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TRANSNATIONAL LAW-MAKING: ASSESSING THE IMPACT OF THE VIENNA CONVENTION AND THE VIABILITY OF ARBITRAL ADJUDICATION

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International commercial dispute resolution through arbitral adjudication has grown at an accelerated pace in recent years.¹ Legislative and decisional law pronouncements in major Western countries recognize the systemic integrity of the arbitral process and affirm its utility as an instrument of transnational commerce. This is especially true in France² and in the United States,³ despite ves-

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¹ An exhaustive bibliographic survey of the domestic and foreign literature on international commercial arbitration would exceed reasonable space limitation. The following list of works constitutes a representative sample of sources. The classical treatments of the subject include: R. DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* (1982); P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1965); J. ROBERT, *L'ARBITRAGE DROIT INTERNE DROIT INTERNATIONAL PRIVÉ* (5th ed. 1983); C. SCHMITTHOFF, *INTERNATIONAL COMMERCIAL ARBITRATION* (multi-volume series); G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* (1984); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42 (1982); Mentschikoff, *Commercial Arbitration*, 61 *COLUM. L. REV.* 846 (1961).

See also *INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION* (M. Domke ed. 1958); J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* (1979); Aksent, *International Arbitration - Its Time Has Arrived!*, 14 *CASE W. RES. J. INT'L L.* 247 (1982); Ehrenhaft, *Effective International Commercial Arbitration*, 9 *LAW & POL'Y INT'L BUS.* 1191 (1977); Kerr, *International Arbitration v. Litigation*, 1980 *J. BUS. L.* 164; McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 *VA. J. INT'L L.* 729 (1977).

² See Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 *TEX. INT'L L.J.* 33 at 50-57, 77-82 (1984) [hereinafter cited as *Arbitral Adjudication*]. See also Decree of May 14, 1980, 1980 *J.O.* 1238, 1980 *D.S.L.* 207; Decree of May 12, 1981, 1981 *J.O.* 1398. For commentary on the French decrees, see Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH*

tiges of reluctance in England.⁴ Moreover, a variety of international organizations has emerged,⁵ promoting and facilitating the recourse to arbitration in the multifarious circumstances of international contracts. The 1958 New York Arbitration Convention⁶ appears to embody not only a wide-ranging, but also a deeply-rooted transnational consensus on international arbitral dispute resolution.

The expression of misgivings about the arbitral process has been

INTERNATIONAL ARBITRATION [Sixth Sokol Colloquium] (T. Carbonneau ed. 1984); Craig, Park & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 LAW & POL'Y INT'L BUS. 727 (1981); Delaume, *International Arbitration Under French Law: The Decree of May 12, 1981*, 37 ARB J. 38 (1982); Derains, *France*, [1982] Y.B. COM. ARB. 3; Goldman, *La nouvelle réglementation française de l'arbitrage international*, in THE ART OF ARBITRATION 153 (J. Schultz & A. Van Den Berg eds. 1982).

³ See Carbonneau, *Arbitral Adjudication*, *supra* note 2, at 45-53, 65-76; 1970 Arbitration Act, 9 U.S.C. §§ 201-208 (1976). *Comment, United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W.L. INT'L L.J. 67 (1971); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961). See also Czyzak & Sullivan, *American Arbitration Law and the UN Convention*, 13 ARB. J. 197 (1958).

⁴ See Carbonneau, *Arbitral Adjudication*, *supra* note 2, at 40-45, 62-65. See also (Eng.) Arbitration Act, 1979, ch. 42, reprinted in 5 Y. B. COM. ARB. 239-46 (P. Sanders ed. 1980). For commentary on the 1979 Act, see, e.g., Hacking, *The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT'L LAW. 95 (1980); Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87 (1980); Steyn, *England*, 8 Y.B. COM. ARB. 8 (1983).

⁵ See Delaume, *Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)*, 109 J. DR. INT'L 775 (1982). See also HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (E. Cohen, M. Domke, F. Eisemann eds. 1977); Coulson, *The Future Growth of Institutional Administration in International Commercial Arbitration*, in THE ART OF ARBITRATION 73 (J. Schultz & A. Van Den Berg eds. 1982).

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, codified in 9 U.S.C. §§ 201-08 (1982). For a comprehensive scholarly discussion of the Convention, see A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981). See also Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959); Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471 (1975); Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW. 320 (1969). See also Sanders, *Consolidated Commentary on Court Decisions on the New York Convention 1958*, 4 Y.B. COM. ARB. 341 (1979). See generally Aksen, *Application of the New York Convention by United States Courts*, [1979] Y.B. COM. ARB. 341; G. GAJA, *NEW YORK CONVENTION* (multi-volume series).

episodic⁷ and has not disturbed the basic consensus on its remedial effectiveness. It is true that practical drawbacks exist.⁸ Additionally, the transnational character of the arbitral process does raise legitimate concern about the continued vitality of national interests within the framework of the arbitral process.⁹ Nevertheless, many of the theoretical objections appear moot,¹⁰ and the real defi-

⁷ See, e.g., Rhodes & Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANS. L. 19 (1984).

⁸ See *id.*

⁹ See, e.g., Carbonneau, *The Exuberant Pathway To Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANS. L. — (1986).

¹⁰ Municipal law can influence the arbitral process in a number of ways. First, the procedural rules of the forum may determine the manner in which the adjudication will be conducted. Second, substantive municipal law may govern the resolution of the dispute. Third, the validity of the award under various national laws may be relevant to the award's enforceability. Unless the losing party acquiesces to the award, the prevailing party will lodge an enforcement action before a national court. Finally, questions arise concerning the relationship between the arbitral tribunal and the laws of the arbitral forum: whether and to what extent forum law can or should influence the course of arbitration solely because the tribunal is presiding in the forum.

The English view of the degree to which national laws and policy can or should influence the international arbitral process is marked by a strong disdain for arbitral anationalism. English judges and commentators refer disparagingly to a system of "floating" arbitration or arbitration "unbound." The traditional English view is that a system of procedural or substantive law for the resolution of disputes can exist only by virtue of sovereign authority. All adjudications conducted in England must be subject to a certain extent to the English judicial system and procedural rules. For a description of this attitude, see Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L. J. 87 (1980). Although weakened somewhat by recent legislation (see Arb. Act, 1979, c. 42), the restrictive English view of arbitration persists. *Accord*, Dallah v. Bank Mellat, [1986] 2 WLR 745.

F.A. Mann is a particularly virulent critic of the concept of international arbitration; he advocates the restrictive English view of arbitration, whether domestic or international. See, e.g., Mann, *England Rejects "Delocalized" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193 (1984); Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed., 1967). [Hereinafter cited as *Lex Facit Arbitrum*]. It is Mann's view that "[i]n the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law." *Lex Facit Arbitrum*, *id.* at 159.

Mann's refusal to recognize international commercial arbitration as a form of adjudication independent of municipal law and national sovereigns reflects a strict Austinian view of the law. Essentially, Mann argues that there can be no party autonomy, hence no institutional autonomy, if autonomy is defined as independence from the strictures of national law:

No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of munici-

ciencies and potential excesses can always be accommodated through informed dialogue and practical adjustments that do not compromise the systemic integrity of the arbitral framework. The fact is that commercial transactions have for centuries been conducted in a transnational context, and merchants have a long history of autonomy in resolving their own disputes. Any concern over the viability of a transnational, commercially self-regulating dispute resolution mechanism belies the history of European law merchant.

Questions concerning the future orientation of the process are more pressing and demand a definition of the international mission

pal law. Even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given state. No private person has the right or power to act on any level other than that of municipal law, every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law.

Lex Facit Arbitrum, *id.* at 160.

Further, Mann rejects the view that arbitrators can decide disputes on the basis of usages and fairness rather than municipal law: "It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon parties to an international commercial contract of their arbitrators powers that no system of law permits and no court could exercise." Mann, *supra* at 197.

This attack upon the existing process is objectionable in a number of respects. On the one hand, the refusal to recognize the evident realities of international commercial activity and the necessity of having a dispute resolution process that transcends parochial national concerns reveal the sterility of the analysis. It begrudges the creative contributions of the dynamic interplay between the law and economic forces merely because they undo prior realities. On the other hand, the strident character of the analysis clouds the real problem: how to strike a workable balance between the transnational arbitral process and the integrity of vital national policy interests — a problem that emerged clearly in the United States Supreme Court's recent opinion in *Mitsubishi*. See text accompanying *supra* note 9.

The American and French concepts of international commercial arbitration may well be excessive in some respects. A moderation of these views, however, will not be achieved by a vociferous denial of what is unmistakably established and functional.

For further discussion of these issues, see J.P. FOUCHARD, *supra* note 1, at 330-550; Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international séjournant en Suisse*, 1976, REV. ARB. 155; Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967); Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Park & Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253 (1983); Paulsson, *Arbitration Unbound*, 30 INT'L & COMP. L.Q. 358 (1981); Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983).

and role of arbitral adjudication. Nations share the perception that national economies are no longer autonomous, that they must function within a larger global framework. The question then becomes not whether a uniform international law of sales is needed, but rather how it is to be achieved. The transnational preeminence that arbitration has gained as a remedial mechanism makes it a likely vehicle for elaborating a common law of international contracts.

Arguments proposing the integration of a normative component to transnational arbitration¹¹ have been complicated by the recent United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention).¹² The Convention aims to establish a uniform international law of sales through statutory means,¹³ attempting thereby to minimize the lack of predictability in international commercial dealings and possibly fulfilling the function of supplying a substantive international law of contracts. The existence of the Convention might render modification of the present arbitral process unnecessary. The choice is, then, between the creation of fixed legislative rules in an international instrument (principally a civilian approach) or having international arbitral tribunals elaborate the tenets of such a law over time on an ad hoc, case-by-case basis (essentially a common law process).

¹¹ See Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANS. L. 579 (1985). "The critical question regarding the future development of international arbitration adjudication . . . is whether it can produce substantive legal principles and, in effect, stimulate and foster the development of a common law of international transactions." *Id.* at 581.

¹² See Final Act of the United Nations Conference on Contracts for the International Sale of Goods, April 11, 1980, U.N. Doc. A/Conf. 97/18 (1980) [hereinafter cited as Vienna Convention].

¹³ *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearings on Treaty Doc. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 6 (1984) [hereinafter cited as *Senate Hearings*] (Statement of Peter H. Pfund, Assistant Legal Advisor for Private International Law, State Dept.). ("[T]he Convention is generally consistent with the approach and outlook of the UCC.") *Id.* at 5-6. See generally Lansing and Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL'S Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L & COM. REG. 63 (1980-1981); Dore and DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L. J. 49 (1982).

Proponents of the legislative approach could be critical of the arbitral solution. For example, history, they might argue, reveals that common law cannot develop without a unified judicial system. Moreover, they might allege that international arbitrators lack public jurisdictional authority and are not otherwise qualified to evaluate and balance various national legal positions on commercial law issues. If international commercial law standards are to be defined, the argument continues, they should emerge from the text of an international instrument rather than the makeshift operation of a private, *ad hoc* adjudicatory process. International commercial arbitrators should implement and be guided by legislatively-established substantive rules; they should not expect to create legal principles and doctrines in their haphazard, private adjudicatory rulings.

The substance of these arguments misunderstands not only the essential character of the law merchant and the common law, but also the workings of the transnational legal process. It fails to account for the role that international arbitral tribunals have already played and can continue to play in the elaboration of a transnational commercial law. The Supreme Court of Italy recently described how the process of commercial arbitration generates non-national legal rules:

[T]he law in which such arbitration operates is transnational, being independent of the laws of the individual states. Since "mercantile" law comes into existence through the adhesion of merchants to the values of their milieu, merchants comply with those values, which the majority of them considers binding, because of necessity. . . .

To the extent that it is established that merchants . . . —independently of their belonging to a state—agree upon the basic values inherent to their trade, . . . a *lex mercatoria* exists. . . .

Accordingly "mercantile" law comes into existence when binding values are recognized and complied with, and merchants coordinate their conduct on the ground of common

rules.¹⁴

This article assesses the impact of the Vienna Convention upon prospective and actual transnational arbitral law-making, and concludes that, given the realities of international commerce, having arbitral awards rendered by way of published decisions with reasons remains the more viable source of an emerging common law of international contracts. At best, in light of its substantive deficiencies and its political underpinnings, the Convention can only serve a veiled function, acting as a remote backdrop for arbitral rulings that actually create viable rules of conduct for international merchants.

I. THE EXAMPLE OF THE LAW MERCHANT: A BRIEF HISTORICAL ACCOUNT

Prior to the emergence of modern nation-states, trading transactions were conducted within a largely self-regulatory, customary framework free of any significant national government constraints. These self-imposed rules of commercial conduct and dispute resolution, which became known as the law merchant or *lex mercatoria*,¹⁵ applied in nearly all regions of Europe. When geographical territories became autonomous political entities and formed national legal systems, the customary commercial law was absorbed into national law. Variations in substance eventually arose, necessitating a system of choice of law principles to designate a governing national law for resolving transnational commercial disputes.

¹⁴ Corte Casse, 1982 Foro It. I 2285 (1982).

¹⁵ See generally, W. BEWES, *THE ROMANCE OF THE LAW MERCHANT* (1923); G. MALYNES, *LEX MERCATORIA* (1685); L. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983); Burdick, *What is a Law Merchant?*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 39 (1909); SCRUTTON, *GENERAL SURVEY OF THE HISTORY OF THE LAW MERCHANT*, in *id.* at 7; Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, in *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS*, Part III, Folio 3 (W. Surrey and D. Wallace, Jr. 2d ed. 1983), a revision of Berman and Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 *HARV. INT'L L. REV.* 221 (1978); Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?*, 3 *BROOKLYN J. INT'L L.* 210 (1977) [hereinafter cited as *Modern Lex Mercatoria*]. See also G. RONGA, *APPROXIMACION A LA HISTORIA DEL DERECHO MERCHANTIL* (1981).

A. *Medieval Trade Fairs*

During the Middle Ages, most European trade was conducted at large commercial fairs, held at established places and times each year.¹⁶ These fairs attracted merchants from all over Europe to places such as Winchester and Sturbridge in England, Besancon and Lyons in France, and Novgorod in Russia.¹⁷ Aside from assurances of safe conduct and true coin provided by sovereigns, the trade fairs were private operations.¹⁸

Although the fairs were relatively peaceful, each fair had its own courts with jurisdiction to resolve the commercial disputes that might arise.¹⁹ These fair courts were designed to respond swiftly to the dispute resolution needs of merchants.²⁰ As Lord Coke noted,

¹⁶ See generally, P. HUVELIN, *ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS ET DES FOIRES* (1897); W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 25-26 (1904); *Modern Lex Mercatoria*, *supra* note 15, at 212-15.

¹⁷ W. BEWES *supra* note 15, at 94-96; *Modern Lex Mercatoria*, *supra* note 15, at 214.

¹⁸ The local sovereign's provision of safe conduct for the merchants was indispensable to the success of medieval trade fairs:

Without the assurance of safe conduct and safe-residence no merchants could have found it worth their while to travel, while in the absence of these institutions it is difficult to guess how the requirements of increasing needs and luxuries could have been supplied. To travel alone and unprotected was to invite attack and plunder.

W. BEWES, *supra* note 15, at 106. Moreover, in England, the King's Exchange supervised international transactions to "regulate the currency, to secure the country against the loss of specie, and . . . to prevent the implication of spurious or debased coin." W. BEWES, *supra* note 15, at 195; See also 26 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, (1924) at 536.

¹⁹ *Id.* at 87; *Modern Lex Mercatoria*, *supra* note 15, at 213. The two primary medieval commercial courts were the court of pie powder and the staple court. See 26 W. HOLDSWORTH, *supra* note 18, at 535-44. Courts of pie powder were incident to most commercial fairs. Their name derives from *piepoudres* or *pede pulverosi*—"dusty feet," but the significance of the name is unclear. One suggested origin for the name is that at fair courts "justice was administered as speedily as the dust could fall or be removed from the feet of the litigants." *Id.* at 536. Another suggestion is that fair courts were "frequented by chapmen with dusty feet, who wandered from mart to mart." *Id.* Staple courts were almost identical to courts of pie powder and were "instituted in the towns of the staple, which, by statute, were the only authorized ports of entry and export for certain commodities such as wool, woofels, leather, tin and lead." Jones, *An Inquiry Into The History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 448 (1958). The staple courts thus regulated trade and customs with regard to these commodities. *Id.* Like fair courts, staple courts were run by merchants. *Id.* at 449.

²⁰ 26 W. HOLDSWORTH, *supra* note 18, at 536. Similarly, Malynes noted: "Merchants' causes . . . ought to be done with great expedition; . . . Merchants' affairs in controversie

these courts provided an inexpensive and rapid dispute resolution mechanism:

[The fair court] is incident to every fair and market because for contracts and injuries done concerning the fair and market there shall be a speedy justice done for advancement of trade and traffic as the dust can fall from the feet.²¹

Efficient and simple adjudicatory techniques allowed cases to be heard from morning until nightfall.²² Although fair courts had juries, the latter were comprised entirely of merchants who were able to understand the cases and render timely verdicts not subject to appeal.²³ Fair courts delivered written, albeit brief, opinions with reasons.²⁴ These decisions eventually grew to represent a recognizable corpus of law.

In the late seventeenth century, Gerard Malynes, an English merchant, wrote the first thorough treatise on the law merchant, describing, *inter alia*, its growth during the Middle Ages and early Renaissance, thereby introducing English merchants and lawyers to European commercial law.²⁵ Malynes' recognition of the non-national status of the law merchant is significant, illustrating that the interest of the commercial community in a uniform law should not be defeated by national political rivalries or local pride. According to Malynes, the Law Merchant "is a customary law approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince."²⁶ Further, the existence of a uniform *lex mercatoria*, indispensable to the expeditious and equitable resolution of disputes between merchants, led the

ought with all brevity to be determined, to avoid interruption of traffick." G. MALYNES, *supra* note 15, at 337.

²¹ *Id.*; Scrutton, *supra* note 15, at 9.

²² G. MALYNES, *supra* note 15, at 337; W. HOLDSWORTH, *supra* note 18, at 536-37.

²³ Malynes, *supra* note 15, at 337; Scrutton, *supra* note 15, at 9.

²⁴ See Scrutton, *supra* note 15, at 10-11 (discussing cases decided between 1275 and 1291).

²⁵ See G. MALYNES, *supra* note 15. This work is divided into three parts. The first consists of forty-seven chapters and deals mainly with commercial and maritime law. The second deals with money. The third and final section discusses commercial paper, subpoenas, enforcement of judgments, and the nature of the courts in which the law merchant was applied.

²⁶ *Id.* at a.

various fairs and markets to develop compatible laws.²⁷

Good faith and adjudicatory dispatch were two preeminent principles of the law merchant.²⁸ The importance of these concepts is evident in a number of supportive ancillary doctrines. For example, an oral contract or a non-notarized document was enforceable because "among merchants good faith was paramount, and was not improved by notarial attestation."²⁹ Similarly, a partnership could be created by oral agreement.³⁰ Parol evidence could also be used

²⁷ For the maintenance of Traffik and Commerce is so pleasant, amiable, and acceptable unto all Princes and potentates, that Kings have been and at this day are of the Society of Merchants: and many times, notwithstanding the particular differences and quarrels, they do nevertheless agree in this course of Trade, because Riches is the bright Star, whose height Traffik takes to direct itself by, or by Kingdoms and Commonwealths do flourish; merchants being the means and instruments to perform the same, to the glory illustration, and benefit of their monarchys and states.

Id. at 2.

Malynes' description of commercial law as transcending political differences is strikingly similar to an optative passage which Clive Schmitthoff wrote in 1969:

The evolution of an autonomous law of international trade founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those of civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade.

The Law of International Trade, Its Growth, Formulation and Operation, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 5 (C. Schmitthoff, ed. 1964). See also *United Nations Convention on Contracts for the International Sale of Goods*, Preamble ("[T]he adoption of uniform rules . . . would contribute to the removal of legal barriers in international trade and promote the development of international trade.")

²⁸ See W. BEWES, *supra* note 15, at 19-25.

²⁹ *Id.* at 19. By contrast, domestic legal systems have traditionally prescribed certain formalities as a prerequisite to the enforcement of a contract. See, e.g., U.C.C. § 2-201 (1977); Statute of Frauds, 29 Car. II, ch. 13 (1677); See generally Cigoj, *International Sales: Formation of Contracts*, 23 NETH. INT'L L. REV. 257, 269 (1976). The recent trend in international sales law is away from formalities. J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES FOR THE 1980 UNITED NATIONS CONVENTION* 152 (1982); K. ZWIGERT & H. KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 50 (1977). The 1980 Sales Convention provides, for example: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Vienna Convention, *supra* note 12, at art. 11.

³⁰ W. BEWES, *supra* note 15, at 21. Again, national legal systems generally impose certain formalities as prerequisites to the creation of a partnership.

to contradict a written document.³¹ Moreover, property in a thing sold was deemed to pass to the purchaser without delivery.³² An unpaid vendor had a lien on the goods in the buyer's hands.³³ Finally, the law merchant allowed the admission into evidence of journals and ledgers to prove a claim upon proper proof of regularity.³⁴

B. *National Incorporation of the Law Merchant*

The law merchant flourished as a set of non-national legal rules for commercial adjudication not only because fair courts were able to develop and preserve it, but also because the national legal systems then existing in Europe were content to have mercantile disputes resolved by a process of commercial self-regulation. Over the course of the sixteenth, seventeenth, and eighteenth centuries, however, national legal systems gradually began to encroach upon that formerly privileged turf and absorb the customary commercial law.³⁵ In England, for example, an increased number of courts and wider judicial jurisdiction encouraged and facilitated the process of absorption. As the common law courts heard commercial cases, they began to take notice of customary commercial law.³⁶

The incorporation of the law merchant into the common law undermined its non-national status to a considerable extent. Moreover, during this period, the common law courts allowed lay juries to determine most commercial matters, thereby instilling uncer-

³¹ *Id.* at 20. *Cf. Goss v. Lord Nugent*, [1883] 5 B. & Ad. 58, 110 Eng. Rep. 713, cited in ZWEIFERT, *supra* note 29, at 79 ("verbal evidence is not allowed to be given of what passed between the parties"); Restatement (Second) of Contracts § 273 Comment b (1981). *But see* Code de Commerce Français art. 109 ("With respect to merchants, acts of commerce may be proven by all means unless it is otherwise provided by law"); J. HONNOLD, *supra* note 29, at 142 (1980 Sales Convention's requirement that "'due consideration is to be given to all relevant circumstances of the case' seems adequate" authority to allow use of parol evidence).

³² W. BEWES, *supra* note 15, at 20. *See* U.C.C. §§ 2-319, 2-320, 2-509, 2-520; 1980 Sales Convention arts. 66-70. *See generally* P. ATTYAH, *THE SALES OF GOODS* (1975); Takinawa, *Risk of Loss in Japanese Sales Transactions*, 42 WASH. L. REV. 463 (1967).

³³ W. BEWES, *supra* note 15, at 20.

³⁴ *Id.* at 22; *See* Fed. R. Evid. 803(6) (business records exception to hearsay rule).

³⁵ Jones, *supra* note 19, at 450-51.

³⁶ *See* Jones, *supra* note 19, at 445-51.

tainty and variability in commercial law rules.³⁷ The courts of general jurisdiction eventually assumed the functions of the commercial courts. Concomitantly, perhaps inevitably, commercial litigation became protracted and expensive. Moreover, a previously transnational law merchant became embedded in the myopic prism of national adjudicatory sovereignty. Obviously, neither development fostered the interests of the international community of merchants.

C. *Assessing the Historical Evolution*

The necessity of commercial activity in conjunction with the feudal circumstances of political decentralization allowed for the creation of a functional, albeit makeshift, process of commercial self-regulation. The emergence of nation-states on the world stage and the ensuing competition to maintain and enhance national identities inexorably led to the assertion of national authority upon commercial dispute resolution, fragmenting uniformity as to both procedure and substance. Late twentieth century technological sophistication and global interdependence demand anew a dislocation of commercial regulation from national sources — a renewal of the former emphasis upon the necessity and specialty of transnational commercial relations. The development of institutional centers for international commerce attests to this emerging need.

³⁷ Lord Mansfield's approach (Lord Mansfield became Lord Chief Justice in 1756) to commercial litigation somewhat mitigated the consequences of this trend. Born and educated in Scotland, a mixed civil and common law jurisdiction, Mansfield derived many of the principles of mercantile law from writings of foreign jurists and the general customs of European merchants. For example, in his celebrated opinion in *Luke v. Lyde*, 2 Burr. 882, 889, 97 Eng. Rep. 614, 619 (1759), Lord Mansfield resolved an issue of freight due for goods lost at sea by referring to the Roman Pandects, the *Consolato del Mare*, Laws of Wisberry and Oleron, and the French Ordonnances. This indicates not only that his approach was international in scope, but also that he sought to discover the uniform principle underlying a mercantile usage through a comparative assessment of its function in different legal systems. See generally Scrutton, *supra* note 15, at 7.

II. THE FORMULATION OF TRANSNATIONAL COMMERCIAL LAW THROUGH INSTITUTIONAL ARBITRATION

Institutional arbitration has emerged as a vehicle through which parties may readily address disputes of a commercial nature, and it has served to consolidate the status of arbitration as the remedy of choice in the international arena:³⁸

The primary significance of institutional arbitration, however, lies in its expression of the non-national recognition of arbitration, a recognition that it advances in the direction of a full internationalization of the arbitral process. Centers of institutional arbitration . . . represent an increasingly "anational" means of implementing the arbitral remedy.³⁹

A. *Non-National Nature of Arbitration as Reflected in ICC Proceedings*

The International Chamber of Commerce (ICC) is a private organization; it receives no government subsidies and is independent of government supervision. Accordingly, it need not conform to the requirements of national legal systems and the other imperatives that influence national court determinations. In addition, the ICC Rules of Arbitration empower ICC tribunals to take commercial customs into account even when a substantive national law governs the resolution of the dispute:

The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate

. . . .

*In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.*⁴⁰

³⁸ Carbonneau *supra* note 2, at 92.

³⁹ *Id.* at 93.

⁴⁰ ICC Rules art. 13(3) & 13(5) (emphasis added).

Further, ICC rules enable arbitrators to act as *amiabile compositeurs*.⁴¹ As one arbitrator has stated:

In addition to the power to decide the dispute before him on the basis of generally accepted legal principles, without being fettered by the technicalities of a particular legal system, the arbitrator sitting as the "amiabile compositeur" is entitled to disregard legal or contractual rights of a party when the insistence on such rights amounts to an abuse thereof.⁴²

ICC arbitrators see their independence from national legal constraints as indispensable to their role in international adjudication and law-making. As one arbitrator stated in a 1974 award:

I myself do not see the need for referring to any particular set of national law rules. . . .

As arbitrator I am myself no representative or organ of any state. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as State judges or other State representatives do, engage the responsibility of [a state]. . . . Furthermore, the courts and other authorities of [a state] can in no way interfere with my activities as arbitrator, neither direct me to do anything which I think I should not do nor to direct me to abstain [sic] from doing anything which I think I should do.⁴³

This independence from national procedural and substantive requirements has led to the emergence of an arbitral decisional law which identifies and applies fundamental principles of international commercial law. As Professor Sanders, sitting as arbitrator in a recent dispute, stated, previous awards "create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, them-

⁴¹ *Id.* art. 13(4).

⁴² Partial Award of June 14, 1979, Case No. 3267, *reprinted in* [1982] Y.B. COM. ARB. 96, 105.

⁴³ Award of 1974, Case No. 2321, *reprinted in* [1976] Y.B. COM. ARB. 132, 134.

selves successively elaborated[,] should respond.”⁴⁴

B. Fundamental Principles of International Commercial Law Identified By ICC Awards

Recent ICC awards reveal that international arbitrators minimize national law considerations and invoke general principles of international commercial law to resolve disputes. In a 1979 award, for example, a tribunal decided a difficult choice-of-law problem by giving preemptive effect to international commercial law.⁴⁵

Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation . . . and to apply the international *lex mercatoria*.⁴⁶

In another award involving a breach of contract, the parties had failed to stipulate an applicable law.⁴⁷ There, the Tribunal held that “in making its determination on the issues involved . . . [it] will apply the widely accepted general principles governing com-

⁴⁴ Interim Award of September 23, 1982, Case No. 4131, *reprinted in* [1984] Y.B. COM. ARB. 131, 136.

⁴⁵ Award of October 26, 1979, Case No. 3131, *reprinted in* [1984] Y.B. COM. ARB. 109; *see also* Award of June 14, 1979 (as previously cited in note 42).

⁴⁶ Award of October 26, 1979, at 110 (as previously cited in note 45); *see also* Award made in Case No. 2103 (1972) (claim for penalty based on non-performance was contrary “to the customs and practices generally observed in commercial matters and particularly in international trade relations”); Award of June 14, 1979, Case No. 3267, at 98 (as previously cited in note 42), in which the arbitrator noted “the silence of both parties on [the] question of governing law [is] an admission from both parties that a predetermination of a given applicable law was not necessary to enable the Arbitral Tribunal to decide upon any of the issues presented to it.” Thus, the Tribunal decided to “apply . . . widely accepted general principle[s] governing commercial international law with no specific reference to a particular system of law.” *Id.*

⁴⁷ Partial Award of June 14, 1979, at 96 (as previously cited in note 42). The number of published arbitral awards is doubtless far fewer than the number of decisions handed down in the English and American common law systems. Nevertheless, it is reasonable to posit that a rule, in order to be a “common law rule,” need not be recognized in hundreds of cases over hundreds of years. Rather, recognition of the same rule by different arbitrators may well constitute proof that the arbitral process, like the fair courts of Medieval Europe, is capable of producing substantive doctrines of commercial law.

mercial international law with no specific reference to a particular system of law."⁴⁸

As did the medieval law merchant, ICC arbitral decisional law recognizes such fundamental concepts of commerce as the good faith obligation in commercial dealings.⁴⁹ In a 1979 award involving the breach of an agency agreement, the Tribunal stated:

In accordance with the principle of good faith which inspired the international *lex mercatoria*, the Tribunal sought to determine whether . . . the breach of the agency was attributable to the conduct of one of the parties and whether it had caused damage to the other which would thus be without justification and which equity would hence require to be

⁴⁸ *Id.* at 98; see also Award of September 23, 1982, Case No. 4131, reprinted in [1984] Y.B. COM. ARB. 131.

⁴⁹ See, e.g., Award of October 26, 1979 at 110 (as previously cited in note 45). In contrast to the Vienna Convention's minimal emphasis on the principle of good faith are those advanced national legal systems that generally require contractants to observe strict rules of good faith and fair dealing. In the United States, for example, the Uniform Commercial Code, which forty-nine American states have adopted, provides: "Every contract or duty . . . imposes a duty of good faith in its performance or enforcement." Uniform Commercial Code § 1-203. See also Restatement (Second) Contracts § 205 (1981) ("every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"). See generally, Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the U.C.C.*, 30 U. CHI. L. REV. 666 (1963); Summers, *Good Faith in General Contract Law and the Sales Provisions of the U.C.C.*, 54 VA. L. REV. 195 (1968); GILMORE, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954). The Code's general definition of good faith is "honesty in fact in the conduct or transaction." With regard to transactions between merchants, however, good faith additionally entails "the observance of reasonable commercial standards of fair dealing in the trade."

Louisiana, the only American state that has not adopted the U.C.C. sales articles, also imposes an obligation on contractants to act in good faith. Article 1901 of the Louisiana Civil Code provides that agreements "must be performed in good faith." The Civil Code adopts the U.C.C.'s definition of good faith as "honesty in fact in the conduct or transaction concerned."

European civil codes generally impose a requirement of good faith in commercial dealings. Article 1134 of the French Civil Code contains the same language as the Louisiana Code. Article 2426 of the German Civil Code provides: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage."

The European Economic Community also recognizes the obligation of good faith. See, e.g., *Flamm v. Comm. of the European Communities* [1982] E. COMM. CT. J. REP. 2371; *Adam v. Comm. of the European Countries* [1982] E. COMM. CT. J. REP. 2431, 2436; *Nungesser v. Comm. of the European Communities* [1982] E. COMM. CT. J. REP. 2015. See generally Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

remedied.⁵⁰

The Tribunal concluded that the conduct of the defendant "was scarcely compatible with the maintaining of good commercial relations" and therefore awarded unpaid commissions and damages to the claimant.⁵¹ Also, ICC awards recognize, as did medieval fair courts, that vital public policy matters are as essential to "good commercial relations" as are good faith and fairness. The dictates of public policy impinge upon the legality of contracts, mandating certain limitations upon contractual freedom:

In general all agreements contrary to mandatory provisions of law or public policy, to morality and bonos mores are null and void This principle is recognized in all countries and in all legal systems. It is an element of generally accepted contract law in the international field.⁵²

The concept of the binding force of contracts is also an instrumental part of the ICC arbitral decisional law. The principle of *pacta sunt servanda* is generally acknowledged in international law.⁵³ The application of the principle has led to frequent claims of *force majeure* or commercial frustration as a defense to the inability to perform the contract. Recognizing the need for stability and predictability in transnational commercial dealings, ICC arbitrators have taken a restrictive view of the *force majeure* defense.⁵⁴ Regardless of some liberalizing national law variations on the doctrine, it can have but one central meaning and role for international contracts litigation:

The principle [of *force majeure*] is universally considered as being of strict and narrow interpretation, as a dangerous

⁵⁰ Award of Oct. 26, 1979, at 111 (as previously cited in note 45); see also *supra* note 49.

⁵¹ *Id.* at 111.

⁵² Award of 1982, Case No. 2930, reprinted in [1984] Y.B. COM. ARB. 105, 107.

⁵³ See Carbonneau, *supra* note 11, at 593.

⁵⁴ See also Award of May 30, 1979, Case Nos. 3099, 3100, reprinted in [1982] Y.B. COM. ARB. 87. In effect, ICC arbitral awards, which rarely uphold *force majeure* claims, have established that three elements must be satisfied in order for *force majeure* to be applicable. These elements, which are similar to those found in national laws, are externality, unavailability, and unforeseeability. *Id.* at 90.

exception to the principle of sanctity to contracts. Whatever opinion or interpretation lawyers of different countries may have about the "concept" for changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to *limit* the application of the so-called "doctrine [of *force majeure*]" . . . to cases where *compelling reasons* justify it.⁵⁶

III. USING FIXED LEGISLATIVE RULES TO ESTABLISH INTERNATIONAL COMMERCIAL LAW

The United Nations Commission on International Trade Law ("UNCITRAL") was formed in 1966. UNCITRAL's express goal is the "promotion of the progressive harmonization and unification of the law of international trade."⁵⁶ The Commission's most recent and notable attempt to achieve this goal has been the completion of the United Nations Convention on Contracts for the International Sale of Goods (The Vienna Convention), signed at Vienna in 1980.⁵⁷

The Vienna Convention, which purports to be a comprehensive code similar to Article 2 of the U.S. Uniform Commercial Code,⁵⁸ will enter into force when ten nations ratify it;⁵⁹ to date, six have done so.⁶⁰ The United States Senate has recently concluded hearings on the ratification of the Convention⁶¹ and it is predicted that

⁵⁶ Award made in Case No. 1512 (1971), *reprinted in* [1976] Y.B. COM. ARB. 129. See Award made in Case No. 2142 (as previously cited in note 43). See also Award made in Case No. 2478 (1974), *reprinted in* [1978] Y.B. COM. ARB. 222.

⁵⁶ [1968-1970]1 Y.B. INT'L TRADE L. COMM'N 1, U.N. DOC. A/CN. 9/SER. A/1970.

⁵⁷ See Vienna Convention, *supra* note 12.

⁵⁸ See *supra* note 13.

⁵⁹ Vienna Convention, *supra* note 12, at art. 99.

⁶⁰ See *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Comm. on Foreign Relations, 98th Cong., 1st Session VI (1983) at 31*. The Convention has been ratified by Argentina, Egypt, France, Hungary, Lesotho and Syria. *Id.*

⁶¹ See Senate Hearings, *supra* note 13. Between 1981 and 1983, the State Department published three notices to the public that meetings were to be held to discuss the Convention. See 48 Fed. Reg. 31762 (July 11, 1983); *id.* at 13541 (March 31, 1983); 46 Fed. Reg. 19134 (March 27, 1981). The State Department then recommended ratification to the President who transmitted the Convention to the Senate. 19 Weekly Comp. Pres. Doc. 1290 (Sept. 21, 1983) ("[O]ur traders and their counsel find it difficult to evaluate and answer

Senate ratification will encourage other nations to follow suit.⁶²

The Vienna Convention has received significant support⁶³ from scholars,⁶⁴ business interests,⁶⁵ and national and international legal organizations.⁶⁶ Such support is not wholly unwarranted. First, as a detailed commercial code, the Convention has at least the appearance of comprehensiveness, giving some predictability as to the consequences of commercial conduct. Second, since the Vienna Convention is available in several languages, it is readily accessible to contracting parties of different nationalities. A close examination of the Convention, however, reveals that it is substantially deficient as a vehicle for establishing international commercial law; it neither unifies the international law of sales nor provides for greater transactional predictability.

claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.")

⁶² Senate Hearings, *supra* note 13 (statement of Peter H. Pfund) ("[B]y setting an example as the major trading country in the world, we will encourage many other countries to become parties to the convention." *Id.* at 12).

⁶³ The Senate expects support and justification for all private international law conventions to come from "primarily the private sector, rather than the U.S. Government," since "the private sector can best explain why and how the conventions will provide tangible and needed benefits to the private sector." Summary Minutes of the Secretary of State's Advisory Committee on Private International Law, 38th Mtg. Prepared by George Taft (May 3, 1985) (received from E. Allan Farnsworth of the Association of American Law Schools, Washington, D.C.).

⁶⁴ See, e.g., J. HONNOLD, *supra* note 29.

⁶⁵ Business organizations urging Senate ratification include the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Foreign Trade Council, the United States Council for International Business, and Business International. Senate Hearings, *supra* note 13, at 31. The German Federation of Industry, however, is opposed to the Convention. *Id.* at 44.

⁶⁶ *Id.* The American Bar Association, the International Law Committee of the Association of the Bar of the City of New York, and the International Chamber of Commerce have all supported the Vienna Convention. *Id.* at 31. The British Law Society, however, is opposed to the Vienna Convention. *Id.* at 43-44. The Society points out that, although Great Britain ratified the 1964 Hague Convention on international sales in 1967, there are virtually no British decisions that apply the Convention. *Id.* at 43. As a result, the Society concluded that there was no reason to believe that the Vienna Convention would be applied by British courts more frequently than the 1964 Hague Convention. *Id.*

A. *The Theory of Law-Making Underlying the Convention and Its Ramifications*

According to the approach of the United Nations Commission on International Trade Law (UNCITRAL), the elaboration of an internationally-applicable law is dependent upon the harmonization of national laws—"as the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is [sic] replaced by a single rule."⁶⁷ Under the Vienna Convention, then, the elaboration of an international law of sales resides in the reconciliation of existing national legal principles — the elimination of conflicts and inconsistencies among national commercial laws. A uniform corpus of controlling international commercial law must be predicated upon agreement among national legislatures rather than the actual practices of the international commercial community.⁶⁸ It is a matter of politics and of parochial conflicts resolution rather than a vision of a transcending legal order specifically established to promote effective commercial relations.

The proposal submitted by the French Delegation during the drafting of the Convention reveals that the UNCITRAL theory of international law-making is premised upon a servile acquiescence to national sovereignty and a national self-interest that is not necessarily in harmony with the interests of commerce. According to the French proposal, international legislation can only be legiti-

⁶⁷ Unification of the Law of International Trade: Note by the Secretariat, 20 U.N. GAOR (Agenda Item 92) U.N. Doc. A/C.6/L.172 (1965), *reprinted in* [1968-70] 1 Y.B. INT'L TRADE L. COMM'N 13, U.N. Doc. A/CN.9/SER.A/1970.

⁶⁸ *Id.* at 21 ("There can be no conflict of laws where a common solution is accepted by all municipal laws."). The theory that a universally adopted text eliminates conflicts of law was forcefully put forth by the Chinese representative, who observed:

[S]hould the various countries succeed in enacting uniform rules of substantive law, the rules of private international law would no longer be relevant since those rules presupposed that municipal laws would remain intact and merely sought to mitigate the disadvantages arising from them. . . . [To paraphrase Beckett,] [p]rivate international law, was in a sense the antithesis of the universal unification of law. Its *raison d'être* was the existence [of] different systems of law

Id. As these references reveal, UNCITRAL gave virtually no consideration to the likelihood that varying interpretations of a uniform text can give rise to a need for private international law.

mated by capricious and unfettered state authority. There are two primary principles of international law-making:

The first is that the rules applicable to transactions in international trade should be established . . . by agreement among states. The second is that in every case, States must be permitted to decline to apply the rules thus agreed upon wherever they . . . jeopardize their interest or wherever for any reason—which they cannot be called upon to state—they consider that they should not accept them.⁶⁹

The substance of the French proposal contravenes the most vital historical attributes of the law merchant, erroneously reducing the elaboration of commercial law to a matter of politics and diplomacy. Most of the law merchant, in fact, was and continues to be created by merchants and merchant courts in response to the economic realities of commerce. Even when national courts assumed adjudicatory power over commercial disputes, judges looked not only to the local law for guidance, but also (in many cases) to foreign law and general commercial practice.⁷⁰ Moreover, the alleged prerogative of national sovereigns to modify or disregard the provisions of an international convention at will eliminates the logical coherence, uniformity, and predictability necessary for a fully functional commercial law.

Given this reverence for national law, the objective of the drafters of the Convention was to devise provisions that would accommodate conflicting national rules and traditions. The drafting sessions reveal that a substantial amount of compromise was necessary to arrive at a principled statement. Often, a rule from a given legal system became the principal Convention rule and other non-conforming national law rules were then integrated into the text of the principal rule as exceptions.⁷¹ When such inchoate ec-

⁶⁹ The Establishment of a Union for *Jus Commerce*, Proposal of the French Delegation, U.N. Doc. A/CN.9/60/1971, reprinted in [1971] Y.B. INT'L L. COMM'N 139, U.N. Doc. A/CN.9/SER.A/1971.

⁷⁰ See, e.g., *supra* note 37.

⁷¹ See Eorsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 323 (1979); Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97

lecticism proved unsuccessful, the drafters simply accepted an intermediary position between conflicting views as the controlling rule. The political whim of the national representatives seems to have overridden the commercial effectiveness of the provisions.

For example, under some legal systems, contracting parties have a duty to act in good faith at every stage of their transaction, while other systems apply a good faith requirement only to the performance of the contract. The conflicting positions on this issue generated significant controversy and debate over the type of good faith provision that should be included in the Convention, ultimately forcing a compromise on even this basic principle of commercial law.⁷² A Hungarian delegate's description of the objections to a comprehensive good faith provision illustrates that primary concern centered upon municipal law considerations rather than whether present international law already incorporates a wide good faith obligation. The focus of such debates fortifies doubts as to whether a mere blending of national laws can produce a statement of law of truly international dimensions:

[Some argued] that "good faith" was required under domestic law, and the same requirement should be extended to international trade. Such an extension by individual countries had been opposed on the ground that this would give aliens greater protection against nationals in domestic courts than such nationals would receive from foreign courts.⁷³

The difficulties that can be isolated with the good faith obligation, while glaring and fundamental, are not atypical of the Convention's provisions. Similar difficulties are apparent in the provi-

HARV. L. REV. 1984, 1989 (1984).

⁷² Earlier draft conventions did not include a reference to good faith; see J. HONNOLD, *supra* note 29, at 123. The drafters of the Convention first referred to good faith in a provision that stated: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith." *Id.* By 1978, however, a divergence of views forced a compromise on this provision. The drafters decided that a "good faith" provision should not impose a general obligation but "should be restricted to a principle for interpreting the provisions of the Convention." *Id.* But see Dore and DeFranzo, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Codes*, 23 HARV. INT'L L.J. 49 at 60-61.

⁷³ Eorsi, *supra* note 71, at 313-14.

sions dealing with the procedure in cases of non-conformity (articles 39, 40, 44); trade usages (article 9); excuse (article 79(1)); reduction-of-price remedy (article 50); and the question of suspension of performance in the event of one party's insolvency (articles 71 and 72).⁷⁴

Since UNCITRAL is a political organization whose members represent national governments, it is not surprising that the drafting sessions often became political debates estranged from the direct interests of commerce.⁷⁵ Controversies ranged from national pride in a particular legal rule⁷⁶ to squabbles involving matters wholly irrelevant to the Convention.⁷⁷ In fact, the variegated opinions held by the delegates and the intensity with which those opinions were expressed became a significant obstacle to completion of the Convention.

Many Convention provisions purport to be unanimous adoptions; however, in reality, they reflect a loose consensus rather than unanimity. As has been recognized:

⁷⁴ Note, *supra* note 71, at 1989-95. This is not to say that there was wide dissension on the contents of all Convention provisions. The provisions relating to a duty to give notice (articles 19, 21, 26) and those regarding transfer of risk (art. 67) do reflect a deeper consensus among the drafters. See Vienna Convention, *supra* note 12, Summary Records of the Meeting of the First Committee, (11th meeting) at 290-92, (13th meeting) at 304-05, (28th meeting) at 388, (36th meeting) at 425-26, (37th meeting) at 430.

⁷⁵ See generally, Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 465-67 (1979) discussing the way in which UNCITRAL made such matters as the Statute of Frauds and trade usages "just a few of the exciting political issues that we have faced over the last decade." *Id.* at 467.

⁷⁶ "Most Americans believe that the Uniform Commercial Code . . . is the most advanced commercial law. Most foreigners consider their own commercial law entirely satisfactory if not the best." Lawyers' Comm. on the Convention on Contracts for the International Sale of Goods, Memorandum: In the Threshold of an International Law of Sales 1 (Sept. 23, 1983), *quoted in* Note, *supra* note 71, at 1991 n.47.

⁷⁷ For example, during the drafting of the convention on the prescriptive period applicable to international sales, the Soviet Union objected to the appointment of a Chilean delegate as the vice-president of one of the conferences on the ground that he was "a representative of the Chilean military junta, which had villainously murdered the lawful president of Chile, Salvadore Allende, had overthrown the . . . government and was spreading bloody terror . . . throughout the country." Official Record of the United Nations Conference of Prescription (Limitation) in the International Sale of Goods at 112, (3d plen. mtg.) U.N. Doc. A/CN.63/SER.3/1974. The United States objected to such "baseless polemics." *Id.* at 113.

Effective forward motion depends on the skill of the Chairman. When he senses the debate has produced the basis for consensus, he will invite the group to accept that result. When differences persist, he may appoint a small working party reflecting the diverse points of view. . . . Often this small working party . . . will produce a clean-cut decision; sometimes it can find agreement only through . . . a hybrid . . . mating of diverse approaches. By such processes it is possible for the Chairman to announce . . . that a consensus has been reached.⁷⁸

Even if objections to a proposed provision persisted, it could be enacted with the objecting delegation merely noting its reservations on the record.⁷⁹ Some scholars were extremely critical of this and other procedures. According to Professor Farnsworth, former United States Delegate to UNCITRAL:

The Chairman will face a few people down. If nobody agrees with the speaker, certain reservations are entered in the nature of footnotes and the Commission gets along with its business. Failing that, progress is made by talking each other to death and by being extremely persistent . . . until, by a process of attrition, someone gives in.⁸⁰

The ineffectual results of patchwork compromise are apparent in some of the Convention's central provisions. The article on good faith again serves as a particularly telling illustration. Article 7 provides: "In the interpretation of this Convention, regard is to be had to . . . the observance of good faith in international trade."⁸¹ The manifest content of the article restricts the scope of the good faith obligation to the interpretation of the Convention without specifically imposing such an obligation upon the contracting parties. Article 7 represents an awkward compromise between delegates who suggested that parties must act in good faith at every stage of contracting and other delegates who contended that refer-

⁷⁸ Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 210-11 (1979).

⁷⁹ *Id.* at 211.

⁸⁰ Farnsworth, *supra* note 75, at 467.

⁸¹ Vienna Convention, *supra* note 12, art. 7(1).

ences to such wide-ranging concepts as "good faith" and "fair dealing" would lead to uncertainty in transactions.

Accordingly, the inconsonant result is reached that "the Convention rejects 'good faith' as a general requirement and uses 'good faith' solely as a principle for interpreting [its] provisions."⁸² This leaves the determination of the status of the good faith obligation under international commercial law to national court adjudication — courts which, given the subtlety of the Convention's distinction, are likely to employ the good faith standard that prevails in their national law, thereby rendering the provisions of the Convention ineffective as an aid to international commercial adjudication.

B. *Ambiguous Provisions And Problems Of Interpretation*

UNCITRAL's codification process, seeking to eliminate uncertainty in the confection of transactions and in the resolution of potential disputes, proceeded on the assumption that if "rules are unified the outcome of disputes will be harmonized."⁸³ As the Article 7 good faith provision illustrates, many of the Convention's major provisions are ambiguous, thereby necessitating some form of judicial construction. The text of the Convention contains little in the way of interpretive rules; national courts, then, are more likely to reach different determinations even when addressing a similar fact pattern.⁸⁴ In short, "a unified statement of rules does not guarantee, nor even inevitably advance, a unified approach to substantive problems. If the rules are understood differently, differing results will be reached."⁸⁵

⁸² J. HONNOLD, *supra* note 29, at 123-24.

⁸³ Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO STATE L.J. 265, 285 (1984). Indeed, it is doubtful that any text can produce certainty or determinacy of result. See Singer, *The Player and the Cards: Nihilism and Legal Theories*, 94 YALE L. J. 1, 14 (1984) ("A legal theory or set of legal rules is completely determinate if it is comprehensive, consistent, directive, and self-revising. Any doctrine or set of rules that fails to satisfy any one of these requirements is indeterminate because it does not fully constrain our choices.")

⁸⁴ During hearings on the proposed ratification of the Vienna Convention, Senator Mathias expressed concern over the possibility that case law will develop "on a piecemeal basis, country by country." Senate Hearings, *supra* note 13, at 11.

⁸⁵ Rosett, *supra* note 83, at 285.

Article 7(2) purports to provide interpretive guidelines for courts or arbitral tribunals ruling on questions that the Convention does not expressly address. It requires that such questions be decided in accordance with the general principles on which the Convention is based.⁸⁶ When such principles cannot be ascertained, the dispute is to be resolved "in conformity with the law applicable by virtue of the rules of private international law."⁸⁷ There are a number of significant obstacles to the implementation of these guidelines.

The Convention nowhere identifies its basic founding principles. The disagreement on such basic issues as the good faith obligation indicates that no universally-accepted principles underlie it. In this regard, the command of Article 7(2) is essentially meaningless. A reference to generally-applicable principles of international commercial law, rather than to those specifically underlying the Convention, might have made Article 7(2) more meaningful by avoiding the problem that the controlling principles might be unidentifiable. Such ambiguities make it quite likely that choice-of-law principles will be invoked frequently in order to localize a governing law. The Convention, then, will have done little to lessen the recourse to traditional, decentralized principles of private international law to resolve transnational commercial disputes.

C. *The Role of National Courts Under the Convention*

Despite the experience with the 1958 New York Arbitration Convention, it is unlikely, given the content of the Vienna Convention and its legislative history, that national courts will develop a uniform approach toward the interpretation of its provisions. In testimony before the U.S. Senate, the State Department sought to assuage concerns that the Convention would increase rather than lessen the substantive disharmony in international law, by asserting that decisional law pertaining to the Convention will be monitored by UNCITRAL and will be made widely available.⁸⁸ The State Department also advanced the specious view that "[i]f cer-

⁸⁶ Vienna Convention, *supra* note 12, at art. 7(2).

⁸⁷ *Id.*

⁸⁸ Senate Hearings, *supra* note 13, at 6.

tain developments in case law in some countries should be unsatisfactory from the point of view of U.S. traders, the individual traders are of course free in their sales contracts to provide for terms that will apply and to which the Convention would yield."⁸⁹

Such individual deviations would themselves undermine the effort to achieve the benefits of uniformity. The necessity of allowing for such deviations reveals that the effort to achieve authentic international uniformity in substantive commercial law should be predicated upon the proven realities of commercial practice rather than the confounding language of diplomatic squabbling. Moreover, in the United States, for example, the Uniform Commercial Code has caused significant interpretative difficulties, and sharp splits of authority exist as to the meaning and application of several of the Code's important provisions.⁹⁰ It is likely that the provisions of the Convention will generate at least as much debate, especially in an environment that does not have the homogeneity and cohesiveness of a single national culture.

Despite the reputed judicial deference to statutory law in civil law countries, civilian courts may also contribute to a non-uniform interpretation of the Convention.⁹¹ The French Court of Cassation has exercised broad discretion in construing provisions of the French Civil Code. For example, the Court has interpreted a purely transitional article to embody a far-reaching strict custodial

⁸⁹ *Id.* at 11.

⁹⁰ For example, Article 2 of the Uniform Commercial Code, which seeks only to unify the law of one nation, the United States, has given rise to numerous conflicting interpretations of several of its important provisions. Compare *Raybond Electronics v. Glen-Mar Door Manufacturing Co.*, 22 Ariz. App. 409, 528 P.3d 160 (1974) (procedural unconscionability) with *Allen v. Michigan Bell Telephone Company*, 18 Mich. App. 634, 171 N.W.2d 689 (1969) (substantive unconscionability). See generally Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Note, *Contractual Interactions and the Uniform Commercial Code*, 89 YALE L. J. 1396, 1404-07 (1980) (discussing U.C.C. § 2-207).

⁹¹ See Perrot, *The Judge: The Extent and Limit of His Role in Civil Matters*, 50 TUL. L. REV. 495 (1976) ("The interpretation of the legal rule . . . opens to the civil [law] judge vast horizons, the potential of which he discovers daily.") *Id.* at 498. See generally F. GENY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (La. State L. Inst. 2d ed. trans. 1963); Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459 (1976). See also Dixon, *Judicial Method in Interpretation of Law in Louisiana*, 42 LA. L. REV. 1661, 1662 (1982).

liability doctrine,⁹² and, on occasion, it has developed legal principles and doctrines in direct conflict with the express language of the Code.⁹³ Unless such courts develop a special policy for international law matters, there is no reason to believe that greater deference will be exhibited to the Vienna Convention than to their own civil codes.

The Convention does encourage courts to look to previous decisions for guidance when interpreting the Convention. However, it is doubtful that courts will do so. As a practical matter, decisions from foreign countries are often difficult to obtain and are rarely translated into other languages. Even if UNCITRAL establishes an international reporter system, it is highly uncertain whether courts in civil law jurisdictions, which have no formal doctrine of *stare decisis*, will consider themselves obligated to follow prior interpretations from foreign jurisdictions. It appears, therefore, that over time national courts will develop their own decisional law under the Convention, and eventually the need for private international law and its conflicts principles will re-emerge.

D. *Other Issues Inhibiting U.S. Adoption of the Convention*

U.S. Senate ratification of the Convention will have a number of effects. First, by operation of the Supremacy Clause of the United States Constitution, the Convention will become the "supreme law of the land," preempting all federal and state commercial law that now applies to transactions within the scope of the Convention.⁹⁴ In light of the substantive problems with the Convention, it is doubtful that the Senate would allow it to have such broad preemptive effect, making it necessary to give a qualified ratification. Second, Senate ratification would immunize the Convention's pro-

⁹² Tunc, *supra* note 91, at 466 (describing interpretation of Code Civil Français art. 1384). "The first paragraph of Article 1384 . . . is devoid of all meaning and is a purely stylistic effort at a smooth transition. Our courts, however, have used [it] . . . to build a general liability for damage caused by things." *Id.*

⁹³ *Id.* at 465 (describing interpretation of Code Civil Français art. 1165). "[I]n sheer disregard of a clear [C]ode article . . . [courts] have allowed stipulation[s] on behalf of a third party and established rules which govern it." *Id.*

⁹⁴ See Senate Hearings, *supra* note 13, at 36; see also *Missouri v. Holland*, 252 U.S. 416 (1920).

visions indefinitely from modification. Under the Supremacy Clause, neither Congress nor the States could alter the Convention. As Senator Mathias stated: "I suppose what my concern is, that we would get locked into a situation that would require the unanimous consent of all the parties to the Convention to any alteration of it."⁹⁵

Such concerns are well-founded. Although the Convention requires unanimous consent for modifications or amendments, UNCITRAL has not established a schedule of meetings to consider modifications; it may be exceedingly difficult to reassemble all of the UNCITRAL delegates and arrive at agreement on modifications. As flaws in the Convention will not be easily remedied, parties will be forced to contract out of the Convention's scope, further weakening its authority.

IV. CONCLUSIONS

The evolution and current status of national economies within the international commercial context demand the elaboration of a revitalized law merchant that will accommodate the transnational dimensions of late twentieth-century commerce. The creation of such a corpus of commercial law will require a consensus among and endorsement from national legal systems in the form of a policy designed specifically to respond to private international law matters on their own terms. The Vienna Convention, rooted in national law considerations seeking to preserve the prerogatives of sovereignty in a competitive political environment, is an inappropriate instrument by which to accomplish the task. The text of the Convention is riddled with instances of parochial political compromise and accompanying substantive ambiguities that only can undo the fabric of international commerce, which continues to be estranged from the realm of politics and diplomacy.

The critical deficiency of the UNCITRAL approach to the unification of international commercial law inheres in UNCITRAL's organization and institutional mission. At some level, and unavoid-

⁹⁵ Senate Hearings, *supra* note 13, at 11 (remark made during testimony of Frank A. Urban III).

ably so, questions pertaining to international trade are political in character. They implicate and reflect all of the major elements of divisiveness in the world community: the dichotomy between civil and common law juridical methodologies; the competition between East-West ideological visions; and the North-South political, cultural, and economic rift. While these political consequences of world trade need to be recognized and addressed through appropriate mechanisms, the uneasy and qualified reconciliation of national views is an unfortunate and inadequate basis upon which to establish a foundation for private international commercial intercourse. The quest for unification is envisaged exclusively in a self-defining political universe that is tolerant only of political considerations. World commerce is myopically seen as a matter of national legal tradition, economic self-interest, and ideology. The autonomy of commerce and the self-evident realities of its operation are too often given only a modicum of attention. More significantly, the elaboration of an international commercial law is divorced nearly entirely from a consideration of its implementation through a process—other than through the infelicitous means of national court adjudication.

At this juncture, there is no persuasive reason to depart from the operation of the process that has worked so well, in its own makeshift way, to secure and encourage international commercial activity. Arbitral adjudication has created a universally-acknowledged mechanism for private international dispute resolution. There are strong indications that the process is now yielding the basic tenets of a common law of international contracts and applying these principles effectively in an adjudicatory context without protests of lawlessness. The applicable law is emerging; it appears to be comprehensive, predictable, equitable, and workable. With perhaps some modifications that might help to sustain its growth in this direction, such as having awards rendered by way of published decisions with reasons, the process should be allowed to evolve and bring its fruits to bear.

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