THE CHOICE OF LAW CLAUSE IN CONTRACTS BETWEEN PARTIES OF DEVELOPING AND DEVELOPED NATIONS

I. INTRODUCTION

Trade between developed and developing countries continues to expand as developed countries seek natural resources and labor-intensive products and developing countries seek technologically advanced products. Though it would seem to be a situation satisfying mutual needs, problems are often rife, particularly in contract negotiations. One area of concern to international lawyers is the choice of law clause, which indicates a body of law to govern the contract in the event of legal problems between the parties. In negotiating an international contract, parties should consider all legal systems available before selecting a particular law to govern their contract.

This Note considers the available systems of law from which a choice of law can be made in a private international contract between individuals of developed and developing countries, with special emphasis on contracts between parties from the United States and Latin America. Factors influencing the choice of law clauses are considered and their influence upon economic relations between developed and developing countries are discussed. Properly employed, the choice of law clause can be an important component in narrowing the political and economic gap between developed and developing countries.

II. THE INTERNATIONAL ECONOMIC CONTEXT

A. *North-South Relations*

The term "North-South relations" was coined during the late 1950s by Sir Oliver Franks, former British Ambassador to the United States, as a reference to relations between developed and developing nations.[1] During that time, the extreme socioeconomic disparities between industrial and agrarian societies were brought to light. Awareness of the problems increased as developed economies continued to expand, while developing economies failed to grow at a proportional rate. In many cases, developing nations underwent further economic decline, which lowered standards of living, defeated social expectations, and

[1] L. GORDON, INTERNATIONAL STABILITY AND NORTH-SOUTH RELATIONS 6 (1978).

troubled political relations with developed nations. Numerous scholars have attributed this economic degeneration to the abusive behavior of developed nations, which exploited their superior commercial bargaining power to the detriment of developing economies. In order to place developing nations on an equal bargaining basis with the developed world, demands for a New International Economic Order (NIEO) evolved, with a quest for guidelines for international relations based on equality and nondiscriminatory treatment.[2] These standards were to be met through preferential treatment; "developed countries generally grant preferences and developing countries are the prime beneficiaries of such preferential treatment."[3] One proposed method of granting preferences is through a reconsideration of the present use of the choice of law clause in private contracts.

B. *Importance of choice of law clauses*

A fairly negotiated choice of law clause reflects the reasonable expectations of the contracting parties, contributes to their amicable relations, and assures predictable litigation results.[4] Generally, the choice of law in the contract will govern questions of validity and performance[5] because courts are inclined to uphold an express contract clause.[6] Private parties from the developed world have used this premise to their advantage[7] by employing standardized form contracts in which the choice of law clause

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[2] The major United Nations actions proclaiming the NIEO are: the Declaration of the Establishment of a New International Economic Order, G.A. Res. 3201, 6 Special Session U.N. GAOR, Supp. (No.1) 3, U.N. Doc. A/1955 (1974); and the Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR 50, U.N. Doc. A/Res/3281 (XXIX) (1975). For an analysis of the standard of preferential treatment invoked by the NIEO, see 18 HARV. INT'L L.J. 109 (1977). For a comprehensive discussion on the NIEO and its implications for international law, see White, *A New International Economic Order*, 24 INT'L & COMP. L.Q. 542 (1975).

[3] 18 HARV. INT'L L.J. 109, 117 (1977).

[4] Entrepreneurs in developed countries use three basic methods of investment strategies in developing countries: first, investment in an industry of a developing country; second, investment through a licensing agreement; third, investment by the export of goods to developing countries, and conversely by the import of goods from developing countries. When referring to a choice of law clause in a contract, unless otherwise stated, application is to any of these investment strategies, all of which would require contracts and all of which should include a choice of law clause.

[5] G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND THE SETTLEMENT OF DISPUTES, Part I, Booklet 2, *Party Autonomy and Express Stipulations of Applicable Law*(1980).

[6] *Id.*

[7] *Id.* at 1.

found at the end of the contract[8] stipulates that the law of the exporting country will govern.[9] Such standardized form contracts are covenient because of the time and expense involved in negotiating a new contract with each trading partner. However, since they are not the products of negotiation, and often the result of unequal bargaining power, these contracts do not always reflect the parties' reasonable expectations. Therefore, parties in developing countries seek to avoid their use and opt instead for negotiated contracts. Developing countries argue that they have no alternative to accepting form contracts with unfavorable choice of law clauses because of their lack of bargaining power. This trading disadvantage is due in part to the admittedly insufficient technological and managerial capacities of developing countries, and in part to the monopolization of world trade by industrialized countries.[10]

In addition to the moral questions raised by the maintenance of such inequities, there are the practical problems inherent in attempting to bind national governments—which often own and operate the transnational enterprises of developing nations—to foreign laws, which take no notice of their socioeconomic interests.[11] Many governments of developing nations have attempted to counter the developed nations' preferences for their own commercial regulations with government contracts specifically providing that all local remedies be exhausted before contractual issues can be submitted to a foreign court. For example, the Calvo Clause, stipulated in the constitutions of many Latin American countries, narrowly defines contractual freedom in state contracts.[12] However, where only private enterprises are parties to

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[8] Maw, *Conflict Avoidance in International Contracts*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE (W. Reese ed. 1962).

[9] *Id.*

[10] THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE 1 (J. Bhagwati ed. 1977). Problems have occurred with all three investment strategies: (1) investment in an industry of a developing country has resulted in import substitution and an influx of peasants into the cities in search of factory jobs causing overcrowding and increased poverty in urban areas; (2) licensing has generally involved technology transfers, in which many problems currently exist; and (3) exporting has generally been of raw materials rather than finished products, thus depriving the developing country of further revenue from the manufacturing process.

[11] Folsom, *Choice-of-Law Provisions in Latin American Contracts, in* INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 61 (W. Reese ed. 1962).

[12] For example, the Peruvian Constitution states, "in every state contract with foreigners, or in the concessions which grant them in the latter's favour, it must be expressly stated that they will submit to the laws and tribunals of the Republic and renounce all diplomatic claims." Art. 17.

an international contract, the superior commercial position enjoyed by parties from developed nations generally enables them to dictate whichever choice of law they favor.[13]

III. COMPONENTS IN THE SELECTION PROCESS

A. *Party Autonomy*

The negotiation of a choice of law clause into a contract is meaningless unless a court having proper jurisdiction is willing to enforce it. Not all courts grant the contracting parties autonomy to choose the law to govern the contract. "Party autonomy" is the doctrine that allows the intention of the parties to govern validity of a contract.[14] Although the United States and Great Britain embrace this view, few developing countries encourage such extensive contractual freedom. Party autonomy is beneficial in that it allows the parties complete freedom to select a law best suited to the needs of their particular relationship. It may become objectionable, however, if it enables the parties to circumvent governmental regulation and policy.[15]

Complete party autonomy is not in the best interest of developing nations due to their insufficient bargaining power *vis-a-vis* developed nations. Allowing firms from developed nations to select from any available rule of law often results in choices that are the most economically feasible, but nevertheless are unacceptable to the developing world's socioeconomic interests. Other arguments posited against party autonomy are that foreigners who avail themselves of foreign markets should also submit themselves to foreign laws, and that foreigners often have no understanding of other legal systems.[16]

On the other hand, several reasons are advanced in support of party autonomy. First, trade between nations is unlike a domestic transaction; in keeping with its international character, regulation of trade and trade-related disputes should not be held to one

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[13] Bhagwati, *supra* note 10.

[14] Naidu, *On the Choice of Law in Contracts: The Doctrine of Autonomy of Parties*, 13 INDIAN J. INT'L L. 594 (1973).

[15] Beale, *What Law Governs the Validity of a Contract?* (pt. 3), *Theoretical and Practical Criticisms of the Authorities*, 23 HARV. L. REV. 260 (1909-10). Beale was the reporter for the first *Restatement of Conflict of Laws* and adhered to the vested rights theory; it is natural, therefore, that he should be opposed to party autonomy.

[16] Roffe, *Reflections on Current Attempts to Revise International Legal Structures: The North-South Dialogue—Clash of Values and Concepts, Contradictions and Compromises*, 9 GA. J. INT'L & COMP. L. 559, 566 (1979).

specific legal system. The legal system chosen should be the one best suited for each particular contract.[17] Second, national courts show a preference for their domestic law[18] and "could be biased in favour of nationals, discriminating against foreign parties" if they are forced to use foreign commercial codes.[19] And, third, a "lack of trust by developed countries in the legal systems of developing countries, particularly where the systems are new," leads to selection of the law of a developed nation.[20]

In state contracts, the controversy of party autonomy centers largely on the concept of national sovereignty and freedom to assert a law beneficial to this end. In private contracts, however, the issue concerns the relative bargaining power of each party and the furtherance of economic goals, with each side promoting its own interest. With the exception of certain natural resources in large demand and short supply, the developed countries have prevailed in this contest of bargaining strength and continue to assert unfettered party autonomy.[21]

B. *Available Systems of Law*

Where the courts recognize the autonomy of the parties to negotiate a system of law that will govern their contract, the contracting parties may effectively agree on what system best suits their purposes. Their choice can include: (1) the traditional principles of international law, *i.e., lex mercatoria*; (2) the private legal system of a state that has codified the traditional principles; or (3) a uniform codification of a private legal system.

1. *Lex Mercatoria*

Classical private international law is based on the assumption that any international contract that is not between states is to be governed by a state's private law[22] and not by international law. However, many courts have found it difficult to adhere to this doctrine because of divergent legal systems. International merchants,

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[17] *Id.* at 566-67.

[18] Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 601 (1980).

[19] Roffe, *supra* note 16, at 567.

[20] *Id.*

[21] This Note does not discuss trade of such resources. That area requires specialized treatment because of its unique characteristics and problems.

[22] This doctrine evolved from the ruling in the *Serbian Loans* case [1929] P.C.I.J., ser. A, No. 20/21, as referred to in E. LANGEN, TRANSNATIONAL COMMERCIAL LAW 2 (1973).

therefore, developed customary practices in their international contract relations to alleviate problems with the traditional doctrine;[23] courts, in turn, began to accept these practices as a substitute for codified law. One customary practice of merchants that has evolved is use of the standardized form contract specifying all obligations, and in effect, substituting the law of the contract for that of a legal system.[24] Based primarily on customary practices, the *lex mercatoria* is rarely used today as the sole source of law for a contract, but instead is used in conjunction with a uniform and/or private law as stipulated in the contract.

Developing countries are hesitant to rely on the *lex mercatoria*,which evolved before they had entered international trade. One author states the dilemma succinctly:

> Developing countries, which have repeatedly mistrusted classical principles of international law because these were established at a time when they were not full-fledged members of the international community, have expressed reliance on traditional instruments of international law, such as treaties or other forms of legally binding instruments. Developed countries, on the other hand, have manifested preference for voluntary instruments that do not have a legally binding character.[25]

In the context of today's multi-billion dollar international transactions, it would be imprudent to base a major portion of a contract on something not legally binding and so evanescent as *lex mercatoria*. Although customary practices or trade usage should be considered in certain situations, in choosing the law to govern major portions of a contract, other sources should be considered.

2. *Private Law*

Private law is that part of a legal system dealing with individuals, and is opposed to public law which involves the state in its role as sovereign.[26] Even in the face of complete party autonomy, most legal systems do place some restrictions on the selection of law governing private contracts. A brief survey of the

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[23] Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221, 223 (1978).

[24] *Id.* at 231.

[25] Roffe, *supra* note 16, at 567.

[26] The United States uses the term "conflict of laws" in the same context as many other countries use the term "private international law."

conflict of law rules governing contracts in the United States, Argentina, Brazil, and Colombia reveals such restrictions.

a. United States

The *Restatement (Second) of Conflict of Laws*, published in 1971, is the codification of conflicts rules in the United States. As with most codifications concerning choice of law in contracts, the *Restatement* provides guidelines to govern when no effective choice is made by the parties, as well as parameters for determining the suitability of a choice made by the parties. Where no effective choice is made by the parties, section 188 of the *Restatement* provides that the law of the state having the most significant relationship to the issue is to govern that issue.[27] Where a choice has been made by the parties, section 187 states that the choice will be allowed to stand if the issue is one that could have been expressly provided for in the contract. The choice of law will be upheld, even if the issue could not have been expressly provided for in the contract with two qualifications: first, the law must have a substantial relationship to the parties or to the transaction, which in most cases would be the place of contracting or the place of performance; second, the choice must not be contrary to the public policy of a state whose interest is greater than that of the state whose law was chosen.

Supplementing the *Restatement* are two Supreme Court cases: *M/S Bremen v. Zapata Off-Shore Co.*,[28] and *Scherk v. Alberto-Culver Co.*[29] In both cases the Court held that a clause in an international contract, which has been negotiated in an arm's length transaction, will be upheld regardless of whether the clause could be found invalid under one party's legal system, unless a strong

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[27] In the absence of an effective choice of law provision, the *Restatement* requires consideration of the following contacts in determining the place with the most significant relation and thus, the law applicable to an issue:

a. the place of contracting,
b. the place of negotiation of the contract,
c. the place of performance,
d. the location of the subject matter of the contract, and
e. the domicile, residence, nationality, place of incorporation and place of business of the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188(2) (1971). These contacts are to be evaluated according to their relative importance with respect to the particular issue. *Id.*

[28] 407 U.S. 1 (1972).

[29] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

reason for finding it invalid is present, such as "fraud, undue influence, or overweening bargaining power."[30] *Zapata* and *Scherk* involved a forum selection clause and an arbitration clause, respectively, and in both cases, the Court ruled against the private United States businesses involved in the litigation. These precedents should apply to a choice of law clause dispute, disabling a United States business from perfunctorily accepting foreign law and then attempting to hide behind the protective cloak of United States law in the event of litigation.

b. Argentina

Article 1205 of the Argentine Code provides that "contracts made outside the territory of the Republic, shall be judged, with respect to their validity or nullity, their nature and the obligations to which they give rise, by the law of the place in which they were entered into."[31] If performance is intended in Argentines or foreigners.[32] However, a contract entered into in Argentina then Argentine law governs the validity and performance regardless of where it was signed or whether the parties are Argentina to be performed elsewhere is governed by the law of the country of performance.[33] An express choice of law clause will be upheld if there is a genuine connection between the governing law and if the contract and the choice does not conflict with Argentine public policy.[34]

c. Brazil

In the past, Brazil has sought to apply its law to virtually all contracts touching its state, regardless of where they were signed.[35] The law in Brazil today follows *lex loci contractus* for both validity and performance, and a contract is deemed made at the place of residence of the one who made the initial proposal.[36] Where performance is in Brazil, however, the *lex loci contractus*

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[30] 407 U.S. at 12. *See also* Delaume, *What is an International Contract? An American and a Gallic Dilemma*, 28 INT'L & COMP. L.Q. 258, 276-77 (1979).

[31] *Quoted in* W. GOLDSCHMIDT & J. RODRIGUEZ-NOVAS, AMERICAN-ARGENTINE PRIVATE INTERNATIONAL LAW 50 (1966).

[32] *See* R. SANGUINETTI, THE STATEMENT OF THE LAWS OF ARGENTINA, IN MATTERS AFFECTING BUSINESS 84 (4th ed. 1975).

[33] GOLDSCHMIDT & RODRIGUEZ, *supra* note 31.

[34] *Id.* at 52.

[35] *See* P. GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 53 (1959).

[36] *Id.* at 54.

is not always applied by Brazilian courts,[37] instead the contract is bound by Brazilian law. Where both contracting and performance are outside of Brazil, the stipulated law or *lex loci* is applied.[38] Currently, Brazil's national law neither authorizes nor prohibits party choice. Thus, the extent of party autonomy cannot be ascertained, although public policy can be used as an excuse to avoid an express choice of law.[39]

d. Colombia

Article 20 of the Colombian Civil Code provides:

> (1) the validity of the contract depends on the local law of origin; (2) the execution of its effect depends on the law of the place of performance; (3) the execution in so far as it affects rights or interests of Colombia must be adjusted to Colombian law, regardless of what so ever may be the place of performance.[40]

The parties choice of law will be allowed if it is not in conflict with Colombian law even if the contract affects rights or interests of Colombia.

The most prevalent restriction in many legal systems is that a contract's choice of law clause will not be enforced where to do so will violate some aspect of the forum's public policy. Apart from this, each nation has its own version of how the law governing a contract is to be selected in the event of no express stipulation and to what extent an express stipulation must be followed. Because of divergent legal systems the laws of the country with which one is contracting should be consulted before selecting the law to govern the contract.

A major problem is encountered by those wishing to consult the national laws of a foreign country before selecting a law to govern their contract. There is a notable lack of easy access to translated sources of laws, a condition that plagues both developed and developing countries. Even if accurate translations are available, there is always the concern of how readily the codes are applied in any given legal system and whether they are supplemented in the foreign courts by other materials not readily accessible to the

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[37] *Id.*

[38] *Id.* at 56.

[39] *Id.* at 55.

[40] *Reprinted in* P. EDER, AMERICAN–COLOMBIAN PRIVATE INTERNATIONAL LAW 59 (1956).

researcher.[41] This problem is twofold for a foreigner dealing with United States law. First, the *Restatement* is not law per se but rather a scholarly treatise promulgated by the American Law Institute and supplemented by other scholarly works and case law in the United States court system.[42] Second, the United States is a multi-legal system with a good deal of variance among each states' system,[43] thus putting an additional burden on foreigners who might rely on the *Restatement*, or who will come in contact with more than one state legal system. Thus, the foreigner will find it virtually impossible to consult a single authoritative source of United States trade law governing any given international transaction.

3. *Uniform Law*

"If the customary law of international commercial transactions were sufficiently well understood throughout the world, there would be no need for national legislation embodying it; and if national legislation were sufficiently uniform throughout the world, there would be no need for international codification."[44] Since customary practices and national legislation have not proved sufficient for all international transactions, there is a great need for international codification. Many attempts have been made by various interest groups to codify conflicts rules, but none have proved totally successful. Two such attempts are the Bustamante Code on Private International Law for regional application drafted by the Organization of American States (OAS), and the Convention on Contracts for the International Sale of Goods, recently drafted by UNCITRAL.

a. Bustamante Code

The Bustamante Code on Private International Law was

[41] Note should be made here of the wide variance of accessibility to foreign legal materials between a multinational and an exporter, and between a large exporter and a medium and small exporter. A true multinational will have subsidiaries in foreign countries and will have easier access to bilingual legal assistance. The large exporter will have more cause to invest in specialized legal expertise in the international law field as the volume of exporting increases. The largest part of the burden falls on the small business or any size business, market testing exports in a foreign market and aiming to keep export costs down during the test period.

[42] Nadelman, *Literature in Latin America on the Law of Conflict of Laws in the United States*, 4 INTER-AMERICAN L. REV. 103, 106 (1962).

[43] *Id.* at 108.

[44] Berman & Kaufman, *supra* note 23, at 246.

drafted in 1928 and ratified by fifteen Latin American states, albeit six with general reservations.[45] The pertinent sections concerning choice of law are Articles 184, 185, and 186, which provide that the law chosen by the parties should govern the contract. In the event no law is chosen or the chosen law is ineffective, then "the personal law common to the contracting parties shall be first applied, and in the absence of such law there shall be applied that of the place where the contract was concluded."[46] This allows complete party autonomy in selection of the law to govern a contract and law of the place of contracting in the absence of effective party selection. The Bustamante Code is an adequate codification; apart from any substantive deficiencies, however, three obstacles have stood in the path of useful application since its incipience.

The first obstacle is the notable absence of the United States as a ratifying state. One source of this problem is the federal system established by the United States Constitution, which leaves such matters to the discretion of individual states.[47] Additionally,

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[45] Nadelman, *The Need for Revision of the Bustamante Code on Private International Law*, 65 AM. J. INT'L L. 782 (1971). Ratifying the Bustamante Code were Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. Bolivia, Costa Rica, Chile, Ecuador and El Salvador had "general" reservations, "providing in substance that the Code rules will apply only if they are not contrary to domestic law." *Id.* at 783. Argentina, Colombia, Mexico, Paraguay and Uruguay signed but did not ratify the treaty. Of these, all but Mexico signed with reservations. *See* INTERNATIONAL COOPERATION IN CIVIL AND COMMERCIAL PROCEDURE: AMERICAN CONTINENT 510 (L. Kos-Rabcewicz-Zubkowski ed. 1975).

[46] Articles 184, 185 and 186 of the Bustamante Code provide:

> Article 184. The interpretation of contracts should be effected, as a general rule, in accordance with the law by which they are governed. However, when that law is in dispute and should appear from the applied will of the parties, the legislation provided for in that case in Arts. 186 and 187 shall be presumptively applied, although it may result applying to the contract a different law as a consequence of the interpretation of the will of the parties.
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> Article 185. Aside from the rules already established and those which may be hereafter laid down for special cases, in contracts of accession, the law of one proposing or preparing them is presumed to be accepted, in the absence of an expressed or implied consent.
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> Article 186. In all other contracts and in the case provided for in the preceding article, the personal law common to the contracting parties shall be first applied, and in the absence of such law there shall be applied that of the place where the contract was concluded.

[47] *See* Nadelman, *supra* note 45, at 788. The United States government, in a note dated September 15, 1969, alluded to this problem, which was earlier mentioned in 1955 when a study of the Bustamante Code, the Montevideo Treaties and the *Restatement of the Law of Conflicts* was made. *Id.* "The note meant to recall, it must be assumed, that legislative jurisdiction over corporations lies with the States of the Union and not with the United States Congress; according to the note, in such cases, United States acceptance of an international agreement is improbable." *Id.*

"[l]ack of United States interest seems to be implied. Not having been a participant in the preparation of the Code, the United States is not likely . . . to accept a revised Code either."[48] It is therefore often urged that the *Restatements* not be considered in the revision process.[49] If the Code is completed and applied, this isolationist view could prove detrimental to the United States businessman, since "[i]nterests of American parties are in ever growing numbers litigated in foreign courts. The United States thus cannot be indifferent to the status of the rules on conflicts in other countries."[50] Furthermore, although the Code is supposed to apply only to states that are signatories of the Code, courts of Code states tend to follow it in cases involving non-signatory countries. Thus, the Code can and does affect United States business interests regardless of the fact that the United States is not a signatory—an additional reason why participation in the Code's revision could benefit the United States.[51]

A second obstacle to the success of the Bustamante Code is the virtual nullification of its benefits by the general reservations of five states upon ratification. For example, Chile ratified the Code with the following reservation: "If Chilean law is in conflict with foreign statutes, the provisions of present and future Chilean statutes shall prevail over the said Code in cases of disagreement between the two."[52] The Code applies in Chile only where there is no internal legislation, past, present, or future to the contrary.[53] Similarly, Costa Rica adopted the Code " 'with express reservation as to everything which may be in contradiction with the legislation . . . of Costa Rica' in force at the time of the subscription 'and that which may be enacted in the future.' "[54] None of the states that have ratified the Code with reservations have amended their internal legislation to be in accordance with the Code.[55] If the Bustamante Code is to have its intended effect, more American states must be encouraged to adopt the Code with fewer or no reservations.

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[48] *Id.* at 790.

[49] *See, e.g.*, Nadelman, *supra* note 42, at 105-06, where the author warns against reliance on the original *Restatement*.

[50] *Id.*

[51] Nadelman, *supra* note 45, at 790.

[52] INTERNATIONAL COOPERATION, *supra* note 45, at 128.

[53] *Id.*

[54] *Id.* at 182.

[55] Nadelman, *supra* note 45, at 783.

The final obstacle to effective application of the Bustamante Code is the narrow group of countries' laws which are codified within it. When codifying conflict of laws rules, a broad, universal approach encompassing many national laws is preferred to a narrow, regional approach encompassing the laws of a limited range of countries.[56] Regional codification may be easier since there are fewer national laws to be reconciled and a regional code can be applied more simply, particularly within a smaller group such as the OAS. Problems arise, however, where parties of a Code state trade with parties of non-Code states, since as previously noted, Code states tend to use the Code indiscriminately, much as the United States uses the *Restatement.* This problem can be alleviated by enlarging the group of countries involved in the codification.

If the obstacles of the Bustamante Code are overcome it could prove beneficial as a codification of international law. The primary relevance of the Bustamante Code to North-South problems is that it is a deliberate effort on behalf of developing countries of Latin America and, as such, expresses their views on conflict of laws. Developed countries should work with Latin American countries toward a revision that can satisfy both groups.

b. *Draft Convention on International Contracts for the Sale of Goods*

In 1972, two Conventions, the Uniform Law on the Sale of Goods (hereinafter ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter ULF), were ratified by various developed and developing countries, including the United States. Together, the Conventions constitute an attempt at international codification of rules governing the international sale of goods and contract formation and include stipulations on conflict rules within these specified boundaries. By 1977, relatively few countries had ratified either ULIS or ULF, indicating problems with the Conventions.[57]

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[56] *Id.* at 791.

[57] Critics have found problems with ULIS and ULF. First, ULIS attempts to exclude conflict issues by excluding rules of private international law for dispute resolution and substituting the law of the Convention. G. DELAUME, *supra* note 5, at 22. Second, ULIS defines an international sale only as the situation where goods are shipped from one state to another, where offer and acceptance are in different states, or where delivery is to be made in a different state from that of offer and acceptance. This often requires application of ULIS in cases where another test should be used to determine choice of law.

Because of the apparent inability of the Conventions to satisfy the need for international codification, the United Nations Conference on Contracts for the International Sale of Goods developed a unified draft based on ULF and ULIS, which was unanimously approved by the full Commission in 1978.[58] Revised in the 1980 Vienna Convention, the Draft Convention was to be ratified by September, 1981. The Draft Convention has limited applicability. Article four states that "only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract"[59] are governed by the Convention. While the Bustamante Code covers a wide range of conflict issues, its territorial base is narrow. On the other hand, the Draft Convention covers international conflicts in contract formation for the sale of goods only, yet its territorial base is meant to be universal. Scholars disagree as to which is the better approach, but application by the business world probably will be the best measure of success.

The ULIS excludes rules of private international law for dispute resolution and substitutes the law of the Convention.[60] This approach is grounded in the view that if the Convention allowed application of private international law, difficulties would arise because of the divergent conflict rules in various legal systems. However, the deletion of private international law led to the complicated reservations made by ratifying states. The new Draft Convention seeks to remedy this problem in Article One, stating:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State.
> (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between,

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Countries ratifying by 1977 were Belgium, Gambia, Italy, the Netherlands, San Marino, the United Kingdom, West Germany (ULIS and ULF) and Israel (ULIS only). Berman & Kaufman, *supra* note 23, at 265. Of the nine countries that had ratified ULIS by 1981, none were socialist, and only one was a developing country. Reczei, *The Area of Operation of the International Sales Convention*, 29 AM. J. COMP. L. 513 (1981).

[58] UNCITRAL, *Report on the Eleventh Session* 10-30 (1978); *reprinted at* 27 AM. J. COMP. L. 325-45 (1979). *See also* Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979).

[59] Draft Convention.

[60] G. DELAUME, *supra* note 5, at 22.

> or from information disclosed by, the parties at any time before or at the conclusion of the contract.
> (3) Neither the nationality of the parties nor the civil or commercial character of the contract is to be taken into consideration in determining the application of this Convention.

That nations need not preclude use of their own law or use of any other private international law makes the Draft Convention more adaptable to current legal systems and more likely to be ratified without troublesome reservations. But despite the improvements of the Draft Convention, numerous problems must be overcome before it will provide a workable solution to the international codification of conflict of laws. Many private businesses in the United States and elsewhere find it burdensome to keep up with the new uniform laws, and speculate that the uniform laws were negotiated in response to pressure from the developing world.[61] Thus, the Conventions are understood as political instruments rather than economically viable proposals for solving international problems. As one commentator noted: "There is also a desire to incorporate in [international law] certain principles that have been usually regarded in the West as political rather than legal and that by their very generality and flexibility of application, lend themselves to manipulation."[62] In contrast, leaders of many developing countries believe that the drafting of uniform law is dominated by developed countries and that the resulting laws misperceive needs of developing nations. Present at the 1981 Vienna Conference on the Draft Convention, however, were many developing nations, including Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Peru, and Uruguay, with Venezuela sending an observer.[63] The representative from Yugoslavia stated:

> [T]he interests of the developing countries and the need for the establishment of the new international economic order should be

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[61] The Group of 77, now 111 strong, was organized during the first United Nations Conference on Trade and Development (UNCTAD) in Geneva . . . . The aim of its members was to involve their demands with greater authority by confronting the industrialized countries with a compact group speaking with one voice. In many of the Western countries, this was viewed in more ideological terms as a split between affluent democracies which put their faith in economic growth and the Third World which wanted a redistribution of the world's wealth to poorer countries.

18 HARV. INT'L L.J. 109 (1977).

[62] Roffe, *supra* note 16, at 569.

[63] *United Nations Convention on Contracts for the International Sale of Goods*, U.N. GAOR, Special Session, U.N. Doc. A/CONF. 97/18 (1980).

> taken into consideration at the adoption of the final text at the diplomatic Conference to be held in Vienna, so that the expectations of the developing countries could be met with regard to the implementation of resolutions adopted at the sixth and seventh special sessions of the General Assembly of the United Nations, a fact of which account should be taken also by UNCITRAL.[64]

Because expansive party autonomy prevails among developed nations, contracting parties may select from a variety of legal systems. However, within this legal spectrum are choices that could prove detrimental to North-South relations in certain situations. From a purely economic perspective, the best choice may be *lex loci*, as most businessmen would deem the choice of their own domestic law to involve less risk and cost. Western businessmen often suspect that the commercial laws of developing nations are commercially restrictive and impermanent. Yet, such fears may also mask the feelings of nationalism, isolationism, and ethnic superiority, which have continually fueled North-South tensions. A mutual determination of rules of international trade would result not only in more favorable cost-benefit ratios, but also in a true balancing of North-South interests in the vital areas of national security and development.

The Draft Convention on the International Sale of Goods is especially encouraging because it promotes all of the beneficial aspects of party autonomy: (1) it does not hold the parties to one legal system; (2) it does not allow national courts to show favoritism to their domestic law; yet, (3) it does alleviate distrust toward the nascent legal systems of developing nations. All nations should welcome the implementation of the Convention, since it, more than any other available system of law, can be a means of circumventing current conflict of laws problems.

IV. *Summary and Conclusion*

Multinational enterprises, operating in accordance with supply and demand capitalism, rarely consider the long-term effects their behavior may have on developing economies. Although United

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[64] *Id.* at 18. The same representative made a recommendation that the Draft Convention include the provision on good faith and fair conduct previously deleted from the revised version to further the goals of the new economic order. This clause should be included as it is not a radical political statement and is a concept readily applied in United States and most Western laws today. *Id.* at 19.

States businesses seldom employ economic malice toward developing nations, their superior bargaining power is an economic fact of life. Private enterprises often resort to a standardized form contract in all international transactions—a contract that gives little or no consideration to the laws and policies of developing nations. Likewise, the United States Government differentiates little in its contractual dealings with developed and developing nations, insisting that United States law govern every transaction in case of dispute.[65] The advantages are rather obvious: (1) certainty and uniformity of results and (2) avoidance of expensive and inconvenient foreign litigation.[66] Although the interests of the sovereign[67] differ somewhat from those of private business, it is difficult to encourage private enterprises to adopt a course of conduct different from that which has proven so cost beneficial to the government.

If the NIEO is to redress the developing Third world's otherwise permanent economic disabilities, some legal systems more equitable than those in current use must be employed to regulate international commerce. An argument has been made that equity and justice demand "income and wealth redistribution through higher prices for developing country exports, systematic and permanent trading preferences, automatic resource transfers and debt relief, enlarged aid programs, preferential access to Northern technology, and unrestrained rights to discriminatory treatment on expropriation of foreign investments."[68] Consideration of developing nations' needs and policies in choice of law provisions would be in keeping with these goals.

However, solutions to worldwide commercial and economic inequities are not found easily. Enterprises from developed nations cannot be expected to follow the Draft Convention on the International Sale of Goods or to give preferential treatment to developing nations for reasons devoid of economic benefit. Perhaps

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[65] Gluck, *Choice of Law and Forum in International Contracts*, 11 PUB. CONT. L.J. 103, 118 (1979).

[66] *Id.* at 117.

[67] "It can be argued that the Government's best interests are always served by winning its case and, therefore, that Government lawyers should invoke foreign law whenever that law supports the Government's position better than U.S. law. United States law, however, reflects congressional policy, which supposedly is the policy of the United States Government. It might be somewhat incongruous, therefore, for a contracting agency which derives its being and contracting authority from congressionally enacted statutes to renounce congressional policies embodied in the substantive law." *Id.* at 118 n.57.

[68] L. GORDON, *supra* note 1, at 18.

the best that can be hoped for is a changed outlook in the business community.

Because contact with foreign laws is admittedly burdensome for private enterprise,[69] there should be "a legitimate interest in establishment of internationally accepted jurisdictional principles,"[70] which would enable avoidance of conflicts. National governments should be encouraged to surrender some of the historical trappings of sovereignty in order "to integrate international organizations or to form a more cooperative international system."[71] Only then can they credibly encourage private enterprise to follow suit. A significant beginning would be the inclusion of fairly negotiated choice of law clauses in contracts linking developed and developing nations.

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[69] Fatouros, *The Computer and the Mud Hut: Notes on Multinational Enterprise in Developing Countries*, 10 COLUM. J. TRANSNAT'L L. 325, 357 (1971).

[70] *Id.*

[71] Vargas-Hidalgo, *The Process of Integration in Latin America*, 15 COMP. JUR. REV. 105, 109 (1978).