

# A NEW PARADIGM FOR INTERNATIONAL BUSINESS TRANSACTIONS\*

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## INTRODUCTION

This Article offers a theoretical analysis of international business law. An international business transaction is any type of deal between parties from at least two different countries. These transactions include sales, leases, licenses, and investments; the parties to international business deals include individuals, small and large multinational corporations, and even countries. Most existing international business law literature provides nuts-and-bolts descriptions of specific laws governing particular types of transnational deals.<sup>1</sup> This Article, however, more broadly discusses the evolution of laws regulating many kinds of international business transactions. Its thesis is that the modern world community has established a new paradigm for transacting international business—altering the most fundamental ways in which the law conceptualizes and enforces deals struck between international actors.

The means by which the law regulates international business have changed directly in response to structural changes in the world legal order itself. At the risk of painting the picture with too broad a stroke, this Article describes the evolutionary landscape as a triptych. First, when the world community was much more decentralized than it is today, *domestic* commercial and corporate law regulated international business. Lawyers viewed international deals as quintessentially private, and there was no international business law to provide substantive rules of decision. Instead, the terms “private international law” and “conflicts of

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1. See William R. Slomanson, *International Business Transactions: A Selected Bibliography*, 17 LAW & POL'Y INT'L BUS. 721 (1985).

law" were synonymous. So when a dispute arose over an international business deal, a tribunal would determine which of two or more conflicting domestic laws should govern the underlying transaction; they often would respect a contract's choice-of-law clause if one existed.<sup>2</sup> Second, during a subsequent transitional period, the legal community began to apply a growing body of international *customary* law known as *lex mercatoria*, or law of merchants, to international business deals. As world trade and communications became increasingly interdependent, this intermediate period fostered the growth of a limited type of substantive international law, based primarily upon the common trade usages and practices among merchants, as well as such universally recognized legal principles as *pacta sunt servanda* (i.e., one should fulfill one's agreements). Third and finally, in today's centralized global atmosphere, legal institutions are creating a true body of substantive international law to regulate many transnational business deals. With the world community growing smaller and closer, it recently has established several multilateral commercial treaties. The 1980 Convention on the International Sale of Goods (CISG)<sup>3</sup>—a supranational counterpart to Article 2 of the Uniform Commercial Code—is but one significant example of this phenomenon.<sup>4</sup>

This Article's organization corresponds with the three evolutionary periods outlined above. Part I discusses the early choice-of-law treatment of international business transactions. Part II concerns the transitional creation of customary international law, or the *lex mercatoria*, to regulate international business. Part III addresses several recent treaties that regulate various types of transnational business deals. The Article's separate treatment of the three periods, however, should not suggest a discrete division between them; the periods actually demonstrate the law's evolution and blend into one another. Finally, Part IV demonstrates that the third evolutionary period—the substantive regulation of international business by treaty law—relates to a paradigmatic or structural revision of the international legal system. It shows that comprehensive multilateral treaties, in particular, represent a new supranational law of international business. This new law is quite appropriate in an in-

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2. See *infra* notes 17-29 and accompanying text.

3. *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, Annex I, U.N. Doc. A/CONF.97/18 (1980), reprinted in 19 I.L.M. 668 (1980) (with commentary) [hereinafter CISG].

4. See *infra* notes 46-106 and accompanying text.

creasingly interdependent global community, with enhanced technology and communications and a more harmonized social and political agenda. The new paradigm also facilitates the greatly increased volume of international business and accommodates the increased involvement of nation-states as parties to transnational business. Drawing upon social science learning, this Article concludes that the structural revision of the international system itself—a paradigmatic shift—has precipitated a fundamental revision in the way the law regulates transnational business.

## I. PRIVATE INTERNATIONAL LAW

### A. *Nomenclature*

The title of this Part, “Private International Law,” conveys the very essence of the first evolutionary period. The legal community viewed international business as a matter of private, not public or sovereign, concern. Lawyers employed the term “private international law” to distinguish it from the term “public international law.” As traditionally defined, public international law governs only nation-state relationships,<sup>5</sup> with nation-states exclusively and independently sovereign over legal matters, resources, and citizens within their territory. Under this conception, nation-states are the exclusive actors in or subjects of public international law; non-state entities such as individuals and business entities are the mere objects of public international law.<sup>6</sup> Hence, public international law is limited to issues that affect one nation’s dealings with another. Examples of such issues include: demarcating geographical boundaries; dividing authority over land, sea, and space territories; initiating and resolving armed conflict; and protecting the global environment.<sup>7</sup> Nation-states created “public law” to regulate these matters by establishing relevant bilateral or multilateral treaties, or by developing

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5. “[T]he Law of Nations is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are states solely and exclusively.” I LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 19 (C. Hersch Lauterpacht ed., 8th ed. 1955).

6. *Id.* Ian Brownlie, *The Place of the Individual in International Law*, 50 Va. L. Rev. 435, 435-40 (1964). For a critique of the classical statist perspective and an argument that today non-state entities may be the subjects of some parts of public international law, see KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 39-49 (1990).

7. For example, those are some of the topics typically included in public international law classes. See, e.g., LOUIS HENKIN, ET AL., *INTERNATIONAL LAW* (2d ed. 1987). International business transactions is usually taught separately. See, e.g., RALPH H. FOLSOM, ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* (2d ed. 1991).

reciprocal legal rights and duties under customary international law.<sup>8</sup>

On the other hand, private international law has no real substance. Used interchangeably with the term "conflicts of laws," private international law determines which of two (or more) relevant but conflicting sovereigns' laws should resolve a dispute. As an English commentator described in traditional terms, private international law controls "cases in which some relevant fact has a geographical connection with a foreign country and may . . . raise a question as to the application of one's own or the appropriate foreign law to the determination of the issue or as to the . . . jurisdiction [of] one's own or foreign courts."<sup>9</sup> The conflict-of-laws area encompasses choice-of-law issues (this Part's main concern) as well as questions about jurisdiction and recognizing foreign judgments.<sup>10</sup>

The label "private international law" is misleading where U.S. law is involved, because conflicts rules apply to both interstate and international transactions and cases.<sup>11</sup> Conflicts rules thus may apply to a transaction that has no international component, just as they apply to truly international transactions. For example, a New York State court in a commercial case would view both Georgia and Canadian corporations as "foreign"; it would view the places of contracting and performance as foreign whether occurring on Georgia or Canadian soil; and it would view both Georgia and Canadian law as foreign. Judges deem both such interstate and international scenarios as similarly raising conflicts questions, and they traditionally have not applied conflicts rules differently in interstate and international cases.<sup>12</sup> However, no matter how foreign Georgians may seem to New Yorkers (and vice versa), the "international" in "private international law" is a misnomer because private international law applies to interstate cases as well. This misnomer symbolizes the "private" and not necessarily the "international" character of international business transactions during this first evolutionary period.

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8. Treaties and custom are the two major sources of public international law. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060.

9. R.H. GRAVESON, *THE CONFLICT OF LAWS* 3 (6th ed. 1969).

10. See HERBERT F. GOODRICH & EUGENE F. SCOLES, *CONFLICT OF LAWS* 1-6 (1964).

11. See RESTATEMENT (SECOND) OF THE LAW OF CONFLICTS § 10 (1971).

12. See *id.* A minority of commentaries have argued that conflicts rules should apply differently in international cases and interstate cases. See, e.g., ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 16-21 (1967); Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599 (1966).

More significantly, the term “private international law” is misleading in suggesting that a body of international law exists to regulate international transactions. During the first era of transnational business, there actually was no supranational commercial law. Not only did substantive international law not exist in this area, but, early on, no international choice-of-law rules existed.<sup>13</sup> Instead, when international business deals soured and the parties went to court, a domestic court used the forum’s domestic choice-of-law rules to determine which domestic business law applied. Not international, but domestic law regulated the forum’s choice of law, and the forum chose from among two or more domestic laws. Even where the parties had pre-selected the particular domestic law to govern their deal, the domestic court would use the forum’s domestic law to determine whether to honor the contractual choice-of-law clause.<sup>14</sup> Indeed, in the early stages of this evolutionary period, there was little international about private international law—except that an international actor or activity was sometimes involved in the business deal.

Private international law during this period did not involve international norms for a very simple reason: the legal community viewed international law as relevant only to sovereign dealings. International law was irrelevant to business deals between private parties even from different countries. Public international law—or the “law of nations” or simply “international law”<sup>15</sup>—governed only nation-state relations and traditionally was relevant only to sovereign actors (the law’s subjects). Public international law was irrelevant to non-sovereign actors (the law’s objects).<sup>16</sup>

At this time, sovereigns were kings, and everyone else was nothing. Domestic law, rather than international law, chose and shaped the norms regulating a variety of legal transactions and disputes between non-sovereign parties—whether sounding in contract, tort, matrimonial, or prop-

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13. See *infra* note 103 and accompanying text regarding more modern international conflicts treaties.

14. See *infra* notes 19-21 and accompanying text.

15. The term “international law” is shorthand for the term “public international law” and not “private international law.” The term “law of nations” is an older term referring to sources of public international law other than treaties. “[T]he law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820). See generally Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

16. See *supra* notes 5-8 and accompanying text.

erty law. Private international law's true domestic character did not change just because one party was a citizen of or incorporated in a different country than the other party; its domestic character likewise did not change just because the place of contracting or performance (or other behavior) occurred in another country. The presence of such foreign elements might have raised conflicts-of-law questions, but municipal law answered those questions. In sum, the legal community did not establish international or supranational law to govern private international transactions in this early historical stage. The nomenclature of "private international law" accurately suggests the presence of a private legal matter, but inaccurately suggests the availability of international law to regulate that matter.

### *B. Choice of Law and International Business*

In the first theoretical scheme, how did domestic choice-of-law rules regulate international business? Most international business transactions are contractual in nature. Business entities from two or more nations usually enter into a contract to sell, lease, license, or invest in a product or service. At least where written contracts exist, the parties may try to preempt domestic law by extensively spelling out the terms of their deal and articulating in great detail their respective rights and duties should certain foreseeable problems or contingencies occur.<sup>17</sup> The parties reduce or avoid the application of domestic law to their deal by leaving as few gaps as possible in their contract. Thus, domestic law—from whatever nation—has fewer contractual gaps to fill. If a dispute over the deal ends up in court or arbitration, the tribunal may simply enforce the contract's terms, assuming that those terms do not violate the forum's norms or a significant public policy.<sup>18</sup> In this sense, private international law certainly does not involve any real international or public law. The private parties mostly have regulated their own deal contractually, with the tribunal serving merely as an enforcement mechanism. Private international law is only required to choose a substantive domestic law where the parties either did not foresee the contingency that led to the conflict, or where they foresaw it but, for whatever reason, chose not to deal with it contractually in advance.

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17. Tyler Brown, Note, *Choice of Law Stipulations by Litigants*, 43 WASH. & LEE L. REV. 141, 143 (1986).

18. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 58-61 (1971); Brown, *supra* note 17, at 141 n.1.

The parties to an international business deal may also try to achieve autonomy by putting a choice-of-law clause in their contract. For example, when negotiating a sale of goods, a United States widget manufacturer and a French retailer might decide that either American or French law should govern their transaction. Of course, if they choose American law, which the United States company might prefer, the manufacturer might have to make concessions to the retailer on another point of negotiation (such as on the price of the widgets or on delivering or insuring the widgets). The parties might also select American law to govern one part of the transaction, and, if normatively compatible, French law on another part.<sup>19</sup> They alternatively might choose the law of a third country to regulate their deal, so that neither party benefits from the familiarity of choosing its own law.<sup>20</sup> Most legal systems, however, will not enforce such a choice unless the deal has some reasonable connection with that third country.<sup>21</sup> For example, if the United States manufacturer and French retailer negotiated and entered into their contract in Germany at a widget industry convention, they might contractually select German law to control the sale. Parties to international business deals may enhance their autonomy by including not only choice-of-law clauses in their contracts, but also choice-of-forum (or arbitration) clauses.<sup>22</sup>

Most courts will enforce choice-of-law clauses.<sup>23</sup> In addition, courts typically honor choice-of-forum and arbitration clauses.<sup>24</sup> In many jurisdictions, dating from the beginning of this evolutionary period, there is significant precedent for honoring the parties' choice of law in interna-

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19. See JOVITA J. SALONGA, *PRIVATE INTERNATIONAL LAW* 366 (1957). See also Louis C. James, *Effects of the Autonomy of the Parties in Conflict of Laws Contracts*, 36 CHI. KENT L. REV. 34, 37-38 (1959).

20. See generally Joost Bloom, *Choice of Law Methods in the Private International Law of Contract*, Part II, 17 CAN. Y.B. INT'L LAW 207 (1979); David J. Branson & Richard E. Wallace, Jr., *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39 (1986).

21. See Brown, *supra* note 17.

22. See generally FOLSOM, ET. AL., *supra* note 7, at 1160-62.

23. See ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 157-67 (1943); SALONGA, *supra* note 19, at 358-67; MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 420-35 (1945); James G. Vaughter, *Choice of Law for International Contracts: An American Critique*: 2 TEX. INT'L L. FORUM 227 (1966); Hessel E. Yntema, "Autonomy" in *Choice of Law*, 1 AM. J. COMP. L. 341 (1952).

24. See Branson & Wallace, *supra* note 20, at 39-40. There are exceptions, however, as some states do not recognize choice-of-forum clauses.

tional business transactions.<sup>25</sup> That precedent established certain conditions for validating choice-of-law clauses: the country whose law is selected must have a nexus with the deal; the chosen law must not contradict a significant public policy of the judicial forum; and the parties may not use a choice-of-law clause to avoid criminal liability.<sup>26</sup>

The judiciary's deference to choice-of-law clauses reinforces the legal community's treatment of international business as private in nature, subject to relatively little sovereign control. Courts simply let international business partners pick which domestic norms will fill their contractual gaps. Even in the absence of an explicit choice-of-law selection, the judiciary sometimes has tried to divine the parties' *implicit* preference—applying the law that the parties probably would have selected had they thought about it beforehand and put their thoughts into writing.<sup>27</sup> This is not to suggest that all jurisdictions have always equally and consistently enforced choice-of-law clauses. Courts sometimes have preferred the domestic law of either the country of contracting or the country of performance over the domestic law that the parties selected.<sup>28</sup> Once this evolutionary period was underway, however, both foreign and United States judges and arbitrators usually deferred to the parties' choice of law.<sup>29</sup>

### C. *Epochal Evolution*

Although the three evolutionary periods shade into each other, the first period ran approximately and predominantly from the eighteenth to mid-twentieth centuries. From the beginning of significant international trade to the start of the *lex mercatoria* period, the conflicts approach governed transnational business. As previously discussed, that approach viewed transnational business to be just as private as a business deal between two United States entities from different states of the Union.<sup>30</sup>

To summarize, the legal community did not create substantive international law to govern transnational deals. Instead, just as with interstate transactions, the international actors were accorded much autonomy to

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25. RESTATEMENT, *supra* note 11, § 187.

26. *See* Brown, *supra* note 17.

27. *See* Yntema, *supra* note 23, at 343; SALOGNA, *supra* note 19, at 368-79; WOLFF, *supra* note 23, at 435-45.

28. *See* Bloom, *supra* note 20, at 209. *See generally*, RESTATEMENT (FIRST) OF THE LAW OF CONFLICTS (1934).

29. *See* sources cited *supra* notes 23, 25.

30. *See supra* notes 11-12 and accompanying text.



regulate their own deal contractually. Moreover, parties typically could choose which domestic law would govern if and when their contract failed its task of self-governance.<sup>31</sup> The private international law relevant to transnational deals thus was very different from the substantive public international law relevant to nation-state dealings.

As the final Part of this Article articulates, the conflicts approach conformed to the structure and nature of the world legal order during the eighteenth to mid-twentieth centuries. Almost all international business transactions at that time involved entirely private, not sovereign actors. The world legal community left non-sovereign matters—including private transnational business—to domestic control. The world legal order was relatively decentralized, lacking significant interdependence through either international organizations or international telecommunications.<sup>32</sup> Thus, it is hardly surprising that the nations did not come together during this epoch to create substantive commercial or business law to govern private deals between foreign actors. Similarly, it is not illogical that the family of nations did not even create international conflicts rules during this period (although they did so later).<sup>33</sup> This epoch, however, began to evolve as international business expanded; as sovereign actors themselves participated increasingly in international business; and as businesspersons sought more normative uniformity and stability in the regulation of their transactions.<sup>34</sup> All these developments led to the dawning of a second evolutionary period.

## II. THE NEW *LEX MERCATORIA*

The uncertainties of the conflicts approach became troublesome to the international business community following the Second World War. This period was marked by an increasing volume and variety of trade across national borders, particularly at first among the Allied Powers of World War II. With increasing trade came an increasing need for a certain, predictable set of laws governing international business deals. The conflicts approach proved inadequate because of the inability of businesspeople to predict confidently which nation's law would govern. Moreover, even where the parties could predict the applicable nation's law, one or more parties were often at a disadvantage in their ability to ascer-

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31. See *supra* notes 17-29 and accompanying text.

32. See *supra* notes 18-21 and accompanying text.

33. See *infra* note 103 and accompanying text.

34. See *infra* note 41.

tain the content of that law because of language barriers and lack of experience with that regulation. As nation-states themselves transacted more business with each other or with private parties, the need for fair and predictable norms also increased.

As a result, the "new *Lex Mercatoria*," or the new law merchant, began to supplant the conflicts approach. This body of mercantile law is autonomous in its origin and nature, meaning that it is of truly international rather than national origin.<sup>35</sup> The *lex mercatoria* draws upon accepted customary business practices among international actors. As a law that merchants developed for merchants, it is naturally pro-mercantile in content. Of course, the new *lex mercatoria* did not develop overnight. Rather, its origins date to the very beginning of international trade in the Middle Ages. Again, all of the international business periods have interrelated evolutionary roots and do not arise in a vacuum.

The medieval law merchant was developed in the context of a lack of national regulation of international trade. The medieval merchant courts, over which merchants, not lawyers, presided, developed a set of pro-mercantile rules. The law merchant included what is now the law of admiralty, as well as rules respecting negotiable paper and sales. The medieval law merchant is also the source of the contract now known as the bill of exchange.<sup>36</sup> Prior to this period, no nation's law recognized such a tripartite financing arrangement.<sup>37</sup>

With the rise of the modern nation-state in the late-seventeenth, eighteenth, and nineteenth centuries, the importance of the medieval *lex mercatoria* as a source of law declined. Nations formulated their own municipal rules of commercial transactions at the onset of a decentralized world order in the seventeenth century. In so doing, nations incorporated a great many of the principles of the *lex mercatoria*, but unfortunately with variations peculiar to each nation's political and eco-

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35. Lord Mansfield's statement that the law merchant "is not the law of a particular country, but the general law of nations" is as applicable to the new *lex mercatoria* as to the medieval version. *Luke v. Lyde*, 2 Burr. 883, 887 (K.B. 1759).

36. See *infra* notes 89-97 and accompanying text.

37. Professor Schmitthoff, one of the foremost authorities on the new *lex mercatoria*, provides a concise history of the medieval law merchant in Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in II CURRENT LAW AND SOCIAL PROBLEMS, 129 (Ronald St. J. MacDonald ed., 1961). For more complete treatment, see WYNDHAM A. BEWES, THE ROMANCE OF THE LAW MERCHANT (1923); WILLIAM MITCHELL, ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT (1903).

conomic climate.<sup>38</sup> Professor Philip W. Thayer wrote the following vivid description of this absorption of the law merchant into the municipal law of England:

With the accession of Coke as Chief Justice in 1606, began a period during which the law merchant in England was absorbed gradually into the common law. The King's judges, always jealous of the special tribunals of the merchants, usurped their functions and took over their law . . . . If the process of absorption thus resulted inevitably in the increasing desuetude of the purely commercial courts, the consequences on the substantive side were likely to be equally marked. The customary doctrines of the law merchant could not be fitted in all cases into the more rigid framework of the common law without distortion. In more than one direction that was bound to affect its commercial application, the common law had been subjected to backgrounds peculiarly English and divorced from any international influences. With the conclusion of the period of absorption, therefore, the commercial law of England still might be based fundamentally on the customs of merchants, and to that extent might retain a cosmopolitan flavor as its chief distinction; but the direct reflection of former days had become a refraction.<sup>39</sup>

Following the medieval law merchant's demise, domestic law variations precipitated the conflicts-of-law approach, as discussed in Part I.<sup>40</sup> The mercantile need for predictability and certainty, however, drove the re-emergence of the new *lex mercatoria*, just as it did the earlier version. The *lex mercatoria*'s increased importance after World War II was the result of an increasing volume of trade and, perhaps just as importantly, the gaining popularity of arbitration as a preferred means of dispute resolution.<sup>41</sup> While domestic tribunals myopically applied domestic conflicts and substantive rules, arbitrators applied the *lex mercatoria*. The *lex mercatoria*, though certainly pro-mercantile, treated the merchants of all countries equally. Arbitrators in particular applied it more neutrally to international entities than the more nationally ethnocentric domestic judges applied domestic laws. Lawyers heralded the developing *lex mer-*

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38. See LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 23-37 (1983).

39. Philip W. Thayer, *Comparative Law and the Law Merchants*, 6 *BROOK. L. REV.* 139, 142-43 (1936) (citations omitted).

40. See *supra* Part I.

41. See generally *HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE* (Ernest J. Cohn et al. eds., 1977); *INTERNATIONAL COMMERCIAL ARBITRATION* (Clive M. Schmitthoff ed., 1974).

*catoria* as a welcome era in international business, remedying many of the shortcomings of the conflicts approach.

Reliance on the new *lex mercatoria* as an important source of law has problems, however, and certainly does not have all the advantages of the later treaty approach.<sup>42</sup> Two of the key problems are: (1) the law merchants' uncertain status as a legitimate, separate source of law; and (2) the difficulty of using confidential arbitral decisions, the primary source of the *lex mercatoria*, as precedent for future decisions.

The first problem, concerning the legitimacy of the *lex mercatoria* as law, is perhaps of more theoretical than practical concern. Nevertheless, it has practical importance to the extent that courts and other adjudicatory bodies are more likely to find favor with and apply a more "legitimate" set of laws. Rigid positivists argue against recognizing the *lex mercatoria* as a legitimate source of law on the ground that law must, by definition, be enforceable by a sovereign with the power to impose force in support of its judgments.<sup>43</sup> The *lex mercatoria* cannot meet this definition of "law" because, like customary international law, it draws upon usually unwritten practices and usages common to business transactions. Others take a more pragmatic view. They argue that because arbitral tribunals apply the new law merchant to resolve disputes and parties take that law into account in drafting international instruments, the *lex mercatoria* is, on some level, law.<sup>44</sup> Whichever jurisprudential view is preferred, however, it is clear that the *lex mercatoria* is a nonpositivistic source of law and thus will never obtain the legitimacy of treaties.

Another problem with the *lex mercatoria* stems from the prevalence of its application by arbitral panels, rather than courts. Because arbitration awards are usually confidential,<sup>45</sup> they are not a particularly useful source of precedent to guide future decision-making. Trying to predict what an arbitral panel will do is therefore like trying to predict the next abortion decision by the United States Supreme Court without the benefit of the Court's past decisions in the area. The basic outlines of the *lex mercatoria*, including its emphasis on common usages and adherence to such basic principles as the freedom to contract and *pacta sunt servanda*,

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42. See generally *infra* Part III.

43. See, e.g., George R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1989).

44. See, e.g., Hight, *The Enigma of the Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 99-108 (Thomas E. Carbonneau ed., 1990).

45. Indeed, it is precisely this confidentiality that often persuades parties to include an arbitration clause in their contracts.

are well known. However, this knowledge is often not helpful in the context of a highly technical conflict between sophisticated international parties. Moreover, even if arbitral decisions were made public, their value is slight because lengthy explications of the ruling are not required and the decisions analyze few written rules. So the *lex mercatoria* again is not positivistic, but rather more akin to customary international law. More precise precedent would be far more helpful in this context, particularly where unique or complex deals are involved. However, more precise precedent is simply unavailable.

For these reasons, the new *lex mercatoria* was not completely satisfactory as a system of laws to govern international business transactions. Lawyers needed more positivistic and widely applied regulation not only in arbitration, but also in the published decisions of municipal courts. The need for such an approach has resulted, in the last ten years, in the third epoch in the development of international business law. Just as the medieval law merchant did not fit the changing world of the seventeenth century, the new law merchant does not fit the current and changing world scene.

### III. MULTILATERAL TREATIES AND THE MODERN EPOCH

The epoch in which the *lex mercatoria* served as the primary source of substantive rules governing international business transactions<sup>46</sup> also marked the infancy of the current multilateral treaty approach. The rise over the last fifteen years of comprehensive multilateral treaties governing commercial matters<sup>47</sup> signals the beginning of the modern para-

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46. See generally *supra* part II.

47. CISG, *supra* note 3; *United Nations Convention on International Bills of Exchange and International Promissory Notes*, U.N. COMM'N ON INT'L TRADE LAW, 21st Sess., at 2-42, U.N. Doc. A/43/820 (1988), reprinted in 28 I.L.M. 170 (1989) (with commentary) [hereinafter CIBN]; *Conventions on International Factoring and on International Lease Financing*, Unidraft Conf. 7/C.1/W.P.27 (1988), reprinted in 27 I.L.M. 922 (1988) (with commentary) [hereinafter CILF].

In addition to these broadly applicable conventions, multilateral treaties that are more specialized in focus have recently been enacted. See, e.g., World Intellectual Property Organization Treaty on Intellectual Property in Respect of Integrated Circuits, 28 I.L.M. 1477 (1989); Arrangement Regarding International Trade in Cotton Textiles, Dec. 20, 1973, 25 U.S.T. 1001; GENERAL AGREEMENT ON TARIFFS AND TRADE ORGANIZATION, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 7 (33d Supp. 1987).

The world order is also increasingly marked by regional multilateral treaties. The most systematic regional efforts are those of the European Economic Community. See, e.g., Convention on the Law Applicable to Contractual Obligations, O.J. (L 266) 1 (1980); Convention on the Contract for International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 190. The Americas, however,

digm's adolescence and its promise of future adulthood. During this final evolutionary period, the world community has established truly international substantive law to govern many transnational business deals. By creating multilateral treaties, the global community has progressed far from the conflicts approach under domestic law in the original evolutionary stage.

The modern treaties also signal progress from the *lex mercatoria* approach, representing a much more developed, uniform, and positivistic commitment to centralized international business regulation. At the same time, the new multilateral treaties also contain provisions reflecting the tension between sovereign preference for domestic law and the desire for supranational commercial law. While surely representing progress, the United Nations Convention on Contracts for the International Sale of Goods (CISG) and other treaties still reflect national ambivalence about the replacement of domestic law with international law.

The following analysis of the modern epoch focuses on the multilateral treaties that are the chief feature of the current international business landscape. Subpart A emphasizes the CISG, which has particularly important implications for the new paradigm. The CISG and other major multilateral treaties (addressed in Subpart B) have given rise to a new paradigm of international business.

## A. *The CISG*

### 1. *Introduction*

The cornerstone of the recent trend toward unification of international business law is the CISG, which the world's major trading powers have adopted.<sup>48</sup> The CISG governs the formation of, and remedies for breaching, contracts for the sale of goods between parties of different nations. The analogy in United States law is to Article 2 of the Uniform Commer-

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have also made some efforts in this inter-regional area. See, e.g., Inter-American Convention on Contracts for the International Carriage of Goods by Road, 29 I.L.M. 81 (1990).

48. Signatories include: Argentina, Australia, Austria, Bulgaria, Byelorussia Soviet Socialist Republic, Chile, China, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Ghana, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, Norway, Poland, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Ukrainian Soviet Socialist Republics, the former U.S.S.R., United States, Venezuela, Yugoslavia and Zambia. *Multilateral Treaties Deposited with the Secretary General as of 31 December 1990*, U.N. Doc. St./LEG/SER.E/9 (1990). Guinea, Canada, and Romania acceded to the CISG in 1991. *Id.* (update as of Oct. 7, 1991). Ecuador and Uganda acceded to the CISG in early 1992. *Id.* (update as of Feb. 12, 1992).

cial Code, as applicable in 49 of the 50 states.<sup>49</sup> Legal scholars have perhaps discussed no treaty since those marking the end of World War II as extensively as the CISG.<sup>50</sup> Indeed, little remains to be said about the treaty with respect to its history<sup>51</sup> or the potential interpretive difficulties presented by its substantive provisions.<sup>52</sup> Another mechanical description of the CISG is not needed here. Accordingly, the following analysis of the CISG's provisions is not offered as a comprehensive introduction to or description of the treaty. Rather, in keeping with this Article's focus,<sup>53</sup> it analyzes the CISG's central and concrete manifestations of the new paradigm within the context of the paradigm's normative framework.

## 2. *The CISG's Scope*

The CISG's scope provisions are the natural focus for such an analysis because they centrally implicate those aspects of nationalism and sovereignty upon which the new paradigm has its most radical impact. When

49. U.C.C. (1990).

50. For a comprehensive collection of such works written prior to the CISG's effective date, see Laura E. Longobardi, Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 *FORDHAM L. REV.* 863, 863 n.1 (1985). More recent works include Amy J. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 *WASH. L. REV.* 607 (1988); Arthur G. Murphy, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 *GEO WASH. J. INT'L L. & ECON.* 415 (1989); Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 *FORDHAM INT'L L.J.* 727 (1989); Muna Ndulo, *The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis*, 38 *INT'L & COMP. L.Q.* 1 (1989); Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 *STAN. J. INT'L L.* 263 (1986); John C. Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part I—The 1980 U.N. Convention on the International Sale of Goods*, 36 *AM. J. INT'L L.* 437 (1988); Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 *BROOK. J. INT'L L.* 23 (1989); Francois Vergne, *The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 *AM. J. COMP. L.* 233 (1985); Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 *N.C.J. INT'L L. & COM. REG.* 109 (1988); V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 *U. PITT. L. REV.* 197 (1988); Barry Nicholas, Note, *The Vienna Convention on International Sales Law*, 105 *L.Q. REV.* 201 (1989); Michael Stonberg, Note, *Drafting Contracts under the Convention on Contracts for the International Sale of Goods*, 3 *FLA. INT'L L.J.* 245 (1988).

51. See, e.g., Cook, *supra* note 50, at 128.

52. See, e.g., Vergne, *supra* note 50; Longobardi, *supra* note 50; Reitz, *supra* note 50; Murphy, *supra* note 50.

53. See *supra* notes 1-4 and accompanying text.

the CISG's substantive international law rules apply to a given transaction, at least one nation may not apply its municipal law to that transaction. In other words, the CISG's international law trumps the domestic law regulation of a deal in whole or in part. As Part IV discusses more fully, this relinquishment of sovereign jurisdiction is radical in its conception, challenging the very core of an international order composed of sovereign states.

The CISG's intricate scheme begins with Chapter I (Articles 1-6), which provides the general rules for determining whether the CISG applies.<sup>54</sup> Article 1(1) provides:

1. This Convention applies to contracts of sale of goods between parties whose places of business are in different States;
  - (a) when the States are Contracting States; or
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.<sup>55</sup>

Under article 1, lawyers must answer at least two inquiries about whether the CISG applies to a particular transaction. First, is the contract one for the sale of goods? Though somewhat technical, this question is noteworthy because of the wide breadth of the category of sales of goods. Because of the quantity and variety of such transactions, international sales of goods constitute the most important category of international business transactions. Virtually every exportation of every type of product or resource across national boundaries constitutes an international sale of goods. The acquiescence of nations to a non-sovereign body of law in such a highly important field is unprecedented and evidences the CISG's significance.

The second inquiry in determining whether the CISG applies is whether the parties' places of business make the CISG applicable. This inquiry includes the initial question whether the parties' "places of business are in different States."<sup>56</sup> It also includes the question whether those "different States" are ones mandating application of the treaty under subsections (a) and (b) of article 1. If both nations are CISG signatories,

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54. CISG, *supra* note 3, arts. 1-6.

55. CISG, *supra* note 3, art. 1(1).

56. CISG, *supra* note 3, art. 1. Determining a party's place of business itself involves some interesting analysis. CISG, *supra* note 3, arts. 1(2), 10. One aspect of this question relevant to this Article's theme is the uncertain treatment the CISG gives to large multinational corporations that have no one place of business. It is unclear whether courts will resolve this uncertainty in favor of applying the CISG or applying municipal law rules.



then the CISG applies.<sup>57</sup> If neither nation is a signatory, then of course it does not apply. Where one nation is a signatory but one is not, whether the CISG applies depends upon whether choice-of-law principles mandate the application of a signatory's municipal law and, in turn, upon whether that signatory accepts the terms of article 1(1)(b) or has taken a reservation pursuant to article 95.<sup>58</sup> This interplay between article 1 and article 95 directly reflects the struggle in the CISG's negotiation process to reconcile state sovereignty with CISG applicability.

Article 1's goal is to supplant domestic law with international law, particularly in cases where one parties' domestic law might apply to the exclusion of the other's domestic law. Article 95, however, allows a nation, at the time of ratification, to make a reservation not to be bound by article 1(1)(b)—the sub-paragraph making the CISG's law applicable when private international law would choose a party's domestic law.<sup>59</sup> If a nation makes such a reservation, the CISG applies only to transactions where both parties hale from nations that are CISG parties (under article 1(1)(a)). Such reservations thus reduce the number of transactions to which the CISG applies.

The United States ratified the CISG subject to this reservation under article 95.<sup>60</sup> Accordingly, if choice-of-law rules mandate the application of U.S. law to a transaction between an American party and a party from a non-CISG nation, presumably Article 2 of the Uniform Commercial Code (U.C.C.) governs the transaction<sup>61</sup> instead of the CISG. The CISG's international rules do not supplant U.S. domestic law in such transactions—contrary to the CISG's goal of establishing an international sales code. Some commentators have questioned whether ratification subject to this reservation constitutes true ratification.<sup>62</sup>

It is difficult indeed to see any substantive distinction between a transaction involving two CISG parties and one between a CISG party and a non-CISG party. Nevertheless, the treaty's history reveals that the United States insisted that a reservation clause reflecting such a distinction (i.e., article 95) be placed in the treaty.<sup>63</sup> The United States insisted on this provision solely to reduce the instances when the CISG would

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57. CISG, *supra* note 3, art. 1(1)(a).

58. CISG, *supra* note 3, art. 95.

59. CISG, *supra* note 3, art. 95.

60. Stonberg, *supra* note 50, at 247.

61. The U.C.C. is applicable in every jurisdiction in the United States except Louisiana.

62. *See, e.g.*, Nicholas, *supra* note 50, at 202.

63. Stonberg, *supra* note 50, at 247.

apply to transactions involving an American party. The U.C.C. applies when the CISG does not, and the U.S. apparently prefers its own law to international law. The U.S. may even view Article 2 of the U.C.C. as superior to the CISG as a sales law.<sup>64</sup> This proprietary attitude is a perfect illustration of the inherent tension between sovereignty and multilateral treaties embodying substantive rules.

One may find further examples of such tension in articles 92-96. These provisions allow a nation to make other significant reservations affecting the CISG's applicability in deals involving that nation's business entities.<sup>65</sup> Article 92 lets a nation make a reservation not to be bound by Part II of the treaty (dealing with contract formation) or Part III (dealing with contract performance and remedies for breach).<sup>66</sup> Article 93 allows a nation to make a reservation so that only one of its multiple territorial units is bound by the treaty.<sup>67</sup> Article 94 allows a reservation by two nations with similar laws not to be bound by the treaty concerning transactions between nationals of those nation-states.<sup>68</sup> Finally, article 96 allows a nation to make a reservation not to be bound by the treaty's statute-of-frauds provisions, which essentially would allow any contract to be oral in deals involving a business from that nation.<sup>69</sup> All these provisions allow nations to apply their own law in situations where the CISG would otherwise apply. The treaty's history reveals that including these provisions was necessary to garner signatures by nations that, like the United States, were reluctant to have international law supersede municipal law.<sup>70</sup>

The CISG's scope is limited further by its "opt-out" provision.<sup>71</sup> Article 6 of the treaty provides as follows: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."<sup>72</sup> This provision allowing busi-

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64. Stonberg, *supra* note 50, at 247; Zwart, *supra* note 50, at 111 n.20.

65. CISG, *supra* note 3, arts. 92-96.

66. CISG, *supra* note 3, art. 92.

67. CISG, *supra* note 3, art. 93.

68. CISG, *supra* note 3, art. 94.

69. CISG, *supra* note 3, arts. 11, 29 & 96.

70. Zwart, *supra* note 50, at 111.

71. CISG, *supra* note 3, art. 6.

72. CISG, *supra* note 3, art. 6. Article 12 (which article 6 mentions) forbids the parties from derogating from or varying the effect of a state's reservation to the CISG's "no Statute of Frauds" provision. See CISG, *supra* note 3, arts. 11-12. If a state has made such a reservation, its requirement of a writing applies even where the CISG otherwise applies, so that parties in this situation may not agree to have the CISG apply with no Statute of Frauds requirement.

ness partners autonomy to choose domestic law over the CISG's law is reminiscent of the private international law era.<sup>73</sup> This opt-out provision may reduce the CISG's use, if the contractual parties choose domestic law instead of international law. Nevertheless, the CISG represents progress from other multilateral business treaties that required business actors to "opt-in" to a treaty's provisions and affirmatively choose to apply the treaty to their deal.<sup>74</sup> Although the opt-out provision reduces the CISG's utility and mandate, it shows an expanded commitment to international business law over treaties with opt-in provisions.

### 3. *Substantive Provisions*

The CISG's substantive provisions also reflect tension with municipal law. The treaty's inclusion of several topics required compromise among the signatories, who usually were reluctant to acquiesce in provisions that differed significantly from their own law.<sup>75</sup> The Eastern and Western blocs confronted one another over such issues as the need for a writing, the mirror-image rule, and trade usages.<sup>76</sup> The nations eventually reached compromises in these three areas, but often in ways that departed from U.S. law.<sup>77</sup>

Contrary to unification efforts, however, the nations could not reach agreement on several other controversial topics. They excluded those topics from the CISG's coverage rather than risk the entire treaty's failure. Because of the differences in domestic treatment of products liability, for example, consumer sales were expressly excluded.<sup>78</sup> Likewise, liability for personal injuries and death was excluded,<sup>79</sup> as were defenses to the formation of a contract, including fraud, duress, and unconscionability.<sup>80</sup>

The CISG's drafters resolved one controversial topic, the availability of equitable relief for breach, in a way that may cause interpretive diffi-

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73. For an exhaustive analysis of the CISG's choice of law framework, particularly as compared with that of the U.C.C., see Isaak I. Dore, *Choice of Law Under the International Sales Convention: A.A.S. Perspective*, 77 AM. J. INT. L. 521 (1983).

74. *E.g.*, CIBN, *supra* note 47, arts. 1(1) & (2).

75. *See* Zwart, *supra* note 50, at 111.

76. *See* Zwart, *supra* note 50, at 116.

77. *See, e.g.*, CISG, *supra* note 3, arts. 11 (rejection of writing requirement) & 19 (acceptance of mirror image rule, rejected in U.C.C. § 2-207 (1990)).

78. CISG, *supra* note 3, art. 2; *see* Zwart, *supra* note 50, at 111.

79. CISG, *supra* note 3, art. 5.

80. CISG, *supra* note 3, art. 4.

culties and a concomitant lack of uniformity in judicial application.<sup>81</sup> The CISG initially takes the civil law position that specific performance of the contract may be extracted from the party in breach, regardless of the availability of other remedies.<sup>82</sup> Article 28 muddies the water, however, by providing that a court need not issue specific relief in situations where such relief is not available under the forum's law.<sup>83</sup> This latter provision was included at the insistence of the United States and the United Kingdom, the two common law nations that do not decree specific relief without a showing that damages would not sufficiently compensate the plaintiff.<sup>84</sup> Article 28's effect is that an American court need not grant specific performance unless it is available under the U.C.C., even where the CISG applies.

As Professor Kastely has noted, article 28 clearly hinders the goal of interpretive uniformity sought by the CISG.<sup>85</sup> It also serves as concrete evidence that, although the changes wrought by the CISG and other treaties are revolutionary, sovereign states are not completely ready to allow a wholesale usurpation of domestic law. Again, however, the very balancing between municipal and international law rules represents systemic change and corresponds with the world legal order's structural changes.

#### 4. *Conclusions About the CISG*

The foregoing analysis reveals that the new international sales law, while the most important and far-reaching of the multilateral treaties enacted thus far, is not completely paramount even within the sphere of international sales. Reservations allowing limitations on the treaty's scope coupled with the treaty's opt-out feature result in a scheme far narrower in scope than, for example, the U.C.C. And topics like products liability proved too sensitive for multilateral treatment.

As a nation's interest in having its own law applied within its own borders grows stronger, its willingness to bow to international norms lessens. Resolving such conflicts between municipal and international law

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81. See Kastely, *supra* note 50, at 607.

82. CISG, *supra* note 3, arts. 46(1) (buyer's right to specific performance) & 62 (seller's right to specific performance).

83. CISG, *supra* note 3, art. 28.

84. Kastely, *supra* note 50, at 626.

85. Kastely, *supra* note 50, at 626; see CISG, *supra* note 3, art. 7(1) (mandating that courts interpret the treaty with its international character in mind).

is destined to be a key focus of subsequent international legislation. Nevertheless, the CISG represents a giant step forward from the eras of conflicts and the law of merchants in the international unification of commercial law.

### B. *Other Treaties*

Although the CISG is by far the most important of the recent international business treaties, it is by no means the only significant one. Three other recent treaties, the United Nations Convention on International Bills of Exchange and International Promissory Notes (CIBN)<sup>86</sup> and the two Conventions on International Lease Financing and International Factoring (CILF)<sup>87</sup> are also important. If nations adopt these treaties as widely as the CISG, the instruments will complement the CISG in forming in the international arena the rough equivalent of Articles 2, 3, and 9 of the Uniform Commercial Code.<sup>88</sup> Though sometimes also in tension with domestic law, these additional treaties advance international business law beyond the *lex mercatoria*.

#### 1. *CIBN*

The CIBN's enactment is particularly noteworthy because it is another step in the centuries-old quest to globalize the law of negotiable instruments. The key characteristic of commercially useful credit instruments is that they are negotiable, that is, able to pass freely to subsequent holders, so that such holders do not need to know the particulars of the transaction that originally gave rise to the instrument. Negotiability, which is basic to all legal systems, requires that certain formal requisites are readily apparent from the face of an instrument in order to cut off certain defenses arising from the original transaction. When presented with an instrument meeting the formal requisites of negotiability, a subsequent holder may confidently accept the instrument without fear that the instrument is worthless because of fraud or other defense to payment. A holder can sell such an instrument for a price roughly equal to its face value.

Due to the importance of negotiability to business-people, one can trace efforts to unify the law of negotiable instruments at least as far back

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86. CIBN, *supra* note 47.

87. CILF, *supra* note 47.

88. John A. Spanogle, *Introductory Note: United Nations Convention on International Bills of Exchange and International Promissory Notes*, 28 I.L.M. 170 (1989).

as the Middle Ages, when merchants formed by uniform usage and custom a crude law of international bills of exchange.<sup>89</sup> This law did not endure, however, and by the 19th century there were strong national differences in the formal requisites for, and the consequences of, the negotiability of commercial credit instruments.<sup>90</sup> Movements on both the regional and international fronts to "reunify" commercial instruments law ensued, and the CIBN embodies these recent efforts.<sup>91</sup>

The CIBN's goal was not to unify the law respecting all commercial instruments that pass in international trade. Such a task would have never been successful because it would have overridden municipal law in an unpredictable fashion, rather than serving the predictability and certainty goals of unification. The CIBN instead creates a new type of negotiable instrument in the form of a promissory note or bill of exchange (but not a check).<sup>92</sup> Unlike the CISG, the CIBN has an opt-in provision, so that it does not apply unless the parties specifically make the instrument subject to the treaty.<sup>93</sup> In addition, the CIBN will not apply unless an instrument reveals on its face that at least two of the acts described on the instrument (e.g., making, drawing, paying) will occur in two different nations, at least one of which is a signatory to the treaty.

Creating a CIBN instrument gives the parties the benefit of knowing the law under which the instrument will be paid. Moreover, this new law has advantages and flexibility not presently found in any municipal law of negotiable instruments. For example, the CIBN allows an instrument

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89. See Jurgen Dohm, *Draft Uniform Law on International Bills of Exchange and International Promissory Notes*, 21 AM. J. COMP. L. 474 (1973); Fairfax Leary, Jr. & Theodore H. Husted, Jr., *An Approach to Drafting an International Commercial Code and a Modus Operandi Under Present Laws*, 49 COLUM. L. REV. 1070 (1949).

90. In fact, strong differences existed even among the states of the United States. It was this division, and its concomitant ill effect on interstate trade, that contributed to the formation of the federal common law under the 1842 decision in *Swift v. Tyson*, 41 U.S. 1 (1842). *Swift*, of course, itself involved a bill of exchange. It is interesting to note that the abolition of the general federal common law in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which for 96 years had served to standardize American commercial law in interstate cases, roughly coincided with the beginning of the drafting of the U.C.C., which has since standardized virtually all American commercial law.

91. See Manley O. Hudson & A.H. Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333, 334 (1931). For details concerning a regional unification movement in Latin America, see Hugo M.B. Guerrico, *Unification and Present Status of Negotiability Legislation in America*, 29 MINN. L. REV. 1 (1944).

92. CIBN, *supra* note 47, art. 1(3).

93. The treaty applies when the bill or note is headed with the specific words "International bill of Exchange [or promissory note] (UNCITRAL Convention)" and when the text of the instrument contains the same words. CIBN, *supra* note 47, arts. 1(1) & (2). Thus, it is impossible for parties to create a CIBN instrument without deliberate action.

to include interest at a variable rate.<sup>94</sup> Few, if any, municipal laws of commercial credit allow negotiability of an instrument with a variable interest rate. Likewise, the CIBN allows the negotiability of an instrument payable in installments,<sup>95</sup> whereas few sovereign legal systems allow such a term. Installment and variable interest rate terms are, however, important modern provisions frequently desired in international transactions, particularly because, unlike checks, most negotiable instruments are instruments of credit rather than merely of payment.<sup>96</sup>

As with the CISG, however, nations' jealousy over the sanctity of their own laws played a part in the negotiation of the CIBN. Compromises between different legal traditions became necessary, particularly between the civil law nations and those with a common-law tradition. One area in which compromise was difficult was in the always-problematic area of forged endorsements. The common-law tradition breaks the chain of negotiability if a forgery occurs, while civil law protects a bona fide taker of a forged instrument. Thus, the common law puts the risk of a forgery upon the taker from the forger, while the civil law puts the risk upon the person whose signature is forged. Both positions are reasonable and both seek to resolve tension between valid public policy concerns. In attempting to reconcile these positions, the CIBN, rather than choosing one of the traditional positions, attempted somewhat unsuccessfully to find compromise between them, resulting in a confusing risk-of-loss scheme.<sup>97</sup>

Despite the difficulties of harmonizing disparate municipal norms, if the CIBN gains widespread acceptance, it is likely to have as important an impact on the law of international negotiable instruments as the CISG has had on sales. Parties will be strongly motivated to adopt the CIBN as the governing law of their instruments. Increasingly, then, municipal law and the *lex mercatoria* will both become irrelevant to many international transactions involving promissory notes or bills of exchange.

## 2. CILF

Two other important treaties that have the potential to unify the law in

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94. CIBN, *supra* note 47, art. 7(d). Cf. U.C.C. § 3-106 cmt. 1 (1990) (noting that an instrument is not negotiable under the U.C.C. unless interest may be calculated without consulting a source outside the instrument).

95. CIBN, *supra* note 47, arts. 7 (b) & (c).

96. See Dohm, *supra* note 89; Spanogle, *supra* note 88.

97. CIBN, *supra* note 47, arts. 25-26. See Carl Felsenfeld, *Forged Endorsements Under the United Nations Negotiable Instruments Convention: A Compromise Between Common and Civil Law*, 45 Bus. Law. 397 (1989).

commercially important areas are the International Institute for the Unification of Private Law (UNIDROIT) Conventions on International Lease Financing and International Factoring.<sup>98</sup> Passed at the same convention, these instruments will govern some significant financing arrangements. The CILF applies to equipment financing (a tripartite financing arrangement) and factoring (pledging of receivables) where the lessee and lessor (or pledgee and pledgor) have their places of business in different countries. The terminology and scope of the CILF are remarkably similar to that of the CISG, and decisions interpreting one may eventually serve as authority for interpreting similar provisions of the other. The CISG, CIBN, and CILF thus help to weave a new international commercial quilt.

Moreover, the CILF treaties have the potential (again, if widely accepted) to simplify the process of reducing the risk of nonpayment in international sales transactions. Traditionally, such risk has been spread through cumbersome letter-of-credit transactions, which involve at least four parties: the buyer, the seller, the buyer's bank, and the seller's bank. Lease financing and factoring transactions, however, are tripartite in nature: a third party accepts the risk of nonpayment in exchange for what the United States would term a security interest in the goods sold.<sup>99</sup> Such a simplification of the international financing process can only serve to enhance the potential of international trade. Again, however, the lease financing and factoring treaties, like the CISG and CIBN, display some ambivalence about moving from domestic to international business regulation.<sup>100</sup>

### C. Other Unification Efforts

In addition to the world-wide efforts to unify commercial law through treaties, there have been several other noteworthy efforts to unify commercial law. Certain initiatives even demonstrate the interface between the three evolutionary stages in international business law. These efforts include regional attempts to harmonize commercial law. For example, the Latin American nations are attempting to unify the law concerning

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98. CILF, *supra* note 47.

99. Mary Rose Alexander, Note, *Towards Unification and Predictability: The International Factoring Convention*, 27 COLUM. J. TRANSNAT'L L. 353 (1989). See also Ronald Cuming, *Legal Regulation of International Financial Leasing: The 1988 Ottawa Convention*, 7 ARIZ. J. INT'L & COMP. L. 39 (1989).

100. See *id.*



the international carriage of goods by road.<sup>101</sup> This Latin American effort parallels the 1956 European Community (EC) effort in that direction.<sup>102</sup>

The EC, of course, represents a unique situation, because it is rapidly undergoing changes that may result in its being treated, for all economic purposes, as one nation-state. Nevertheless, there has been a proliferation of recent treaties addressing commercial issues in the EC. One of the more interesting efforts in this direction is the Convention on the Law Applicable to Contractual Obligations, which is an attempt to harmonize the conflicts-of-law rules in commercial cases.<sup>103</sup> Because this treaty straddles the conflicts approach marking the first evolutionary period<sup>104</sup> and the current multilateral treaty approach,<sup>105</sup> it is particularly interesting given this Article's thematic context.

Finally, the current wave of international business law treaties is supplemented by the older INCOTERMS (an acronym for "international commercial terms"). Lawyers prepare these definitions of trade terms for the Commission on International Commercial Practice of the International Chamber of Commerce. The Commission first adopted a uniform statement of the meaning of nine such terms in 1936. The INCOTERMS are important because parties may use them as a shorthand way of stating their agreement, with assurance that there is an outside, objective source for the definition of the contract terms. Although certainly not positivistic law per se, the INCOTERMS represent a quasi-codification of the trade usages among merchants. Particularly where the parties expressly refer to the INCOTERMS themselves when incorporating those terms into a contract, much of the uncertainty inherent in the conflicts approach, and even in the *lex mercatoria* approach, may be reduced. As a clarification and crystallization of trade practices, the INCOTERMS help bridge the latter two evolutionary periods of international business.

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101. Inter-American Convention on Contracts for the International Carriage of Goods by Road, 29 ILM 81 (1990) (with commentary). For an interesting discussion of this treaty, see Paul B. Larsan, 1989 *Inter-American Convention on International Carriage of Goods by Road*, 39 AM. J. COMP. L. 121 (1991).

102. The Convention on the Contract for International Carriage of Goods by Road, *supra* note 47.

103. Convention on the Law Applicable to Contractual Obligations, *supra* note 47.

104. See *supra* part I.

105. See *supra* notes 48-100 and accompanying text.

#### D. *Conclusions About Multilateral Treaties*

The new trend towards unification of international commercial law through treaties is certainly growing. The CISG is already a dominant force in the important area of international sales. The CIBN and CILF promise similarly to prevail in international credit and financing transactions. When these major multilateral efforts are considered along with regional unification efforts, particularly in Europe, and the INCOTERMS' quasi-official codifications, one cannot escape the overall conclusion that sovereign control over international business is giving way to substantive, positivistic, truly international law. This does not mean that all multilateral treaty efforts have been successful.<sup>106</sup> Such failures, however, do not undercut the importance of treaties as a positivistic source of law.

#### IV. A NEW INTERNATIONAL BUSINESS PARADIGM

This Article thus far has demonstrated the significant changes in how the legal community regulates international business. Over the past few centuries, that regulation has evolved from no international business law, under the conflicts approach; to the growth of a customary law regulation of international business, under the *lex mercatoria* approach; to finally the advent of positive public international business law, under the multilateral treaty approach, most notably through the CISG. Of course, in every legal discipline, domestic as well as international, the law changes over time. However, the transformation of international business law signifies more than just an incremental normative change: it signifies a quite radical revision in the very prism through which we view transnational deals and disputes. Not only has the law changed, but the legal system itself has changed. After all, the terms "private" and "public" are polar concepts, and yet, from the first to the third evolutionary periods, international business rules have moved from the domain of

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106. One interesting example of a treaty that began with good intentions but ended in failure is the World Intellectual Property Organization Treaty on Intellectual Property in Respect of Integrated Circuits, *supra* note 47. This treaty proposed to unify the law relating to patenting and copyrighting integrated circuits, computer chips, but failed when the United States and Japan, the leading producers of integrated circuits, refused to sign it. Predictably, the American and Japanese objected to the treaty, claiming it provided too little protection to the producers of integrated circuits, a powerful political and economic force in both countries. The World Intellectual Property Organization's failure is thus an unequivocal lesson to drafters of multilateral treaties: nations will not tolerate supranational usurpation of municipal law where very important national interests are implicated.

“private international law” to that of “public international law.” This movement is no less than revolutionary. Recall Hannah Arendt’s description of “revolutions,” which do not signal “restoration” but “that an entirely new story, a story never known or told before, is about to unfold.”<sup>107</sup> And revolutionaries, she wrote, “are agents in a process which spells the definite end of an old order and brings about the birth of a new world.”<sup>108</sup>

Part IV of this Article elaborates upon the thesis that a systemic change, or revolution, is occurring in international business regulation. It shows how that regulatory change historically relates to changes in the world legal order itself. Moving from the medieval to the modern order, this Part conceptualizes a “paradigmatic shift” in international business transactions, utilizing social scientist Thomas Kuhn’s influential work in non-legal areas.<sup>109</sup> That the modern paradigm still contains tension between domestic and international law does not dispute the thesis, but rather helps to prove it. Ambiguity within the law, and ambivalence about changing it, actually demonstrates the paradigm shift: “Dual loyalty to the past and to that which is still to come injects an element of incoherence in . . . international law activity during any period of transition from one world order system to another.”<sup>110</sup> Hence, this Part seeks theoretical coherence in explaining the interface of the three evolutionary periods.

### A. *The Westphalian Order*

Our history lesson moves forward from the medieval order.<sup>111</sup> Under

107. HANNAH ARENDT, *ON REVOLUTION* 21 (1963).

108. *Id.* at 35. *See generally id.* at ch. 1.

109. *See* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Analyses of Kuhn’s scholarship include: BARRY BARNES, T.S. KUHN AND SOCIAL SCIENCE (1982); PARADIGMS AND REVOLUTIONS (Gary Gutting ed., 1980); Dudley Shapere, *The Structure of Scientific Revolutions*, 73 *PHIL. REV.* 383 (1964).

110. Richard A. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 *YALE L.J.* 969 (1975). *See generally* THOMAS S. KUHN, *THE ESSENTIAL TENSION*, ch. 12 (1977) (clarifying the meaning of “paradigm” and elaborating upon the transition from one paradigm to another).

111. The following historical discussion of the medieval order through the seventeenth century draws upon DAVID MALAND, *EUROPE AT WAR 1600-1650* 179-90 (1980); R. MOWATT, *A HISTORY OF EUROPEAN DIPLOMACY 1451-1789* 104-22 (1971); A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 86-125 (1947); DAVID OGG, *EUROPE IN THE SEVENTEENTH CENTURY* 118-82 (8th ed. 1961); *THE THIRTY YEARS WAR* (Geoffrey Parker ed., 1984); JOSEF POLISENSKY, *WAR AND SOCIETY IN EUROPE 1618-1648* 17-35 (1978); *THE THIRTY YEARS’ WAR* (Theodore K. Rabb ed., 2d ed. 1981); RANDALL, *supra* note 6, at 195-97; IV *THE CAMBRIDGE MODERN HISTORY*

the pyramidal design of a Christian commonwealth, the Pope "vertically" governed Europe.<sup>112</sup> The term "vertical" helps dimensionally to describe the Pope's centralized leadership over the European hierarchy. In other words, the medieval order was a centralized hierarchy of tribes, farmers, church, guild, and prince, with the Pope sitting atop the pyramid.<sup>113</sup> Of course, secular forces eventually opposed the Pope. When Philip IV taxed the French clergy in the early fourteenth century, Pope Boniface VIII issued the famous bull *Unam Sanctam*, defining the plentitude of Papal power over all of the Christian community, including sovereign France.<sup>114</sup> The Pope further decreed that "spiritual power exceeds any earthly power in dignity and nobility, as spiritual things excel temporal ones."<sup>115</sup> In arguing against the tax, the Pope thus tried to assert his centralized papal authority over the Holy Roman Empire.

Philip, however, defied the Pope's vertical authority, disavowing the bull. Because he ruled over one of the first territorial units to possess the attributes of statehood, Philip's defiance helped establish sovereignty as the basic organizing unit of the post-Roman Empire. In 1300, it seemed the sovereign state would become the prevailing political form in Western Europe. The people's loyalty to the state was stronger than the people's allegiance to the Pope.<sup>116</sup>

According to most historical accounts, the Peace of Westphalia, in 1648, signifies the formal shift from the papal's vertical rule to sovereign decentralized rule: "The sovereign state of 1300 . . . was still not very strong . . . . It took four to five centuries for European states to overcome their weaknesses, . . . to bring lukewarm loyalty up to the white heat of nationalism."<sup>117</sup> The Treaty of Westphalia formally ended the Thirty

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395-433 (Adolphus W. Ward et al. eds., 1906); CICELY V. WEDGWOOD, *THE THIRTY YEARS WAR* 445-84 (1961); FALK, *supra* note 110, at 975-87; Leo Gross, *The Peace of Westphalia 1648-1948*, 42 AM. J. INT'L L. 20, 24-30 (1948); Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 269-76 (1978).

112. For other discussions of vertical (and horizontal) jurisdiction, see RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 21-24 (1964); RANDALL, *supra* note 6, at 26-29. See generally MYRES S. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960) (analyzing institutional competencies and structuralism in the international order).

113. Falk, *supra* note 110, at 980; Gross, *supra* note 111, at 28.

114. POPE BONIFACE VIII, BULL *Unam Sanctam* on the Plentitude of the Papal Power (1302), reprinted in *CHURCH AND STATE THROUGH THE CENTURIES*, at 89 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1954).

115. *Id.* at 91.

116. JOSEPH REESE STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* 57 (1970).

117. *Id.*

Years War, establishing the horizontal, non-hierarchical authority of decentralized nations separately over the people, resources, and activities within the sovereign's borders. The War had its roots in 1609, when Duke John William died without heir. That succession battle, however, was only the match that lit an ever-lengthening and significant conceptual fuse. The War more fundamentally pitted the world's existing vertical forces—the status quo under the pope and under the emperor's feudal hierarchy—against the emerging horizontal forces—the growing nation-states, emerging middle class, and the Calvinists and Lutherans. As Professor Leo Gross puts it, prior to the Treaty of Westphalia, “powerful intellectual, political, and social forces were at work which opposed . . . the aspirations and the remaining realities of the unified control of Pope and Emperor. In particular the Reformation and Renaissance, . . . each in its own field, attacked the supreme authority claimed by the Pope and the Emperor.”<sup>118</sup> It nevertheless took the forces for horizontal governance more than thirty full years to defeat the Hapsburg empire.

Incorporating the Treaties of Munster and Osnabruck, the Treaty of Westphalia<sup>119</sup> lay the framework for the new sovereign-dominated world legal order. The treaty separated church and state, but allowed each sovereign to supervise religious matters within its own boundaries. This jurisdictional separation helped to recognize the sovereignty and supremacy of the burgeoning nation-states. Under the Westphalian order, nation-states exclusively composed the global order. Public international law did not recognize or regulate entities other than nation-states; such entities were objects of the law. In theory at least, each nation was separate, equal, and free to regulate its citizens, assets, and territories. The Westphalian arrangement thus horizontally decreed each national government “*sovereign and equal* by juridical fiat, rather than by virtue of some higher authority within the world order system.”<sup>120</sup> Of course, as with all constitutive documents (such as the U.S. Constitution and U.N. Charter), the Treaty of Westphalia contained some balancing between new and old world ideals.<sup>121</sup> A papal bull even condemned the

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118. Gross, *supra* note 111, at 28.

119. *Treaty of Westphalia* (1648), in I MAJOR PEACE TREATIES OF MODERN HISTORY 7 (Fred L. Israel ed., 1967).

120. RICHARD A. FALK, A STUDY OF FUTURE WORLDS (1975).

121. See Hugo Grotius, *The Law of War and Peace* (L. Loomis trans., W.J. Black 1949) (1625); see also Hersch Lauterpacht, *The Grotian Tradition in International Law*, 1946 BRIT. Y.B. INT'L L. 1. Hugo Grotius' significant work, postulating sovereign absolutism under a natural law theory, is said to have influenced the Westphalian document. Falk, *supra* note 110, at 984-85.

Treaty,<sup>122</sup> but to little avail. In sum, the Treaty's formation was the most "decisive juridical event"<sup>123</sup> and it established the sovereign system for the seventeenth century forward: "The Peace of Westphalia . . . marks the end of an epoch and the opening of another. It represents the majestic portal which leads old into the new world."<sup>124</sup>

### B. *A Kuhnian Approach*

Social scientist Thomas Kuhn's scholarship may help to illuminate the Westphalian legal order as well as revisions of that order. In the late 1960s, Kuhn began to study the structure of revolutions in scientific disciplines.<sup>125</sup> His premise was that scientists in a specific area share "law, theory, application, and instrumentation together . . . provid[ing] models from which spring particular coherent traditions of scientific research."<sup>126</sup> However, Kuhn thought that historiographers were wrong to describe those models as solely an incremental accumulation of data. Such descriptions failed to explain scientific revolutions—"those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one"<sup>127</sup>—Copernican astronomy replacing Ptolemaic astronomy, for example.

Critical to Kuhn's approach is the concept of a "paradigm." He defined that term as having two meanings. The broader usage conceptualizes paradigms as being "global, embracing all the shared commitments of a scientific group."<sup>128</sup> A paradigm thus provides a framework for "the entire constellation of beliefs, values, techniques, and so on shared by . . . a given community."<sup>129</sup> The second, more dictionary-like definition conceptualizes a paradigm more narrowly as "one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples can replace explicit rules as a basis for the solution of remaining puzzles of normal science."<sup>130</sup> Hence, synonymous with a paradigm's first conceptualization is the term "disciplinary matrix"—that is,

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122. See *BULL Zelo domus Dei* condemning the Religious Clauses of the Peace of Westphalia, reprinted in *CHURCH AND STATE THROUGH THE CENTURIES*, *supra* note 114, at 194.

123. Falk, *supra* note 110, at 982.

124. Gross, *supra* note 111, at 28.

125. See KUHN, *supra* notes 109, 110.

126. KUHN, *supra* note 109, at 10.

127. KUHN, *supra* note 109, at 92.

128. KUHN, *supra* note 110, at 294.

129. KUHN, *supra* note 109, at 175.

130. KUHN, *supra* note 109, at 175.

“the common possession of the practitioners of a professional discipline . . . composed of ordered elements of various sorts.”<sup>131</sup> Synonymous with the second concept is the term “exemplar”—that is, a problem-solving example that practitioners in a given community share and find useful to apply in repeated circumstances.<sup>132</sup>

A revolution occurs when new scientific discoveries are incompatible with the current paradigm. Although a particular paradigm can accommodate some incremental changes—with scientists just “mopping up” or implementing the “normal science” of ongoing research—it cannot encompass new ideas that diametrically oppose the existing paradigm’s very tenets.<sup>133</sup> After first anxiously resisting paradigmatic change, practitioners may lose faith in the disciplinary matrix or exemplar to which they were comfortably accustomed. It is quite understandable that scientists would prefer working within the disciplinary framework that formed their training and probably their life’s work. People simply prefer the familiar over the unfamiliar. However, individuals will revolt against the old order when a significant amount of cognitive dissonance occurs between new knowledge and old. Rather than representing anomalies in the status quo paradigm, revisionist theories incite a revolutionary disciplinary matrix or exemplar. Such “anomalies” are transformed and become the new paradigm’s postulates and tautologies. Kuhn’s approach thus accounts for systemic revolutions, or “paradigm shifts.”<sup>134</sup>

### C. *Kuhn and International Business*

Although Kuhn is a social scientist, several legal commentators have tried to apply his work to various areas of the law, including the “Erie Doctrine,”<sup>135</sup> the language and logic of individual rights,<sup>136</sup> global legal reform;<sup>137</sup> and, international humanitarian issues.<sup>138</sup> Of course, the relevant task here is to analyze international business law under Kuhn’s ap-

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131. KUHN, *supra* note 110, at 297.

132. KUHN, *supra* note 109, at 10-11, 23-24.

133. KUHN, *supra* note 109, at chs. 6 & 7.

134. KUHN, *supra* note 109, at chs. 6 & 7.

135. William Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 909-12 (1988).

136. Gardeau A. Spann, *Secret Rights*, 71 MINN. L. REV. 669, 701-21 (1987); *See also* D.H. Kaye, *The Logic and Antilogic of Secret Rights*, 72 MINN. L. REV. 603, 618-19 (1988).

137. Falk, *supra* note 110; *see also* RICHARD FALK, *REVITALIZING INTERNATIONAL LAW* ch. 1 (1989). Professor Falk’s analysis is especially valuable.

138. RANDALL, *supra* note 6, at ch. 9; *see also* Kenneth C. Randall, *Federal Courts and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 421-24 (1988).

proach. The pressing issue is whether a paradigm shift, or revolution, has occurred in the way that practitioners in the modern legal system transact their international business deals.

To begin, Kuhn's historiography helps to explain the establishment of the Westphalian legal order in the seventeenth century. The Treaty of Westphalia represented not just incremental legal change, but established a systemic framework for decentralized state sovereignty. The new sovereign cornerstone simply could not fit within the papal-dominated pyramid.<sup>139</sup> Because the horizontal tenets of the Westphalian instrument were incompatible with vertical papal authority, a new paradigm emerged.

Philip IV's conflict with Pope Boniface VIII highlighted this paradigmatic schism. In addition, a major confrontation, the Thirty Years War, validated the spawning sovereign nations.<sup>140</sup> No less than a revolution occurred, due to the incongruity between the horizontal forces for decentralization and the vertical contours of pre-Reformation Europe. The drafters of the Treaty of Westphalia thus constituted a new disciplinary matrix—substituting a new prism through which leaders and lawyers saw the world.

The first evolutionary stage of international business—the conflicts period—synchronizes with the Westphalian paradigm. Recall the absence of any international regulation of business during that initial stage.<sup>141</sup> That lacuna was due to the separatism of independent nation-states. Without any unified international business law, separate sovereign nations applied their own domestic choice-of-law rules to decide which domestic substantive law to apply. This private—rather than public—international law approach perfectly fit the decentralized Westphalian legal order. Horizontal state sovereignty is the hallmark of the Westphalian paradigm. When regulating international business, or resolving a business dispute, each sovereign nation applied its own law (conflicts and often substantive rules) to behavior and problems within its borders.

Under the Westphalian paradigm, no centralized mechanism existed for harmonizing each sovereign's international business regulation. Instead, when there were conflicts of law, one domestic law was chosen, superseding other municipal norms. In short, for better or worse, legal practitioners could apply sometimes disparate conflicts theories, norms,

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139. See *supra* notes 112-15 and accompanying text.

140. See *supra* notes 116-24 and accompanying text.

141. See *supra* part I.



and rules during Westphalia's heyday without any cognitive dissonance because there was neither centralized rule nor centralized rules. Moreover, classical public international law did not include private transactions within its realm, leaving unregulated the activities of non-sovereign actors.

The conflicts approach to international business, however, eventually gave way to the *lex mercatoria* approach.<sup>142</sup> This transformation was due to changes in the world legal order following World War II. Even though state sovereignty remained the international system's capstone, the post-war decades gave rise to increased centralization.

Several significant trends led to such sovereign interdependence. Perhaps most importantly, the world community established new and major international organizations, such as the United Nations, the International Court of Justice, the General Agreement on Tariffs and Trade, the International Monetary Fund, and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).<sup>143</sup> Possessing different but not unrelated goals, each of those institutions initiated communication, compromise, and consensus among nations. The family of nations vertically sought cooperation and understanding, hoping never again to engage in major armed conflict in a divided world.<sup>144</sup> In addition, explosive advancements in telecommunications systems and international transportation made the world somewhat smaller, causing increased centralization. Apart from such global happenings, many regions of the world began centralization efforts following the Second World War—the initiation of the European Community is but the most important example of this phenomenon.<sup>145</sup> Those regional efforts sought harmonization on both economic and non-economic issues. Of course, all of these post-War developments conflicted with the basic tenets of the Westphalian

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142. See *supra* part II.

143. For background concerning such intergovernmental bodies, see FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* (1977).

144. For example, parties to the U.N. Charter, in the Preamble, resolve "to combine our efforts to accomplish [the] aims" of "[saving] succeeding generations from the scourge of war," "[reaffirming] faith in fundamental human rights," and "[establishing] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ." U.N. CHARTER pmbl. Article 1 aspires that the U.N. "be a centre for harmonizing the actions of nations in the attainment of" the U.N.'s purposes, including the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character . . ."

145. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, 25 Mar. 1957, 298 U.N.T.S. 3 (1958).

paradigm; these developments replaced sovereign dominance and separatism with global harmonization and interdependence.

The conflicts approach to international business—attributable to the Westphalian dogma—thus contradicted the enhanced international centralization following World War II. Under private international law, there was no attempt to reconcile or unify domestic commercial norms; indeed, lawyers did not view international business transactions as subject to any supranational norms at all.<sup>146</sup> Fighting over which domestic law to choose and racing to one's own courthouse to argue for the application of familiar norms, however, is incompatible with a legal order attempting to achieve harmony and improved foreign relations.

The conflicts approach (and the label "conflicts" means exactly what it says—domestic law *conflicts*) also became less appropriate as the number of international business transactions increased. Inconsistencies among national commercial law became more disruptive to a stable business environment as the number and scope of deals grew. Moreover, once nation-states themselves started transacting more business with private corporate entities, the need for harmonized business norms grew. Even if public international law traditionally was the domain of nation-states only,<sup>147</sup> the line between public and private international law became blurred once nations began engaging in international business. Nation-states sought mutually beneficial international laws to regulate their business conduct, just as they seek reciprocally helpful laws to regulate their non-business conduct.

Compared with the conflicts analysis, the newer *lex mercatoria* approach advances international norms to foster cooperation and consensus in business matters. In applying the emerging customary law, more neutral and objective arbitral panels began replacing separate and possibly biased domestic forums during this evolutionary stage. Seeking to replace domestic business rules with international rules, arbitrators tried to divine a customary law reflecting certain business practices and usages familiar in many parts of the world. Though some have questioned whether the *lex mercatoria* really represents international law, it certainly has greater supranational qualities than the domestic law applied during the conflicts era. The new *lex mercatoria* approach symbolizes the world order's paradigmatic movement away from the rigidly central-

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146. See *supra* part I.

147. See *supra* notes 5-8, 15-16 and accompanying text.

ized tenets of Westphalia. Lawyers developed a more centralized business law while the international paradigm itself was becoming more centralized.

Interestingly, during the same time as the creation of the *lex mercatoria*, some regional attempts were made to create international conflicts-of-law treaties.<sup>148</sup> These treaties, as well as the *lex mercatoria*, reflect the incompatibility between private international law and the post-World War II legal order. Bridging the first two evolutionary periods, the treaties acknowledge that more unified legal norms, arrangements, and behavior must coalesce with the changing paradigm in which legal practitioners live and work.

Hence, despite the shortcomings of the *lex mercatoria*, this secondary stage helped to redefine the disciplinary matrix or exemplar of international business. Not only the norms, but the very system of international business changed. This second evolutionary period transitioned international business from the decentralized conflicts paradigm to the increasingly centralized multilateral treaty paradigm.

Assuming a paradigm shift opposing Westphalia, a further movement away from the *lex mercatoria* and toward multilateral commercial treaties is logical. Especially in the last few decades, post-war developments have led to ever-increasing centralization and cooperation on multiple international topics, such as human rights, terrorism, the environment, and trade.<sup>149</sup> Indeed, the very list of topics subject to public international law has greatly expanded. Reached normally through global institutions, the growing international consensus concerning those subjects demonstrates the world's centralized and harmonized treatment of major issues.<sup>150</sup> The end of the Cold War and geopolitical polarization between the U.S. and Soviet blocs has facilitated that normative harmonization. Increased political agreement has led to increased normative cooperation.

The modern global community mostly has used multilateral treaties over the past few decades to codify its agreement on international sub-

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148. See, e.g., Convention on the Law Applicable to Contractual Obligations, *supra* note 47.

149. Indeed, as Professor Henkin argues, because nation-states create international laws they find mutually beneficial on various subjects, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

150. See generally RANDALL, *supra* note 6, at 200-04 (discussing modern centralized institutional efforts on public international law issues, particularly humanitarian concerns).

jects. Similarly, the community has established multilateral treaties to reach consensus and codification on international business matters. Those treaties, most notably the CISG, CIBN, and CILF, advance beyond the *lex mercatoria*. Compared with customary international law, written treaty law is normatively more precise, explicit, expansive, and clear. By becoming a party to a multilateral business treaty, a nation shows a greater commitment to the unification and harmonization of commercial norms; it expressly commits itself to subordinate domestic norms to international norms. By elevating interdependence over sovereignty, nations help to establish a new, centralized paradigm for international business transactions.

The prominent CISG replaces horizontally oriented norms with vertically oriented norms, unless the business partners expressly opt-out of the treaty's application. In short, the treaties' centralized treatment of international business perfectly matches the international paradigm's centralized treatment of other significant non-business issues. As with the horse and the cart, the new world order's structural trends have given rise to multilateral treaties, and those centralized norms, in turn, have precipitated more structural interdependence among nations. The new paradigm will continue to crystallize as international business grows, as sovereigns transact more international business, and as more comprehensive commercial and business treaties are created.

The CISG and other treaties do have limitations. They have a restricted scope; they contain mechanisms that occasionally preempt treaty law with municipal law; and they sometimes strike a contradictory balance between domestic and international law. This tension, however, does not foreclose the possibility of a paradigm shift. It actually is logical that practitioners in any subject area (scientific or legal) would display ambivalence about a radical change in their discipline. As Kuhn and others argue, such tension really demonstrates that a paradigmatic shift is occurring.<sup>151</sup> Any significant systemic change naturally causes tension and even disarray. The Thirty Years War led to the Westphalian paradigm. Another major armed confrontation, the Second World War, gave rise to increased centralization, moving the world order away from the Westphalian paradigm. Those who constituted the Treaty of Westphalia commingled old and new world ideas and values in that instrument,<sup>152</sup>

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151. See *supra* note 110 and accompanying text; see also *supra* notes 133-34 and accompanying text.

152. See *supra* notes 122-23 and accompanying text.

just as did those who constituted the United Nations Charter (and even the United States Constitution).

The modern multilateral business treaties similarly contain systemic ambiguities. These treaties commit lawyers to supranational commercial law, but also show some reluctance to give up sovereignty on certain legal issues. The creation of these documents has not been without disagreement. This disagreement is quite understandable considering the significant revision in the way the instruments regulate international business. The CISG, CIBN, and CILF do not yet represent an entire international commercial code; and other treaty efforts admittedly have been less successful.<sup>153</sup>

During even the early years of the modern evolutionary era, however, it is possible to view the treaties at least as an exemplar, rather than as a disciplinary matrix.<sup>154</sup> The modern treaties may befit Kuhn's use of "paradigm" in its narrower, less universal sense—providing a sufficient "puzzle solution" for only a few particular types of sales and other leasing and factoring deals subject to the treaties described above. It is possible, of course, that such exemplars will develop soon into an entire disciplinary matrix, particularly as lawyers continue to create additional multilateral business treaties. However, one cannot deny the radical change in the way lawyers transact international business. The legal community has completely reconceptualized international business from being subject to private international law—which meant no substantive regulation under the conflicts approach—to being subject to the significant public international law of the modern era of multilateral treaties. This normative reconceptualization is emblematic of a paradigm shift, because the centralized multilateral treaty approach to international business simply does not square with the decentralized tenets of Westphalia. In international business transactions, the world community is ringing out and replacing the old paradigm with the new. Even if the new international business tale has not yet been entirely written or told, it is in more than its first draft.

### CONCLUSION

The world has become more interdependent and cooperative. Enhanced economic and political harmony have led to increased interna-

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153. See *supra* note 106 and accompanying text.

154. See *supra* notes 128-32 and accompanying text.

tional trade. Following the Second World War, however, international lawyers and business-people suffered from a lack of any real substantive international law to shape and govern their expanding transnational deals. Linked with an era of national separatism and heightened state sovereignty, the conflicts-of-law approach chose one domestic commercial law to control a business deal, often contradicting the domestic norms of one of the other dealmaker's countries. Seeking predictability and stability, international actors started to replace the conflicts approach with the new *lex mercatoria* approach, relying upon certain accepted business practices to formulate their transactions. Increased centralization in today's world community has precipitated the modern approach to international business, with multilateral commercial treaties supplanting the less-positivistic *lex mercatoria*. In sum, international partners have radically reformed the way they transact business, moving from no international commercial law to today's significant commercial treaty law.

This normative shift is quite logical; it corresponds to changes in the world legal order itself. Furthermore, it is sensible that the legal community would create and shape norms, during any era, in a way befitting the contours of that community. Accordingly, now that the world legal order is increasingly centralized and interdependent, one would expect the legal community to generate more supranational norms to govern the greatly expanding international trade.

The changes in international business today suggest more than an incremental revision of the law—they symbolize a paradigmatic shift in the international business system itself, a shift in the structural underpinnings of the legal order. Drawing upon social science learning, the Authors hope this Article offers theoretical coherence to the new international business landscape and demonstrates the emergence of a new paradigm of international business transactions.