rules, rather than some kind of common law divorced from the society of which he was a functionary.⁹ The *ius gentium*, however, not only differed from the *ius civile* used for purely domestic consumption, but it also contained foreign (especially Greek) elements.¹⁰ Moreover, its rules were conceived for the express purpose of dealing with the "transnational" transactions of the times, and it came to be considered as a natural law, which could serve mankind at large.¹¹ In fact, the idea that it represented a universal law persisted over the centuries, as shown by the fact that the term *ius gentium* was later used to connote both public and private international law.¹²

A *lex mercatoria* with universal purport, which Maitland called the "private international law" of the Middle Ages,¹³ developed after the Dark Ages, when trade and commerce once again brought together merchants from many parts. The rules that governed their transactions were not purely local in nature.¹⁴ Nor, however, were they derived from the other supranational systems of the times, the revived *ius civile* elaborated by law teachers in Upper Italy¹⁵ and the Catholic Church's canon law. Rather, the emerging law merchant, which amounted to a "rebirth of the old *ius gentium* of the Mediterranean,"¹⁶ had to develop institutions, such as negotiable

7. *Lex Mercatoria and Arbitration*, *supra* note 1, at xxiv.

8. *See generally* Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History* 73-74, 81, 86 (1966); Hans Julius Wolff, *Roman Law* 33, 72, 84 (1951).

9. *See De Ly*, *supra* note 1, at 10-11.

10. *See* Kunkel, *supra* note 8, at 73-74, 81, 86; Wolff, *supra* note 8, at 33, 72, 84; Franz Wieacker, *On the History of Supranational Systems of Commerce*, in *The Legal Organization of Commerce and Its Relation to Social Conditions* 7, 10 (1979).

11. G. Inst. 1.1; Cicero, *De republica* 3.12; *De off.* 3.17.69; *De har. sep.* 14.32; Sir Henry Maine, *Ancient Law* 50 (Sir Frederick Pollock ed. 1906).

12. *See* *Scrimshire v. Scrimshire*, 161 Eng. Rep. 782, 791 (Consist. 1752); *Luke v. Lyde*, 97 Eng. Rep. 614, 617 (K.B. 1759); Hugo Grotius, *De iure belli ac pacis libri tres: the translation* (Francis W. Kelsey trans., 1964) *passim*; Maine, *supra* note 11, at 50, 92-99.

13. Frederic William Maitland, *Select Pleas in Manorial and Other Seigniorial Courts* 133 (1889).

14. *See* Wieacker, *supra* note 10, at 11-12.

15. *See* Berger, *supra* note 1, at 54.

16. Munroe Smith, *The Development of European Law* 223 (1928).

instruments, for which these legal systems offered no counterpart to deal with the exigencies of commercial transactions that did not respect territorial boundaries.¹⁷ Maritime commerce, in particular, by its very nature called for universal rules. In fact, to this day the international conventions that govern this world-wide activity still reflect many of the rules maritime tribunals elaborated, by means of the comparative method, from a wide variety of sources as the *Usatges* of Barcelona, the *Rôles d'Oléron* and the law of the Hanse towns.¹⁸ As these examples show, the idea of supranational norms of commercial law developed through practice rather than legislation¹⁹ is hardly novel.

Once nation states emerged and the notion of sovereignty spread, however, the idea of a transcendental law lost appeal; the common law absorbed the *lex mercatoria* and civil law countries nationalized it²⁰ by putting its rules and institutions between the covers of domestic commercial codes. Thus, while recognizing the difference between ordinary local rules of private law and those dealing with commerce—which, by its very nature, cannot be confined within a particular territory—the codifiers, proceeding from the premise that commercial law as well required the state's imprimatur, put a domestic stamp on rules and principles derived from international practice, as did the English judiciary.²¹ Indeed, so strong was the pull of the notion that only the state can make law that jurists doubted the existence, or at least the legal character of public international law, whose rules and institutions were, after all, not enacted by a "sovereign."²² Even those who accepted that international law does amount to a legal system nevertheless took the position that it was ultimately derived from the law-making power of nation states, whose consent furnished the basis for its authoritative quality.²³ Individuals and enterprises, however, were not considered to be "subjects" of international law; only nation states could qualify as such.²⁴ In those positivistic times, the very idea of a supranational *lex mercatoria* or *ius gentium* to govern private transactions was anathema because "if it is assumed that law can only be made by nation-states, then of course it 'follows' that law cannot be made by communities that transcend nation states."²⁵ Since private dealings, including commercial transactions, were not

17. On the law merchant of the Middle Ages see generally Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 333-56 (1983); Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 7-21 (1983).

18. See Friedrich K. Juenger, *Choice of Law and Multistate Justice* 23 (1993) (with further references).

19. See Roy Goode, *Commercial Law in the Next Millennium* 11 (1998).

20. See Uwe Blaurock, *The Law of International Commerce, in The Unification of International Commercial Law* 9, 13 (Franco Ferrari ed., 1998).

21. See Trakman, *supra* note 17, at 23-26.

22. See John Austin, *The Province of Jurisprudence Determined* 208 (1st ed. 1832).

23. See Grigori Ivanovich Tunkin, *Theory of International Law* 89-203 (William E. Butler trans., 1974).

24. See Mark W. Janis, *An Introduction to International Law* 240-43 (3d ed. 1999).

25. Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy, in Lex Mercatoria and Arbitration, supra* note 1, at 53, 54.

subject to public international law, they had to be controlled by the law of some sovereign; the only question being *which* sovereign.

II. THE PROBLEMS WITH PRIVATE INTERNATIONAL LAW

To answer the question which domestic law should govern a particular multistate transaction, courts and legislatures have looked to the writings of conflict of laws scholars. Ironically, the glossators and commentators were the first to discuss choice-of-law issues. Although their primary activity had been the elaboration of a universal law, the *ius commune* that once prevailed throughout continental Europe, these medieval jurists dealt with the subject because they were of course familiar with the diversity of the legal rules and institutions found in the *statuta* of the cities of Upper Italy, where they taught and practiced.²⁶ Building on their efforts, successive generations of authors from many nations further developed and refined their contributions to the conflict of laws.²⁷

The intricate problems posed by the attempt to deal with multistate activities by applying domestic rules attracted some great legal scholars, such as Bartolus of Sassoferrato,²⁸ Friedrich Carl von Savigny²⁹ and Joseph Story.³⁰ As might be expected, not only the rules they advocated but also their fundamental approaches to the choice-of-law problem differed considerably. Nor have these differences of opinion been resolved. Thus, to this day it remains doubtful whether the statist's unilateralist approach—recently revived by American conflicts scholars such as Brainerd Currie—which attempts to determine the spatial reach of substantive rules,³¹ the multilateralist methodology Story³² and Savigny³³ advocated, or perhaps an admixture of the two, is the most appropriate one to accomplish this delicate task. Obviously, methodological uncertainties of this kind hardly serve the needs of international commerce between enterprises that treasure certainty and predictability in legal relationships.³⁴

The clash of different schools of thought is not the only problem with private international law. Unilateralism as well as multilateralism are beset by a number of inherent difficulties, which the proponents of these choice-of-law methodologies have yet to resolve in a satisfactory fashion. I have discussed these conundrums elsewhere,³⁵ for present purposes it may suffice simply to refer to them. There is,

26. See Juenger, *supra* note 18, at 11.

27. For the evolution of conflict of laws doctrines *see id.* at 11-21.

28. *See id.* at 13.

29. *See id.* at 34-40.

30. *See id.* at 29-31.

31. See Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963); Juenger, *supra* note 18, at 98-103.

32. See Juenger, *supra* note 18, at 30.

33. *See id.* at 39.

34. Concerning the uncertainties of applying choice-of-law rules to international commercial transactions *see* Berger, *supra* note 1, at 9-12.

35. See Juenger, *supra* note 18, at 86-87, 131-39.

first of all, the multilateralists' "General Part"³⁶ of the conflict of laws, which contains an odd assortment of constructs as characterization,³⁷ *renvoi*,³⁸ public policy,³⁹ the preliminary (or "incidental") question⁴⁰ and other puzzles⁴¹ engendered by the questionable premises on which multilateralism rests. Nor is unilateralism immune to such self-inflicted difficulties. For the past thirty years, Currie's followers have been discussing the oddities of "true" and "false conflicts,"⁴² the "unprovided-for case"⁴³ and *dépeçage*⁴⁴ that their approach creates. In spite of all the intellectual efforts wasted on dealing with the problems their methodologies spawn (which have engendered a voluminous literature), neither of the two schools can offer satisfactory answers to the simple question which law the courts of different nations will actually apply to a particular international transaction.

Both multilateralism and unilateralism reward forum shoppers by letting the decision of transnational disputes hinge on where the dispute is litigated,⁴⁵ which frustrates the business community's quest for certainty and predictability in commercial dealings. To be sure, it is the multilateralist school's objective to safeguard these values. In fact, uniformity of decision was the rationale Savigny offered to justify the multilateral system he advocated⁴⁶ and multilateralists still pursue the elusive goal of "decisional harmony,"⁴⁷ as it is usually called nowadays. But multilateral rules cannot possibly guarantee that the same law will be applied irrespective of where a dispute happens to be litigated. First of all, it is difficult to localize in one state or another transactions that, by their very nature, transcend national frontiers.⁴⁸ What choice-of-law rules should, for instance, govern copyright issues arising from Internet transmissions?⁴⁹ To accomplish the remarkable feat of tying down a transaction that straddles state lines to one territory or another, multilateralists use the white magic of connecting factors. These,

36. See *id.* at 70-82.

37. See *id.* at 71-74.

38. See *id.* at 77-79.

39. See *id.* at 79-82.

40. See *id.* at 74-76.

41. See *id.* at 86.

42. See *id.* at 137-38.

43. See *id.*

44. See *id.* at 138-39.

45. See De Ly, *supra* note 1, at 58; Goode, *supra* note 19, at 87.

46. See 8 Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* 129; Juenger, *supra* note 18, at 36, 39.

47. See, e.g., Pierre Mayer, *Droit international privé* 56 (5th ed. 1994) ("*harmonie des décisions*"); Max Keller & Kurt Siehr, *Allgemeine Lehren des internationalen Privatrechts* 57 (1986) ("*Entscheidungsharmonie*").

48. See De Ly, *supra* note 1, at 58. "[T]ypical international contracts are *ab initio* not localized within any single national system." Blaurock, *supra* note 20, at 18.

49. See Symeon C. Symeonides et al., *Conflict of Laws: American, Comparative, and International* 894-97 (1998); Jane C. Ginsburg, *The Private International Law of Copyright in an Era of Technological Change*, 273 *Collected Courses of the Hague Academy of International Law* 239, 322-98 (1998).

however, have an arbitrary quality⁵⁰ and may unduly favor one of the parties by invoking that party's home state law.⁵¹

Moreover, private international law rules differ widely from state to state, as the variations between recent European conflicts codifications demonstrate, and the "General Part" casts doubt on the actual effect of applying a particular choice-of-law rule. Hence it cannot be predicted with any confidence what substantive law will be held to control a given dispute;⁵² of necessity the rights and duties of the parties to an international transaction depend on the forum that adjudicates them. In practice, judges, after paying lip-service to the forum's conflicts rules, tend to favor the application of domestic law.⁵³ Assuming, however, that they, faithful to their local conflicts rules, do venture to apply alien rules of decision, there is of course no guaranty that they will apply them correctly⁵⁴ or that these rules resolve the parties' dispute in a satisfactory manner.⁵⁵ Even less apt to provide certainty, predictability and uniformity of result than the traditional multilateral conflicts rules is the unilateralist methodology, especially the current version that attempts to derive solutions to choice-of-law problems from the "interests" states are said to have in the applications of their laws.⁵⁶ That approach obviously favors the *lex fori*; indeed, unilateralists have little use for the multilateralists' vaunted goal of "decisional harmony."⁵⁷ Worse yet, neither unilateralism nor multilateralism offers any guarantee of just decisions in multistate cases.

The two methodologies do, however, have some things in common. Both proceed from the assumption that courts are equally capable of applying domestic and foreign law, an assumption that is hardly grounded in reality.⁵⁸ Moreover, both fail to address the fundamental question how domestic law can possibly be suitable

50. See De Ly, *supra* note 1, at 58.

51. See Juenger, *Private International Law and the German Legislature*, in *The International Lawyer* (Freundesgabe für Wulf H. Döser) 623, 630-31 (1999) (the Rome Convention's "characteristic performance" test).

52. See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts Prepared by the Institute for the Unification of Private Law (UNIDROIT)*, in *Transnational Law in Commercial Legal Practice* (Center for Transnational Law ed., 1999).

53. See De Ly, *supra* note 1, at 57-58.

54. See *infra* notes 58 and 116.

55. See Barton S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 *Ann. Survey Int'l Comp. L.* 111, 114 (1995). As a noted conflicts scholar once observed, "one who expects results in multistate cases that are . . . satisfying in terms of standards of justice and of party acceptance is doomed to disappointment." Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 *Law and Contemp. Probs.* 27, 42 (Sept. 1977).

56. The existence of such "interests" may well be doubted. See Juenger, *supra* note 18, at 135-36.

57. See Symeon C. Symeonides, *General Report*, in *Private International Law at the End of the 20th Century: Progress or Regress?* (Symeon C. Symeonides ed. 1999) (discussing Currie's discarding the desideratum of international uniformity).

58. The judge's task becomes difficult if he is required to apply a foreign law, particularly if it belongs to a "family" different from his own He is liable to distort it, if only because he does not usually have direct access to its sources, which are written in a language not his own. There are many examples of this: for a national judge to apply foreign law is difficult, haphazard, and not very satisfactory in any country.

David, *supra* note 4, at 11. See also *infra* note 116 and accompanying text.

for transactions that transcend state and national frontiers. Shortly before the turn of the century, when legal positivism reigned supreme and nationalist fervor had reached its pinnacle, a Dutch conflicts scholar wrote:

It is an erroneous idea that private international law has attained its objective when it has chosen from among the laws that touch upon a legal relationship It is this idea which has converted our science into a conflicts guillotine and has produced these badly chosen questions that the legislator can only resolve by a "*sic jubeo*." ⁵⁹

René David voiced the same criticism, adding that the use of domestic tools to solve questions that are essentially international "is to square the circle."⁶⁰ Similarly, the Uruguayan private international law scholar Quintín Alfonsín answered the question "can a *national* private law . . . adequately regulate an *extranational* relationship,"⁶¹ with a resounding "no," because the law adopted by a state is designed to serve the needs of its society and can therefore not be applied to transnational relationships, whose exigencies are different from national ones.⁶² Attacking the very foundation of private international law, he said:

From a scientific and an economic point of view it is inadmissible, in effect, that the destiny of a contract should depend on whether it be governed by the national laws of A or the national laws of B, all the more so if the selection between the two can only be made by reference to imperfect criteria⁶³

For this reason Alfonsín believed in an evolutionary process, which would lead from choice-of-law rules to substantive solutions, so that transnational contracts would ultimately be governed by transnational law.⁶⁴

Respectable authority supports the proposition that this stage has at long last been reached. Noted scholars, in particular Berthold Goldman, have commented on the emergence of a new *lex mercatoria*,⁶⁵ an evolution that is driven by the use of standard contract terms in international commercial practice and the prevalence of arbitration. Because the members of arbitral tribunals owe no allegiance to any particular nation, this method of dispute resolution allows enterprises effectively to denationalize their dealings. It is therefore too late to argue that the exigencies of international commerce are necessarily subordinate to the positive laws of nation

59. Daniël Josephus Jitta, *La méthode du droit international privé* 44 (1890) (translation by the author).

60. David, *supra* note 4, at 7.

61. Quintín Alfonsín, *Teoría del Derecho Internacional Privado* 19 (1955) (translation by author).

62. *Id.*

63. Quintín Alfonsín, *Régimen Internacional de los Contratos* 171 (1950) (translation by the author).

64. *Id.* at 179.

65. See, e.g., Berthold Goldman, *The Applicable Law: General Principles of Law—Lex Mercatoria*, in *Contemporary Problems in International Arbitration* 113 (Julian D. M. Lew ed., 1986); *Lex Mercatoria and Arbitration*, *supra* note 1, at xix.

states. "Unification and creation of the law on the transnational plane . . . reflect the commercial realities of modern international business practice. . . . Legal theory has to take account of this phenomenon in order to avoid any claims that it is out of touch with reality"66 The need for such a supranational kind of law can be expected to increase as the volume of international transactions keeps growing and new developments put in question the traditionalists' preference for geography over teleology. Phenomena such as "cyberspace," which are at odds with the traditionalists' conception of the world as legal territories surrounded by fixed borders, suggest the usefulness of a law that knows no boundaries.⁶⁷

III. INTERNATIONAL RULES AND PRINCIPLES IN CURRENT PRACTICE

As one might expect, conflicts scholars who are imbued with traditional notions of sovereignty and legal positivism have sharply criticized the opinions of internationalists.⁶⁸ One of their arguments, the *lex mercatoria's* alleged dearth of rules, has lost cogency. The uniform commercial law of our times includes, *inter alia*, the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention),⁶⁹ a set of positive norms, and the UNIDROIT Principles of International Commercial Contracts, a "restatement."⁷⁰ While the former is limited to sales transactions, the latter—the work product of eminent scholars from both of the two major legal cultures, the common and the civil law—amounts to a broadly gauged code of contract law. As far as both quality and coverage are concerned, the UNIDROIT Principles compare favorably with the domestic laws of most states and nations; in fact, it seems fair to say that they are superior in many respects to, for instance, the contracts provisions of the German Civil Code.⁷¹ A mere restatement, they are not burdened by the compromises⁷² that inevitably mar the final product when negotiators insist on protecting what they may believe to be national interests.⁷³ In addition to these international endeavors to

66. Berger, *supra* note 1, at 230.

67. See Symeonides et al., *supra* note 49, at 894-87; Ginsburg, *supra* note 49, at 376-98.

68. See, e.g., Paul Lagarde, *Approche critique de la lex mercatoria*, in *Le droit des relations économiques internationales* 125 (1982); Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in *Liber Amicorum for the Rt. Hon. Lord Wilberforce* 149 (Maarten Bos & Ian Brownlie eds., 1987).

69. Apr. 11, 1980, 1489 U.N.T.S. 3 (1988), 19 I.L.M. 671 (1980), *reprinted in* 15 U.S.C. 333 (1997).

70. 34 I.L.M.1067; see generally Michael Joachim Bonell, *An International Restatement of Contract Law* (2d ed. 1997).

71. For critical comments on various deficiencies of, for instance, the rules on breach of contract found in the German Bürgerliches Gesetzbuch see, e.g., I B. S. Markesinis et al., *The Law of Contracts and Restitution: A Comparative Introduction* 398-401 (1997); Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* 486, 511-12 (impossibility), 492, 509, 511 (breach) (3d ed. 1996). See also Zweigert & Kötz, *id.* at 513-15 for a brief comparative reference to the U.N. Convention on the International Sale of Goods and the UNIDROIT Principles.

72. See Bonell, *supra* note 70, at 63-65.

73. "[E]very international convention represents but the sum of compromises that the representatives of different legal, political and economic systems were able to achieve. Because,

codify rules, there have been attempts to list the pertinent principles of transnational commercial law observed in practice.⁷⁴

Thus there now exists a body of rules that, having a supranational purport, is better suited to deal with international transactions than choice-of-law rules possibly could. To be sure, private international law, at least its multilateral variant, does have some supranational features, even though its rules are of national origin. Because of a shared academic tradition—which, through Story, also spread to the common law⁷⁵—it contains a number of universal ideas, or at least ideas that are recognized in several nations.⁷⁶ Specifically, as far contracts, the lifeblood of international commerce, are concerned, most civilized nations have long recognized that the parties to an agreement are free to stipulate the law they wish to govern their respective rights and duties. The principle of party autonomy is now firmly established in the laws of all developed countries and has acquired true international stature by having been enshrined in choice-of-law conventions.⁷⁷

Significantly, party autonomy has troubled quite a few “conflictualists” because that principle cannot be readily explained in terms of either unilateralism or multilateralism,⁷⁸ as the reaction of scholars from both of these two schools shows. Multilateralists such as Ludwig von Bar⁷⁹ and Beale⁸⁰ rejected it, Batiffol attempted to explain it away,⁸¹ and Kegel calls it a “*Verlegenheitslösung*.”⁸² Preoccupied with notions of sovereignty and state interests, unilateralists such as Currie find it difficult to understand how the concerns of private parties could possibly trump those of states.⁸³ Party autonomy of course echoes, on the level of private international law, the fundamental substantive principle of freedom of contract. It

however, there are always issues for which a compromise cannot be found, gaps are unavoidable.” Franco Ferrari, *Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen*, 53 *Juristenzeitung* 10 (1998) (translation by the author).

74. See Berger, *supra* note 1, at 208-29. For such a list see *id.* at 278.

75. See Juenger, *supra* note 18, at 29.

76. [T]here has always been a common conceptual framework in European conflicts theory including the United Kingdom. Concepts like classification, preliminary question, renvoi, evasion of law and public policy are common ground in all European legal systems. . . .

There are no impediments to a *ius cogens* in private international law.

Bernd von Hoffmann, *The European Community and Private International Law*, in *European Private International Law* 15 (Bernd von Hoffmann ed., 1998). The list of international commercial law principles in Berger, *supra* note 1, at 278 contains several choice-of-law principles. See rules 26-28 *id.* at 289-90; see also Klaus Peter Berger, *The CENTRAL-List of Principles, Rules and Standards of the Lex Mercatoria*, in *Transnational Law in Commercial Legal Practice* 121 (Center for Transnational Law ed., 1999).

77. See *id.* at 27-29; Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 *Am. J. Comp. L.* 195, 200, 204 (1997).

78. Concerning problems the traditional approach has with party autonomy see De Ly, *supra* note 1, at 63-74.

79. See 2 Ludwig von Bar, *Internationales Privatrecht* 3-5 (1889).

80. See 2 Joseph H. Beale, *The Conflict of Laws* 1079-86, 1091 (1935).

81. See Henri Batiffol, *Les conflits de lois en matière de contrats* 340 (1938).

82. Gerhard Kegel, *Internationales Privatrecht* 483 (7th ed. 1995) (“*Verlegenheitslösung*”).

83. See Currie, *supra* note 31, at 103 (“subversion of the interest of the state”).

offers an eminently practical solution to the choice-of-law quandary by enabling individuals and enterprises to submit their transactions to a legal order that can accommodate the needs of international commerce. Hence it makes sense, for instance, to specify the application of English law in commercial cases (which foreign parties often do even if their contract has no contact whatsoever with the United Kingdom).⁸⁴

Notwithstanding the vital function party autonomy serves in international commerce, some "conflictualists," preoccupied with the tenets of sovereignty and legal positivism, have tried to limit the parties' choice to a selection from among positive laws. Thus, according to Paul Lagarde, one of its reporters, article 3 of the Rome Convention on the Law Applicable to Contractual Obligations⁸⁵ does not authorize individuals and enterprises to designate the *lex mercatoria*, the UNIDROIT Principles or any other non-positive legal system, as the law that is to govern their agreement.⁸⁶ Whether the European courts will actually construe the Rome Convention in such a restrictive fashion is questionable;⁸⁷ I certainly know of no case that has so held. Yet, the fetters with which "conflictualists" attempt to adorn the universal principle—whose ultimate justification is its responsiveness to the needs of international commerce—is revealing: it cogently demonstrates the inclination of traditional private international law scholars to relegate felt necessities to a low priority on their scale of values.

IV. IS THERE A ROLE FOR THE *LEX MERCATORIA* IN PRIVATE INTERNATIONAL LAW?

Irrespective of how unsatisfactory it may be, however, as matters stand now, any rumors of a demise of "conflictualism" would be highly exaggerated. Bad habits die hard; for the foreseeable future private international law—enshrined as it is in domestic legislation and international conventions—can be expected to remain the preferred approach to dealing with international transactions. This fact inevitably poses the question whether private international law and universalism must forever remain at loggerheads, or whether there is room for co-existence, and perhaps some form of interaction, between the two schools of thought.

A. *Justice Story and the Lex Mercatoria*

Luckily, not all of us who teach private international law are entirely averse to the *lex mercatoria*. I certainly have been impressed by the arguments of those who

84. See Goode, *supra* note 19, at 94.

85. European Convention of June 19, 1980 on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, reprinted in 19 I.L.M. 1492 (1980).

86. Paul Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, 80 *Revue critique de droit international privé* 287, 300-01 (1991).

87. See *infra* note 107 and accompanying text.

look favorably upon the new law merchant.⁸⁸ Nor am I the only one.⁸⁹ In fact, Justice Story—who coined the term “private international law”⁹⁰—was a firm believer in the existence of a supranational law of commerce, as shown by his opinion in *Swift v. Tyson*.⁹¹ In that case, which dealt with the issue whether the endorsement of a negotiable instrument was void because it lacked consideration pursuant to New York case law, he said that “the true interpretation of [contracts and other commercial instruments] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.”⁹² For this proposition he relied on an opinion in an admiralty case by Lord Mansfield (one of whose accomplishments was the incorporation of the law merchant into English common law), which quoted Cicero’s observation about the *ius gentium*.⁹³ In *Swift*, Story used the same quotation: “*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*”⁹⁴

Of course, the eminent American judge and scholar penned his opinion before the old *lex mercatoria* was nationalized; once legal positivism became rampant, *Swift v. Tyson* came under attack. Justice Holmes debunked this precedent, saying that “law in the sense in which courts speak of it today does not exist without some definite authority behind it”⁹⁵ and “the authority and only authority is the State,”⁹⁶ a passage on which Justice Brandeis relied in *Erie R.R. v. Tompkins*,⁹⁷ the decision that overruled *Swift*. The consequences of the doctrine the Supreme Court adopted

88. See Friedrich K. Juenger, *The Lex Mercatoria and the Conflict of Laws*, in *Lex Mercatoria and Arbitration*, *supra* note 1, at 265; Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 Vand. J. Transnat’l L. 487 (1995); Friedrich K. Juenger, *Lex Mercatoria und Eingriffsnormen*, in *Festschrift für Fritz Rittner* 233 (1991).

89. Alfonsin, *see supra* note 61 and accompanying text, as well as Josephus Jitta, *see supra* note 59 and accompanying text, taught private international law. For favorable views of contemporary teachers of private international law *see, e.g.*, Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 Int’l & Comp. L. Q. 747 (1985); Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in *Lex Mercatoria and Arbitration*, *supra* note 1, at 71. Echoing the earlier authors’ concerns, Lowenfeld wrote:

Lex mercatoria, as I see it, can furnish an alternative to a conflict of laws search which is often artificial and inconclusive, and a way out of applying rules that are inconsistent with the needs and usages of international commerce and which were adopted by individual states with internal, not international transactions in mind.

Id. at 85.

90. See Joseph H. Story, *Commentary on the Conflict of Laws* 11 (2d ed. 1841).

91. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

92. *Swift*, 41 U.S. (16 Pet.) at 19.

93. See *Luke v. Lyde*, 97 Eng. Rep. 614, 617 (1759).

94. *Swift*, 41 U.S. (16 Pet.) at 19. Earlier, Story had used a slightly different version of this quotation in an admiralty case, *De Lovio v. Boit*, 7 F. Cas. 418, 443 (C.C. D. Mass. 1815), in which he referred to the “great system of maritime law.”

95. *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533, 48 S. Ct. 404, 409 (1928) (Holmes, J., dissenting).

96. *Id.* at 535, 48 S.Ct. at 409.

97. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79, 58 S. Ct. 817, 823 (1938).

in *Erie* illustrate the hazards of "conflictualism." That case has helped balkanize American law and prompted innumerable choice-of-law problems, especially in mass disaster cases. The difficulties it created induced Judge Weinstein, the eminent judge and scholar, to revive—in the *Agent Orange*⁹⁸ litigation—the rule in *Swift* under the guise of a "national consensus law."⁹⁹ This bold move had the purpose of promoting an acceptable outcome of the staggering number of lawsuits brought for injuries armed services personnel had suffered on account of the defoliants sprayed on enemy territory during the Vietnam war. As this case shows, an overarching law designed to take into account international realities is apt to produce more sensible and practical solutions than the conflictualists' insistence on the need to invoke domestic laws to dispose of disputes that, by their very nature, are not confined to the borders of a single state.

B. Party Autonomy and the UNIDROIT Principles

While it may appear that private international law and the *lex mercatoria* are simply incompatible, on reflection it becomes apparent that there is room for co-existence; the new law merchant can in fact interact with choice-of-law principles. First of all, at least some private international law scholars take the position that party autonomy ought to enable individuals and enterprises to submit their international dealings to supranational law or the UNIDROIT Principles.¹⁰⁰ Few would deny that such a choice is possible whenever a contract provides for arbitrating rather than litigating future disputes that may arise between the parties. In fact, if the parties should have failed to do so (and sometimes even if they select a national law to govern their agreement), arbitrators have been known nevertheless to invoke rules and institutions derived from the *lex mercatoria* and the UNIDROIT Principles.¹⁰¹ The argument that they thereby violated their mandate and acted as mere *amiable compositeurs* without the parties' consent has been rejected in a number of reported cases.¹⁰² Moreover, countless important transactions are already governed by non-national rules such as the Uniform Customs and Practices for Documentary Credits of the International Chamber of Commerce and the INCOTERMS.¹⁰³

98. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

99. *See id.* at 696-99, 708, 709, 711-13.

100. *See infra* note 107 and accompanying text.

101. For references see B. Fauvarque-Cosson, in *A New Approach to International Commercial Contracts* 95, 114 (1999). A U.S. federal district court enforced an arbitral award that invoked the UNIDROIT Principles notwithstanding a choice-of-law clause that provided for the application of Iranian law. *See Islamic Republic of Iran v. Cubic defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998). For a discussion of this case *see* Michael Joachim Bonell, *UNIDROIT Principles: A Significant Recognition by a United States District Court*, 4 *Uniform L. Rev.* 651 (1999).

102. For pertinent national court decisions *see supra*, Berger, note 1, at 85 n.353; Blaurock, *supra* note 20, at 23-24.

103. *See supra* Berger, note 1, at 67-68, 226-27; Arthur I. Rosett, *The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Commercial Contracts*, 46 *Am. J. Comp. L.* 347, 352-53 (Supp. 1998).

Because of their preoccupation with "sources,"¹⁰⁴ however, die-hard conflictualists object to allowing contractual stipulations that invoke non-positive rules.¹⁰⁵ For this reason, the Rome Convention has been worded in such a way as not to permit the parties to submit their agreement to the UNIDROIT Principles or the *lex mercatoria*.¹⁰⁶ Whether the Convention will in fact be interpreted to restrict the freedom of individuals and enterprises engaged in international transactions to select whatever law they like, be it national or supranational, remains doubtful.¹⁰⁷ If the drafters, however, should have succeeded in imposing such a nonsensical restraint—for no other reason than to safeguard doctrinal purity¹⁰⁸—they would have rendered a disservice to the European Union. The prohibition against the selection of non-national norms deprives enterprises of a valuable option, which in practice can serve the important function to overcome a deadlock by stipulating to a neutral law. Moreover, it inhibits courts from filling gaps of international conventions by recourse to the UNIDROIT Principles or other supranational bodies of law.¹⁰⁹ Unable to invoke to rules specifically developed for international realities, courts must then resort to national law, thereby jeopardizing the conventions' very objective of creating a uniform law.¹¹⁰

This will not do at a time when "we find commercial practice in a period of change unprecedented in its pace and scale."¹¹¹ However, a remedy is at hand. Since the Treaty of Amsterdam amended the Treaty of Rome to include the harmonization of conflicts rules among the tasks assigned to the European Community, it now allows for "supranationalizing" the choice-of-law rules contained in the Rome Convention by substituting a regulation for this compact.¹¹²

104. "[T]he *lex mercatoria*-doctrine constitutes a veritable threat to the classical theory of legal sources." Berger, *supra* note 1, at 29. As to that theory see Peter Berger, *Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung*, 54 *Juristenzeitung* 369, 371-72 (1999).

105. "Among [the general] . . . principles [of private international law] is the *Magna Charta* of conflict of laws which states that domestic courts may not apply a-national law." Berger, *supra* note 1, at 78.

106. See *supra* notes 85-86 and accompanying text.

107. The view of legal authors differ widely. See, e.g., Christoph Reithman & Dieter Martiny, *Internationales Vertragsrecht* 62-63 (5th ed. 1996); Katharina Boele-Woelki, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, 1 *Uniform L. Rev.* 652, 664-66 (1996); Bernard Dutoit, *The Rome Convention on the Choice of Law For Contracts*, in *European Private International Law*, *supra* note 76, at 39, 44-45; Ferrari, *supra* note 73, at 15, 17; Ralf Michaels, *Privatautonomie und Privatkodifikation*, 62 *RabelsZ* 580, 596-98 (1998); Johannes Christian Wichard, *Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte*, 60 *RabelsZ* 269, 282-90 (1996).

108. See Lagarde, *supra* note 86, at 300-01.

109. See Ferrari, *supra* note 73, at 15.

110. Ferrari criticizes this feature of the Rome Convention. See *id.* at 15-16, 17.

111. Goode, *supra* note 19, at 7.

112. Article 65(b) of the Treaty Establishing the European Community, as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, now includes "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws" among the European Community's tasks. Concerning the potential consequences of this new provision for

If the European Community's Council and Commission do embark on such a project, one should certainly hope that commercial law experts will bring to their attention the need to liberalize its provisions so as to authorize, in clear and unambiguous terms, individuals and enterprises to subject their agreements to non-national rules. This would allow the parties to designate a legal order oriented to the exigencies of international commercial transactions, which they may find preferable to opting for one of the parties' home-state law or a neutral legal system.¹¹³ Such a choice is also likely to guarantee greater predictability than choice-of-law rules possibly could.¹¹⁴ Amending the terms of the Rome Convention in this fashion would, at the same time, enable courts to resort to the UNIDROIT Principles for the purpose of filling gaps in international conventions.¹¹⁵

Permitting the choice of a non-national law such as the UNIDROIT Principles would also alleviate the difficulties private parties and the courts encounter when they are required to ascertain and apply a foreign law couched in an alien terminology. Even if the rules of private international law were clear and precise, which they are not for reasons already stated,¹¹⁶ this daunting task inevitably introduces uncertainty concerning the contracting parties' respective rights and obligations. In contrast, the UNIDROIT Principles, readily accessible in any half-way decent law library, set forth the pertinent legal norms in reasonably clear and cogent terms.¹¹⁷ Nor do the Principles pose major interpretative difficulties to monolingual counsel and judges: they are available not only in English, the *lingua*

Europe's private international law see Burkhard Heß, *Die "Europäisierung" des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag—Chancen und Gefahren*, 2000 *Neue Juristische Wochenschrift* 23; Christian Kohler, *Interrogation sur les sources de droit international privé européen après le traité d'Amsterdam*, 1999 *Revue critique de droit international privé* 1; Thomas Pfeiffer, *Die Entwicklung des Internationalen Vertrags-, Schuld- und Sachenrechts 1997-99*, 1999 *Neue Juristische Wochenschrift* 3674.

113. See Boele-Woelki, *supra* note 107, at 659.

114. See Wichard, *supra* note 107, at 292.

115. See *supra* notes 109-10 and accompanying text.

116. See Juenger, *supra* note 18, at 157-59. Foreign law issues pose difficulties even within regional organizations, such as the European Community, where an enormous volume of commercial transactions moves freely across national borders. As has been observed:

legal counsels in the Member States are simply not qualified to give their clients precise information on foreign contract law and the essential points in which it differs from domestic law. In practice, legal advisers recommend choice of law clauses which almost invariably refer the case to domestic law, and this advice is usually due to pure ignorance of alternative options offered by foreign legislation. Moreover, the adviser knows that, in case of a dispute with his foreign counterpart, he will be in a superior negotiating position

Jürgen Basedow, *A Common Contract Law for the Common Market*, in *The Unification of International Commercial Law*, *supra* note 20, at 41, 50. See also Boele-Woelki, *supra* note 107 and accompanying text.

117. The rules are concise, clearly arranged and conveniently collected . . . in a slim volume of no more than 200 pages in length. The succinct wording, limpid comments and an abundance of examples dealing with real-life situations are all designed for easy use. . . .

The Principles are, as it were, presented on a silver platter.

Boele-Woelki, *supra* note 107, at 660.

franca of our times, but have been translated into a variety of other languages. As is apparent, if the current version of the Rome Convention must indeed be construed to restrict the parties' choice to positive national laws, it is sadly out of date and in dire need of reform.¹¹⁸

C. Choice-of-Law Conventions

Apart from their utility as a law to which individuals and enterprises may subject their international dealings, the *lex mercatoria* and the UNIDROIT Principles can also play a role in choice-of-law statutes and conventions. When I served as a member of the U.S. delegation to the 1994 Fifth Inter-American Specialized Conference of the Organization of American States (CIDIP-V) in Mexico City, I proposed the inclusion of the following provision in the draft of an Inter-American Convention on the Law Applicable to International Contracts:

If the parties have not selected the applicable law, or if this election proves ineffective, the contract shall be governed by the general principles of international commercial law accepted by international organizations.¹¹⁹

As was to be expected, private international scholars took issue with this proposal. However, owing to the support of the eminent Venezuelan conflicts and international law scholar Gonzalo Parra-Aranguren, who chaired the pertinent committee, the Conference ultimately adopted the text now found in the second paragraph of article 9 of the Inter-American Convention:¹²⁰

[The court, in addition to the wide range of objective and subject factors specified in the first paragraph of article 9] shall also take into account the general principles of international commercial law recognized by international organizations.

The wording of this provision, which mixes together traditional contacts with substantive principles in eclectic fashion, is hardly ideal.¹²¹ It does, however, have the undeniable virtue of granting courts and arbitrators a leeway of discretion that allows them to resort to the UNIDROIT Principles, rather than some obscure and internationally unacceptable rule found in national law.¹²²

118. See *id.* at 673-75, 677.

119. Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 Am. J. Comp. L. 381, 391 (1994). This formula was designed to refer to contract rules accepted by such bodies as UNIDROIT.

120. Inter-American Convention on the Law Applicable to International Contracts, OAS Doc. OEA/Ser.K/XXI.5 (Mar. 17, 1994), reprinted in 33 I.L.M. 732 (1994).

121. See Juenger, *supra* note 119, at 391.

122. See *id.*

D. Domestic Choice-of-Law Statutes

On a different occasion, I was asked to comment on the choice-of-law provisions contained in a draft of the new Russian Civil Code. In addition to questioning the draft's reliance on the traditional multilateral methodology and the dysfunctional national law principle,¹²³ I offered a critique of various specific articles and proposed an approach different from the drafters' contract choice-of-law provisions.¹²⁴ As might have been expected, the draft—modeled on the Rome Convention¹²⁵—used the “closest connection” formula and the “characteristic performer” test, which, in addition to other deficiencies, accords unwarranted choice-of-law privileges to parties habitually engaged in international commerce.¹²⁶

I questioned the ability of Russian judges, new as they are to the private international law business, to deal effectively with conflicts and foreign law issues and pointed out that the “characteristic performer” test might not only disadvantage Russian importers of goods and services but also invoke substandard foreign contract rules. I therefore suggested to substitute the following provision:

In the absence of an agreement of the parties on the applicable law, the contract shall be governed by the UNIDROIT Principles of International Commercial Contracts.

The UNIDROIT Principles were framed with the aid of representatives of the former Soviet Union and have been translated into Russian. Obviously, construing them presents fewer problems than the draft's convoluted conflicts rules. Even more importantly, the Principles not only obviate the need to delve into foreign law but also provide greater certainty and predictability than the recourse to traditional multilateral choice-of-law rules and the attendant “General Part.”¹²⁷ My letter was never answered, which goes to show that one should never underestimate the power of conventional conflicts wisdom.

123. See Friedrich K. Juenger, *The National Law Principle*, in 2 *Mélanges Fritz Sturm* 1519 (1999).

124. See letter of Dec. 17, 1997, to Professor A. L. Makovsky, Private Law Research Centre, Moscow; letter of June 1, 1998 to Dr. A. Zhiltsov, Head of Comparative and Private International Law Research Center, Moscow (both on file with the author).

125. Article 1251, entitled “Choice of Law by Parties to a Contract,” provided, in relevant part, as follows:

1. In the absence of an agreement of the parties on the applicable law, the contract shall be governed by the law of the country with which the contract is most closely connected.
2. The law of the country with which the contract is most closely connected is, unless otherwise follows from a statute, terms and the nature of the contract or the circumstances of the case considered in their entirety, the law of the country where the place of residence or the main place of business of the party whose performance is characteristic for the content of the contract is located.

126. See Friedrich K. Juenger, *Two European Conflicts Conventions*, 28 *Victoria U. Wellington L. Rev.* 527, 540 (1998).

127. See *supra* notes 36-41 and accompanying text.

E. Creating a Ius Commune by Means of Choice-of-Law Rules

Although no positive private international law statutes have taken this path, it is nevertheless possible (and certainly seems advisable) to incorporate the UNIDROIT Principles into such enactments. There is, however, yet another way in which private international law can promote the ends of international commerce. No doubt, as far as transnational contracts are concerned, the elaboration of a supranational substantive law is preferable to relying on traditional private international law rules. But is the same not equally true of other international transactions? If so, what if there is no quasi-codification along the lines of the UNIDROIT Principles available to serve as a set of norms in, say, tort cases? Might it not be possible to employ choice-of-law approaches to create such a body of substantive international rules, a new *ius gentium* that extends beyond the field of contracts? It is certainly not beyond the realm of possibility to develop such a true "international private law"¹²⁸ by recourse to conflicts methodology. In fact, as I pointed out on an earlier occasion, as long as courts pursue a definite policy, even diverging choice-of-law approaches can yield a similar assault, and thereby in effect create substantive rules of decision.¹²⁹

There is also a more direct way of achieving this purpose: alternative reference rules that favor a desired policy can help to create such an "international private law." Rules of this kind are neither novel nor revolutionary; they have long been used in practice. Perhaps the best example is the principle, which dates back to the days of the statisticians, that compliance with either the *lex loci contractus* or the *lex loci solutionis* is sufficient to protect a contract against formal invalidity.¹³⁰ Should private international law not promote similar commonsensical solutions to the legal problems of a world in which transactions fail to respect state and national frontiers? Or are those of us who teach and write about private international law condemned to debate forever the respective merits of the unilateralist and the multilateralist methodologies? The time seems ripe to combine the conflictualist with the internationalist approach. The contracts scholars who drafted the Convention on the International Sales of Goods and the UNIDROIT Principles have rendered important contributions to international trade and commerce, as has the work of those who compile lists of international commercial contract rules.¹³¹ It now behooves private international experts to do their part in creating the legal structures needed in this age of unprecedented "globalization" because "legal scholars have an important role to play in encouraging national courts to think internationally."¹³² As a German author put it, "the reevaluation of the relationship between an

128. See Friedrich K. Juenger, *Private International Law or International Private Law?*, 5 King's College L. J. 45 (1994-95).

129. See *id.* at 60.

130. See Juenger, *supra* note 18, at 178.

131. See *supra* note 74 and accompanying text.

132. Goode, *supra* note 19, at 93. See also *id.* at xvii.

autonomous international commercial law and national private law should be one of the future tasks of private international law."¹³³

This issue of the *Louisiana Law Review* is dedicated to a good friend and scholar of note. Our views diverge in many respects, but Symeon Symeonides is one of the few American conflicts scholars who not only pay special attention to international transactions but have also given the *lex mercatoria* some thought. He refers to the subject in his General Report to the XVth International Congress of Comparative Law,¹³⁴ and deals with it in the context of the cyberspace problem, which he discusses in the last chapter of his conflicts casebook.¹³⁵ This should help direct attention to an important development, which is somewhat neglected in American conflicts literature, and educate the students who use that book to a phenomenon of considerable importance they are bound to encounter in practice.

133. Karl Firsching & Bernd von Hoffmann, *Internationales Privatrecht* 61 (5th ed. 1997).

134. See Symeonides, *supra* note 57, at 19-20.

135. See Symeonides et al., *supra* note 49, at 896-97.