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AN ARGUMENT FOR RATIFICATION: SOME BASIC PRINCIPLES OF THE 1994 INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS

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I. INTRODUCTION

The Organization of American States (OAS)[1] Fifth Inter-American Specialized Conference on Private International Law took place in Mexico City, Mexico, from March 14-18, 1994.[2] The General Assembly of the OAS had met on four prior occasions, in 1975,[3] 1979,[4] 1984,[5]

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[1] The OAS is the world's oldest regional organization, tracing its origins to the First International Conference of American States that opened on April 14, 1890, in Washington, D.C. The First International Conference established the International Union of American Republics along with a Commercial Bureau to act as its Secretariat. In 1910, the International Union became the Union of American Republics, and the Commercial Bureau reconfigured as the Pan American Union. After World War II, the Ninth International Conference of American States, held in Bogota, Colombia in 1948, adopted the Charter creating the OAS. The Charter transformed the Union of American States into the OAS and the Pan American Union into its General Secretariat. *See* Heidi V. Jiménez, *Introductory Note* to Organization of American States: Integrated Text of the Charter As Amended by the Protocols of Buenos Aires and Cartagena De Indias; the Protocol of Amendment of Washington; and the Protocol of Amendment of Managua, done at Bogota, Colombia, 1948 (as amended 1967, 1985, 1992, & 1993) 33 I.L.M. 981. Thirty-five member states have since ratified the Bogota Charter as amended: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Cuba, Dominic, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. *See id.* at 982.

[2] *See* Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, 33 I.L.M. 732, 732-39 [hereinafter Mexico Convention].

[3] The First Inter-American Specialized Conference on Private International Law [hereinafter CIDIP-I] was held in Panama City between January 14-30, 1975. *See* First Inter-American Specialized Conference on Private International Law, Jan. 30, 1975, 14 I.L.M. 325. Six Conventions were adopted at the Conference: the Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad, *id.* at 325-28; Inter-American Convention on the Taking of Evidence Abroad, *id.* at 328-32; Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, *id.* at 332-34; Inter-American Convention on Conflict of Laws Concerning Checks, *id.* at 334-36; Inter-American Convention on International Commercial Arbitration, *id.* at 336-39; Inter-American Convention on Letters Rogatory, *id.* at 339-43.

[4] The Second Inter-American Specialized Conference on Private International Law [hereinafter CIDIP-II] took place in Montevideo, Uruguay, from April 23 to May 8, 1979. Second Inter-American Specialized Conference on Private International Law, May 8, 1979, 18 I.L.M. 1211. Eight conventions were approved at the Conference: Inter-American Convention on Conflicts of Laws Concerning Checks, *id.* at 1220-22; Inter-American Convention on Conflicts of Laws Concerning Commercial Companies, *id.* at 1222-24; Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, *id.* at 1224-27; Inter-American Convention on the Execution of Preventive Measures, *id.* at 1227-31; Inter-American Convention on Proof of and Information on Foreign Law, *id.* at 1231-34; Inter-

1989,[6] and has subsequently met once in 1996. On March 17, 1994, the Mexico Convention[7] adopted two conventions: a Convention on the International Traffic in Minors[8] and the Inter-American Convention on the Law Applicable to International Contracts.[9] This article looks at the Inter-American Convention on the Law Applicable to International Contracts. The article will discuss some of the principles of private international law upon which the Mexico Convention is premised. Based on these principles, the article argues in favor of the convention's ratification by the United States Congress.[10]

American Convention on Domicile of Natural Persons in Private International Law, *id.* at 1234-36; Inter-American Convention on General Rules of Private International Law, *id.* at 1236-38; Additional Protocol to the Inter-American Convention on Letters Rogatory, *id.* at 1238-47.

[5] The Third Inter-American Specialized Conference on Private International Law [hereinafter CIDIP-III] was held in La Paz, Bolivia, from May 15-24, 1984. *See* Third Inter-American Specialized Conference on Private International Law: Conventions and Additional Protocol, May 24, 1984, 24 I.L.M. 459. The Conference adopted three Conventions: Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, *id.* at 460-64; Inter-American Convention on Personality and Capacity of Judicial Persons in Private International Law, *id.* at 465-67; Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, *id.* at 468-71; Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, *id.* at 472-83.

[6] *See* Fourth Inter-American Specialized Conference on Private International Law, July 15, 1989, 29 I.L.M. 62 [hereinafter CIDIP-IV]. CIDIP-IV approved three conventions at the Conference: Inter-American Convention on the International Return of Children, *id.* at 63-72; Inter-American Convention on Support Obligations, *id.* at 73-80; Inter-American Convention on Contracts for the International Carriage of Goods by Road, *id.* at 81-90.

[7] The convention was signed by representatives from Bolivia, Brazil, Uruguay, and Venezuela. *See* Mexico Convention, *supra* note 2, at 732.

[8] *See* Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 33 I.L.M. 721.

[9] *See* Mexico Convention, *supra* note 2, at 732. At CIDIP-IV, the Mexican delegation submitted a draft convention. The conference adopted a set of principles for future deliberation of the draft convention. An Inter-American Juridical Committee prepared a draft convention and report in advance of CIDIP-V that was deliberated upon and revised at a meeting held in Tuscon, Arizona, in November 1993. This draft formed the basis of discussions at the Mexico Convention. *See* Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights And Comparisons*, 42 AM. J. COMP. L. 381 (1994); *see also* Harold S. Burman, *International Conflicts of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990's*, 28 VAND. J. TRANSNAT'L L. 367, 377 n.29 (1995).

[10] The United States delegation utilized general guidelines in considering the draft Convention: "(a) the provisions were to be based on trade and commercial contract concerns, rather than personal, labor, or other contracts; (b) rules were, when possible, intentionally to favor trade facilitation; (c) commercial predictability and trade usages were to receive higher priority than the neutral balancing of all parties' interests in possible litigation; (d) party

The second part of the article affirms that the underlying premises of the Mexico Convention are founded on the principles of private international law enunciated in the 1980 Rome Convention on the Law Applicable to Contractual Obligations. An overview of the two conventions illustrates this point. The article draws comparisons between numerous overlapping provisions and the similarity of the principles upon which each is based. American conflict of law rules embodied within the Restatement (Second) Conflict of Laws are compared to those embodied within the two conventions to lay a foundation for ratification.

The third part of the article introduces the general principles of the doctrine of renvoi and problems inherent in applying these principle to conflict-of-law doctrine. The article seeks to explain why the doctrine of renvoi, within both the Rome and Mexico Conventions, has been expressly omitted.

The fourth and fifth parts of the article, freedom of choice and closest connection, respectively, form the central nexus upon which the article is based. The doctrine of freedom of choice encompasses the internationally recognized concept of party autonomy, the ability of the parties to choose the applicable law of the contract. The similarity of principles underlying party autonomy under each convention is explored. When the contracting parties fail to make a valid conflict-of-law choice, each convention provides a mechanism whereby the courts can choose the applicable law, namely, the theory of closest connection. The subjective and objective criteria the framers introduced into the Mexico Convention, in association with a reference to international commercial law criteria such as UNIDROIT and CISG principles, as well as the recognition of *lex mercatoria*, distinguish it from the Rome Convention and provide the most persuasive arguments for ratification. The last part of the article sets forth the various arguments in support of ratification.

II. THE ROME AND MEXICO CONVENTIONS: A BRIEF SYNOPSIS

The framers of the Mexico Convention utilized the principles underlying the Rome Convention on the Law Applicable to Contractual Obligations of

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autonomy as to conflict-of-law was to receive maximum support; (e) correlation was to be sought when appropriate with ongoing revisions in the Uniform Commercial Code." Burman, *supra* note 9, at 378.

1980[11] as their primary model and, to a lesser degree, used the United Nations Conference on the Law Applicable to Contracts for the International Sale of Goods.[12] For this reason, and to lay the foundation for the premises of this article, the article discusses the influence the Rome Convention had on the drafters of the Mexico Convention by way of a comparative analysis of the underlying principles of each convention.

A. The Rome Convention

The Rome Convention was opened for signature on June 19, 1980.[13] Pursuant to article 29 of the convention,[14] following the deposit of the seventh

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[11] *See* Convention on the Law Applicable to Contractual Obligations, opened for signature June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome Convention]; *see also* Burman, *supra* note 9, at 377; Friedrich K. Juenger, *Contract Conflict-of-Law in the Americas*, 45 AM. J. COMP. L. 195, 204 (1997). For an overview of the convention, see generally Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to International Contractual Obligations, 1980 O.J. (C 282) [hereinafter Giuliano-Lagarde Report].

[12] *See* U.N. Conference on Contracts for the International Sale of Goods, Final Act, Apr. 10, 1980, U.N. Doc. A/CONF. 97/18 [hereinafter CISG]; *see generally* Gonzalo Parra-Aranguren, *Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts*, 69 TUL. L. REV. 1239 (1998); Hernany Veytia, *The Requirement of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191 (1995); Alejandro M. Garro, *The Gap-filling Role of the UNIDROIT Principles in International Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149 (1995); Juenger, *supra* note 9, at 382. Friedrich K. Juenger served as an advisor to the United States delegation to CIDIP-V. *See id.* at 393; *see also* Burman, *supra* note 9, at 377 (Harold S. Burman was the co-head of the American convention with Peter H. Pfund).

[13] For a fuller discussion on the Rome Convention, see RICHARD PLENDER, THE EUROPEAN CONTRACTS CONVENTION THE ROME CONVENTION ON THE CONFLICT-OF-LAW FOR CONTRACTS (1991); PETER KAYE, THE NEW PRIVATE INTERNATIONAL LAW OF CONTRACT OF THE EUROPEAN COMMUNITY (1993); PETER M. NORTH, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW (12th ed. 1992); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS (2d ed. 1992). *See generally* Georges R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?*, 22 VA. J. INT'L L. 105 (1982); Patrick Ross Williams, *The EEC Convention on the Law Applicable to Contractual Obligations*, 35 INT'L & COMP. L.Q. 1 (1988); Paul Lagarde, *The European Convention on the Law Applicable to Contractual Obligations: An Apologia*, 22 VA. J. INT'L L. 91 (1982); Friedrich K. Juenger, *The European Convention on the Law Applicable to Contractual Obligations: Some Critical Observations*, 22 VA. J. INT'L L. 123 (1982); Andreas F. Lowenfeld, Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws (*The Influence of Modern American Conflicts Theories on European Law*), 30 AM. J. COMP. L. 99 (1982).

[14] "This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval . . . for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval." Rome

instrument of ratification,[15] the convention entered into force on April 1, 1991.[16] The purpose of the convention is the continuation and unification of private international law and the establishment of uniform rules concerning the law applicable to contractual obligations.[17] The convention applies to contractual obligations in any situation involving a choice between the laws of different countries.[18] Accordingly, the convention is applicable to all contracts in which the parties are from a member state, to all contracts where a party is from a non-member state but has contracted with a party from a member state, or, if the parties are both from non-member states, when a conflict-of-law dispute is to be adjudicated before a court of a member state.

The Rome Convention is comprised of four principle parts: the autonomy of contracting parties to select a law to govern their contracts; applicable law based on closest connection of contracts with countries, in the absence of a parties choice; safeguards for the operation of mandatory rules of law of countries other than those of applicable law; and the principle and mechanism of uniform interpretation of the convention as between differing contracting states.

The scope of the convention is defined in the negative. Article 1 of the convention expressly excludes questions involving the status or legal capacity of natural persons (subject to article 11);[19] contractual obligations relating to wills and succession;[20] rights in property arising out of a matrimonial relationship;[21] rights and duties arising out of a family relationship, parentage, marriages of affinity, including maintenance obligations in respect of children who are not legitimate;[22] obligations arising out of a bill of exchange, checks and promissory notes, and other negotiable instruments to the extent that the obligations arise out of their negotiable character;[23] arbitration agreements and

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Convention, *supra* note 11, art. 29.

[15] The United Kingdom deposited its instrument of ratification on January 29, 1991. *See* Recent Actions Regarding Treaties to Which the United States is Not a Party, 31 I.L.M. 245 (1992).

[16] *See id.* Ten states, including the United Kingdom, have ratified the convention: France (Nov. 10, 1983); Italy (June 25, 1985); Denmark (Jan. 7, 1986); Luxembourg (Oct. 1, 1986); Germany (Jan. 8, 1987); Belgium (July 31, 1987); the Netherlands (June 21, 1991); Ireland (Oct. 29, 1991); Greece (Sept. 29, 1988). *See id.*

[17] *See* Rome Convention, *supra* note 11, pmbl.

[18] *See id.* art. 1(1).

[19] *See id.* art. 1(2)(a).

[20] *See id.* art. 1(2)(b).

[21] *See id.*

[22] *See id.*

[23] *See id.* art. 1(2)(c).

choice of forum agreements;[24] issues arising under corporate law;[25] questions as to whether an agent is able to bind a principal;[26] the constitution of trusts and the relationship between settlers, trustees and beneficiaries;[27] evidence and procedure (both subject and not subject to article 14);[28] and certain insurance contracts.[29]

B. Comparisons to the Mexico Convention

The correlation between the two conventions is evinced both in the intention and purpose of each convention and their actual provisions. The integral purpose of the Mexico Convention is akin to that of the Rome Convention; it is to enhance the regional integration of private international law between the member states and to accompany the regional integration that has already occurred through the economic independence of its members.[30] The Rome Convention, like all European Community Treaties, is the result of a culmination of a hybrid mix of common law and civil law legal systems. In comparison, the thirty-five states that have ratified the Bogota Charter, as amended,[31] likewise represent a diverse mix of common law and civil law systems.[32] The Mexico Convention, in following its European model, signaled a major shift in traditional Latin American jurisprudence toward the concept of party autonomy with the drafters of the convention embracing the academic preponderance for party autonomy in Europe.[33]

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[24] *See id.* art. 1(2)(d).
[25] *See id.* art. 1(2)(e).
[26] *See id.* art. 1(2)(f).
[27] *See id.* art. 1(2)(g).
[28] *See id.* art. 1(2)(h).
[29] *See id.* art. 1(3).
[30] *See* Mexico Convention, *supra* note 2, pmbl.; *see also* Juenger, *supra* note 9, at 382.
[31] *See supra* text accompanying note 1.
[32] *See* Burman, *supra* note 9, at 379 n.32; *see also* Juenger, *supra* note 9, at 382 (stating that the Mexico Convention, like the Rome Convention, commended itself as the work of eminent scholars).
[33] *See* Juenger, *supra* note 9, at 387 nn.20 & 21; Burman, *supra* note 9, at 380. For a discussion on the treatment of party autonomy by U.C.C. § 1-105(1) and the Restatement (Second) of Conflict of Laws § 187(2)(a) (1971), see generally Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); Juenger, *supra* note 9, at 387-88; Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); William M. Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977 (1992); Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and the United Nations Convention*

A cursory glance at each convention reveals several contiguous provisions. Article 14 of the Mexico Convention mirrors in near verbatim format article 10 of the Rome Convention in stipulating the scope of the applicable law of the contract.[34] In addition, the contractual obligations to which the Mexico Convention is applicable, as defined in article 5, hold a close symmetry to the contractual obligations enumerated in article 1 of the Rome Convention to which the convention is deemed inapplicable.[35] Article 7 of the Mexico Convention mirrors in part article 3(1) of the Rome Convention by allowing the parties to a contract to choose the law governing the contract.[36] Article 7 of the Mexico Convention further mirrors article 3(1) of the Rome Convention in allowing the parties to a contract to either expressly or implicitly, through their conduct, choose the law to govern the contract.[37] Furthermore, article 7 of the Mexico Convention provides for contractual *dépeçáge*, the application of a different governing law to separate parts of a contract, in line with articles 3 and 4 of the Rome Convention.[38] The Rome Convention applies the principle of *dépeçáge* to the determination of the applicable law in default of choice as it does to the determination of that law in accordance with party autonomy.[39]

The drafters of the Mexico Convention in article 8 again followed the line taken by the Rome Convention by allowing the parties to a contract to change the law applicable to the contract at any time, irrespective of whether the parties initially chose the law applicable to the contract.[40] In article 9, the drafters of the Mexico Convention set out the basic rules for the determination of the applicable law governing the contract in the event the parties did not select an applicable law or their election proved ineffective.[41] In so doing, the drafters adopted the "closest ties" rule found in article 4(5) of the Rome Convention.[42] In article 11 of the Mexico Convention, the drafters adopted the principles embodied within article 7(1) of the Rome Convention stipulating that the forum may take into account not only the mandatory rules of

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on Contracts for the International Sale of Goods: A Comparative Analysis and Proposal for Revision of UCC Sections 2-509 and 2-510, 87 NW. U. L. REV. 1415 (1993).

[34] *See* Mexico Convention, *supra* note 2, art. 14; Rome Convention, *supra* note 11, art. 10.

[35] *See* Mexico Convention, *supra* note 2, art. 5; Rome Convention, *supra* note 11, art. 1.

[36] *See* Mexico Convention, *supra* note 2, art. 7; Rome Convention, *supra* note 11, art. 3(1).

[37] *See* Mexico Convention, *supra* note 2, art. 7; Rome Convention, *supra* note 11, art. 3(1).

[38] *See* Mexico Convention, *supra* note 2, art. 7; Rome Convention, *supra* note 11, arts. 3 & 4.

[39] *See* PLENDER, *supra* note 13, at 106.

[40] *See* Mexico Convention, *supra* note 2, art. 8; Rome Convention, *supra* note 11, art. 3(2).

[41] *See* Mexico Convention, *supra* note 2, art. 9.

[42] *See* Rome Convention, *supra* note 11, art. 4(5).

decisions, but also, any strongly held policies of a foreign legal system to which the contract has close ties.[43]

Both the Rome and Mexico Conventions exclude contractual issues relating to negotiable instruments and arbitration.[44] The exclusion of an effective conflict-of-law provision relating to such contractual obligations would not detract from the ratification of the Mexico Convention. The justification for this exclusion can be found in the reasons enunciated for their omission from the Rome Convention.[45] The exclusion from the Rome Convention of contractual obligations arising under negotiable instruments was premised on the actual fallibility of the uniform rules within the convention itself.[46] The perceived fallibility of the uniform rules, at least with respect to negotiable instruments, results from imprecise language. By their nature, negotiable instruments require the applicable law to be identified with precision. Indeed, the homogeneity of negotiable instruments lends itself to rules of greater precision and less flexibility. Such precision was not possible under the Rome Convention, which established general principles of private international law applicable to contracts between parties from different states.[47]

Arbitration agreements and agreements as to the choice of court were excluded from the scope of the Rome Convention for two main reasons. First, such "matter[s] lie within the sphere of procedure and form part of the administration of justice (exercise of State authority)" and secondly, "rules on this matter might have endangered the ratification of the Convention."[48] In addition, it was argued by the framers of the convention that arbitration and choice of court agreements "were adequately covered by other international

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[43] *See* Mexico Convention, *supra* note 2, art. 11; Rome Convention, *supra* note 11, art. 7(1).

[44] *See* Rome Convention, *supra* note 11, art. 1(2)(c)-(d); Mexico Convention, *supra* note 2, art. 5(d)-(e).

[45] *See* Giuliano-Lagarde report, *supra* note 11.

[46] *See id.*

[47] *See* PLENDER, *supra* note 13, at 63 n.19; Giuliano-Lagarde Report, *supra* note 11. The report noted the following:

> [I]n retaining this exclusion . . . the Group took the view that the provisions of the Convention were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules. Moreover, the Geneva Conventions [to which the United States is a signatory] govern most of these areas. *Id.*

[48] Giuliano-Lagarde Report, *supra* note 11.

agreements."[49] As the prior international agreements are open for ratification by the member states of OAS, the same arguments for exclusion in the Rome Convention apply to the Mexico Convention.

Finally, the Mexico Convention as with the Rome Convention expressly excludes the doctrine of renvoi.[50]

C. An American Perspective: The Restatement (Second) Conflict of Laws

The theoretical principles of the Rome Convention that provide support for the Mexico Convention[51] are present within the Restatement (Second) Conflict of Laws.[52] The Rome Convention (and by implication the Mexico Convention) and the Restatement (Second) take similar approaches concerning conflict-of-law theory as it relates to contracts. This lends support to an argument that ratification of the Mexico Convention by the United States would not have an adverse affect on its current rules of private international law (conflict-of-law).

In adopting section 187 of the Restatement (Second), the various states in the United States have adopted a rule akin to article 3 of the Rome Convention and article 7 of the Mexico Convention, which allow the contracting parties to

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[49] PLENDER, *supra* note 13, at 66. The agreements referred to by the framers included notably: The Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, arts. 2 & 5, 21 U.S.T. 2517, 2519-20, 330 U.N.T.S. 3, 38-42. *See also* KAYE, *supra* note 13, at 119-20.

[50] *See* Mexico Convention, *supra* note 2, art. 17; Rome Convention, *supra* note 11, art. 15.

[51] *See* Burman, *supra* note 9, at 377; *see also* Hernany Veytia, *The Requirement of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191, 1196 (1995); Juenger, *supra* note 9, at 393; Juenger, *supra* note 11, at 207. In adopting the Rome Convention as its model, it is generally perceived that the framers of the Mexico Convention have improved upon the provisions of the Rome Convention. *See generally* Burman, *supra* note 9, at 377 ("[The Mexico] Convention concluded with several innovations that give it a distinctive position in this category of treaties."); Juenger, *supra* note 11, at 207-08 ("[T]he Mexico . . . Convention's drafters put the comparative method to good advantage; instead of merely copying, they created a superior product."); Juenger, *supra* note 9, at 393 ("[I]f one compares the [Rome Convention and the Mexico Convention] the Americas have amply justified their codificatory efforts by using the comparative method to create a superior product.").

[52] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT (SECOND)]. The Restatement (Second) was adopted and promulgated by the American Law Institute on May 23, 1969, and published in 1971.

The Restatement (Second) is applicable to international contracts under § 10. "The rules in the Restatement of this Subject are also usually applicable to cases with elements in one or more foreign nations. This is properly so since similar values and considerations are involved in both interstate and international cases." RESTATEMENT (SECOND) § 10 cmt. c.

a contract to choose the law governing the contract.[53] Neither the Rome Convention,[54] the Mexico Convention,[55] nor the Restatement (Second),[56] in defining their scope, define the ambit of "contractual obligation,"[57] "international contract,"[58] or "contract."[59] Both the Rome and Mexico Conventions leave the issue to be characterized by the contracting parties and, in default, to the courts. The Restatement (Second) stipulates that "the term 'contract' is used to refer both to legally enforceable promises and to other agreements or promises which are claimed to be enforceable but are not legally so."[60] However, the Restatement (Second) does not characterize whether a transaction is contractual.[61]

The broad brush approach taken by both the Rome and Mexico Conventions in delineating the parameters of their scope is mitigated to the extent that each defines its scope in the negative.[62] The Restatement (Second) does not contain an analogous provision to either article 1(2) of the Rome Convention or article 5(a)-(f) of the Mexico Convention.[63] However, it can be implied, by reason of omission, that a strong correlation exists between the scope of the two conventions and the Restatement (Second). Additionally, contractual issues relating to status and capacity,[64] negotiable instruments,[65] certain insurance contracts,[66] and arbitration agreements[67] are expressly covered by the scope of the Restatement (Second), and it can be argued that the matters

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[53] *See* RESTATEMENT (SECOND) § 187(1) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ."). *See generally* Samuel J. Cohen, *The EEC Convention and the U.S. Law Governing Conflict-of-Law for Contracts, With Particular Emphasis on the Restatement Second: A Comparative Study*, 13 MD. J. INT'L L. & TRADE 223, 224 (1989).

[54] *See* Rome Convention, *supra* note 11, art. 1.

[55] *See* Mexico Convention, *supra* note 2, art. 1.

[56] *See* RESTATEMENT (SECOND), *supra* note 52, at ch. 8 Introductory Note.

[57] *See* Rome Convention, *supra* note 11, art. 1(1).

[58] *See* Mexico Convention, *supra* note 2, art. 1.

[59] *See* RESTATEMENT (SECOND), *supra* note 52, at ch. 8 Introductory Note.

[60] *Id.*

[61] *See* Cohen, *supra* note 53, at 225-26.

[62] *See supra* notes 19-29, 35.

[63] *See* Rome Convention, *supra* note 11, art. 1(2); Mexico Convention, *supra* note 2, art. 5(a)-(f).

[64] *See* Restatement (Second), *supra* note 52, § 198.

[65] *See id.* §§ 214-217.

[66] *See id.* §§ 192-193.

[67] *See id.* §§ 218-220.

expressly excluded by the Rome and Mexico Conventions are excluded, by reason of omission, from the scope of the Restatement (Second).[68]

A further area of comparative similarity between the Rome Convention (and by implication the Mexico Convention) and the Restatement (Second), also lies within article 1(2) of the Rome Convention - the status and legal capacity of natural persons. Pursuant to article 1(2)(a) of the Rome Convention, the determination of the conflict-of-law pertaining to "questions involving the status or legal capacity of natural persons . . . ,"[69] save for the exception carved out in article 11, falls within the ambit of the conflict-of-law rules of the forum state.[70] The exception in article 11 is narrow. It applies only to contracts concluded between persons in the same country, and it prevents a party from invoking the contractual defense of incapacity. There is an exception if the one party was aware of the other party's lack of capacity at the time the contract was concluded, or was unaware of the other party's incapacity as a consequence of negligence.[71] This has the added effect of minimizing the potential of an unfair surprise, by limiting the scope of the application of article 1(2)(a) to overcome the lack of a certain conflict-of-law rule as to capacity in the convention.[72]

The Restatement (Second) expressly addresses the issue of capacity.[73] Pursuant to section 198, the issue of whether the parties had legal capacity to enter into a particular contract is determined by the law chosen by the parties, if an effective choice has been made under section 187.[74] Alternatively, the issue is determined under section 188 by reference to the local law of the state, which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles found in section 6.[75] The Restatement (Second) protects a contracting party from unfair surprise when

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[68] *See* Cohen, *supra* note 53, at 226.

[69] Rome Convention, *supra* note 11, art. 1(2).

[70] *See* PLENDER, *supra* note 13, at 57, 59; Cohen, *supra* note 53, at 227. For a critical analysis as to the exclusion of contractual capacity from the Rome Convention, see KAYE, *supra* note 13, at 112; LOSCH & STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 350 (1987).

[71] *See* Rome Convention, *supra* note 11, at art. 22.

[72] *See* Cohen, *supra* note 53, at 228; KAYE, *supra* note 13, at 113, 311-19; PLENDER, *supra* note 13, at 57-60.

[73] *See* RESTATEMENT (SECOND), *supra* note 52, § 198.

[74] *See id.* at cmt. a.

[75] *See id.*; *see also id.* § 188(1).

faced with a defense of contractual incapacity on the grounds that the parties failed to make an effective conflict-of-law in their contract. It does this by subjecting the contract to the law chosen by the parties[76] or to the law of the forum as set out in section 188(1).[77]

However, the application of the law of the forum state under section 188(1) may produce an inequality between the parties not seen in article 1(2) of the Rome Convention. The inequality arises because the party who resides in the state with the most significant contacts to the contract (which results in the law of that party's state being adopted) may lack the ability to ascertain the true capacity of foreign parties to the contract.[78] The ratification of the Mexico Convention has the potential to eradicate this problem first, as the convention would automatically supersede the Restatement (Second) and second, for the same reasons why the problem does not arise under the Rome Convention, it would not arise under the Mexico Convention.

III. THE RENVOI DOCTRINE

The doctrine of renvoi allows a court to adopt a foreign country's conflict of law rules instead of its own in determining the proper law to be applied to a matter.[79] The doctrine is expressly excluded in both the Rome and Mexico Conventions.[80]

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[76] *See id.* § 187(1)-(2).

[77] *See* Cohen, *supra* note 53, at 227-28.

[78] *See* Cohen, *supra* note 53, at 227-28 nn.24-25.

[79] *See* BLACK'S LAW DICTIONARY 1298 (6th ed. 1990). For a more detailed discussion of the doctrine, see DICEY & MORRIS, THE CONFLICT OF LAWS 67-71 (10th ed. 1980); JOHN WESTLAKE, PRIVATE INTERNATIONAL LAW ch. 2 (7th ed. 1925); GEOFFREY CHESIRE & PETER M. NORTH, PRIVATE INTERNATIONAL LAW 58-76 (10th ed. 1979); MARTIN WOLFF, PRIVATE INTERNATIONAL LAW §§ 178-95 (2d ed. 1950); A.E. ANTON, PRIVATE INTERNATIONAL LAW (A TREATISE FROM THE STANDPOINT OF SCOTS LAW) (1967); JOHN P. FALCONBRIDGE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS ch. 6-10 (2d ed. 1954); WALTER W. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); ROBERT A. LEFLAR, AMERICAN CONFLICT OF LAW 166 (3d ed. 1977); Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); Andreas F. Lowenfeld, *Renvoi Among the Law Professors: An American View of the European View of American Conflict of Laws*, 30 AM. J. COMP. L. 99, 106 (1982).

For an overview of the theoretical debate among American conflict of law scholars on renvoi since the early 19th century see Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991); *see also* Green v. Robertshaw-Fulton Controls Co., 29 F.R.D. 490, 500 (S.D. Ind. 1962); Cooper v. Cherokee Village Development Co., 364 S.W.2d 158, 162 (Ark. 1963).

[80] *See* Rome Convention, *supra* note 11, art. 15; Mexico Convention, *supra* note 2, art. 17.

A. The Problem of Renvoi

The proper law of a contract is the law of a country where a person is domiciled. This means the domestic law of that country or, when applied to a foreign country, the domestic law of that foreign country and any domestic law that the laws of that foreign country would apply to the decision of the case to which the rule refers to.[81] The problem of renvoi is aptly illustrated by the following passage: "[it] arises whenever a rule of the conflict of laws refers to the 'law' of a foreign country, but the conflict rule of the foreign country would have referred the question to the 'law' of the first country or to the 'law' of some third country."[82] The problem inherent in the doctrine of renvoi arises because of a conflict between the conflict rules of different countries. The result can mean the matter being passed backwards and forwards between each jurisdiction. For example, if the English conflict rule stipulates that a matter is to be governed by the law of domicile, but the foreign country conflict rule stipulates that the issue is governed by the law of nationality, the issue can potentially pass from the jurisdiction of the English courts to that of the foreign country and so forth.[83]

This jurisdictional ping-pong can be resolved through either the theories of single or double renvoi. However, the application of either theory will not eliminate the problem arising in the first place. The former applies, for example, in instances when the conflict rule of the foreign country refers the matter back to the law of the English courts or to that of a third country. The English court would then have the option to accept the reference and in so doing apply English domestic law or the law of the third country. The latter theory arises when, for example, the English court resolves the matter as it would have been resolved by the court of the foreign country. If the foreign court in applying its conflict rules would apply English law, then the English court would apply English domestic law. If the foreign court would accept English conflict rules, then the English court would apply the domestic law of that foreign country.[84]

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[81] *See* DICEY & MORRIS, *supra* note 79, at 64.

[82] *Id.* at 65.

[83] *See id.* at 32, 65.

[84] For a fuller discussion on the theories of single and double renvoi, see generally DICEY & MORRIS, *supra* note 79, at 65-67; CHESHIRE & NORTH, *supra* note 79, at 59; FALCONBRIDGE, *supra* note 79, at 173-74.

B. The Exclusion of Renvoi Under the Rome Convention

Article 15 of the Rome Convention expressly excludes renvoi. Accordingly, the domestic rules of contract law of a country under the convention control a contract as opposed to that country's particular conflict of law rules. Article 1(1) of the Rome Convention[85] stipulates that the Rome Convention only applies to contractual obligations where the parties have a choice between the laws of different countries. The parties can explicitly make this choice under article 3,[86] or, in the absence of an express choice, the contract will be governed by the law of the country with which the contract is most closely connected.[87]

Where the parties to a contract have chosen the law to be applied under article 3, there is no place for renvoi. When the parties have chosen the law to govern the contract it is done with the intent that the provisions of the chosen law will be applicable. This in itself excludes any possibility of renvoi to another law.[88] Even if the parties do not choose the law that will govern the contract, renvoi is also excluded. The reasoning lies within article 4(2). Article 4(2) of the Rome Convention creates a presumption that the country most closely connected to the contract is the country, at the time the contract concludes, where the party who is to effect the performance of the contract has its habitual residence.[89] It is unreasonable for a court to subsequently subject a contract to the law of another country by introducing renvoi for the sole reason that the conflict-of-laws rule in the country where the contract is localized contained other connecting factors.[90]

C. Renvoi in the United States

Whenever a forum state must consider a foreign law, the question as to the role a forum state should give the foreign state's conflict-of-law rules is:

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[85] *See* Rome Convention, *supra* note 11, art. 1(1).

[86] *See id.* art. 3.

[87] *See id.* art. 4.

[88] *See* Giuliano-Lagarde Report, *supra* note 11. This view has been adopted, among others, by France, Germany, Great Britain, Ireland, and the Benelux countries. *See id.*

[89] *See* Rome Convention, *supra* note 11, art. 4(2).

[90] *See* Giuliano-Lagarde Report, *supra* note 11. The framers of the Rome Convention are of the view that the exclusion of renvoi was justified in any convention regarding conflict of laws. "If the Convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place." *Id.*

should the forum state consider only the foreign state's substantive laws or the whole law of the foreign state, including that state's conflict-of-law rules? This issue has preoccupied American conflict-of-law scholars for most of this century, without any clear resolution.[91] In the early half of this century, the consensus concluded that the forum should ignore the foreign state's conflict-of-law rules.[92] However, on the whole, the judiciary generally ignored renvoi.[93] The latter half of this century has evinced a shift in conflict-of-law jurisprudence with the rise in prominence of the "policy analyst." The policy analysts resolved the renvoi debate by applying the internal law of the foreign state, thus eliminating the issue *in toto*.[94]

The approach of the Restatement (Second) to renvoi is dependent on whether the parties to the contract have chosen the law to govern the contract. It allows the parties to the contract to specify the application of renvoi to the contract.[95] In the event the parties to the contract fail to indicate an intention regarding renvoi, the Restatement (Second) imputes a presumption that renvoi is not applicable.[96] When the parties to the contract do not specify the law to govern the contract, the Restatement (Second) does not apply renvoi.[97] In the absence of an effective conflict-of-law, the conflict-of-law rules refer to the local law for determining the law that governs the contract.[98] The limitation of renvoi by the Restatement (Second) is justified due to the uncertainty created by the doctrine's application and the infrequent occasions when renvoi is applicable to contract law.[99]

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[91] *See* Kramer, *supra* note 79, at 981.

[92] *See* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 57 (1935); Ernest Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 190 (1910); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924). *But see* Erwin Griswold, *A Distinction in the Renvoi Doctrine*, 35 HARV. L. REV. 454 (1922); Griswold, *supra* note 79, at 51, HERBERT GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS (3d ed. 1949). For a summary of these opposing views, see generally Kramer, *supra* note 79, at 980-81.

[93] *See* Kramer, *supra* note 79, at 981.

[94] *See id.* For a critical appraisal of the modern American approach to renvoi, see Kramer, *supra* note 79. To resolve the renvoi problem, one must explain precisely how conflict-of-law rules allocate lawmaking power. This explanation reveals conflict-of-law rules not as external limitations on the power to prescribe, but rather as efforts first to define and then to accommodate the legitimate policy objectives of different states. *Id.*

[95] *See* RESTATEMENT (SECOND), *supra* note 52, § 187.

[96] *See id.* § 187(3).

[97] *See id.* § 188; *see also id.* at cmt. g.

[98] *See id.* at cmt. g. "Local law" does not encompass a state's conflict-of-law rules.

[99] *See* RESTATEMENT (SECOND), *supra* note 52, § 186(b).

The Mexico Convention, like the Rome Convention, excludes the doctrine of renvoi in determining the law applicable to international contracts by stipulating "law" to mean the applicable law in a state.[100] As such, the ratification of the Mexico Convention, *inter alia*, with its exclusion of renvoi, would not encroach upon current American conflict-of-law jurisprudence[101] or the Restatement (Second), save for the flexibility of the parties to expressly submit themselves to a foreign state's conflict-of-law rules. Due to the uncertainty this creates in any event, its exclusion is arguably a better option.

IV. FREEDOM OF CHOICE

A. Party Autonomy: An Introductory Note

The genesis in Europe for the recognition of party autonomy was visible as long ago as the 17th century.[102] The subsequent formation of what is now the European Union, in turn, saw a movement for a drawing together and harmonization by the member states of their conflict-of-law rules. The outcome was unification under the auspices of the 1980 Rome Convention.[103] Article 3 therein recognizes the principle of party autonomy.[104] It provides, *inter alia*, that parties to a contract have the freedom to choose the applicable law to govern the contract. In the absence of a valid choice of applicable law

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[100] *See* Mexico Convention, *supra* note 2, at art. 17.

[101] See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 3.13 (2d ed. 1992) (stating that American courts employ renvoi only in limited circumstances); Brad Karp, *The Litigation Angle in Drafting Commercial Contracts*, 913 PRAC. L. INST.: CORP. L. & PRAC. HANDBOOK SERIES 39, 61 (most jurisdictions do not apply renvoi); 16 AM. JUR. 2D *Conflict of Laws* § 5 (1998) ("The doctrine of renvoi has been repudiated by many American authorities."); Kramer, *supra* note 79, at 982:

> [P]olicy analysts responded to this problem by offering a broader approach to conflict-of-law that they claimed eliminates the renvoi problem altogether . . . According to modern conflict-of-law scholars, foreign conflict-of-law rules can be ignored because legislative jurisdiction should be allocated based on the policies underlying the substantive laws at issue, and general conflict-of-law rules were not developed with these policies in mind.

[102] *See* Juenger, *supra* note 11, at 199 ("As early as the 17th century, Dumoulin espoused . . . the notion of party autonomy . . . that would control should the parties have failed to avail themselves of their power to designate the applicable law.") *See also infra* note 107, regarding the vagaries of the principle of party autonomy in each Member State.

[103] *See* Juenger, *supra* note 11, at 200.

[104] *See* Rome Convention, *supra* note 11, at art. 3.

by the parties, article 4, which follows the English proper law principle, invokes the law having the closest connection to the contract.[105]

In contrast, the path to party autonomy has been somewhat more tortuous in both Latin America and the United States.[106] In America, conflict-of-law jurisprudence found itself shackled beneath the Bealeist doctrine of conflict of laws.[107] As Beale was the Reporter of the Restatement (First) Conflict of Laws (1934), the Bealeist doctrine was, not unexpectedly, emulated therein.[108] By the latter half of this century, the principle of conflict-of-law supported by Beale and other eminent scholars was replaced by a theory premised on policy analysis[109] expounded by such eminent scholars as Brainerd Currie.[110] The movement away from conflict-of-law theory premised upon the principle of territoriality[111] to modern conflict-of-law theory based on the English notion of the proper law of the contract (the law of the state with which the contract has the closest connection),[112] saw acceptance in the American courts[113] and subsequently in the Restatement (Second).[114] "At the same time, American

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[105] See Juenger, *supra* note 11, at 200.

[106] *See id.* at 196 (discussing the backwardness of Latin American conflict-of-law jurisprudence); *id.* at 197 (discussing the development of party autonomy in the United States); Kramer, *supra* note 79, at 979.

[107] The underlying premise of Beale's doctrine is that "private parties lack the power to 'do the legislative act' of substituting their decision on what law should apply for that of the legislature and that such power would be 'theoretically indefensible.' " Juenger, *supra* note 11, at 197. Beale wrote:

> The question whether a contract is valid . . . can on general principles be determined by no other law than . . . by the law of the place of contracting. . . . If . . . the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so.

BEALE, *supra* note 92, at 1079, 1083, 1091.

[108] *See* Juenger, *supra* note 11, at 197.

[109] *See* Kramer, *supra* note 79, at 981.

[110] *See id.* at 982, 1003-12. For a critical attack on modern American conflict-of-law theory, see Kramer, *supra* note 79, at 982, 1003-12. "According to modern conflict-of-law scholars, foreign conflict-of-law rules can be ignored because legislative jurisdiction should be allocated based on the policies underlying the substantive laws at issue, and general conflict-of-law rules were not developed with these policies in mind." *Id.* at 982. Also, "both explanations offered by interest analysts for ignoring foreign conflict-of-law rules must be rejected." *Id.* at 1011.

[111] *See* Kramer, *supra* note 79, at 982.

[112] *See* Juenger, *supra* note 11, at 198.

[113] *See* Austin v. Austin, 124 N.E.2d 99, 102 (N.Y. 1954); Juenger, *supra* note 11, at 198.

[114] *See* RESTATEMENT (SECOND), *supra* note 52, § 188(1) ("The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties

judges also followed their English colleagues in recognizing party autonomy."[115] The principle of party autonomy in the United States has been codified in both the Uniform Commercial Code[116] and the Restatement (Second).[117]

B. Party Autonomy Under the Rome Convention

Article 3(1) of the Rome Convention declares: "[A] contract shall be governed by the law chosen by the parties."[118] This embodies the doctrine of party autonomy.[119] Article 3 is a liberal provision that gives multinational parties to a contract considerable freedom and ability to specify the applicable law to govern the contract.[120] Party autonomy is a generally recognized principle that has been incorporated into the provisions of numerous international treaties.[121] The application of the doctrine to the selection of the

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under the principles stated in § 6."). *See* Juenger, *supra* note 11, at 198.

[115] Juenger, *supra* note 11, at 198; *see* Seigelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955); Overseas Trading Co. v. United States, 159 F. Supp. 382 (Ct. Cl. 1958).

[116] *See* U.C.C. § 1-105(1) (1990). *See generally* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (4th ed. 1995) (outlining basic content of UCC and analyzing growing case law).

[117] *See* RESTATEMENT (SECOND), *supra* note 52, § 187 (the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one that the parties could have resolved by an explicit provision in their agreement directed to that issue).

[118] Rome Convention, *supra* note 11, art. 3(1).

[119] *See* PLENDER, *supra* note 13, at 87-102; KAYE, *supra* note 13, at 147-70; I.G.F. Baxter, *International Business and Choice-of- Law*, 36 INT'L & COMP. L.Q. 92 (1987); Cohen, *supra* note 53, at 3; R. Weintraub, *How To Chose a Law for Contracts and How Not to*, 17 TEXAS INT. L.J. 155 (1982); Williams, *supra* note 13, at 4.

[120] *See* H. Matthew Horlacher, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Treaty on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L.J. 173, 177 (1994). The few restrictions on party autonomy in the Rome Convention are found in articles 3(3), 5(2), 6(1), 9(6), 7 & 16. *See* Rome Convention, *supra* note 11.

[121] *See* Franco Ferrari, Recent Development: *CISG Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1 (1995). Ferrari discusses party autonomy under CISG, *supra* note 12, and the 1964 Hague Convention. The Hague Convention approved two conventions: the Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS] and Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 [hereinafter ULF].) Ferrari writes:

> By providing for [party autonomy] the draftsmen of the Convention *de quo* reaffirmed one of the general principles embodied in the 1964 Hague Convention, that is, the principle according to which the primary source of the rules governing international sales contracts is party

applicable law to apply to a contract is a universally recognized principle.[122] Thus, the inclusion of party autonomy in article 3(1) of the Rome Convention is but a simple reaffirmation of a principle currently embraced in the private international law of most countries.[123] Indeed, it is suggested by Friedrich Juenger that the principle of party autonomy appeared as long ago as 1074 as a result of a conflict-of-law clause being inserted into the marriage contract between El Cid, the Castilian reconquistador, and the lady from León whom he wed that year.[124] Upon the inclusion of party autonomy in the Rome

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> autonomy. Thus the drafters clearly acknowledged the Conventions dispositive nature and the "central role which party autonomy plays in international commerce and, particularly, in international sales.

Ferrari, *supra* note 121, at 84-85. The Hague Conventions were enacted in Belgium, Great Britain, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, and San Marino. *See* Hague Convention, *reprinted in* 13 AM. J. COMP. L. 453 (1954). *See also* Ferrari, *supra* note 121, at 7 n.22, for an amusing riposte to Harold J. Burman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 J. INT'L DISP. RESOL. 235, 290 n.160 (1988), which sets forth the nations having ratified the conventions.

CISG was approved by the General Assembly of the United Nations at the diplomatic conference in Vienna held from March 10 to April 11, 1980. *See* CISG, *supra* note 11. CISG entered into force on January 1, 1988, and has been ratified by some fifty nations. For a detailed list of those nations and dates of ratification, see Ferrari, *supra* note 121, at 13 n.66.

For other international treaties that have also adopted the rule of freedom of choice, see European Convention on International Commercial Arbitration, Apr. 21, 1961, art. 8, 484 U.N.T.S. 349 (stating that the parties are free to determine the law that the arbitrators must apply in a dispute); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 42, 575 U.N.T.S. 159 (stating that the Tribunal shall rule on the dispute in accordance with the rules of law adopted by the parties); Hague Convention on the Law Applicable to Agency, Mar. 14, 1978, art. 5, English text reproduced in 26 AM. J. COMP. L. 438 (1978) (noting that the internal law chosen by the principal and the agent is to govern the agency relationship between them).

[122] *See* Ferrari, *supra* note 130, at 40 ("As far as the [Rome] Convention's recognition of party autonomy (in the sense of conflict-of-law) is concerned, its employment should not raise any problems, it being a concept universally recognized throughout domestic private international law codifications long before the [Rome] Convention's coming into force."); *see also* Williams, *supra* note 13, at 11 ("The freedom afforded to the contracting parties by the [Rome Convention] to choose the law to govern the contract is a rule currently prevailing in the private international law of all Member States and also in most other countries."); Ole Lando, *New American Conflict-of-Law Principles and the European Conflict of Laws of Contracts*, 30 AM. J. COMP. L. 19, 40 (1982) ("[the doctrine of party autonomy belongs] to the common core of the legal systems").

[123] *See* Giuliano-Lagarde Report, *supra* note 11.

[124] *See* Friedrich K. Juenger, *The E.E.C. Convention on the Law Applicable to Contractual Obligations: An American Assessment*, *in* CONTRACT CONFLICTS: THE EEC CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY 295, 297 (P.M. North ed., 1982); KAYE, *supra* note 13, at 147.

Convention, the issue as to whether or not the parties intended that choice of applicable law to govern an interpretation of the applicable law of the contract was settled.[125] Pursuant to article 3(1), the contract is governed by the law chosen by the parties, which choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[126] "The choice cannot be set aside on the ground that the parties have selected a system regarded by a court as arbitrary, whether because it is unconnected with the contract or otherwise."[127]

The convention imposes but two limits on party autonomy neither of which acts as more than a partial restraint.[128] First, the mandatory rules of law set out in articles 3(3),[129] 5(2),[130] 6(1),[131] 9(6),[132] and 7[133] will override the parties

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[125] The issue as to whether or not the parties were free to stipulate by what law the validity of their contract was to be governed was unclear under English law. *See* PLENDER, *supra* note 13, § 5.03-5.04. *See generally* Giuliano-Lagarde Report, *supra* note 11 (discussing party autonomy under the law of France, Germany, Italy, Belgium, Luxembourg, the Netherlands, and England).

[126] *See* Rome Convention, *supra* note 11, art. 3(1).

[127] *See* PLENDER, *supra* note 13, § 5.04.

[128] *See* KAYE, *supra* note 13, at 148.

[129] *See* Rome Convention, *supra* note 11, art. 3(3):

> The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by the contract, hereinafter called mandatory rules.

[130] *See id.* art. 5(2): "Notwithstanding the provisions of Article 3, a conflict-of-law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence."

[131] *See id.* art. 6(1): "Notwithstanding the provisions of Article 3, in a contract of employment a conflict-of-law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice."

[132] *See id.* art. 9(b):

> Notwithstanding paragraphs 1-4 of this article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

[133] *See id.* art. 7(1):

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the

conflict-of-law in stipulated circumstances. Second, under article 16, the rules of the chosen law of the contract may be refused by a court if the application of those rules would be incompatible with the public policy of the forum.[134] Hence, article 16 can override the parties choice of conflict-of-law.

Though under article 3(1) of the convention the parties' freedom to choose the applicable law to govern the contract is without restriction, this freedom is subject to a caveat under article 3(3). Where the parties choose a law that will circumvent the mandatory rules of a country whose laws would, within reason be applicable, the parties' freedom to choose an applicable law to govern the contract is curtailed if each of all the other elements relevant to the situation are connected to one country only.[135]

Articles 5 and 6 of the convention resulted from the drafters' concern that traditionally weaker parties in consumer contracts (buyers) and contracts of employment (employees) be protected from adverse conflict-of-law clauses.[136] Article 7 of the convention permits the parties to apply the mandatory rules of one country as opposed to the system of law of another country chosen by the parties where the first has a close connection to the contract.[137] Article 7 can be distinguished from article 3(3) on the basis that it requires the contract to have just a close connection to the country before the mandatory rules under the convention become applicable. By contrast, article 3(3) requires all elements, other than the conflict-of-law clause, to be connected to a country prior to the mandatory rules becoming applicable. "The rationale of Article 7 lies in an interests analysis; if a State has a strong enough interest in a contract, application of its laws is compelled, regardless of the governing law."[138]

Article 3(1) of the convention, in addition to recognizing an express conflict-of-law of the parties applicable to the contract, recognizes that a court can, in light of all of the facts, find that the parties have made a real conflict-

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law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

[134] *See id.* art. 16.

[135] *See id.* art. 3(3).

[136] *See* Horlacher, *supra* note 120, at 179; Giuliano-Lagarde Report, *supra* note 11; PLENDER, *supra* note 13, § 5.21.

[137] *See* Rome Convention, *supra* note 11, art. 7.

[138] Horlacher, *supra* note 120, at 179-80.

of-law not expressly stated in the contract.[139] Thus, a court may find the parties have, within the four corners of the contract, chosen the applicable law to govern the contract.[140] It is the word "choice" in article 3(1) that is imperative to the notion of an implied conflict-of-law. The presence of a choice by the parties to the contract prevents a court, in the absence of an express conflict-of-law, from reverting to the default provision in article 4 that looks to the most closely connected country's law. Instead, article 3(1) points a court in the direction of ascertaining whether the parties have at some stage evinced an intention as to a particular law to govern the contract.[141]

The standard a court must utilize in assessing the parties implied conflict-of-law is reasonable certainty.[142] The standard is a subjective one influenced by several factors the drafters of the convention anticipated a court should consider in its determination.[143] Such factors, as identified in the Giuliano-Lagarde Report, include: the contract is a standard form of contract and the parties are aware that it is governed by a particular system of law; there exists a prior course of dealings between parties under contracts containing express conflict-of-law clauses; there is a choice of forum clause in a contract that is unambiguously indicative of an intention by the parties to subject the contract to the law of that forum; there is an express reference to a country's legislative provisions within the contract; there exists an express conflict-of-law provision in related transactions existing between the same parties; and the presence in the contract of the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of the place.[144]

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[139] *See* Rome Convention, *supra* note 11, art. 3(1): "The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."

[140] *See* Giuliano-Lagarde Report, *supra* note 11; KAYE, *supra* note 13, at 149. In contrast, Professor Diamond asserts that article 3(1) is not intended to introduce the possibility of an implied conflict-of-law. *See* Aubrey L. Diamond, *Conflict of Laws in the EEC*, 32 CURRENT LEGAL PROBLEMS 155, 160 (1979); *see also* PLENDER, *supra* note 13, § 5.06.

[141] *See* KAYE, *supra* note 13, 149.

[142] *See* Rome Convention, *supra* note 11, art. 3(1).

[143] *See* Giuliano-Lagarde Report, *supra* note 11. Plender draws an interesting comparison with article 31(2)(b) of the Vienna Convention on the Law of Treaties to illustrate the wide support for the proposition that "in ascertaining the intentions of the parties to a contract, there shall be taken into account any subsequent practice in the application of the contract which establishes the agreement of the parties, at the time of its conclusion." PLENDER, *supra* note 13, § 5.11.

[144] *See* Giuliano-Lagarde Report, *supra* note 11. In relation to arbitration agreements, the applicable law relating to the arbitration agreement may defer to the implied law found to govern the contract as a whole. *See* PLENDER, *supra* note 13, § 5.08.

C. *Dépeçage Under Article 3 of the Rome Convention*

Dépeçage is the process whereby different issues in a matter that arose out of a single set of facts are decided based on the laws of different states. Under a dépeçage conflict-of-law theory, a court will consider issues over which rule of law is applicable to each issue.[145] In other terms, dépeçage is a principle of law by which a court is required, in determining an issue with a foreign element, to identify the system of law most appropriately applicable to govern each particular issue. The result, however, may lead to different systems of law governing separate issues in a case.[146] The principle of dépeçage is embodied in article 3(1) of the convention but to a much more limited extent than the principle generally connotes.[147] As utilized by the drafters of the convention, dépeçage is but a logical conclusion to the principle of party autonomy. On the same premise that a conflict-of-law must be identifiable with reasonable certainty, likewise on the severability of a contract where each part of a contract is governed by a different conflict-of-law, that conflict-of-law must be similarly identifiable.[148]

> It must be borne in mind that the law governing an arbitration agreement may not be the same as that governing the contract to which it relates. If the arbitration is to be held in the territory of a state which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the law governing the validity of the arbitration agreement will normally be that of the country where the award is to be made.

Id. But cf. SIR M. MUSTILL & S. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 63 (2d ed. 1989) (noting that "[t]he presumption [in favor of the country where the award is to be made] would . . . readily be rebutted in favor of the proper law of the underlying contract").

[145] *See* BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

[146] *See* PLENDER, *supra* note 13, § 5.13.

[147] *See* Rome Convention, *supra* note 11, art. 3(1) ("By their choice the parties can select the law applicable to the whole or a part only of the contract."). In adopting such a limited version of the principle, the drafters of the convention have followed the lead set by article 7(1) of the Hague Convention of December 22, 1986:

> A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.

Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 12. *See also* PLENDER, *supra* note 13, § 5.13 (discussing the normally broad connotation of dépeçage in private international law).

[148] *See* PLENDER, *supra* note 13, § 5.13; Giuliano-Lagarde Report, *supra* note 11.

D. Variation of the Chosen Law Under Article 3 of the Rome Convention

Article 3(2) of the convention provides, inter alia, that the "parties may at any time agree to subject the contract to a law other than that which previously governed it."[149] The agreement to subject the contract to a new law can be made either during the performance of the contract, at its conclusion, or during the course of legal proceedings.[150]

> [T]he rule now embodied in article 3(2) . . . promotes commercial convenience: if the parties choose to alter the applicable law, they will do so because they judge that it suits their shared interests. . . . No useful purpose is served in denying the parties the opportunity to vary the applicable law, when they can always achieve the same end by terminating the original contract and making a new one subject to a different legal system.[151]

E. Party Autonomy Under the Mexico Convention

The principle of party autonomy can be found in article 7 of the Mexico Convention.[152] The first sentence of article 7 parallels article 3(1) of the Rome Convention that, in itself, embodies the doctrine of party autonomy. The third sentence of article 7 provides for contractual dépeçage in line with the third sentence in article 3(1) of the Rome Convention. The second sentence in

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[149] Rome Convention, *supra* note 11, art. 3(2). PLENDER, *supra* note 13, § 5.15. "This rule like dépeçage, is a further expression of the principle of party autonomy." *Id.*

[150] *See* Giuliano-Lagarde Report, *supra* note 11; *see also* KAYE, *supra* note 13, at 155:

> The . . . purpose of Article 3(2) would appear to be to provide *a conflict-of-law rule* whereby parties are permitted to avail themselves of the power in Article 3(1) to select a law to govern their concluded contract, *expressly or implicitly . . . and subsequent to conclusion, where the law so chosen differs from the law otherwise applicable thereto.*

[151] PLENDER, *supra* note 13, § 5.15.

[152] Mexico Convention, *supra* note 2, art. 7:

> The contract shall be governed by the law chosen by the parties. The parties agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.

For a comparison to the Rome Convention, see *supra* pp. 481-487. *See also* Juenger, *supra* note 9, at 386-88; Burman, *supra* note 9, at 380.

article 7 makes provision in accordance with the second sentence in article 3(1) of the Rome Convention for a court to impliedly find the parties have chosen the applicable law to govern the contract. The standard under the Mexico Convention that a court must utilize in ascertaining an implied intent is arguably subjective and objective. The provision that, "[i]n the event that there is no express agreement, [it] must be evident from the parties' behavior" connotes a subjective standard. In contrast, "from the clauses of the contract," imputes an objective standard. As to the basis for implying conflict-of-law, article 7(2) of the Mexico Convention provides that the "selection of a certain forum by the parties does not necessarily entail selection of the applicable law."[153] "Though phrased negatively, this provision in effect incorporates the English presumption *qui elegit judicem elegit ius*, which allows the forum to apply its own law, thus helpfully obviating the expense and delay that an inquiry into foreign law inevitably entails."[154] Article 8 of the Mexico Convention, follows the provision in article 3(2) of the Rome Convention that allows contracting parties to agree at any time to subject the contract to a law other than that which previously governed it.[155]

As with the Rome Convention, the drafters of the Mexico Convention imposed certain limits upon the principle of party autonomy. The Mexico Convention departs from its role model, however, in not enumerating specific categories of protective laws vis a vis consumer and employment contracts, as found in articles 5 and 6 of the Rome Convention.[156] Instead, the drafters of the Mexico Convention relied, in article 11, on a more general provision that, in itself, is sufficient to provide protection to buyers and employees, as well as to other parties afforded protection under articles 5 and 6 of the Rome Convention.[157] Article 11 permits a court to avoid application of the convention by allowing the mandatory laws of the forum state to be applied.[158]

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[153] Mexico Convention, *supra* note 2, art. 7.

[154] Juenger, *supra* note 9, at 388.

[155] *See* Mexico Convention, *supra* note 2, art. 8.

[156] *See* Juenger, *supra* note 13, at 204. "Instead of setting for the narrowly circumscribed conflict-of-law privileges for various categories of weaker parties, as the Rome Convention does, article 11 . . . relied on a general clause." *Id.*

[157] Mexico Convention, *supra* note 2, art. 11:

> Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.

See also Burman, *supra* note 9, at 382.

[158] *See* Burman, *supra* note 9, at 382.

Additionally, article 11 permits the application of the mandatory law of a third state, at the discretion of the forum state, when the contract is determined to have close ties with that third state.[159] Again, the drafters of the Mexico Convention have significantly departed from the Rome Convention.[160] Article 18 acts as a further fetter to the application of the Mexico Convention on similar grounds as article 11, save by invoking public order.[161]

V. THE CLOSEST CONNECTION

A. The Principle of Closest Connection

The principle of closest connection is embodied in article 4(1) of the Rome Convention.[162] The principle operates when the parties have failed to either expressly or impliedly stipulate the applicable law to govern the contract in accordance with article 3.[163] The applicable law to be applied to the contract under article 4(1) is that of the country to which the contract has the closest connection. In support thereof, articles 4(2) and 4(5) of the convention establish a presumption that the applicable law is the law of the country with the closest connections to the contract.[164]

In determining the law to be applied, article 4(1) permits a court to consider events subsequent to contract formation in its determination of the country

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[159] *See id.*

[160] *See* Juenger, *supra* note 11, at 204 (stating that "[i]n marked contrast . . . the Mexico Convention allows the contracting parties to choose a non-national law, such as the *lex mercatoria* or its codified version, the UNIDROIT Principles of International Commercial Contracts").

[161] *See* Mexico Convention, *supra* note 2, art. 18; Burman, *supra* note 11, at 382 (noting that "both of these grounds for non-application are common in the jurisprudence of most countries; they also have state law precedents in the United States"); *see also* Juenger, *supra* note 11, at 204 (commenting on the breadth of protection encompassed within article 11, which allows "the decisionmaker to invoke forum as well as foreign 'rules of immediate application' (or, as the convention calls them, "rules of public policy"), which take precedence over the stipulated law, sufficiently protects these weaker parties against abuses of superior bargaining power").

[162] *See* Rome Convention, *supra* note 11, art. 4(1): "To the Extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected."

[163] *See* PLENDER, *supra* note 13, § 6.01. *See generally* DICEY & MORRIS, *supra* note 79. For an overview of the applicability of the principle in each of the Member States of the European Union prior to its inclusion in the Rome Convention, see Giuliano-Lagarde Report, *supra* note 11.

[164] *See* Rome Convention, *supra* note 11, arts. 4(2) & 4(5).

with the closest connection to the contract.[165] Thus, the issue is determined by the features and effects of the contract that, if looked at independently, would lead to a showing of closest connection to a country. This is a theoretical departure from article 3(1) in which courts are permitted to look at subjective factors to ascertain an intention of the contracting parties towards a possible applicable conflict-of-law.[166]

The flexibility the drafters imputed into the closest connection principle embodied in article 4(1) is materially fettered not just by the presumptions referred to above, but also by the precisely defined application of the principle of dépeçage relating to severable contracts also found in article 4(1).[167]

B. Dépeçage Under Article 4(1) of the Rome Convention

The drafters of the convention also applied the principle of dépeçage to the determination of the applicable law in default of an express or implied conflict-of-law by the contracting parties.[168] The principle as embodied in the final sentence of article 4(1) provides that: "a severable part of a contract which has a closer connection with another country may by way of exception be governed by the system of law of that other country."[169] Thus, the cumulative effect of dépeçage in articles 3 and 4 of the Rome Convention entails that the contracting parties can indicate either expressly or impliedly through their conduct that they have chosen one legal system to govern just a part of the contract as opposed to the whole contract. That part of the contract so delineated will be governed by the system of law the parties have chosen to apply. The remainder of the contract will be governed by the law of the country having the closest connection to that part of the contract.[170]

The drafters of the convention were unanimous in their desire to discourage the concept of severability.[171] The drafters did agree, as a compromise, to empower the courts to effect a severance of a contract solely as an exception to the general rule of closest connection found in the first half of article 4(1).

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[165] *See* Giuliano-Lagarde Report, *supra* note 11; PLENDER, *supra* note 13, § 6.04 (cautioning "that it does so only by implication and it cannot necessarily be assumed that the Convention authorizes . . . courts to take account of post-contractual conduct irrespective of the rules applied in this respect by putative applicable laws."

[166] *See* Rome Convention *supra* note 11; KAYE, *supra* note 13, at 173.

[167] See Giuliano-Lagarde Report, *supra* note 11.

[168] *See* Rome Convention, *supra* note 11, art. 4(1).

[169] *Id.*

[170] *See* PLENDER, *supra* note 13, § 6.05; KAYE, *supra* note 13, at 175-76.

[171] *See* Giuliano-Lagarde Report, *supra* note 11.

That power of severance is restricted to that part of a contract that is readily identifiable as independent and separate and has a closer connection to another country.[172]

One of the failings of the convention, in terms of clarity, is its failure to define and fully establish the parameters of "severability" or whose legal system is applied to establish whether a part of a contract can be severable.[173] Two possible theories exist to determine the applicable legal system to ascertain the severability of a part of a contract. First, severability may be determined in accordance with criteria that can be extracted from various provisions in the convention.[174] Second, severability may be established in accordance with the law governing the remainder.[175] The latter approach appears more persuasive because a general premise of the convention is this: the law governing the remainder of the contract would be "deemed inapplicable to a part of the contract to which it would have been held to apply by a court of that county, at least in a situation not involving a choice between the laws of different countries."[176]

C. Characteristic Performance Under Article 4(2) of the Rome Convention

Article 4(2)[177] implies that the most closely connected country is the country where the party who is to effect performance of the contract, which is characteristic of the contract, has his habitual residence. The characteristic performance criteria in article 4(2) gives effect to two general theories. First, in the absence of an express or implied choice of a system of law by the parties, the contract should be governed by the law appropriate to its characteristic performance. This connotes that the court in determining the relevant law should restrict its investigation to the "four corners of the contract." Second, encapsulated within the principle of characteristic performance in article 4(2) is the general idea that performance by a party

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[172] *Id.*

[173] *See* PLENDER, *supra* note 13, § 6.07; Kaye, *supra* note 13, at 175.

[174] One author asked, "Is the test a purely physical one - a requirement that the severable part be contained in separate words or clauses of the contract?" M. Pryles, *Reflections on the EEC Contractual Obligations Convention - An Australian Perspective*, *in* CONTRACT CONFLICTS: THE EEC CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY, *supra* note 124, at 323, 333. *See also* PLENDER, *supra* note 13, § 6.07 (noting that "that the severability at a part of a contract ought to be established in accordance with the law guessing the remainder").

[175] *See* PLENDER, *supra* note 13, § 6.07.

[176] *Id.*

[177] *See* DICEY & MORRIS, *supra* note 79, at 1190.

under the contract is referable "to the function which the legal relationship involved fulfills in the economic and social life of any country."[178]

Article 4(2) imputes clarity to the principle of closest connection contained in article 4(1).[179] Irrespective of the framers' intention to impute clarity to the closest connection concept, in conceptualizing the principle of characteristic performance and the inherent presumptions therein they have created several interpretive problems. First, the framers have neither in the text of the convention nor in the legislative history within the Giuliano-Lagarde Report carved out a readily ascertainable objective meaning of "characteristic performance."[180] Second, it is difficult to identify which performance obligation within a contract is the most significant.

It is suggested that "characteristic" should be read as isolating within the confines of the contract (a four corners approach), the most important of the contractual obligations therein.[181] The "most significant contractual obligation" approach curries favor with the author. Under this definition of "characteristic," the most significant contractual obligation is determined first, by ascertaining which particular performance is the most important for that type of contract and secondly, which performance is the most significant under the actual contract in question.[182] In designating the performance obligation that is the most significant under the contract, the obligation chosen should be the one that is the central nexus of the contract, the one "whose character is the overwhelming feature of the contract."[183] In this connection, it is the second of the general theories encapsulated within article 4(2) that a court must consider in its determination, namely, "the function which the legal relationship involved fulfills in the economic and social life of a country."[184]

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[178] Giuliano-Lagarde Report, *supra* note 11.

[179] *See* Giuliano-Lagarde Report *supra* note 11; *but cf.* PLENDER, *supra* note 13, § 6.10 (noting the widespread criticism of the characteristic performance concept that is chiefly premised on the "grounds that the 'characteristic performance' of a contract may be difficult to discover [and] that in referring to the habitual residence of the characteristic performer the Convention assumes a uniformity that may not exist: and that the reference to a place of business through which a contract is to be performed amounts to the unwarranted presumption of a place of performance").

[180] *See* KAYE, *supra* note 13, at 179.

[181] For a general consideration of the definal complexities of the term "characteristic" see KAYE, *supra* note 13, at 179-80. Two basic definitions exist, one that confines the fact finder to the four corners of the contract and the other that allows the fact finder to consider external matters. *Id.*

[182] *Id.* at 180.

[183] *Id.*

[184] Giuliano-Lagarde Report, *supra* note 11.

The application of the general principles of "characteristic performance" to identify the most significant contractual obligation in unilateral contracts is a relatively simple process. In a unilateral contract only one party is bound by a contractual obligation to perform under the contract. It is this contractual obligation that constitutes characteristic performance.[185] However, in a bilateral contract characterized by mutual reciprocal obligations of each party, the counter-performance usually takes the form of the payment of money. This counter-performance does not constitute the characteristic performance of the contract. It is the performance by the party, which in turn generates the counter-performance to pay, which constitutes the characteristic performance of the contract.[186] In those contracts in which it is not possible to ascertain a characteristic performance, pursuant to article 4(5), article 4(2) is deemed inapplicable.[187]

The applicable system of law under article 4(2) that is deemed the most closely connected to the contract, is not that of the country in which the characteristic performance of the contract is to occur; rather, it is the system of law of the country in which the characteristic performer habitually resides or of the central administration or place of business.[188] In the event article 4(2) is deemed inapplicable, the system of law of the country in which the contract will be performed prevails.[189] This presumption is subject to rebuttal where there is more than one country that can be classified as "closely connected."[190] Then, it is the system of law of the country of characteristic performance that is applied.[191] However, where the characteristic performer is a "trader" or "professional," and a contract is formed in the course of such trade or profession, the system of law of the country of the trader or professional or principal place of business is presumed to be the system of law most closely connected to the contract.[192] However, in the event it is agreed in the contract that contractual performance will take place in a different country and through a separate place of business, the system of law that is presumed the most closely connected is that of the country where the different place of business is situated.[193] The rules of presumption pertaining to whether the system of

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[185] *See id.*; *see also* KAYE, *supra* note 13, at 181.
[186] *See* Giuliano-Lagarde Report, *supra* note 11.
[187] *See* Rome Convention, *supra* note 11, art. 4(5).
[188] *See* Giuliano-Lagarde Report, *supra* note 11.
[189] *See id.*
[190] *See id.*
[191] *See id.*
[192] *See id.*
[193] *See id.*

law of the country of the principal or other place of business only apply when the trader or professional are classified as the characteristic performer of the contract.[194]

D. The Rebuttable Presumptions of Articles 4(3) and (4)

Article 4(3) stipulates that the presumption embodied within article 4(2) does not apply to contracts dealing with immovable property.[195] In such contracts, the framers adopted a presumption that the contract is most closely connected with the country where the immovable property is situated.[196] Likewise with article 4(2), the presumption is rebuttable under article 4(5) if the contract appears to be more closely connected to the system of law of another country.[197]

In article 4(4), which is specifically referable to contracts for the carriage of goods, the characteristic performance presumption in article 4(2) is not applicable.[198] In the absence of an express or implied conflict-of-law by the parties under article 4(1), the law applicable to a contract for the carriage of goods is presumed to be the law of the country in which, at the time of contractual conclusion, the carrier had his principal place of business and the place of loading, the place of discharge, or the consignors principal place of business.[199] The presumption as to the applicable system of law in article 4(4) is also rebuttable by article 4(5) where the contract is more closely connected to the system of law of another country.[200]

E. The Theory of "Closest Connection" Under the Mexico Convention

In marked contrast to the principle of party autonomy found in article 7, the drafters of the Mexico Convention did not follow as closely the principle of "closest connection" espoused in the Rome Convention.[201] Article 9 of the Mexico Convention adopts what is termed the "closest ties" theory in determining which system of law shall apply to the contract in the absence of

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194 *See id.*; *see also* KAYE, *supra* note 13, at 183-85; PLENDER, *supra* note 13, § 6.10.
195 *See* Rome Convention, *supra* note 11, art. 4(3).
196 *See id.* art. 4(5).
197 *See* Giuliano-Lagarde Report, *supra* note 11.
198 *See* Rome Convention, *supra* note 11, art. 4(4).
199 *See id.*
200 *See id.* art. 4(5); *see also* Giuliano-Lagarde Report, *supra* note 11.
201 *See* Juenger, *supra* note 9, at 389; Burman, *supra* note 9, at 381.

an express or implied conflict-of-law by the parties to the contract.[202] The "closest ties" concept is a concept akin to that of the "closest connection" found in the Rome Convention. However, the Mexico Convention departs from the objectivity principles in article 4(2) of the Rome Convention when it empowers the fact finder to look at both objective and subjective criteria to ascertain the system of law of the state with which the contract has the closest ties.[203] This departure from the objective approach taken by the framers of the Rome Convention to the determination of the factors within a contract that constitute the closest connection provides the fact finder with a much broader platform upon which to ascertain the applicable system of law to govern the contract.[204]

In addition, the framers of the Mexico Convention departed from the concept of characteristic performance also found in article 4(2) of the Rome Convention. In so doing, the framers made their most radical departure from the principles laid down in the Rome Convention. In this departure, the framers directed the fact finder in the second sentence of article 9(2) to take into account, along with all objective and subjective elements, the general principles of international commercial law recognized by international organizations.[205] The adoption of this objective and subjective criteria in place of the Rome Convention's objective characteristic performance formula was largely motivated by the perceived failings of that formula.[206] The result

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[202] *See* Mexico Convention, *supra* note 9, art. 9(2) ("If the parties have not selected the applicable law, or if their election proves ineffective, the contract shall be governed by the law of the state with which it has the closest ties.").

[203] *See id.* ("The court will take into account all objective and subjective elements of the contract to determine the law of the state with which it has the closest ties.").

[204] *See* Juenger, *supra* note 11, at 205 ("[T]his provision grants the judge or arbitrator a wider leeway of discretion than the Rome Convention."); *see also* Juenger, *supra* note 9, at 389 (discussing the effect of including a subjective criteria and arguing that "[t]he reference to "subjective elements" would seem to include the possibility of taking into account the parties' 'hypothetical' or 'presumed' intent").

[205] *See* Mexico Convention, *supra* note 2, art. 9(2); Burman, *supra* note 9, at 381.

[206] For a discussion of the deficiencies of the characteristic principle, see generally KAYE, *supra* note 13, at 187-91:

> Article 4(2) has been subject to a great deal of criticism[;] . . . there are three main species of objection which have ranged against this system. First, the characteristic obligation doctrine is said to derive from certain Swiss formulations, designed to avoid the German System, incorporating scission of applicable law in the absence of choice. . . . Secondly, presumptions take away much of the flexibility gained from the basic rule in Article 4(1), and consequently fell out of fashion, as being wrong in principle, under pre-existing English contract conflicts.

achieved by the framers of the convention permits the fact finder to "select that law which best accords with substantial justice and the exigencies of international commerce."[207]

The concepts the drafters of the convention included in article 9 are buttressed by those in article 10, which also enable the fact finder to determine the applicable law of the contract, with a view to discharging the requirements of justice and equity in the particular case to give consideration to the guidelines, customs, and principles of international commercial law.[208] The adoption of this article represents, in the spirit of the principles adopted in article 9, an endorsement of custom and the principles of good faith and fair dealing which underpin the theory of substantial justice contained within the UNIDROIT Principles.[209]

VI. WHY THE UNITED STATES SHOULD RATIFY THE MEXICO CONVENTION

A. The Mexico Convention Constitutes a Body of International Uniform Laws

There has existed since the 1950s an emerging trend for the unification of the laws governing transnational contracts.[210] Quite simply, this trend is driven not just by the certainty of law that such unification promotes but also, and probably more importantly from a commercial interest, it enhances the flow of international trade.[211] This trend is evinced by the 1964 Hague Convention, CISG, the 1980 Rome Convention, and the 1994 Mexico Convention, among others.[212]

In developing this uniform body of private international law, the emphasis is on transcending the vagaries of national law to develop a uniform and

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> Thirdly, if there is a presumption as to applicable law, it ought not to have been permitted to be rebutted, which effectively removes whatever certainty - if any - it brings; the rule of closest connection in Article 4(1) might just as well have stood alone, without the need to go through the presumptive process, eventually returning to the original starting point of the closest connection.

[207] Juenger, *supra* note 11, at 206; *see also* Juenger, *supra* note 9, at 391 (noting that this result "allows decisionmakers to dispense with a tedious investigation into the subtleties of conflicting laws and to rely instead on the rules laid down in the UNIDROIT Principles.").

[208] *See* Mexico Convention, *supra* note 9, art. 10.

[209] *See* Juenger, *supra* note 9, at 392.

[210] *See* Burman, *supra* note 9, at 367.

[211] *See* Ferrari, *supra* note 121, at 4, 4 nn.2-3.

[212] *See* Hague Convention, *supra* note 121; CISG, *supra* note 121; Rome Convention, *supra* note 11; Mexico Convention, *supra* note 2.

universally acceptable body of international commercial principles subject to a uniformity of interpretation by each country's judiciary not hitherto possible with the application of national rules of interpretation. So, how is this uniformity created? First, it is inadequate for uniform laws to be simply promulgated and subsequently ratified by the states party to the treaty. The interpretation and effect given to such laws will inevitably be at the mercy of judicial interpretation in each ratifying nation.[213] To circumvent this multitudinous interpretation of international uniform laws it must be expressly stated in the convention that such laws are not to be subject to interpretation by the application of each nation's domestic law.[214] Instead, regard must be had in the interpretation and application of such uniform laws to the international character and to the desirability of achieving uniformity in their interpretation and application,[215] or, pursuant to articles 9 and 10 of the Mexico Convention, regard must be had to "the general principles of international commercial law . . . [and to the] guidelines, customs and principles of international commercial law as well as commercial usage and practices generally accepted."[216]

In addition to achieving uniformity of interpretation under the auspices of the international character and pursuant to general international commercial principles, regard must also be had to the judicial decisions of the courts of other contracting states to the treaty or convention.[217] Where the courts of other contracting states have previously dealt with an issue arising under a treaty or convention, such decisions should carry precedential value, if an

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[213] *See* R.J.C. Munday, Comment, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450 (1978). The author notes:

> The principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words. *Id.*

[214] *See* John O. Honnold, *The Sales Convention in Action, Uniform International Words: Uniform Application?* 8 J.L. & COM. 207, 208 (1988) ("[O]ne threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law.").

[215] *See* Rome Convention, *supra* note 11, art. 18; Ferrari, *supra* note 121, at 9-10; CISG, *supra* note 11, art. 7(2).

[216] Mexico Convention, *supra* note 9, arts. 9 & 10.

[217] *See* Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 204-05 (1994).

existing body of international case law exists, or at the least should have persuasive value.[218]

The Mexico Convention as a conflict of laws convention constitutes an internationally agreed upon body of international commercial principles designating the law governing international contracts.[219] In approving the convention, each member state made a commitment to continue the progressive development and codification of private international law among each member state, and to "[reassert] the advisability of harmonizing solutions to international trade issues."[220] As such, the convention should be ratified by the United States and take its place among the growing body of international uniform laws.[221]

B. The Influence of the United States in Framing the Mexico Convention

The essential principles of the convention are the freedom of parties to choose the applicable law to govern a contract,[222] and, in default of either an express or implied conflict-of-law by the parties, the "contract shall be governed by the law of the State with which is has the closest ties."[223] The rule of law adopted in article 7 of the convention received United States support notwithstanding its derogation from more restrictive principles embodied within both the Restatement (Second) and the U.C.C.[224]

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[218] *See* Ferrari, *supra* note 121, at 12.

[219] In defining the convention, Burman stipulated that it "forms a body of internationally agreed upon resolutions of legal problems arrived at between representatives of a number of countries, including many of [the United States'] trading partners.... As such, [the] Convention [is] a source of transnational legal norms that may be applied directly in foreign jurisdictions." Burman, *supra* note 9, at 375-76. For a list of those nations who are a party to OAS, see *supra* note 1.

[220] Mexico Convention, *supra* note 2, at 733.

[221] Discussing the effect of the Mexico Convention on the recent trend towards the harmonization of international private law, Harold Burman noted that "we are moving, though slowly, away from the concept that applicable law is inherently limited only to national laws, or those treaty provisions within formally ratified documents. Recognition and application of internationally approved norms can allow a modern *lex mercatoria* to develop more fully." Burman, *supra* note 9, at 387. No doubt, the ratification of the Mexico Convention will, with regard to the harmonization of conflicts-of-laws rules, advance this trend more rapidly.

[222] *See* Mexico Convention, *supra* note 2, art. 7.

[223] *Id.* art. 9.

[224] *See* RESTATEMENT (SECOND), *supra* note 9, § 187; U.C.C. § 1-105(1) (1998). *See generally* Burman, *supra* note 9, at 380-81 (affirming United States approval of article 7 because it is "consistent with trends in certain areas of modern conflicts law as it relates to particular commercial practices").

Article 9 of the Mexico Convention was a compromise solution adopted by the framers. The United States delegation to the Mexico Convention proposed, in the event the parties to a contract failed either expressly or impliedly to chose an applicable law to govern the contract, that the contract be governed by "general principles of international commercial law accepted by international organizations."[225] The compromise adopted in article 9(2) retained the proper legal approach proposed by the United States delegation but relegated the status of general principles of international commercial law to a factor to be taken into consideration by the factfinder, rather than the overriding consideration in determining the applicable law.[226] Nevertheless, the overriding principle conforms to the American prerogative.[227]

Likewise, article 10 of the convention resulted from a proposal of the United States delegation.[228] It is considered one of the most innovative provisions in the convention.[229] The intention of article 10 is "to increase the extent to which the intentions of commercial parties and the development of business usages that are commonly recognized in international, if not in domestic, commerce would be recognized by the Convention."[230] The most pertinent provision in the convention was adopted as a direct result of proposals by the United States delegation.[231]

C. The Improvement the Mexico Convention Represents Over the Principles of the Rome Convention

The principle of party autonomy embodied in article 7 of the Mexico Convention, as well as numerous other international treaties and conventions, is indispensable to the conduct of international trade. Along with its cohorts, choice of forum and arbitration clauses, it provides a solution to the interna-

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[225] Juenger, *supra* note 9, at 391.

[226] The opposition to the United States' proposal was due to concern that it would create uncertainty arising out of a perceived difficulty for national judges to apply the principles. *See* Veytia, *supra* note 12, at 1194-95.

[227] *See id.*

[228] *See* Burman, *supra* note 9, at 381.

[229] *See id.*

[230] *Id.* Burman further stipulates that the "the purpose was . . . to establish provisions aimed at facilitating commerce by engaging through the Convention those business practices that underlie much of international trade." *Id.*

[231] For an overview of the approach taken by the United States delegation, see Burman, *supra* note 9, at 378.

tional commercial problems that arise out of a diversity of legal and judicial systems.[232]

With regard to the concept of party autonomy, what distinguishes the Mexico Convention from the Rome Convention is the freedom it allows the contracting parties to choose a system of law not connected to the country of either party.[233] "Such freedom of choice is better attuned to the modern commercial realities than the Rome Convention's retrogressive insistence on limiting the parties' selection to positive laws."[234] This liberal view of party autonomy strikes a cord with what is suggested and is the current trend in American conflict-of-laws jurisprudence,[235] namely "conflicts pragmatism."[236] The premise of the emerging theory can be seen in Friedrich Juenger's arguments for a more relaxed view towards contractual conflict-of-law in the current review of the UCC.[237] Juenger advocates that the parties to the contract should be free to choose the law of any jurisdiction, subject only to public policy limitations.[238] In contrast, Kramer advocates a more limited party autonomy provision in the UCC that would limit the parties to choosing between the laws of interested states, defined as "states that bear some substantial connection to the parties or the dispute."[239] Hence, Kramer's theory does not contemplate the concept of a neutral conflict-of-law provision.

In contrast, the concept of neutral conflict-of-law clauses has begun to find favor in the courts in the United States.[240] It is suggested that the difficulty in

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[232] *See* Juenger, *supra* note 11, at 195-97.

[233] *See* Juenger, *supra* note 11, at 204 (noting that "the Mexico Convention allows the contracting parties to choose a non-national law, such as *lex mercatoria* or its codified version, the UNIDROIT Principles of International Commercial Contracts").

[234] *Id.* at 204-05.

[235] Proponents of this trend include Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421 (1995); *But cf.* Kramer, *supra* note 79, at 1003-1012 (arguing against this modern trend); Larry Kramer, *Rethinking Choice-of-Law*, 90 COLUM. L. REV. 277, 328 (1990) (arguing that party autonomy should be limited in contractual conflicts).

[236] Borchers, *supra* note 235, at 437. Borchers distinguishes between a conflicts pragmatism doctrine and legal positivism. The doctrinal differences between the two is aptly chronicled by Borchers in scholastic exchanges between Kramer and Juenger.

[237] *See* Borchers, *supra* note 235, at 435. At present, § 1-105 of the UCC requires that the parties select a law with which the transaction has a reasonable relationship. *See* U.C.C. § 1-105.

[238] *See* Borchers, *supra* note 235, at 435.

[239] *Id.* (discussing letters from Kramer to Harry Sigman in 1994).

[240] *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); *see also* Borchers, *supra* note 235, at 436 (noting that "[r]elatively few U.S. cases have endorsed conflict-of-law clauses pointing to the law of jurisdictions with little or no connection to the dispute").

the conflict "pragmatists doctrine" "lies in trying to identify the reasons for allowing parties to select, at least in some circumstances, the law applicable to the transaction."[241] The theoretical underpinnings of the debate are the positivistic and nonpositivistic theories.[242] Under the latter theory, party autonomy resembles a rule of substance that finds commonality with many states in the United States and sovereign states.[243] Its premise is that greater certainty and predictability ensues in allowing parties the freedom to choose the applicable law to the contract.[244] In this regard, the author supports the nonpositivistic approach favored by Borchers and Juenger. In particular, if the theoretical debate is transposed to the international arena, allowing the parties to choose a neutral law carries more weight. Contract conflict rules will inevitably vary between different countries, and the ability of the parties to choose a neutral system of law may save the deal.[245]

The Mexico Convention embraces the nonpositivistic approach presently rising in eminence in the United States. In doing so, the convention aligns itself with several international conventions that also allow the parties to choose a neutral system of law.[246] Accordingly, because the "weight of authority internationally is to allow parties to select the law of an unconnected state,"[247] the United States should ratify the convention.

In the absence of an effective conflict-of-law by the parties, article 9 of the convention adopts the commonly used closest-ties formula and dispenses with the concept of characteristic performance found in the Rome Convention. The second sentence of article 9 is an innovative approach adopted by the

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[241] Borchers, *supra* note 235, at 437.

[242] The positivistic theory asserts the exclusive supremacy of the sovereign state as a source of rights and duties. *See* Borchers, *supra* note 235, at 437. The nonpositivistic approach allows for the possibility of activities playing a role in defining legal rights and duties. In this regard, limiting the parties to choosing between legal systems that might potentially apply anyway is not a sensible limitation. *Id.*

[243] *See id.*

[244] *See* Borchers, *supra* note 235, at 437 ("If one sees this 'shared multistage interest' as the ultimate foundation for party autonomy, however, the idea of limiting the parties to choosing between bodies of law that might potentially apply is not a sensible limitation.").

[245] In advocating the need for a neutral system of law in international contracts, Borchers noted that "the U.S. Supreme Court implicitly recognized this concern in *Zapata* because a large part of the choice of an English court (a neutral forum) was a desire to avoid the application of the *Bisso* doctrine by a U.S. court." *Id.* at 438.

[246] *See* Ferrari, *supra* note 121, at 84 ("Notwithstanding the presence of all the requirements for the application of the Convention, the CISG does not necessarily have to apply."); *see also* Borchers, *supra* note 235, at 438 ("One feature of the recently completed UNIDROIT Principles . . . is that these principles invite parties to choose them with a conflict-of-law clause.").

[247] Borchers, *supra* note 235, at 438.

convention in that it requires the general principles of international commercial law recognized by international organizations to be taken into consideration in determining the applicable law.[248] The convention indirectly incorporates the UNIDROIT Principles of International Commercial Contracts.[249] By incorporating the UNIDROIT Principles, the convention adopts principles of contract law common to numerous jurisdictions or principles that have been "adapted to the exigencies of international commerce."[250] The convention should prove to be a proficient guide to what law should be applicable to commercial contracts.

Furthermore, by reference to the customs and principles of international law as well as commercial usage and practices in article 10, the drafters of the Mexico Convention also incorporated by reference *lex mercatoria*. Unlike the Rome Convention, the Mexico Convention places reliance on generally accepted commercial practices, which are binding on the parties. "The Inter-American Convention opens new perspectives for the application of the general principles of commercial law in the international sphere."[251]

In so radically departing from the principles of "closest connection" and "characteristic performance" in the Rome Convention, the framers of the Mexico Convention have taken it out of the quagmire of being merely a "local" convention onto the much higher plane of international integration, with an emerging body of international commercial law that stands out on its own above the vagaries inherent in applying the national law of a country. For this reason, along with the added benefit of certainty and harmonization the adoption of such a law imputes, the convention should be ratified.

VII. CONCLUSION

The arguments in support of ratification begin with a comparison of the similarity between the two conventions. Both exclude the doctrine of renvoi and, in turn, adopt the principle of party autonomy. It is the inclusion and exclusion of these principles and the recognition of general principles of internationally recognized conventions and treaties, including *lex mercatoria*,

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[248] This provision has been termed "one of the greatest accomplishments of the Mexico Convention" as the general principles of international commercial law "were conceived as accepted norms designed especially for governing international transactions." Veytia, *supra* note 12, at 1196.

[249] *See* Veytia, *supra* note 12, at 1195; Juenger, *supra* note 9, at 391; Parra-Aranguren, *supra* note 12, at 1250.

[250] Veytia, *supra* note 12, at 1196-97.

[251] Parra-Aranguren, *supra* note 12, at 1251.

to determine the system of law to govern the contract in the absence of an express or implied choice, which give the Mexico Convention its credibility. The emergence of an international body of uniform rules and principles straddling atop the national laws of each sovereign state must be recognized and applied in the ever-expanding world market place to add certainty and uniformity in the sphere of international trade.