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RETHINKING THE COMMERCIAL LAW TREATY

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INTRODUCTION

In the modern world, corporations engage in international business transactions as a matter of course. A U.S. manufacturer based in New York agrees to sell mining equipment to a Swiss firm. A British lender agrees to finance a South African corporation's purchase of a commercial airliner. A German bank agrees to purchase at a discount the accounts receivable of a Dutch automobile company. In these transactions, the parties must grapple with an array of risks. One of these is the risk of *legal uncertainty*, or the risk of being forced to litigate disputes under an unfamiliar law.[1] Because different national legal systems contain different rules, the application of a particular state's law can have a profound impact on the outcome of any dispute arising out of the transaction. For example, a sales contract deemed to be governed by New York law is likely to give rise to a very different set of rights and obligations than an identical contract deemed to be governed by Swiss law.[2] The possibility of being forced unexpectedly to litigate disputes under the law of another state is a perennial source of concern to commercial actors.[3] This state of affairs can render international commercial transactions more costly than transactions conducted exclusively at the domestic level.[4]

The resolution of this particular problem is bound up in national legal rules relating to "private international law" or "conflict of laws." These rules, at least in principle, enable courts consistently and predictably to determine which state's laws will

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[1] This Article uses a lowercase "s" when referring to states in the international sense (states) and an uppercase "s" when referring to States within the United States (States).

[2] *See infra* note 37. *See generally* J.W. Carter, *Party Autonomy and Statutory Regulation: Sale of Goods*, 6 J. CONT. L. 93 (1993) (identifying differences in perfect tender rules under the British Sale of Goods Act of 1893 and the United Nations Convention on Contracts for the International Sale of Goods (CISG)).

[3] *See* John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1395 (2002) (listing "legal diversity across jurisdictions" as part of the "classic set of legal and business risks" of international business transactions).

[4] *See* Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT'L L. 1511, 1519 (2006) ("Contracting in an international context generally is regarded as more costly than contracting domestically.").

supply the legal framework underlying a contract with connections to more than one state.[5] Scholars have long bemoaned, however, the unpredictable (and sometimes unprincipled) outcomes generated by these rules, and the fact that their content may vary from state to state.[6] Consider state attitudes towards choice-of-law clauses. In Brazil, courts routinely decline to give effect to contractual choice-of-law clauses in international commercial contracts, a practice that has "forced U.S. lawyers to add a risk premium to their [clients'] contracts with Brazilian parties."[7] In the United States, courts generally enforce choice-of-law clauses but may refuse to do so if the jurisdiction whose law is chosen lacks a "substantial" or "reasonable" relationship to the underlying transaction.[8] And in the states of the European Union, courts

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[5] *See* BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 178–79 (1963) ("The central problem of conflict of laws may be defined, then, as that of determining the appropriate rule of decision when the interests of two or more states are in conflict . . . .").

[6] With respect to unpredictability, see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 730–34 (2009) (summarizing reasons why many scholars view conflicts doctrine as a "mess," though taking issue with that characterization); *see also* Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 528 (2000) (noting the "present state of chaos" in conflicts doctrine); Ole Lando, *Optional or Mandatory Europeanisation of Contract Law*, 8 EUR. REV. PRIVATE L. 59, 63 (2000) (characterizing conflict of laws doctrine as "a constant maze of uncertainty"). With respect to bias, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 366–67 (1992) (summarizing studies suggesting that conflicts decisions in the United States exhibit pro-recovery, pro-local-resident, and pro-forum biases); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002) ("[J]udges tend to be biased in favor of local law.").

[7] Dana Stringer, Note, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 COLUM. J. TRANSNAT'L L. 959, 960 (2006); *see also id.* at 976 ("The continued use of the public policy exception to override the already limited choice of foreign law makes it extremely difficult for a U.S. lawyer to manage risk and reduce Brazil costs."). For an excellent survey of the effectiveness of choice-of-law clauses in various Latin American legal systems, see generally María Mercedes Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. PRIVATE INT'L L. 23 (2010)

[8] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . the chosen state has no substantial relationship to the transaction and there is no other reasonable basis for the parties' choice."); ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 60–62 (2009) (criticizing the Second Restatement's substantial relationship requirement); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 554 (2006) ("As a

respect the law chosen by the parties "even if the law chosen has no connection with either the parties or the subject matter of the contract."[9] These differing approaches to the relatively straightforward question of whether to enforce a choice-of-law clause suggest that private international law rules are not, in themselves, a solution to the problem of legal uncertainty. Indeed, in some cases these rules can be a source of it.

Commercial law treaties represent a more comprehensive solution to the problem of legal uncertainty.[10] The primary aim of such treaties is not to constrain the behavior of states and state actors, but rather to facilitate commercial transactions between private parties by harmonizing law across national borders.[11] There are two basic types.[12] The first, organized around the

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general pattern, it is hard to find any U.S. case that upholds a choice of law clause selecting a law with little or no connection to the dispute."); *see also* U.C.C. § 1-301 (2008) (imposing a "reasonable relation" requirement on the law chosen by the parties' choice-of-law clause).

[9] DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 664 (2d ed. 2010).

[10] This Article uses the term "commercial law treaties" to distinguish private law treaties relating to contracts, the sale of goods, the carriage of goods by sea and air, negotiable instruments, and the enforcement of choice-of-law, choice-of-forum, and arbitration clauses in commercial contracts, from treaties relating to other areas of law (such as family law or intellectual property law).

[11] The vast majority of treaties to which the United States is a party are public law treaties, whose primary purpose is to "constitute and constrain the behavior of state institutions." Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1795 (2009). The United States is, however, a party to a relatively small number of treaties that are unconcerned with the behavior and practice of states. These treaties instead govern the activities of private individuals vis-à-vis other private individuals. *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280–81 (1982) ("Public international law regulates activity among human beings operating in groups called nation-states, while private international law regulates the activities of smaller subgroups or of individuals as they interact with each other.").

[12] *See* Symeon C. Symeonides, *Party Choice of Law in Product-Liability Conflicts*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 263, 264 (2004) (noting that commercial law treaties can be used to harmonize the substantive laws of various states or to eliminate the differences in conflicts law of various states); *see also* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 448 n.24 (1989) (discussing these two functions of commercial law treaties); Friedrich K. Juenger, *The* Lex Mercatoria *and Private International Law*, 60 LA. L. REV. 1133, 1133 (2000) (noting that scholars view the two types of commercial law treaties as "divergent approaches" stemming from different schools of thought).

concept of uniform substantive rules, aims to mitigate the problem of legal risk by harmonizing substantive commercial law that applies to international transactions.[13] Once these rules have been incorporated into the national law of those jurisdictions that ratify the treaty, the question of governing law in international transactions becomes moot; if the relevant commercial law is the same in all states, then it should make little difference which state's substantive law governs the contract.[14]

The second, organized around the concept of uniform choice-of-law rules, seeks to mitigate this same problem not by promulgating uniform substantive rules, but by harmonizing the processes by which national courts go about deciding which state's law to apply to govern a given contract.[15] This approach seeks harmony "not in the promulgation of uniform substantive rules, but in the creation of a process for choosing among competing national and international rules, leaving the substance of the domestic system largely untouched."[16] These treaties typically include language directing national courts generally to give effect to contractual provisions (such as choice-of-law clauses) in commercial contracts.[17] They also contain language spelling out how national courts should determine which law will apply to govern the contract in the absence of a choice-of-law clause.[18]

These two approaches are by no means mutually exclusive. Indeed, they can be mutually reinforcing. One can imagine, for example, a scenario whereby a constellation of commercial law

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[13] Symeonides, *supra* note 12, at 264. I refer to this type of treaty throughout the Article as a "substantive treaty."

[14] In order for true predictability to obtain, of course, a complementary set of institutions must interpret and enforce that law in a consistent way. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1063 (2000) (asserting that Delaware's Court of Chancery and high volume of business litigation has produced "well-developed precedent" that some commentators argue has increased predictability); *see also infra* note 199 and accompanying text.

[15] I refer to this type of treaty throughout this Article as a "choice-of-law treaty."

[16] Arthur I. Rosett, *The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Commercial Contracts*, 46 AM. J. COMP. L. 347, 351 (Supp. 1998). *See generally* JOSEPH F. MORRISSEY & JACK M. GRAVES, INTERNATIONAL SALES LAW AND ARBITRATION 62–66 (2008) (surveying choice-of-law treaties).

[17] *See infra* note 66.

[18] *See infra* note 66.

treaties provided greater legal certainty for a given transaction by establishing a set of international default rules *and* by giving the parties the power to choose whether to have their contract governed by those rules or by existing national commercial codes. In a world where the costs of legislating each of these two options are equal, however, the question becomes whether one type of treaty is, on balance, better than the other at mitigating the problem of legal uncertainty.[19] If one is superior, then treaty drafters and legislators committed to the project of reducing the degree of uncertainty inherent in international commerce should prioritize the task of negotiating, ratifying, and implementing commercial law treaties of that particular type.

The conventional wisdom has long been that treaties organized around the concept of uniform substantive rules represent, on balance, the preferred solution.[20] At least two rationales have

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[19] To be sure, these treaties may serve other, nonfunctional values. For example, they could serve as "market signaling" devices that evidence a state's commitment to a business-friendly environment. Alternatively, they could promote a positive political message about cooperation across national borders and the universality of trade and commerce. *See, e.g.*, Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 267 (1984) ("Unification of the law . . . makes a positive political statement, giving concrete form to hopes for one peaceful family of nations . . . ."). Viewed through a functionalist lens, however, the primary purpose of these treaties is to reduce uncertainty in international business transactions by establishing the same set of rules—whether substantive or choice-of-law—across many jurisdictions. *See, e.g.*, René David, *The Methods of Unification*, 16 AM. J. COMP. L. 13, 13 (1968) (stating that "the essential thing" for either substantive or choice-of-law treaties is to "bring to an end the uncertainty, confusion and chaos characterizing the present situation").

[20] *See* Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 149, 176 n.3 (Jody S. Kraus & Steven D. Walt eds., 2000) (questioning the broad consensus in both domestic and international commercial law that "formal uniformity has led as well to substantive uniformity, to the certainty, predictability and stability that are the bedrock desiderata of commercial law"); Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving From Harmonisation to Unification?*, 8 UNIFORM L. REV. 123, 125–27 (2003) (detailing problems with choice-of-law rules); Linarelli, *supra* note 3, at 1405–09 (outlining economic reasons to prefer harmonization of substantive law to a choice-of-law approach); Juenger, *supra* note 12, at 1149 ("No doubt, as far as transnational contracts are concerned, the elaboration of a supranational substantive law is preferable to relying on traditional private international law rules."); Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467, 469 (1995) (observing in the field of international commercial law "a tendency favoring the uniform substantive rules over the

been invoked in support of this preference.[21] First, substantive law treaties are said to reduce transaction costs in cross-border transactions; once the relevant law is the same in both jurisdictions, there is no need for each party to expend resources researching the substantive law of the counterparty's jurisdiction.[22] Choice-of-law treaties, by comparison, merely facilitate the ability of parties to choose an existing system of national commercial law to govern their contract or, in the absence of a choice-of-law clause, enable the courts to determine which national law to apply. Each party must still incur the costs, whether ex ante or ex post, of familiarizing itself with the national substantive law of the jurisdiction chosen as the governing law.

Second, substantive treaties are said to articulate a uniquely international commercial code that is better suited to governing cross-border commercial transactions than is national commercial law.[23] In the words of Roy Goode: "The time has long passed when domestic legislation shaped for internal trade can provide sensible solutions to the problems of international commerce."[24] Since the

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uniform conflict-of-law rules"); David, *supra* note 19, at 17 ("Agreement on the rules of conflict of laws . . . will not be enough to satisfy the needs of legal practice in many cases.").

[21] *See, e.g.*, SANDEEP GOPALAN, TRANSNATIONAL COMMERCIAL LAW 11–12, 23 (2004) (identifying transaction costs as a reason for substantive unification); *id.* at 16–17 (discussing better law as a reason for substantive unification).

[22] *See* Cuniberti, *supra* note 4, at 1519 ("[T]he purpose of harmonizing commercial law ought to be to reduce the transaction costs of the parties."); Linarelli, *supra* note 3, at 1401 ("International default rules have the potential to decrease transaction costs and facilitate exchange."); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 671–72 (1999) ("Because uniform law subjects a transnational commercial transaction to a single set of rules, it reduces the legal costs associated with the transaction.").

[23] *See* René David, *The International Unification of Private Law*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 5, at 7, 12 (1973) (criticizing the use of "domestic tools . . . to solve questions which are essentially international" and asserting that "national systems of internal commercial law are unfitted to govern international commercial contracts"); GOPALAN, *supra* note 21, at 16 ("There are situations in which national laws do not meet the demands of international commerce.").

[24] Roy Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law*, 50 INT'L & COMP. L.Q. 751, 752 (2001); *see also* Linarelli, *supra* note 3, at 1401 ("[D]omestic legal systems may fail to specify default rules in areas where special problems arise in international transactions."); Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1820 (1988) ("Some national laws may not be sufficiently developed to provide a basis for

very purpose of choice-of-law treaties is to enable national courts to determine which national substantive law applies to govern a particular transaction, these treaties do nothing to redress the perceived inadequacies in national codes in the international commercial context. Indeed, by making it easier for parties to elect to have their contracts governed by a particular national law, it could be argued that choice-of-law treaties actually perpetuate the continued use of suboptimal national rules in international commerce.

In this Article, I critically examine each of these two rationales as part of a broader inquiry into the question of whether the preference for substantive law treaties is warranted.[25] With respect to transaction costs, I argue that there is no principled reason why an international treaty that articulates substantive rules of commercial law should necessarily be better at reducing transaction costs than the national commercial law of a foreign state; in each case, domestic actors must familiarize themselves with a body of law different from the one with which they are most familiar. I suggest that just as Delaware law provides a common frame of reference for corporate lawyers in the United States, so too could a given national commercial law provide a common frame of reference to parties engaged in international commercial transactions. I argue, in short, that the *need* for a substantive treaty as a tool for reducing transaction costs is open to question, although I freely concede that such a treaty *can* serve this function.[26]

The second rationale frequently invoked in support of substantive law treaties—that they offer law better suited to international legal transactions than existing national law—is also suspect.[27] The limited empirical evidence as to the preferences of market actors, who are presumably in the best position to evaluate which law best approximates their preferences, provides little

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international transactions; even sophisticated national systems may be conducive only to domestic transactions.").

[25] *Cf.* GOPALAN, *supra* note 21, at 80 (stating that "[t]here is no easy answer as to which of the two types of harmonization [substantive or choice-of-law] is more desirable").

[26] *See infra* Part III.A.

[27] *See supra* notes 23–24 and accompanying text.

support for the idea that these actors view the law in substantive law treaties as "better" than national commercial law.[28] To the contrary, the limited evidence indicates that commercial actors (1) routinely exclude the best-known substantive treaty—the United Nations Convention on Contracts for the International Sale of Goods (CISG)—from the law governing their international sales contracts, and (2) routinely insert in those same contracts choice-of-law clauses selecting national commercial law as the governing law. In other words, were the decision left to market actors, there is at least some evidence that they would prefer a treaty-based solution that enhanced their ability to choose to have their contracts governed by the national law of their choice.[29]

Choice-of-law treaties do precisely this. They direct national courts (in most cases) to enforce ex ante agreements that a particular contract be governed by the national law of a particular state. Viewed through the lens of effectuating the preferences of individual commercial actors, therefore, choice-of-law treaties seem likely to lead to the application of default rules that more closely approximate these preferences. In addition, from a systemic perspective, choice-of-law treaties have the potential to encourage the production of better commercial law at the national level by facilitating the development of a market for commercial law on the international stage.[30] By stimulating competition

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[28] *See infra* Part II.B. Where a substantive treaty seeks to solve a collective-action problem, a different conclusion may obtain. The Convention on International Interests in Mobile Equipment (Cape Town Convention), which created a centralized, international database for the recordation of security interests, is an example of a treaty that likely represented an improvement over national law because it dramatically simplified the process for securing certain types of loans. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention]. However, where a treaty merely purports to provide default rules there is scant evidence that rules drafted at the international level better reflect the baseline preferences of the parties than do rules of national commercial law.

[29] *See infra* Part II.B. Of course, parties can and routinely do adopt substantive commercial law rules developed by private actors.

[30] The United States, for example, has a "market" for corporate law in large part because courts in all U.S. jurisdictions recognize the same choice-of-law rule with respect to corporate law: the law of the state of incorporation governs the internal affairs of a corporation. *See* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 36 (2006) (observing that "[f]or disputes over a corporation's

among jurisdictions to update and modernize their national commercial codes, this market could lead to the development of more efficient commercial law in international transactions.[31] Although widespread enforcement of choice-of-law clauses has potential downsides—including the potential for evasion of efficient mandatory rules at the national level—such problems are arguably less acute in the commercial context than they might be in other areas of law.[32] Moreover, the risks of such an approach are counterbalanced by the potential benefits.

This Article proceeds as follows. In Part I, I outline in greater detail the nature, origins, and basic rationales underlying both types of commercial law treaties. In Part II, I examine the two primary arguments for preferring substantive law treaties—reduced transaction costs and improved law—and identify weaknesses underlying these rationales. In Part III, I explain why choice-of-law treaties may present a better solution to the problem of legal uncertainty. I also respond to some potential objections to a choice-of-law approach.

I. THE COMMERCIAL LAW TREATY

Legal uncertainty in international commercial transactions is largely a problem of not knowing what default rules will be used to fill any "gaps" that may exist in a commercial contract with connections to more than one jurisdiction.[33] When drafting a

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internal affairs . . . states generally apply the law of the incorporating state" and noting the prevailing view that "this respect for firm choice creates a common market for corporate law" and "sparks regulatory competition among the states").

[31] *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 789 (1999) (discussing the potential benefits of a market for international commercial law); *see also* O'HARA & RIBSTEIN, *supra* note 8, at 60 ("[S]tates may be motivated to compete for business in the law market.").

[32] *See infra* Part III.C.*1*.

[33] Scholars have long distinguished between "default" and "mandatory" legal rules. CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 10–15 (2d ed. 2009). Default rules may be modified by contract; mandatory rules may not. *Id.* at 11. Mandatory rules in the commercial law context may include laws intended to protect uninformed or weaker parties to a transaction (e.g., consumer protection statutes), laws intended to give effect to the moral sentiments of the community (e.g., laws against gambling), and laws intended to protect third parties (e.g., price-fixing laws). The majority

contract, it is impossible to foresee and provide for every contingency; in this sense, all contracts are necessarily incomplete.[34] The purpose of default rules, then, is to "mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction."[35] In so doing, these rules aim to resolve unaddressed contingencies in a manner that is consistent with the ex ante preferences of the majority of commercial actors.[36] Because different legal systems contain different default rules, the choice of governing law can affect the outcome of any subsequent dispute. A sales contract governed by Swiss law, as mentioned above, is likely to give rise to a very different set of rights and obligations than an identical contract governed by New York law.[37] The challenge in international

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of laws in the field of commercial law, however, are default rules. *See, e.g.*, Margaret L. Moses, *The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jury Trials Under Article 5?*, 72 IND. L.J. 681, 713 (1997) ("[T]he vast majority of provisions in the U.C.C. . . . are 'default rules.' ").

[34] *See, e.g.*, Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 468 (1980) ("[B]ecause of the costs involved in enumerating and bargaining over contractual obligations under the full range of relevant contingencies, it is normally impractical to make contracts which approach completeness.").

[35] Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983).

[36] GILLETTE & WALT, *supra* note 33, at 14 ("[F]or transactions between sophisticated commercial parties, the primary objective of commercial law is to replicate the bargain that parties otherwise would have reached and thus to reduce the transaction costs that they must incur."). The notion that default rules should attempt to mirror party preferences is the prevailing view. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433 (1989) (stating that the default term should be "the term that the parties would have selected with full information and costless contracting"). *But see* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94–95 (1989) (suggesting that default rules be crafted around the concept of "penalty defaults" that create incentives for information disclosure).

[37] In Switzerland, for example, the law of sales distinguishes between "inferior goods" and "different goods." Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 465 (2009). If the seller delivers inferior goods that do not conform to the contractual terms, "the buyer must give prompt notice to the seller . . . to preserve any remedies for breach of contract with a one year limitation period . . . ." *Id.* However, if the seller delivers different goods from those specified in the contract, "the buyer can demand performance for ten years after the conclusion of the contract regardless whether it gave notice of nonperformance or not." *Id.* This distinction is unknown under New York law, which merely stipulates that the "[r]ejection of goods must [occur] within a reasonable time after their delivery or tender" and "is ineffective unless the buyer

commercial agreements, therefore, is one of knowing ex ante whether an agreement will be governed by New York law, on the one hand, or Swiss law, on the other.

One possible means of addressing this challenge is for many states to ratify a treaty containing a uniform set of default rules that would govern specified types of international commercial exchanges.[38] This approach is organized around the principle of harmonizing substantive rules. Another possible solution is for states to ratify a treaty that establishes a set of choice-of-law rules

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seasonably notifies the seller." N.Y. U.C.C. LAW § 2-602(1) (McKinney 2002). In addition, an action for breach of a sales contract in New York "must be commenced within four years after the cause of action has accrued." N.Y. U.C.C. LAW § 2-725(1) (McKinney 2002). The parties may by agreement "reduce the period of limitation to not less than one year but may not extend it." *Id.*

[38] Other means by which commercial parties may mitigate the risk of legal uncertainty in international commercial transactions include (1) the use of form contracts, or (2) incorporating by reference detailed terms and conditions promulgated by industry groups. *See, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724–25 (2001) (noting the incorporation of Liverpool Cotton Association rules in contracts for the international sale of cotton). The International Chamber of Commerce, for example, has promulgated Incoterms, default contract terms frequently incorporated by reference into international sales contracts, and the Uniform Customs and Practices, default terms frequently incorporated into international letters of credit. Ingeborg Schwenzer, *Avoidance of the Contract in Case of Non-Conforming Goods (Article 49(1)(A) CISG)*, 25 J.L. & COM. 437, 439–40 (2005). In addition, trade associations routinely produce standard form contracts and default terms for use by their members. Bernstein, *supra*, at 1724–25. There are, however, at least two limitations on the use of these private-ordering solutions. First, they are costly. Linarelli, *supra* note 3, at 1401–02. In the absence of a trade association that can pool the resources of its members, it is questionable whether individual firms are willing to incur the time and expense of drafting a comprehensive form agreement or a set of sales terms specifically geared to their needs. Second, such private-ordering solutions are by their terms limited. Incoterms, for example, address only some of the issues presented in an international sales transaction. In addition, private ordering solutions do not and cannot address issues of contract formation or defenses thereto. For these issues, parties must refer back to national law. *See* Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 402 ("Parties contract against the background of legal rules and depend upon courts to give effect to their ordering. Even when the parties are in a position to exercise self-help, they depend on the forbearance of courts to respect the consequences of private enforcement."). *See generally* Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005) (explaining the limits of private ordering in the field of intellectual property); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002) (discussing private ordering and proposing limits to safeguard distributional and other nonefficiency goals).

to be used by courts in different states to determine which state's national default rules should govern a particular contract. Such a treaty would, among other things, direct national courts to give effect to any ex ante agreement between the parties as to the governing law, subject to certain exceptions. This approach is organized around the principle of harmonizing choice-of-law rules. Each approach is discussed below.

A. SUBSTANTIVE TREATIES

More than a century ago, Lord Justice Kennedy gave a speech before the Liverpool Board of Legal Studies in which he urged his listeners to

> Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country. Or, to put the same thing in the concrete, that the Courts of the foreign country would deal with questions arising out of collisions at sea, questions of salvage, limitation of liability, freight, mortgages, liens, insurance, agency, sale of goods, stoppage in transition, and bills of exchange . . . as they would be dealt with in his own country's Courts.[39]

The basic problem identified by Lord Justice Kennedy is that of legal uncertainty. His proposed solution, distilled to its essence, was the substantive international unification of all commercial law. Once commercial law was everywhere unified and made uniform, then the problem of legal uncertainty would cease to exist. To date, however, the worldwide unification of all commercial law remains a distant dream. There are many

[39] Lord Justice Kennedy, The Unification of Law, Address Before the Liverpool Board of Legal Studies, *in* 10 J. SOC'Y COMP. LEGIS. 212, 214 (1909).

reasons, but several were captured by a commentator writing forty years after Lord Justice Kennedy's speech:

> National pride makes itself felt in the realm of law as well as in other spheres. The abandonment of national rules of law seems to imply that there is something amiss with the rules which are to be displaced, and national *amour proper* suffers accordingly . . . . Moreover, lawyers of all nationalities are apt to be hostile to unification, very largely because they may not have the leisure or the inclination to investigate the reasons by which it is prompted.[40]

This skepticism about the desirability of the complete unification of commercial law has been tempered, however, by a willingness by states to consider alternatives that are more limited in their scope. One of these alternatives is the drafting of substantive treaties that, by their terms, apply exclusively to international transactions.[41] These treaties set forth a uniform set of rules in particular areas of commercial law.[42] States that ratify the treaty commit to amend their national commercial codes to adopt this set of rules and to direct their courts to apply them when (and only when) the contract at issue has some connection to another state.[43] When limited in this way, these treaties no longer

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[40] H.C. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 158 (2d ed. 1949).

[41] *See* David, *supra* note 19, at 14–19 (discussing approaches to achieving unification in the context of international law); George A. Zaphiriou, *Harmonization of Private Rules Between Civil and Common Law Jurisdictions*, 38 AM. J. COMP. L. 71, 71, 74 (Supp. 1990) (discussing the widespread adoption of the 1980 Convention for the International Sale of Goods, which only applies to international transactions).

[42] Substantive law treaties can be either "opt-in" or "opt-out." If the treaty is opt-out, then it will apply to international contracts within its scope of application unless the parties specifically provide otherwise. If the treaty is opt-in, then it will apply only if the parties specifically choose to have their transaction governed by the treaty.

[43] In the United States, for example, the New York Convention does not apply to arbitral agreements and awards arising out of a relationship between U.S. citizens "unless that relationship involves property located abroad, envisages performance or enforcement

purport to displace national rules of commercial law, which continue to govern domestic transactions.

If widely adopted, such treaties offer the prospect for the creation of a truly international law that obviates the need for market actors to familiarize themselves with the national law of other states; the governing law in international transactions would be the (shared) uniform rules established under the relevant commercial law treaty.[44] Such a treaty functions, in effect, as a transactional interface that "reduces information and negotiation costs between parties who are ordinarily subject to the rules of different jurisdictions."[45] Once the rules that apply to international contracts are made everywhere the same, then greater legal certainty will exist as to the content of the law likely to be applied to govern these contracts.[46]

The best-known substantive treaty is the United Nations Convention on Contracts for the International Sale of Goods (CISG).[47] The CISG is a uniform sales law that governs contracts for the sale of goods where the buyer and the seller have their respective "places of business . . . in different states," provided that the states in question are parties to the treaty.[48] This convention, which has been ratified by more than seventy states and which has been analogized to an international version of Article 2 of the

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abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202 (2006).

[44] *See* Bénédicte Fauvarque-Cosson, *Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple*, 49 AM. J. COMP. L. 407, 415 (2001) ("The prevailing opinion is that, as far as international contracts are concerned, '[t]he unification of substantive law obviates the need for choice-of-law rules.'" (quoting Friedrich K. Juenger, *The Problem with Private International Law*, 37 CENTRO DI STUDI E RICERCHE DI DIRITTO COMPARATO E STRANIERO 25 (1999) (It.))).

[45] David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, *in* 1 FAIR TRADE AND HARMONIZATION 41, 53–54 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

[46] *Id.*

[47] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]; *see* Schwenzer & Hachem, *supra* note 37, at 457 (describing the CISG as a "story of a worldwide success").

[48] CISG, *supra* note 47, art. 1, 1489 U.N.T.S. at 60. The CISG may also apply "when the rules of private international law lead to the application of the law of a Contracting State." *Id.*; *see also* ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 11 (1989) (explaining the scope of the CISG).

Uniform Commercial Code, addresses a wide range of contract issues, including formation, the respective obligations of the buyer and seller, the passing of risk, and remedies for breach.[49] There are, in addition, a number of other substantive law treaties proposed by the United Nations Commission on International Trade Law (UNCITRAL) and by the International Institute for the Unification of Private Law (UNIDROIT), the two international organizations most deeply committed to the project of harmonizing substantive commercial law. These other treaties likewise seek to establish international rules to apply across a number of areas of commercial law.[50]

The vast majority of substantive treaties—like most commercial law rules formulated at the national level—are comprised of

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[49] The CISG has been described by various commentators as "a 'quantum leap,' a 'new legal lingua franca,' a 'milestone,' a 'triumph of comparative legal work' and 'arguably the greatest legislative achievement aimed at harmonizing private commercial law.'" Kevin Bell, Essay, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 238 (1996) (footnotes omitted). Another prominent example of a commercial law treaty is the Cape Town Convention, which has been ratified by more than thirty states. Cape Town Convention, *supra* note 28, 2307 U.N.T.S. 285; *see Status of the Convention on International Interests in Mobile Equipment*, UNIDROIT, http://www.unidroit.org/English/implement/i-2001-convention.pdf (last visited Oct. 2, 2010) (listing thirty-nine ratifying nations). It establishes an international registry where lenders may record security interests in mobile equipment such as aircraft and railway stock, thereby ensuring that security interests perfected under the law of one state are given due priority even if the equipment in question is moved to the territory of another state. *See* Cape Town Convention, *supra* note 28, 2307 U.N.T.S. at 348–49.

[50] These conventions include the United Nations Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001, http://www.uncitral.org/pdf/English/texts/payments/receivables/ctc-assignment-convention-e.pdf (last visited Oct. 2, 2010); the United Nations Convention on International Bills of Exchange and International Promissory Notes, Dec. 9, 1988, 28 I.L.M. 170; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 190; the United Nations Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, http://www.uncitral.org/pdf/English/texts/electcom/06-57452_Ebook.pdf (last visited Oct. 2, 2010); the International Convention on Travel Contracts, Apr. 23, 1970, 1275 U.N.T.S. 541; the Convention on Agency in the International Sale of Goods, Feb. 17, 1983, 22 I.L.M. 249; the Convention on International Financial Leasing, May 28, 1988, 27 I.L.M. 931; and the Convention on International Factoring, May 28, 1988, 27 I.L.M. 943.

default rules.[51] While some substantive treaties contain mandatory rules, these agreements tend to focus on the harmonization of rules relating to the international transportation of goods by sea and by air—areas in which mandatory rules are perceived as necessary to counter the possibility of cartels and one-sided contracts issued by common carriers.[52] While there is no question that treaties containing mandatory rules serve an important function in international commerce, this Article focuses primarily on those substantive treaties that establish default rules.[53]

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[51] *See* CISG, *supra* note 47, art. 6, 1489 U.N.T.S. at 62 ("The parties may exclude the application of [the CISG] or . . . derogate from or vary the effect of any of its provisions.").

[52] *See* Linarelli, *supra* note 3, at 1402–03 (distinguishing between default and mandatory rules in international commercial transactions). The Hague Rules, which have been ratified in one form or another by more than sixty states, are the prototypical commercial law treaty of this type. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233 [hereinafter Hague Rules]. They established a set of mandatory rules that apply to bills of lading for the carriage of goods by sea. The Hague Rules have been succeeded by the Hague-Visby Rules, the Hamburg Rules, and (most recently) the Rotterdam Rules, all of which articulate mandatory rules governing the carriage of goods by sea. Protocol to Award the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 127 [hereinafter Hague-Visby Rules]; United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608 [hereinafter Hamburg Rules]; United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, http://www.uncitral.org/pdf/English/texts/transport/Rotterdam_rules/09-85608_Ebook.pdf (last visited Oct. 2, 2010). The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, which has been ratified by only four states, rounds out the set in that it governs the liability of operators of transport terminals for damages that occur to international packages while in transit. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Apr. 19, 1991, 30 I.L.M. 1503; *see Status Page*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-13&chapter=10&lang=en (last visited Oct. 2, 2010) (listing four ratifying states). The Warsaw Convention seeks to accomplish many of the same ends in the context of the transportation of goods and passengers by air. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 2242 U.N.T.S. 350 [hereinafter Warsaw Convention].

[53] The overall number of successful worldwide substantive law treaties is relatively small as measured by the total number of state ratifications. *See* Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 J. INT'L ECON. L. 49, 51 (1999) ("[R]egulatory harmonization is infrequent at the global level."). The only two instruments that have been widely ratified are (1) the CISG (along with an associated convention relating to limitations periods), and (2) the Cape Town Convention (along with an associated protocol relating to the recordation of security interests in aircraft equipment). Regional instruments have enjoyed more success, particularly in Europe.

B. CHOICE-OF-LAW TREATIES

National courts long ago developed rules to determine which substantive national law should be applied to resolve contractual disputes with connections to more than one jurisdiction.[54] In the United States, where these rules are typically judge-made, the field of study is known as "conflict of laws." In civil law jurisdictions, where the rules are more frequently the product of legislation, the field is known as "private international law." Scholars have, however, long criticized the rules in both systems as vague and indeterminate.[55] A further complication—at least from the point of view of the international actor—is that the content of these rules varies significantly from state to state.[56] The application of French conflicts rules, for example, may lead to the application of the substantive law of one state, whereas the application of English conflicts rules may lead to the application of the substantive law of another.[57]

This state of affairs has long attracted the attention of legal reformers. As early as 1874, there were advocates for a regime whereby "states [would] be bound by a certain number of general

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There have also been efforts by states in South America and Africa to harmonize substantive commercial law within their respective regions. *See* Richard Frimpong Oppong, *Private International Law in Africa: The Past, Present, and Future*, 55 AM. J. COMP. L. 677, 713 (2007) (noting the efforts of the Organisation for the Harmonisation of Business Laws in Africa (OHADA) to "harmonize the business laws in the contracting states through the elaboration and adoption of simple, modern, and common rules adapted to their economies" (footnote omitted)).

[54] *See* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 1 (1965) (describing the efforts of thirteenth-century Italians to develop a legal solution to the problem of "how to choose between conflicting laws"); PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 3 (1999) (noting the long history of private international law).

[55] *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1165–84 (2000) (discussing problems with conflicts law and evaluating various proposals to make it more predictable).

[56] *See* NYGH, *supra* note 54, at 3 ("[N]ational choice of law rules dealing with the absence of choice tend to differ."); Erin A. O'Hara, *Introduction* to 1 ECONOMICS OF CONFLICT OF LAWS, at x (Erin A. O'Hara ed., 2007) ("States don't agree on a single approach to choice of law and many of the approaches currently in use take the form of vague and often multifactored standards.").

[57] *See* Juenger, *supra* note 12, at 1138 (observing that differences in private international law rules make determining which substantive law applies to a dispute unpredictable).

rules of private international law, in the form of one or more international treaties, ensuring the uniform solution of conflicts."[58] Choice-of-law treaties aim to harmonize at an international level the rules for determining the applicable national law in commercial disputes where the contract at issue exhibits international elements. The principal international organization tasked with preparing treaties in this area is the Hague Conference on Private International Law (Hague Conference).

Over the past half-century, only a small number of choice-of-law treaties relating to international contracts have been proposed and an even smaller number have been widely ratified. The most successful is a regional instrument, the Convention on the Law Applicable to Contractual Obligations, which entered into force as a treaty in 1991 and which was subsequently converted, with some modifications, into an instrument of the European Union in 2008 (Rome I).[59] In its current incarnation, Rome I directs courts generally to enforce any choice-of-law clause contained within the contract regardless of whether the law chosen has any connection to the transaction.[60] The ability of the parties to choose their governing law is not unlimited, however, as Rome I stipulates that certain types of commercial contracts—typically those involving natural persons as opposed to corporations—are subject to different choice-of-law rules. The law governing consumer contracts, for example, is generally determined by "the law of the country where the consumer has his habitual residence."[61] Similarly, although the parties are empowered to choose the law that will govern individual employment contracts, the chosen law may not "depriv[e] the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that [would have otherwise applied]."[62]

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[58] Mancini, CLUNET 285 (1873) (cited in David, *supra* note 23, at 142 n.304).

[59] *See* Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome I].

[60] *Id.* art. 3, at 10 ("A contract shall be governed by the law chosen by the parties. . . . By their choice the parties can select the law applicable to the whole or to part only of the contract.").

[61] *Id.* art. 6(1), at 12.

[62] *Id.* art. 8(1), at 13.

Two other choice-of-law treaties—the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Hague Convention) and the Inter-American Convention on the Law Applicable to International Contracts (Inter-American Convention)—contain similar provisions generally directing national courts to enforce choice-of-law clauses.[63] Indeed, language requiring that courts generally enforce such clauses has become a standard component of modern contractual choice-of-law treaties. This development is noteworthy because many national choice-of-law rules, at least historically, were much less solicitous of the right of individuals to choose the governing law.[64] In the United States, for example, these clauses were long viewed with great skepticism both by the courts and the academy, on the theory that it was not the place of contracting parties to tell the court what law should apply.[65] Although U.S. courts are today much more likely to enforce choice-of-law clauses than they were in the first half of the twentieth century, such clauses will still sometimes be enforced only if the parties or the transaction have a "substantial" or "reasonable" relationship to the chosen

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[63] *See* Convention on the Law Applicable to Contracts for the International Sale of Goods art. 7, Dec. 22, 1986, 24 I.L.M. 1573, 1575 [hereinafter Hague Convention] ("A contract of sale is governed by the law chosen by the parties."); Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, 33 I.L.M. 732, 734 [hereinafter Inter-American Convention] ("The contract shall be governed by the law chosen by the parties."); *see also* Hague Convention, *supra*, art. 2, at 1575 ("[T]he Convention does not apply to . . . sales of goods bought for personal, family or household use."). Outside of Europe, very few choice-of-law treaties have been successful; the Hague Convention and the Inter-American Convention have each been ratified by only two states. *See Status Table*, HAGUE CONF. ON PRIVATE INT'L L. (Dec. 11, 2007), http://www.hcch.net/index_en.php?act=conventions.status&cid=61; Status of Inter-American Convention on the Law Applicable to International Contracts, ORGANIZATION OF AM. STS., http://www.oas.org/juridico/English/sigs/b-56.html (last visited Sept. 28, 2010). In 2006, the Hague Conference undertook a feasibility study on the viability of another convention that would update the Hague Convention. *See* PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS 3 (2009) [hereinafter HAGUE CONFERENCE FEASIBILITY STUDY].

[64] *See* Juenger, *supra* note 12, at 1141–42 (listing scholars who opposed allowing parties to choose their governing law).

[65] The *First Restatement of Conflict of Laws*, adopted by the American Law Institute (ALI) in 1934, expressly refused to give effect to party stipulations regarding choice of law.

jurisdiction.[66] Courts in South American states, citing concern that the rights of their citizens will not be adequately protected by foreign laws, are even more reluctant to enforce choice-of-law clauses.[67]

Modern choice-of-law treaties seek to upend this status quo by making choice-of-law clauses enforceable in the vast majority of cases and by standardizing exceptions to this general rule. Supporters of the modern approach cite the importance of party autonomy and a desire to promote certainty and efficiency in international commerce.[68] On the international level, therefore, there is a consensus that in an era of globalization and interconnected markets, economic actors engaged in international commerce should be able to choose the governing law without regard to whether that jurisdiction has a tangible connection to the transaction.[69] To date, however, choice-of-law treaties

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[66] *See* O'HARA & RIBSTEIN, *supra* note 8, at 57–59 (discussing exceptions to State enforcement of choice-of-law provisions under the U.C.C.); Zhang, *supra* note 8, at 554 ("As a general pattern, it is hard to find any U.S. case that upholds a choice of law clause selecting a law with little or no connection to the dispute.").

[67] *See, e.g.*, Albornoz, *supra* note 7, at 58 (observing that "party autonomy in international contracts . . . is not so clearly received, or is subject to serious restrictions, or even rejected in some Latin American legal systems"); Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 195 (1997) ("The lodestar of contract conflicts, i.e., the principle of party autonomy, has long been controversial in Latin-American legal literature and practice."); *id.* at 199 ("In marked contrast to the Americas . . . Europe has long recognized progressive choice-of-law approaches that accord private parties the freedom to select the law they wish . . . ."); Frank C. Shaw, *Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America*, 30 LAW & POL'Y INT'L BUS. 147, 155–56 (1999) (noting reluctance among courts in some Latin American countries to enforce choice-of-forum and choice-of-law clauses); Stringer, *supra* note 7, at 970–71, 977 (positing that the "robust territoriality" of Brazil's conflict-of-law statute may have origins in colonial threats to Brazil's sovereignty).

[68] NYGH, *supra* note 54, at 2–3 (identifying these considerations as reasons "normally given why parties to an international contract should have the right to choose the applicable law").

[69] *See* Zhang, *supra* note 8, at 552–53 ("The international community has generally agreed that as long as the parties are free to make a contract, they should have the same freedom to select the law to govern the contract, subject to certain limitations imposed by the law."); *see also* Vita Food Prods., Inc. v. Unus Shipping Co., [1939] A.C. 277 (P.C.) at 277 (Eng.) (enforcing contractual provision applying English law to a transaction in which the only connection with England was the choice-of-law clause); NYGH, *supra* note 54, at 58–59 (citing the Rome Convention and the Mexico Convention as examples of treaties that favor party autonomy).

proposed at the global level—or, indeed, anywhere outside of Europe—have struggled to gain widespread acceptance. This is at least in part attributable to a general preference by scholars and policymakers in the Americas for substantive treaties. I discuss the stated rationales underlying this preference—and the weaknesses inherent in these rationales—in the next Part.

II. THE PROBLEMS WITH SUBSTANTIVE LAW TREATIES

The conventional wisdom among academics and policymakers in the Americas has long tended to favor prioritizing the ratification of substantive treaties to choice-of-law treaties as a solution to the problem of legal uncertainty.[70] The two rationales most frequently invoked in support of this preference are that substantive law treaties (1) reduce transaction costs, and (2) contain default rules that are better suited to international commercial transactions than national commercial codes.[71] In this Part, I question the premises underlying each of these claims.

I argue first that while substantive law treaties have the capacity to reduce transaction costs in international commercial transactions, it is far from clear that these treaties represent the only (or even the optimal) means of accomplishing this goal. Specifically, I suggest that the same cost could be avoided through widespread familiarity with the national law of a given state. This law—if widely known—could serve as a common point of reference for parties engaged in international commercial transactions.

I also challenge the notion that substantive treaties provide better default rules than national commercial codes. Drawing on evidence derived from actual commercial practice, I show that the practice among many parties engaged in international commercial transactions is to choose national commercial law—not the rules in substantive treaties—to govern their contracts. Specifically, the evidence shows that commercial actors routinely exclude the best-known and most widely ratified substantive treaty—the CISG—from their international sales contracts. This finding suggests

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[70] *See supra* note 20 and accompanying text.

[71] *See supra* notes 21–24.

that these actors do not always view the rules in these treaties as better approximations of their baseline preferences. It also suggests that these actors may prefer, at least in the abstract, a treaty that directs national courts to enforce choice-of-law clauses selecting national law.[72]

A. TRANSACTION COSTS

One of the justifications often invoked in support of substantive treaties is that they reduce transaction costs.[73] Specifically, proponents argue that these treaties can serve as a common point of reference for lawyers and commercial actors from different legal traditions.[74] Because these treaties set forth a substantive body of law that is, in principle, familiar to individuals from a variety of different nationalities, choosing it as the governing law in international transactions obviates the need for either party to research the national commercial law of the other, thereby bringing about a reduction in transaction costs.[75]

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[72] There are other complaints sometimes directed at substantive law treaties. One is that they are too vague. Rosett has argued, for example, that the drafters of the CISG were so determined to accommodate the idiosyncrasies of a diverse set of legal systems that the text of that treaty offers little certainty to commercial actors. *See* Rosett, *supra* note 19, at 267–68; *see also* J.S. Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L.Q. REV. 530, 534 (1990) ("Conventions which represent an amalgam of inconsistent rules drawn from different systems differently structured with different underlying assumptions do not make a satisfactory basis for a commercial code.").

This same accusation, however, could be leveled at a number of choice-of-law treaties. These treaties typically permit national courts to refuse to enforce choice-of-law clauses if these clauses are deemed to violate "public policy." Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIVATE INT'L L. 201, 201–02 (2008) ("[P]ublic policy exceptions in private international law have . . . been frequently criticised for their uncertainty.").

[73] *See* Peter Schlechtriem, *25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 167, 171 (Harry M. Flechtner et al. eds., 2008) (arguing that the CISG reduces drafting costs); *supra* note 22.

[74] *See, e.g.*, John Honnold, *Introduction to the Symposium*, 21 CORNELL INT'L L.J. 419, 420 (1988) (calling the CISG a "legal *lingua franca*").

[75] *See* Karen Halverson Cross, *Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered*, 68 OHIO ST. L.J. 133, 159 (2007) ("[T]he CISG provides a common frame of reference around which to negotiate [a] contract, which should result in lower transaction

There is no doubt that a substantive treaty is capable of serving as a common language to persons from different legal backgrounds. There is no principled reason, however, why such a treaty must necessarily play this role. Indeed, the role could just as easily be played by the national law of a particular state. Consider the act of learning a second language. It is possible that everyone could learn Esperanto—a language specifically crafted to serve as a universal language—but it is equally viable that everyone simply learn an existing national language, whether that language is French, English, or Chinese.[76] Alternatively, consider the status of corporate law in the United States. Corporate lawyers across the United States tend to be familiar with the law of a single jurisdiction—the State of Delaware—which serves as a common frame of reference in corporate transactions.[77] When parties from different States are seeking to negotiate corporate mergers and acquisitions or to obtain venture financing, their lawyers can discuss these issues within the context of their shared knowledge of Delaware law. The prominence of Delaware law is especially notable in light of the existence of the Model Business Corporation Act (MBCA), a harmonizing instrument that has been adopted in one form or another in over thirty U.S. States.[78] It is possible, in other words, for the national law of a particular state to serve as a *lingua franca* that reduces transaction costs in transactions touching on multiple jurisdictions. There is no

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costs for the parties."); Cuniberti, *supra* note 4, at 1519 (explaining how harmonizing international commercial law reduces transaction costs).

[76] *See* Hobhouse, *supra* note 72, at 534–35 (comparing the CISG to Esperanto); Johan Steyn, *A Kind of Esperanto?*, *in* 2 THE FRONTIERS OF LIABILITY 11 (P.B.H. Birks ed., 1994) (same).

[77] *See* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1992 (2006) ("[C]orporate attorneys can . . . be expected to be generally familiar with Delaware law."); Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 (2001) ("In transactions or disputes involving firms incorporated elsewhere, lawyers regularly look to Delaware case law for guidance if there is no binding precedent or controlling statute in the relevant state of incorporation.").

[78] MODEL BUS. CORP. ACT, introduction at ix n.1 (2008). *See generally* Dooley & Goldman, *supra* note 77 (discussing differences between Delaware law and the MBCA).

particular need to develop a special set of uniform rules to achieve this end.

Indeed, commentators have observed that parties who routinely engage in international commercial transactions often become familiar with the national commercial laws of foreign states. As Aaron Fellmeth has noted:

> [C]ompanies that do a good deal of international business eventually become familiar with the nuances of the commercial laws of their major partners, and do not necessarily object to their sales agreements being governed by English, French, Canadian, or Japanese law.... For these companies, the CISG is unnecessary and merely adds a complicating set of rules.[79]

Thus, while it is clear that substantive law treaties *can* provide a common frame of reference that reduces transaction costs, it is far from clear that they are *necessary* to accomplish this goal. In fact, national law may provide a better solution to the problem of transaction costs because differing views as to its meaning may ultimately be resolved by a single court whose decisions are binding upon all lower courts. No similarly authoritative interpretive body is tasked with maintaining uniform interpretations of substantive law treaties at the international level. Indeed, one criticism sometimes leveled at these treaties is that national courts in different states are prone to rendering conflicting interpretations of the same provision.[80]

One could argue, of course, that substantive law treaties offer a number of other, offsetting advantages as compared to national

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[79] AARON XAVIER FELLMETH, THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS 347 (2009).

[80] *See, e.g.*, John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 672 (2009) (arguing that substantive law treaties only provide uniform law if "courts in each jurisdiction refrain from interpreting those rules in a manner that results in a hodgepodge of different national interpretations of the same international text"); Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 729 (1987) ("Different courts have construed identical provisions in different ways, and these conflicting interpretations have undermined the uniformity of the uniform laws.").

law. Some have argued, for example, that these treaties represent better, more efficient law specifically tailored to international transactions.[81] Others have suggested that these treaties are superior to national law because (1) they have been translated into multiple languages, and (2) libraries and online databases provide repositories of cases and articles discussing them.[82] These same advantages could accrue, however, to the national law of a state willing to incur the costs of making its national commercial law accessible to international commercial actors. One could also argue that substantive treaties offer "neutral" governing law that parties could choose as a compromise when each party is wary of litigating a dispute under the national law of the other. Here again, however, national law can provide a solution. Contracting parties can (and sometimes do) choose as their governing law the national law of a "neutral" jurisdiction that has no relationship to the transaction.[83] The law chosen may be the law of a well-established commercial jurisdiction (e.g., England or New York), that of a country with a reputation for neutrality (e.g., Switzerland), or that of a small state that has revised its national commercial law in an attempt to capture the legal business of parties engaged in international transactions.[84] There are, to be sure, reasons why parties may not wish for the law of major commercial centers such as England or New York to govern their contracts. They may be concerned that national commercial law is sometimes drafted in response to domestic pressures and does not

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[81] *See infra* Part II.B.

[82] *See* Sandeep Gopalan, *Transnational Commercial Law: The Way Forward*, 18 AM. U. INT'L L. REV. 803, 804–05 (2003) (arguing that one of the "principal motivations for harmonization endeavors" is that "[t]he harmonizing instrument is drafted in several languages and is more accessible").

[83] *See, e.g.*, Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, 7 EUR. J.L. REFORM 303, 306–07, 311 (2005) (discussing the issues that arise when parties choose neutral state law to govern their transaction); Schwenzer & Hachem, *supra* note 37, at 465–66 (expressing skepticism about the selection of national law as neutral law as compared to the selection of a substantive treaty, but noting the possibility).

[84] I explain in greater detail in Part III the possibility that a small state could step into the gap and seek to provide a commercial code that is attractive to international commercial actors.

always take international commerce into account.[85] They may be unfamiliar with the common law tradition.[86] They may simply disagree with the foreign policy of the United States or the United Kingdom. It is difficult to quarrel, however, with the proposition that the law of each of these states, or that of another state altogether, could serve as a common frame of reference to parties from very different legal traditions if it were used in a sufficient number of transactions.

In summary, while there is little doubt that substantive law treaties can reduce transaction costs, it is likewise clear that national law can serve this function. The claim that substantive law treaties should be preferred to choice-of-law treaties because the former (and not the latter) reduce transaction costs is therefore open to question.

B. BETTER LAW

Another argument in support of preferring substantive law treaties to choice-of-law treaties is that the former produce law better suited to governing international transactions. In economic terms, the substantive law set forth in these treaties is said to be more "efficient" than domestic commercial law because it better captures the preferences of most parties engaged in international commerce.[87] As outlined below, this argument suffers from the fact that many commercial actors routinely exclude the CISG from their international sales agreements.[88] More to the point, these same actors routinely insert choice-of-law clauses in those same

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[85] *See* Andrew T. Guzman, Essay, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1149–50 (2001) (noting that states pursue interests other than efficiency in their law, including the protection of domestic constituency interests).

[86] *See* Fountoulakis, *supra* note 83, at 306 (asserting that civil law lawyers' unfamiliarity with the common law approach makes the common law seem "less predictable and, therefore, a dangerous playing field").

[87] *See* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 225 (1997) ("[I]n theory the efficient gap-filling or 'default' rule is what most parties would want."); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611 (1998) (stating that efficient default rules are those that "best approximate the parties' desires by maximizing their joint wealth or utility").

[88] *See infra* note 113 and accompanying text.

agreements specifying that the contract shall be governed by national law.

1. Criteria for Determining "Better Law." It is difficult to determine, in the abstract, whether one set of commercial laws is more efficient than another because one cannot know, in the abstract, what the parties' actual preferences are. There are, however, at least two possible metrics by which this question could be answered. First, one could look to whether commercial actors with an interest in uniform commercial laws proposed by international organizations have actively lobbied states to ratify these treaties. If so, this could suggest that these organizations see this law as an improvement over existing national law and, hence, more in line with their preferences. While this metric is potentially promising, it is ultimately unsatisfying because it is so difficult to isolate the variable that we care about—the views of the commercial actors—amid the many competing inputs that legislators consider in deciding whether to enact legislation or ratify a given treaty.

Alternatively, one could seek to determine the preferences of those same commercial parties by looking to the laws that they choose to govern their contracts.[89] The most straightforward way to approach this question is to conduct a survey of (1) databases of publicly available contracts and (2) cases summarizing the provisions of contracts actually litigated. These surveys offer a sense of (a) how frequently the parties to a commercial contract choose either to exclude or include the CISG—the quintessential substantive treaty—from or in their commercial agreements, and (b) how frequently parties select national law in those same

[89] Still another possible means of determining the views of commercial actors as to the relative desirability of substantive law treaties or choice-of-law treaties would be to look to the total number of these treaties that have been ratified (or the total number of states that have ratified a particular type of treaty) and use this as a proxy for the level of support that each treaty type enjoys among states and commercial actors. Such a comparison would, however, be misleading in that the number of substantive commercial law fields that could be unified via treaty is vast, whereas the number of ways of harmonizing choice-of-law rules is relatively small. There will always be more treaties of the former type than of the latter. In addition, because there are many reasons why a state may choose to ratify a particular treaty, *see supra* note 19, one cannot assume that commercial actors prefer one particular treaty type merely because several treaties of that type have been widely ratified.

contracts. This analysis can then be supplemented by (3) surveys of commercial actors and their attorneys to ascertain their views of substantive treaties. If the surveys of contracts and cases suggest that commercial actors routinely exclude a given commercial law treaty, and if the attorney surveys reveal a lack of enthusiasm for substantive treaties, then this suggests that commercial actors and their attorneys likely do not view substantive law treaties as an improvement on national commercial law.[90]

This approach, to be sure, presents its own set of challenges.[91] In an article published in 2005, Filip De Ly remarked on a number

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[90] Steven Walt suggests that the decision to exclude the application of even efficient substantive law treaties could be attributed to the problem of novelty. Walt, *supra* note 23, at 673. Specifically, he argues that new default rules "increase uncertainty about case outcomes" and that this can "retard the adoption of even optimal sales law." *Id.* It is possible, therefore, that parties have generally excluded treaties such as the CISG from their contracts not because they are inefficient but, rather, because these treaties lack the background of case law and interpretive materials that characterize national law. While this argument is plausible, there are at least two problems with it. First, a number of scholars have argued separately that the CISG rules are themselves inefficient. *See, e.g.*, Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L. REV. L. & ECON. 446, 485 (2005) (predicting that the "CISG ultimately will lose out" to domestic law systems that provide more desirable substantive rules to contracting parties). Second, while the number of CISG cases decided by U.S. courts has increased over the past twenty years—which supports the novelty argument—this increase has been driven almost entirely by the application of the CISG as a default rule. *See* Mathias Reimann, *The CISG in the United States: Why it Has Been Neglected and Why Europeans Should Care*, 71 RABELS ZEITSCHRIFT FÜR AUS LÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABEL J. COMP. INT'L PRIVATE L.] 115, 119, 123 n.30 (2007) (Ger.) (characterizing the CISG "as the default source of regulation"). In virtually none of these cases did the parties affirmatively choose the CISG to apply to their contract. *See id.* at 122–23 (noting that in one case where the court applied the CISG "the parties had most likely never considered the CISG before they found themselves in court"). Familiarity, in other words, does not seem to have led to more parties specifically choosing to have the CISG govern their transaction.

[91] There are four specific challenges worth noting. First, the vast majority of commercial contracts are not publicly available. When they are, there arises the problem of selection bias, i.e., whether the contracts available for scholars to review are in fact representative. Second, the relevant case law does not always divulge whether a given substantive treaty is being applied as a default (because the parties declined to choose a governing law) or because the parties expressly selected that treaty as the governing law. In addition, these cases also present problems of selection bias, i.e., whether the contracts at issue in reported cases are typical. Third, there is a small-numbers problem. The number of substantive law treaties that have been widely ratified is relatively small. The CISG and the Cape Town Convention are the only two substantive treaties aimed at a worldwide audience that have been ratified by a sufficient number of states to generate meaningful data. *See, e.g.*, Amelia

of these challenges as he sought to ascertain how frequently market actors affirmatively choose to exclude a particular substantive treaty—the CISG—from their contracts.[92] He noted that his inquiry was motivated, at least in part, by frustration that a number of writers had simply stated, without evidence, that such actors tend specifically to exclude the CISG from their contracts.[93] He bemoaned the fact that, as of the date of his writing, there were "no empirical studies as to the opting out of the CISG in practice."[94]

Fortunately, scholars in recent years have conducted several empirical inquiries in this area, which makes it possible to draw some tentative conclusions about the preferences of commercial parties (at least with respect to the CISG). Although these studies tend to confirm the basic thesis of this Part—that there is little evidence that commercial actors seem to prefer the substantive rules contained in commercial law treaties to national legal codes—one must remain cognizant of their limitations. More study is necessary before one can draw any definitive conclusions.

2. Contract Surveys. I recently conducted a survey of one source of publicly available contracts in the United States—the

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H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 386 (2007) (noting that the CISG and Cape Town Conventions are the only major commercial law treaties ratified by the United States). And the Cape Town Convention is so narrow in its focus—it details the rights and remedies available to lenders that take a security interest in aircraft, railway stock, and space assets—that its scope of application is limited. *See* Cape Town Convention, *supra* note 28, 2307 U.N.T.S. 285. Given this small sample size, it is difficult to disentangle concerns relating to a particular treaty from concerns about substantive treaties generally. Fourth, obtaining access to foreign contracts and cases and, even assuming access is obtained, translating these documents, can be problematic. All of these problems complicate the task of drawing definitive conclusions about the relative preferences of commercial actors contracting internationally. Accordingly, the conclusions reached in this Section should be viewed as tentative pending a more comprehensive survey.

[92] *See* Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, *in* QUO VADIS CISG? 25, 25–42 (Franco Ferrari ed., 2005).

[93] *See id.* at 27 n.7. For examples of scholars who have generally asserted that parties tend to exclude the CISG, see Fountoulakis, *supra* note 83, at 317 ("[I]t is reported in the [German academic] literature that the CISG is often excluded by the parties in day-to-day practice." (citing several German sources)); Walt, *supra* note 22, at 687–88 ("Only the hapless tend to have their contracts governed by the CISG.").

[94] De Ly, *supra* note 92, at 28.

EDGAR database maintained by the U.S. Securities and Exchange Commission (SEC). Publicly traded companies are periodically required to file with the SEC certain contracts deemed "material" under the relevant SEC regulations. These contracts are then made available online via EDGAR.

The EDGAR database makes it possible to search the text of these contracts for specific words and phrases. In August 2009, a search of this database for the phrase "International Sale of Goods" received approximately 1600 hits, almost all of which were references to the CISG. A research assistant and I reviewed the 126 most recent contracts containing this phrase. We found that 124 of the contracts reviewed (98% of the total) used the phrase specifically to *exclude* the CISG as a source of governing law. Two contracts reviewed (2%) used the phrase specifically to *choose* the CISG as the governing law. In the two cases where the CISG was specifically chosen as the governing law, the parties also specified a national law as the governing law for matters not covered by the CISG.[95]

This limited survey supports the conclusion that commercial actors are not particularly enamored with the CISG.[96] The

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[95] *See* Supply Agreement by and between NVE Corporation and Phonak AG 11, Feb. 19, 2009, http://www.sec.gov/Archives/edgar/data/724910/000072491009000004/phonak 09.html (last visited Oct. 1, 2010) ("This Agreement is construed in accordance with and governed by Delaware law, the UN-Convention on Contracts for the International Sale of Goods, as well as general terms of sale of Supplier. General order terms of Phonak shall not be applicable to this Agreement."); Contract Form between Jiangsu Zhongneng Photovoltaic Industry Development Co., Ltd. and MSA Apparatus Construction for Chemical Equipment Ltd., July 27, 2007 (on file with author) ("The construction, validity, interpretation, performance, implementation and all matters relating to this Contract and any amendment thereto shall be governed by the United Nation Convention for the International Sale of Goods. However, to the extent the United Nation Convention for the International Sale of Goods does not cover, the law of Hong Kong shall apply.").

[96] In this same sample, all of the contracts (100%) contained choice-of-law clauses. The law chosen in 25 of the contracts (20%) was the law of a foreign country. The law chosen in the remaining 101 contracts (80%) was the law of a State in the United States, with New York leading the way (35% of the U.S. total). In addition, 64 of the contracts (51%) contained arbitration clauses and 47 of the contracts (37%) contained choice-of-forum clauses. Only 15 of the contracts (12%) contained neither an arbitration clause nor a choice-of-forum clause. All of this suggests that the parties to the contracts included in the survey were concerned with exercising some degree of control over where disputes arising out of the contract would be litigated in addition to exercising control over the choice of law.

contracts surveyed overwhelmingly chose to exclude the CISG as the governing law while selecting the law of a particular national jurisdiction as the governing law. Several caveats are in order, however. First, the survey was by necessity limited to contracts entered into by public companies required to file material contracts with the SEC. It may well be that different patterns would emerge if one were able to complete a comprehensive review of contracts between private companies. Second, although many of the contracts in question were international contracts, others were between domestic parties. Thus, although one may wonder why exclusively domestic counterparties would expressly exclude the CISG from the contract, the sample was not limited to international commercial contracts. Third, the survey was again by necessity limited to contracts deemed material under the relevant SEC regulations, which means the contracts in question were important to the company that filed them. Each of these contracts was, therefore, almost certainly reviewed by an attorney before being filed, which may well be atypical. On the other hand, to the extent these contracts are the products of sophisticated commercial actors, the widespread exclusion of the CISG suggests that these actors see it as risk-enhancing rather than risk-reducing.[97]

Finally, the survey included only those contracts that expressly referenced the CISG. Because that treaty may apply as a default rule if the parties do not exclude it, it may be that the survey captured only those instances where parties opted out and failed to capture instances where the parties implicitly consented to have the CISG govern their contract by choosing the national law of a state that is a party to the CISG. This possibility seems unlikely because there is no small amount of uncertainty as to when the CISG will apply as a default rule. By its terms, it applies to

[97] Filip De Ly has identified four potential reasons why a party may choose to opt out of the CISG: (1) the CISG conflicts with more detailed self-regulation (as in the case of commodity associations, which already have detailed standard contracts); (2) the party may prefer to have its contract governed by domestic sales rules that it knows; (3) ignorance as to the content of the CISG; and (4) lack of clarity as to whether software qualifies as "goods" within the meaning of the CISG. De Ly, *supra* note 92, at 28–34.

"contracts of sale of goods between parties whose places of business are in different [s]tates."[98] There is a robust body of criticism concerning this standard, and even defenders of the CISG concede that the scope of its application is not always clear.[99] If the parties wanted to ensure that the CISG would apply to govern their contract, they would expressly reference it (as did the two surveyed contracts that specifically chose the CISG). The failure to mention the CISG in their choice-of-law clauses suggests that many market actors lack a strong preference for it. Nevertheless, because this possibility cannot be completely discounted, it constitutes a potential limitation on the EDGAR survey data.

These survey findings are generally consistent with those of another study conducted by Christopher Drahozal, who sought to determine empirically how frequently parties involved in international arbitration chose "a-national" law as their governing law.[100] In his article, Drahozal presented evidence tending to contradict the idea that a "significant number of parties contract for application of transnational law in lieu of national law in their international commercial contracts."[101] In concluding that commercial actors prefer to have their contracts governed by national commercial law, he reviewed information from cases decided before the International Court of Arbitration of the International Chamber of Commerce (ICC). Specifically, Drahozal looked to data supplied by the ICC that identified the sources of law chosen by parties involved in ICC arbitrations.[102] Table I

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[98] CISG, *supra* note 47, art. 1, 1489 U.N.T.S. at 60. The CISG further requires that (a) "the States are Contracting States" or (b) "the rules of private international law lead to the application of the law of a Contracting State." *Id.*

[99] *See* Rosett, *supra* note 19, at 265 n.2 ("The application of the [CISG] is limited in important but uncertain ways . . . .").

[100] *See* Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 538–39 (2005) (noting that "a-national" law includes such terms as "general principles of international trade" and "international commercial law," as well as the CISG).

[101] *Id.* at 525.

[102] *Id.* at 538–40.

details the applicable law in ICC arbitration clauses from 2000 to 2007.[103]

TABLE I: APPLICABLE LAW IN ICC ARBITRATION CLAUSES								
	2000	2001	2002	2003	2004	2005	2006	2007
National Law	75%	77%	79.4%	80.4%	79.1%	79.3%	82.7%	79.3%
Other Rules	2%	1%	2.3%	1.2%	1.3%	1.7%	2%	0.5%
Applicable Law Not Specified	23%	22%	18.3%	18.3%	19.6%	19%	15.3%	20.2%

As Table I makes clear, the parties overwhelmingly chose to have their (international) contracts governed by national—as opposed to international—commercial law.

In cases specifically involving the international sale of goods, Drazhozal's study also presented findings consistent with those in my own survey. He found that, in 2000, only two contracts at issue in ICC arbitrations specified that the CISG would provide the governing law, out of more than 541 cases filed.[104] In 2001, this number remained the same, even as the total number of cases filed rose to 566.[105] No contracts in ICC arbitrations specifically mentioned the CISG in 2002.[106] In 2003, three contracts (out of 580) did so.[107] This does not mean, of course, that ICC arbitrators applied the CISG in only seven cases between 2000 and 2003. Where the parties elected for a contract to be governed by national law, and where the national law in question was that of a state party to the CISG, then the arbitrators likely applied the CISG as part of the national governing law as a default rule. Similarly, where no governing law was selected, and where a conflict of laws analysis led the arbitrators to apply the national

[103] *Id.* at 539; Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN. ST. L. REV. 1031, 1039 (2009) (providing data for 2003 to 2007).

[104] Drahozal, *supra* note 100, at 538–39.

[105] *Id.* at 539.

[106] *Id.*

[107] *Id.*

law of a contracting state, the CISG may have been applied. Because the ICC does not publish most of its decisions, it is impossible to determine in precisely how many cases the CISG was applied. There is, however, reason to suspect that the number is not large. Drahozal also examined the relatively small number of ICC decisions published in the *Yearbook of Commercial Arbitration* between 1983 and 2002 and found that, of the 110 published awards, only 13.6% "were based to some extent (albeit often a small extent) on transnational law or some other a-national basis of decision."[108] In the rest of the decisions, comprising approximately 86.4% of the total, the arbitrators relied on national law.[109]

Data from ICC arbitrations thus provide little reason to believe that parties engaged in international commercial transactions are affirmatively choosing to have their contracts governed by the terms of substantive treaties.[110] Where these parties consider the question at all, they tend to choose national law as their governing law.

3. Case Surveys. A second potential means of determining the preferences of contracting parties is to examine reported cases involving the application of substantive treaties. In some of these cases, the judge will note in his or her decision that the treaty in question is being applied because the parties expressly chose it as their governing law. If the parties specifically chose the treaty in a substantial number of cases, this suggests a preference for the treaty rules as compared to national commercial law.

In the United States, state and federal courts have referenced the CISG in over 100 cases to date. After reviewing many of these cases, Mathias Reimann came to the conclusion that in virtually all of them the CISG applied "because the parties failed to opt out" rather than "because they wished the CISG to apply."[111] He also

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[108] *Id.* at 542.

[109] *Id.*

[110] This conclusion is also consistent with at least one study conducted with respect to contracts in Germany. *See* Reimann, *supra* note 90, at 123 n.27 ("[O]pt-outs [from the CISG] are also very frequent although they are by no means routine and still leave the CISG applicable in [approximately one-third] of all cases.").

[111] *Id.* at 123–24.

noted specific cases in which it was clear that the parties had no idea at the time of contracting that the CISG would provide the governing law.[112] In one case, for example, each party attempted to choose a different national law as the governing law without realizing that the national law of either state would result in the application of the CISG.[113] In other words, there is little reason to think that the parties in that case—or a number of the other cases reviewed by Reimann—recognized in advance that the CISG would apply to govern their agreement.

In a different survey of cases, Gilles Cuniberti reached broadly similar conclusions.[114] In his study, Cuniberti analyzed 149 reported CISG cases from France, Germany, and the United States.[115] He found that in 63% of the U.S. cases, 75% of the German cases, and 95% of the French cases in which the court applied (or declined to apply) the CISG, the parties had failed to include any choice-of-law clause in their agreement.[116] In these cases, the CISG was applied as a default rule because the parties had their places of business in different states.[117] The likely explanation for the lack of choice-of-law clauses in the cases surveyed by Cuniberti—as he himself acknowledges—is the problem of selection bias.[118] Where the contract expressly excludes the CISG as a source of law, its applicability is rarely raised as an issue in litigation.[119] This means that the reported cases likely capture a disproportionate number of disputes where the parties did not expressly select the governing law and the applicability of

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[112] *Id.* at 123.

[113] *Id.* (discussing Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001), and noting that "[s]ince *both* parties had attempted to choose a specific domestic regime, it stands to reason that neither really wanted the CISG to regulate the transaction" and that "the parties had most likely never considered the CISG before they found themselves in court").

[114] *See* Cuniberti, *supra* note 4, at 1529–43.

[115] Cuniberti reviewed forty-one contracts litigated in French courts, seventy contracts litigated in German courts, and thirty-eight contracts litigated in U.S. courts. *Id.* at 1529–33.

[116] *Id.* at 1530–33.

[117] *Id.*

[118] *Id.* at 1536.

[119] *Id.*

the CISG was a disputed issue.[120] In addition, sophisticated actors frequently choose to submit their international disputes to arbitration.[121] It may be that national courts end up hearing a disproportionate number of cases in which the parties neglected to include either a choice-of-law clause or an arbitration clause in their agreement.

Perhaps the most significant finding from both of the above studies is that in virtually none of the reported cases did the parties expressly choose to have their agreement governed by the CISG; it was typically applied where the parties in question failed to select a law to govern their agreement. This finding is broadly consistent with the notion that "[o]nly the hapless tend to have their contracts governed by the CISG."[122] There is, in short, nothing in either of these case surveys that suggests that parties tend to view the CISG as better law than national sales law.

4. Surveys of Practicing Attorneys and Companies. Still another means of evaluating the attitudes of commercial actors vis-à-vis the CISG is to survey lawyers who routinely advise clients engaged in international business transactions. One such survey, conducted by Martin Koehler and Guo Yujun, questioned practicing attorneys in China, Germany, and the United States in an attempt to capture their views of the CISG.[123] Their most significant finding is that a mere 8.3% of the respondents stated that they viewed the CISG as "legally superior" to national commercial law.[124] The vast majority of respondents either stated a preference for national law or reported their indifference as between the two regimes.[125]

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[120] *Id.*

[121] *See* David J. McLean, *Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L L. 1087, 1092 (2009) ("[A] 2006 study of 150 global in-house counsel indicated that 73% of corporations prefer international arbitration to trans-national litigation.").

[122] Walt, *supra* note 22, at 688.

[123] Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems: An International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China*, 20 PACE INT'L L. REV. 45 (2008).

[124] *Id.* at 53.

[125] *Id.*

In the United States, for example, 35.4% of respondents stated that they considered national law to be superior to the CISG, whereas 39.6% of respondents viewed neither national law nor the CISG as legally superior.[126] In China, the respective percentages were 37% and 44.4%.[127] In Germany, the respective percentages were 21.2% and 72.7%.[128] This means that 75% of U.S. respondents, 81.4% of Chinese respondents, and 93.9% of German respondents expressly declined to support the notion that the CISG contains law that is better suited than national law to govern international sales transactions.[129] Koehler and Yujun correctly note that these findings run contrary to conventional wisdom, observing that "[t]he decision reached by the majority of the respondents that the CISG is not more advantageous, at least legally, than the non-uniform law contradicts the opinion prevailing in the literature."[130]

Koehler and Yujun also report that although the survey respondents did not tend to see the CISG as legally advantageous, they were more likely to cite practical (as opposed to legal) reasons for choosing to exclude it.[131] These practical reasons included such concerns as the CISG not being widely known,[132] their clients (or their clients' business partners) preferring the application of national law,[133] insufficient experience with the CISG,[134] or

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* The authors note that revisions to the German Civil Code that took effect in 2002 and to the Chinese Contract Law that took effect in 1999 had the effect of making these national laws more like the CISG. *Id.* at 53–54.

[130] *Id.* at 54.

[131] *Id.* at 56.

[132] *Id.* at 49. For surveys indicating that many attorneys in the United States are still unfamiliar with the CISG, see generally Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361, 361 (Supp. 1998) (discussing the general lack of awareness of the CISG among lawyers in Florida); George V. Philippopoulos, *Awareness of the CISG Among American Attorneys*, 40 UCC L.J. 357 (2008) ("Notwithstanding almost two decades of CISG as the law governing the area of international contracts for the sale of goods, it continues to suffer from neglect [from U.S. attorneys].").

[133] Koehler & Yujun, *supra* note 123, at 49.

insufficient case law related to the CISG.[135] In addition, approximately a third of the attorneys surveyed stated that another "practical" reason to exclude the CISG was that "no advantage was seen in the application of the uniform law."[136] This suggests that a meaningful number of the respondents viewed the CISG as presenting practical problems in addition to the legal problems identified above. This may explain why 70.8% of respondents from the United States and 72.7% of respondents from Germany reported that they "exclude the CISG principally or preponderantly."[137] While only 44.4% of attorneys in China reported the same, the authors caution against reading too much into this low number because of the possibility that "some [of the Chinese respondents] did not realize that they could opt out of the CISG."[138]

These results are broadly consistent with those of another recent survey by Peter Fitzgerald that polled attorneys in Florida, California, New York, Montana, and Hawaii as to their views of the CISG.[139] This survey found that only 24% of respondents reported that they regularly choose to opt in to the CISG (whether in whole or in part).[140] Among the majority that regularly choose to opt out, the most frequently cited rationale for doing so was "[a] general preference for the UCC."[141] Even where the survey respondents cited concern over specific provisions of the CISG as a reason to opt out, "when asked to detail those specific concerns a strong generalized preference for the UCC (or other national law) was still evident, rather than particularized concerns over the

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[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 48.

[138] *Id.*

[139] Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1 (2008).

[140] *Id.* at 14.

[141] *Id.* at 15.

CISG."[142] This survey data, again, calls into question the assertion that national actors generally perceive the rules contained in the CISG—and perhaps substantive law treaties more generally—as superior to national commercial law.

5. Conclusion. To be clear, I am not arguing that the various studies cited above, whether taken individually or collectively, amount to irrefutable proof that commercial actors prefer national commercial law generally to the law contained in international commercial law treaties generally. Virtually all of the evidence presented above relates to a single treaty—the CISG—that deals exclusively with one aspect of international commerce—the sale of goods. More research is needed to confirm that these specific conclusions are generalizable. It seems significant, however, that numerous commentators have praised the CISG as the most successful substantive treaty in history. They have described it as a " 'quantum leap,' a 'new legal lingua franca,' a 'milestone,' a 'triumph of comparative legal work' and 'arguably the greatest legislative achievement aimed at harmonizing private commercial law.' "[143] More so than any other commercial law treaty, the CISG has benefited from a significant amount of academic commentary and efforts to encourage practicing lawyers and businesspersons to familiarize themselves with its terms. In other words, the CISG represents the best example of a type. When that example is excluded by its presumptive beneficiaries in a substantial number of cases, it inevitably raises questions about the type.

Overall, the data presented above provide support for the proposition that market actors do not always see the rules contained in the best-known, most widely ratified substantive treaty as representing better law than national commercial law. This evidence, notwithstanding the limitations noted above, tends to undermine the contention that substantive treaties represent a better solution to the problem of legal uncertainty in international commercial transactions than choice-of-law treaties.

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[142] *Id.* Other reasons cited as reasons to opt out include client preferences and a lack of familiarity with the CISG. *Id.*

[143] Bell, *supra* note 49, at 238 (footnotes omitted).

III. THE CASE FOR CHOICE-OF-LAW TREATIES

The case for preferring choice-of-law treaties to substantive treaties is straightforward. By requiring national courts to enforce choice-of-law clauses in most international commercial contracts, such treaties give the contracting parties the power to select the law of their choice, thereby enabling them to mitigate the risks of legal uncertainty. In this Part, I outline two broad benefits to this approach. First, individual benefits can accrue to contracting parties when they are permitted to choose their governing law. Second, systemic benefits can accrue to commercial actors everywhere from the development of a robust international market for commercial law.

On an individual level, the widespread ratification of a choice-of-law treaty validates the principle of party autonomy. It does so by (1) establishing a clear and consistent rule directing courts to enforce choice-of-law clauses in the vast majority of cases, and (2) standardizing the exceptions to this rule. While most substantive treaties also recognize the importance of party autonomy—by empowering contracting parties to opt in or opt out of their provisions—the scope of autonomy permitted under these treaties is comparatively limited. Substantive treaties offer only a single additional set of rules for the parties to choose between. Choice-of-law treaties, by contrast, enable the parties potentially to select their governing law from among hundreds of different national and subnational commercial codes.

On a systemic level, the widespread ratification of a choice-of-law treaty has the potential to facilitate the development of an international market for commercial law. In such a market, which is made possible only by the widespread and consistent enforcement of choice-of-law clauses, various jurisdictions would compete to produce substantive law that parties engaged in international transactions could then choose to govern their agreements. This market has the potential to foster the creation of up-to-date national commercial law that reflects the realities of modern commerce. Substantive treaties, by comparison, do little to foster any sort of market for law. These substantive rules are,

moreover, likely to ossify over time and fall out of touch with current commercial practices.

To be sure, there are reasons why one might remain skeptical of choice-of-law treaties. One critique is that the widespread enforcement of choice-of-law clauses would enable sophisticated actors to evade efficient mandatory regulations put in place by a particular state. The market described above, on this view, may lead not to a race to the top, in which states seek to update and improve their commercial law, but would instead foster a race to the bottom, in which states rewrite their commercial law in an attempt to do away with basic contractual protections. I contend that a race to the bottom is unlikely for structural, national, and political reasons and that many of these concerns may be substantially addressed in the text of the choice-of-law treaty itself.

Another critique is that choice-of-law treaties (and, indeed, substantive treaties) are largely unnecessary because of the widespread availability of arbitration, which enables the parties to exercise a considerable degree of control over both the forum in which disputes will be heard and the law that will be applied to govern these disputes. While arbitration certainly offers some advantages over litigation in national courts, I suggest that these advantages can be overstated and that there are systemic reasons why one might prefer more cases be litigated in public fora rather than before private arbitral tribunals.

A. PARTY AUTONOMY

Choice-of-law treaties embrace party autonomy as a core value. In requiring courts generally to defer to the parties' choice of governing law, these treaties place the interests of the individual—rather than those of the state—at the center of the choice-of-law inquiry.[144] This basic conceptual approach—which

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[144] *See* O'Hara, *supra* note 56, at xiv (summarizing literature); *see also* O'HARA & RIBSTEIN, *supra* note 8, at 60–62 (explaining that requiring a "substantial relationship" to a state to enforce a choice-of-law clause fails to account for the individual's interest). The debate over the relative weight to be accorded to the respective interests of the state and

represents a historical break with the practice of many countries—has attracted support from a number of scholars. Erin O'Hara and Larry Ribstein, for example, argue that choice-of-law doctrine should emphasize "efficiency through enforcing individuals' ex ante choice of law over ex post court determination of the appropriate allocation of political power."[145] Such an approach, they argue, is both wealth-maximizing and efficiency-enhancing because it empowers parties to organize their transactions as they see fit, thereby contributing to certainty and predictability in contractual relations.[146] Similarly, Mo Zhang argues that choice-of-law rules should not be "concerned with the protection or application of governmental interest but rather . . . with the reconciliation of private interests and expectation."[147] This approach should be followed, he argues, because it validates the principle of freedom of contract and contributes to predictability in international commerce.[148]

In addition to the advantages that follow from predictability, the widespread ratification of a choice-of-law treaty could generate other less obvious benefits for parties engaged in international commerce. If a company deals with customers and suppliers in multiple jurisdictions, for example, the regular enforcement of choice-of-law clauses would enable the company to develop policies in line with the law of a single state.[149] Regular enforcement of such clauses would also "enable[ ] parties to choose the law of a state that has a well developed and specialized body of precedent

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the individual in international choice-of-law decisions has a long history. *See* NYGH, *supra* note 54, at 8–10.

[145] O'Hara & Ribstein, *supra* note 55, at 1232; *see also* Joel P. Trachtman, *The International Law Market*, 104 AM. J. INT'L L. 140, 145 (2010) (book review) (generally supporting the idea of free choice of law with respect to commercial contracts).

[146] O'Hara & Ribstein, *supra* note 55, at 1152. O'Hara has also suggested that focusing on private interests in resolving conflict of laws issues can discourage interest group rent-seeking and minimize the harms that flow from such activity. O'Hara, *supra* note 56, at xiv.

[147] Zhang, *supra* note 8, at 553.

[148] *Id.* at 552–53; *see id.* ("[A]s long as the parties are free to make a contract, they should have the same freedom to select the law to govern the contract, subject to certain limitations imposed by the law.").

[149] *See* O'Hara, *supra* note 56, at xix.

used to solve particular types of legal problems."[150] Still another advantage is that these clauses would "enable parties to avoid laws that are archaic and outdated but have not yet been repealed or overturned in the enacting state."[151] In short, by validating the principle of party autonomy, a choice-of-law treaty greatly simplifies the project of doing business internationally.

The standardization of the exceptions to the general rule that choice-of-law clauses should generally be enforced may be even more important than the widespread acceptance of the rule itself. The exceptions set forth in most choice-of-law treaties can be divided into three categories.[152] The first seeks to validate state interests by specifically carving out certain categories of contracts (e.g., consumer contracts) from the general rule that choice-of-law clauses should be enforced.[153] The second seeks to validate state interests by requiring courts to enforce "mandatory" rules imposed by the forum state (e.g., antitrust laws) regardless of any choice-of-law clause.[154] The third permits courts to refuse to enforce choice-of-law clauses where the law of the foreign state is repugnant to the "public policy" or "good morals" of the forum state (e.g., a foreign law recognizing the legality of slave contracts).[155] Rome I, for example, contains a public-policy exception,[156] a mandatory-rule exception,[157] and also carves out certain types of contracts from its ambit.[158] The Hague Convention also contains a public-policy exception and a mandatory-rule exception but sets forth more limited carve-outs.[159] What is significant, however, is that

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[150] *Id.* (citation omitted).

[151] *Id.* (citation omitted).

[152] *See* Zhang, *supra* note 8, at 548–51 (discussing "rules that prescribe party autonomy").

[153] *See, e.g.*, *infra* note 158.

[154] *See, e.g.*, Zhang, *supra* note 8, at 548–49 (describing mandatory rules in the Rome Convention and Mexico City Convention).

[155] *Id.* at 551.

[156] *See* Rome I, *supra* note 59, art. 21, at 15 (allowing forums to apply a public policy exception).

[157] *Id.* art. 9, at 13 (providing for the application of mandatory rules).

[158] *Id.* arts. 6–8, at 11–13 (providing carve-outs for consumer contracts, insurance contracts, and individual employment contracts).

[159] *See* Hague Convention, *supra* note 63, art. 2, 24 I.L.M. at 1575 (excluding "sales of goods bought for personal, family or household use"); *id.* art. 17, at 1577 ("The Convention does not prevent the application of those provisions of the law of the forum that must be

none of the exceptions in either treaty has the effect of declaring the law of most states off limits. The exceptions provide that a state may refuse to enforce a choice-of-law clause in specific types of contracts, mandate that its own law apply in certain areas, or decline to give effect to a particular foreign law it deems offensive, but subject to these constraints, the parties are generally free to choose whatever law they wish.

Compare these exceptions to the "substantial" or "reasonable" relationship requirement, which has long been a fixture in American choice-of-law doctrine. This requirement provides that a choice-of-law clause should not be enforced if the chosen law has no "substantial" or "reasonable" relationship to the parties or the transaction.[160] The basic rationale in support of the requirement is that validating a contract "under the law of a state that can have only an officious and meddlesome interest in affecting the result is to exalt certainty and predictability over all other social purposes including the cogent reasons any state must find before it can rationally interdict a bargain freely struck."[161] The relationship requirement imposes obvious and meaningful constraints on party autonomy. Rather than being able to choose

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applied irrespective of the law that otherwise governs the contract."); *id.* art. 18, at 1577 ("The application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*)."); *see also* Inter-American Convention, *supra* note 63, art. 1, 33 I.L.M. at 734 ("Any State Party may, at the time it ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.").

[160] *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2) (1971) (directing courts not to enforce a choice-of-law clause where the law chosen exhibits "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice"); U.C.C. § 1-301(a) (2008) ("[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."); *see also* E. Artificial Insemination Coop., Inc. v. La Bare, 619 N.Y.S.2d 858, 859 (App. Div. 1994) ("[C]hoice of law provisions generally are given effect by the courts of [New York] unless the jurisdiction whose law is to be applied has no reasonable relation to the agreement at issue or enforcement of the subject provision would violate a fundamental public policy of this State.").

[161] RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 377 (3d ed. 1986); *see also* O'Hara & Ribstein, *supra* note 55, at 1198 (noting that the substantial relationship test "helps ensure that chosen states internalize some effects of inefficiently lax laws by enabling those states to regulate only those who have a connection with the state").

from among hundreds of different possible national and subnational commercial codes, the parties are limited to just a handful of choices.[162]

This standardization of exceptions via a choice-of-law treaty has the potential to sweep away idiosyncratic national exceptions—like the relationship requirement—that have the effect of severely constraining parties' ability to choose the law of the state that best suits their needs.[163] To be sure, the remaining exceptions are broad and open-ended enough that courts could conceivably continue as they were, for example, by concluding that the application of the law of a state that is not connected to the parties or transaction is repugnant to its public policy.[164] At a minimum, however, the standardization of the exceptions helps to scale back the scope of potential exceptions, thereby enabling the parties to analyze the problem of potential nonenforcement through a set of lenses that is consistent from state to state.

B. AN INTERNATIONAL MARKET FOR COMMERCIAL LAW

Choice-of-law treaties can also generate systemic benefits. Giving commercial actors the ability to choose from among many national and subnational commercial codes could, at least in principle, facilitate the development of an international "market" for commercial law where states compete to supply better commercial law to actors who have the ability to choose among them. O'Hara and Ribstein have written extensively about the

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[162] *See, e.g.*, Nova Ribbon Prods., Inc. v. Lincoln Ribbon, Inc., No. 89-4340, 1992 WL 392614, at *1–2 (E.D. Pa. Dec. 14, 1992) (refusing to enforce a choice-of-law clause selecting New York law because it lacked a "substantial relationship" to the case). *But see* O'Hara & Ribstein, *supra* note 55, at 1199 ("[C]ourts applying the Restatement (Second) rule have generally enforced contractual choice of law.").

[163] *See, e.g.*, Barnes Grp., Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1039 (4th Cir. 1983) (Hall, J., concurring in part and dissenting in part) (noting the problem of exceptions to choice-of-law enforcement swallowing the rule); Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1673 (1982) ("Choice-of-law clauses simply are not followed by the courts.").

[164] *See* Note, *supra* note 163, at 1673 (stating that some courts frequently invoke the "fundamental policy exception" to overturn choice-of-law clauses).

potential virtues inherent in such a market for law.[165] Specifically, they argue that "[t]he strongest advantage of contractual choice is that it promotes competition among legal regimes."[166] As O'Hara has noted:

> If states benefit from attracting parties, their assets, and/or their litigation, and if the parties' choices turn on the relative desirability of the states' laws, then states have an incentive to compete with one another to provide laws that enable the parties to maximize the value of their exchanges.[167]

Scholars have previously evaluated the costs and benefits of an international market for law in such areas as securities regulation,[168] bankruptcy,[169] and asset-protection trusts.[170] The variety of choices made possible by such markets have drawn praise for their capacity to promote legal innovation and enable parties to structure their transactions at the lowest possible cost.[171]

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[165] *See generally* O'HARA & RIBSTEIN, *supra* note 8 (arguing that jurisdictional competition improves law and streamlines the legal system); O'Hara & Ribstein, *supra* note 55 (same); O'Hara, *supra* note 56, at xxii (asserting that jurisdictional competition can lead to a " 'race to the top' ").

[166] O'Hara & Ribstein, *supra* note 55, at 1186.

[167] O'Hara, *supra* note 56, at xxii.

[168] *Compare* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361 (1998) (arguing in support of regulatory competition in the provision of securities regulation), *with* James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1200 (1999) (questioning the value of regulatory competition in securities markets).

[169] *See* Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2275 (2000) (arguing for a "regime of bankruptcy selection clauses").

[170] *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1039 (2000) (exploring competition in "the development of so-called asset protection trusts").

[171] In the context of analyzing whether uniform state law in the United States is efficient, for example, Larry Ribstein and Bruce Kobayashi have observed that "even the best uniform rules can perversely stifle innovation or cause rules to be applied to transactions for which they are unsuitable." Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 181 (1996). Although they are careful to note that their data do not clearly indicate whether, in practice, uniform laws

To date, however, only a few scholars have expressly considered the virtues of an international market for commercial law. One of these is Paul Stephan, who has written eloquently about the virtues of a world where "persons engaged in international commerce had virtually unlimited power to choose by agreement which law would apply to disputes arising out of their relationship" and where states "could compete for legal business on the basis of the attractiveness of their rules."[172] Curiously, however, Stephan specifically discounts the importance of choice-of-law treaties in facilitating the development of such a market, arguing that the process by which such treaties are drafted is so flawed that no choice-of-law treaty could possibly represent an improvement on the status quo.[173] The discussion below outlines several reasons why I believe this critique is too severe. In fact,

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represent a superior approach to a choice-of-law approach, they do suggest that there are a number of theoretical reasons to believe that "[w]ider enforcement of contractual choice of law would be a first-best solution." *Id.*; *see also* Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 72 (2002) ("[U]niform laws may be inferior to contractual choice of law as a solution to diverse state laws."). In a similar vein, Clayton Gillette and Steven Walt have suggested that parties might prefer diversity to uniformity with respect to legal rules governing payment systems. Clayton P. Gillette & Steven D. Walt, *Uniformity and Diversity in Payment Systems*, 83 CHI.-KENT L. REV. 499, 529 (2008). They argue that such a diverse "menu of legal rules allows parties to structure their transaction at the lowest possible cost by selecting a payment system that best approximates their optimal allocation of the legal risks that attend payment." *Id.* In the regulatory context, Alan Sykes has likewise argued in favor of a system of "regulatory heterogeneity" as contrasted with international "regulatory harmonization." Sykes, *supra* note 53, at 50. In short, there can be virtue in diversity.

[172] Stephan, *supra* note 31, at 789. Stephan suggests that this end could be realized by unilateral changes in law and policy undertaken on an ad hoc basis by states at the national level. *Id.* at 744. National courts and legislatures could gradually come to accept the idea that enforcing choice-of-law clauses can be efficiency-enhancing. Such a process is, however, likely to be slow and is unlikely to generate uniform outcomes across national borders. Even if national courts were to agree that choice-of-law clauses should generally be enforced, widely varying views would likely persist as to what exceptions to the general rule, if any, should be recognized.

[173] *Id.* (suggesting that the entire project of drafting commercial law treaties is an exercise in futility); *id.* at 788 ("[M]y critique of technocratic lawmaking [on public choice grounds] necessarily implies that we cannot correct these tendencies by redirecting the focus of the unification project. If the drafting of substantive laws results in either compromised and largely empty content or clear-cut victories for special interests, we should not expect international efforts aimed at reforming adjectival [procedural] law—*e.g.*, a harmonized system of choice of law—to do any better.").

the widespread ratification of a choice-of-law treaty seems likely to provide a meaningful impetus for the growth of an international market for commercial law.

To better understand the dynamics underlying such a market, it is useful to review briefly the literature relating to a similar market for law that is said to exist currently in the United States. This is the market for corporate charters.[174] This market is made possible by the fact that all States have long recognized the same choice-of-law rule in the area of corporate governance—the internal affairs doctrine—which stipulates that the internal affairs of the corporation are governed by the law of the state of incorporation.[175] States have an economic incentive to encourage corporations to incorporate (or reincorporate) under their law because each corporation pays an annual franchise fee to the State in which it is incorporated.[176] This economic incentive has prompted some States—most notably Delaware—to amend their corporate codes in an attempt to entice out-of-state corporations to reincorporate under that State's law.[177] While there is a great deal of debate as to whether this competitive process is beneficial or detrimental, as discussed at greater length below, there is little

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[174] *See generally* Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999 (1994) (comparing the dynamics of state competition in the areas of corporate law and choice of law). Marcel Kahan and Ehud Kamar have argued that although the potential exists for a robust market for corporate charters in the United States, a combination of entry barriers and political factors have (to date) deterred States other than Delaware from vigorously competing to attract these charters. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 724 (2002). Notwithstanding their empirical claim that States are not currently competing for charters, Kahan and Kamar observe that the conditions for such a market have been satisfied, thereby making it "entirely plausible that an enterprising governor will in the future revamp her state's corporate law, establish a specialized court, and go after a portion of Delaware's profits." *Id.* at 725. By contrast, absent international agreement regarding choice-of-law rules, the necessary conditions for the creation of a robust international market for commercial law are lacking.

[175] *See supra* note 30.

[176] *See, e.g.*, Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 235–65 (1985) (discussing incentive effect of franchise fees).

[177] *See* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 59 (2008) ("State revenues, in the form of annual franchise fees for registering corporations, have long been the conspicuous motive for the state of Delaware to maintain a body of corporate law and specialized courts that attract out-of-state firms.").

doubt that the underlying dynamics have prompted Delaware to revise (and revise again) its corporate law in the hopes of attracting firms.[178]

The widespread ratification of a choice-of-law treaty has the potential to facilitate the development of a similar market for commercial law on an international scale. In such a market, states would amend their commercial laws in an effort to supply better commercial law to market actors, who could choose to have their contracts governed by the law of a particular state.[179] As states came to appreciate the benefits that can accrue from having their law chosen as the governing law—in the form of court fees, benefits to local counsel, and national reputation, as discussed below—they would be incentivized to undertake legal reform in the hopes of emulating the success of other jurisdictions. Over time, this process could lead to efficiency-enhancing competition among jurisdictions to provide better commercial law to parties engaged in international commercial transactions. The key to the successful development of this market, however, would be the establishment of a clear and consistent rule in favor of enforcement of choice-of-law clauses. The most straightforward way of establishing such a rule would be via a choice-of-law treaty.

States have at least three incentives to participate in an international market for commercial law. First, to the extent that contracts that choose the law of a given state are often litigated in that state's courts, the state could see a direct financial benefit in the form of court fees. If a dispute litigated in that state's courts involves exclusively foreign parties, then the fees imposed could (and should) be higher than those charged to domestic litigants.[180] Second, and more importantly, the attorneys in a given jurisdiction will almost certainly benefit from the increased

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[178] The literature in this area is vast. *See infra* note 204.

[179] *Cf.* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 6 (1993) ("Corporation codes can be viewed as products, whose producers are states and whose consumers are corporations.").

[180] *See* Dammann & Hansmann, *supra* note 177, at 4 (encouraging jurisdictions to "charge higher court fees for hearing purely foreign cases"). It is unlikely, however, that court fees alone would provide sufficient incentive for states to undertake the legal reforms required to participate in this market.

business that comes with the need for experts on that jurisdiction's law. Jon Macey and Geoffrey Miller argue that attorneys in Delaware benefit disproportionately from Delaware's success in the market for corporate charters, which gives the Delaware bar strong incentives to lobby the legislature to enact laws that perpetuate this success by attracting more corporate charters to the State.[181] Attorneys in New York have likewise lobbied that State's legislature to amend its laws to perpetuate that State's role as a leading commercial law jurisdiction.[182] One factor that could drive the development of an international market for commercial law, therefore, is the actions of self-interested lawyers lobbying their state legislatures to revise their laws in the hopes of attracting business to the state.[183]

Third, and finally, there is the role of state pride. Members of the bar in New York and England have long prized their jurisdictions' leading roles in the resolution of international

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[181] Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 473 (1987); *see also* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073 (2009) ("Recent empirical work has established that New York state is the dominant provider of law and adjudicatory services for large commercial contracts." (citing Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009))).

[182] *See* Miller & Eisenberg, *supra* note 181, at 2079 (acknowledging New York's "vigorous efforts to attract" commercial contracts). Geoffrey Miller and Theodore Eisenberg have shown how interjurisdictional competition for commercial law can hinge on state innovations in the enforcement of choice-of-law clauses and how jurisdictions can (and do) compete to have their law selected as the governing law in commercial contracts. *See id.* at 2091. In a recent article, they carefully documented steps taken by the State of New York to maintain its position as a preeminent commercial law jurisdiction, which included enacting statutes "assuring that [its] law and forum will be available for major contracts regardless of the parties' other connections with the state." *Id.* at 2079. These statutes enable commercial actors to litigate certain contractual disputes in New York courts under New York law regardless of whether the transaction has any relationship to New York, so long as the value of the contract is above a million dollars. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2010); N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2010). These statutory innovations occurred in the wake of concerns that New York law was losing its status as one of the world's leading jurisdictions for commercial law to London. Miller & Eisenberg, *supra* note 181, at 2091–92. These innovations were, in turn, copied by a number of other states, including California, Florida, Delaware, Ohio, and Texas. *Id.* at 2092.

[183] *See* Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 281 (discussing incentives for lawyers to support choice of their own state's law).

business disputes.[184] The Delaware bar is likewise proud that their State is the leading U.S. jurisdiction in corporate law.[185] And in seeking support for a specialized business court in Massachusetts, one commentator asked:

> Should Massachusetts, a commercial and business leader since the 18th century, when sailing ships, laden with spices and tea from Java and Sumatra and other treasures from the Orient, first docked at Salem, and now a major player in high technology, sophisticated finance, medical care, insurance, and the economic aspects of higher education, be left to bask in the faded glories of its past in this emerging area of judicial activity?[186]

National pride, as in so many other things, can play a role in driving legal change, and intangible benefits can accrue to a jurisdiction whose laws have a favorable reputation on the world stage. Thus, national pride may also play a role in prompting states to participate in the international market for commercial law.

In choosing a governing law in this market, many parties would, of course, gravitate towards selecting the law of well-established commercial jurisdictions such as New York or England. The example of Delaware suggests, however, that there may be a role for small states to play in providing commercial law to market actors engaged in international transactions. Smaller states may, by virtue of their size and relative lack of political influence, be able to successfully market their law as fair-minded

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[184] Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 497–98 (1989) (discussing legislative history indicating that the purpose of New York legislation was "to enhance the status of New York as a leading commercial and financial center").

[185] William T. Allen, Keynote Address, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71 (2000) ("[A] sense of professional pride and dedication . . . has accrued as generations of Delaware lawyers took their turn at designing, redesigning and interpreting provisions of [the state's corporate law].").

[186] Allan Van Gestel, *Why a Business Litigation Session at Suffolk Superior Court*, BOSTON B.J., Nov.–Dec. 2001, at 14.

and neutral in a way that more influential states may not. In addition, it seems unlikely that a single small state would dominate the international market for commercial law in the way that Delaware currently dominates the market for corporate charters in the United States. As discussed above, the best commercial law is the law that most faithfully captures the baseline expectations of the parties, and these preferences are likely to be different in different parts of the world. Commercial actors doing business exclusively within the Middle East, for example, may prefer to have elements of Islamic law inform their commercial agreements, whereas commercial actors doing business within South America are unlikely to express such a preference. One can imagine, therefore, a number of small states scattered throughout the world revising their commercial law in an attempt to become the state of choice for commercial agreements negotiated by regional commercial actors.

In order for an efficient international market for commercial law to develop, however, at least three conditions must be satisfied.[187] First, the relevant choice-of-law treaty must be drafted in such a way so as to respect party choice generally while discouraging parties from choosing foreign law as a means of evading efficient national regulations.[188] While making clear that the parties' choice of law shall be respected by national courts so long as there is some rational basis for the choice,[189] the treaty should also contain safeguards that will protect against use of choice-of-law clauses that many would consider inequitable. The

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[187] Linarelli, *supra* note 3, at 1404–05 ("Contractual choice of law as an alternative to international rules can work so long as . . . (1) it is possible to Coasian bargain over the choice of law, (2) the parties do not evade efficient mandatory rules, and (3) the distributional consequences resulting from Coasian bargaining are not repugnant to the sense of justice of the vast majority of persons if they were asked to evaluate the fairness of the transaction.").

[188] *See* Ribstein, *supra* note 183, at 255 (discussing the claim that enforcement of choice-of-law clauses facilitates evasion of mandatory rules). The argument is that by empowering the parties to choose the law of another state—and by directing national judges to enforce that choice—the state loses the ability to ensure that its efficient mandatory laws are properly enforced. *Id.* (citing laws that prohibit contract terms, such as fiduciary duty waivers, as examples of efficient mandatory rules).

[189] *See supra* note 69 and accompanying text.

Rome Convention, for example, limits the ability of the contracting parties to choose the governing law with respect to certain types of contracts—such as consumer contracts, employment contracts, and some insurance contracts—in order to limit the ability of parties to evade consumer protection laws and other regulations.[190]

Second, the parties must actually negotiate the choice of law. Commercial actors engaged in negotiating international agreements are not interested in the overall efficiency of the economic rules chosen. Instead, these actors will tend to "bargain towards the choice of rules . . . to maximize their individual share of the surplus of the transaction."[191] Under ordinary circumstances, a given party would likely prefer to have its contract governed by the national law of its home jurisdiction because its lawyers are already familiar with that law and need not incur the costs of familiarizing themselves with a foreign legal system. The choice of the law of a third state that is competing in the international market for commercial law will therefore occur only where neither party is able to force the other to accept the law of its home jurisdiction. The development of an efficient market, in other words, hinges on the outcomes of bargains struck by actors with roughly equal negotiating power who haggle over the choice of governing law.

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[190] *See supra* note 158 and accompanying text. Additionally, in the choice-of-forum context, the proposed Choice-of-Court Convention excludes a veritable laundry list of matters from its scope, including contracts to which a natural person is a party, contracts relating to the carriage of passengers and goods, and contracts relating to competition matters. *See* Convention on Choice of Court Agreements arts. 1–2, June 30, 2005, 44 I.L.M. 1294, 1294–95. In the arbitration context, the New York Convention provides that a state need not recognize and enforce an arbitral award if such action "would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 330 U.N.T.S. 3, 50 [hereinafter New York Convention]. More to the point, if a state perceives that its ability to enforce its own laws is threatened by a given convention, then it will decline to ratify it. In order for a choice-of-law treaty to be effective, therefore, it must strike a balance between party autonomy and state interests. *See, e.g.*, *supra* notes 152–59 (listing examples of treaties that use carve-outs to protect state interests while still allowing robust choice of law). Although different state parties may disagree on precisely where the line should be drawn, there is broad consensus that one can allow for a considerable degree of party choice while simultaneously protecting the relevant state interests. *See supra* notes 155–60 and accompanying text.

[191] Linarelli, *supra* note 3, at 1408.

Third, and finally, the states who choose to compete in this market must take affirmative steps to lower the costs of obtaining information about the law in their jurisdiction. One of the great obstacles to the development of any sort of international market is the problem of mutual incomprehension; most of the world's commercial actors and their counsel do not speak more than one or two languages. For a state to successfully entice commercial actors from elsewhere to select its law, it must first incur the costs of translating cases and statutes into multiple languages, thereby publicizing the attractiveness of its law internationally.[192]

Each of the conditions outlined above is realizable. There are examples of successful choice-of-law treaties.[193] There is evidence that parties sometimes choose the law of a "neutral" third state to govern their contracts where each is unwilling to submit to the law of the other.[194] Additionally, states and bar associations in various countries routinely produce materials designed to make a given set of laws more comprehensible and accessible. Even if all these conditions are met, however, it is important to recognize that the benefits of an international market for commercial law will accrue only to those parties that are sophisticated enough to recognize that such a market exists and to take advantage of it. The market will be of little use (or relevance) to those parties that routinely decline to include choice-of-law clauses in their international commercial contracts.

The dynamism that could be unleashed by this competitive process could, moreover, serve as a remedy to a long-standing concern with respect to substantive treaties: their tendency towards stasis. The development of uniform international rules often requires years (if not decades) of deliberation and

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[192] This last condition is not as problematic as it may first appear. If small states are seeking to carve out a role for their law in a regional market for law, as one would expect, then it is more likely that commercial actors in the region would speak the same language.

[193] *See, e.g.*, Rome I, *supra* note 59, discussed *supra* notes 59–62.

[194] *See* Fountoulakis, *supra* note 83, at 305 (noting the possibility of parties choosing the law of a third state to govern an international contract); Zhang, *supra* note 8, at 560 ("[I]n many cases, the parties may have to end up selecting a 'neutral law' in order to close the deal because neither party feels comfortable with the application of the law of the country of the other party.").

painstaking international negotiations. One of the consequences of this lengthy drafting process is that substantive treaties are rarely viewed as state of the art; rather, they tend to reflect the needs of the law dating from when they were first proposed. It is unclear, for example, as to whether the CISG—which was finalized in 1980—covers sales of computer software.[195] And the Hague Rules—which were drafted in 1924 and are still in effect in some jurisdictions, including the United States—take no account of the phenomenon of container shipping that has dominated transoceanic commerce since the 1950s.[196] This problem of stasis is amplified by the fact that these instruments have historically been very difficult to amend because amendment typically requires unanimous consent.[197] While it is true that national law is also sometimes slow to change in response to changing economic and social pressures, it is far easier to enact a new law at the state level than to create, revise, or otherwise amend a substantive treaty whose provisions have already been written into the national law of dozens of states. A choice-of-law treaty—in contrast to a substantive treaty—thus facilitates efforts to update national commercial law in response to social and economic change.

The widespread ratification of a choice-of-law treaty is a necessary condition for the development of a robust international

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[195] *See* Felix Miao, *Protection of Intellectual Property Rights in Software Products and How to Accomplish a Technology Transfer Transaction in China*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 61, 93 (2007) ("[T]he existing case law is murky regarding whether computer software can be categorized as 'goods' under CISG.").

[196] *See* Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 TEX. INT'L L.J. 427, 428–30 (2009) ("The draftsmen of the early 1920s did not anticipate the container revolution, let alone electronic commerce, so [the Hague Rules are] even more outdated than the more modern international regimes that most of the world's commercial powers and most U.S. trading partners have already adopted." (footnote omitted)). The Rotterdam Rules, which were finalized in 2008, represent an attempt to modernize these rules. *Id.* at 427–29.

[197] *See, e.g.*, Rosett, *supra* note 19, at 272 (discussing the improbability of amending or clarifying the CISG because of its unanimous-consent requirement); Hobhouse, *supra* note 72, at 532–33 (arguing that recent substantive law treaties lack "the capacity to develop and adapt to meet changing circumstances"). One could, in principle, solve this problem by negotiating a treaty provision that allows a supermajority of states to amend the treaty instead of mandating unanimity.

market for commercial law. It is unclear, however, whether such a treaty is in itself sufficient to realize this goal. For such a market to develop fully, it is important that states come to some sort of agreement on a range of other issues. One of the advantages enjoyed by Delaware, for example, is the fact that its corporate law is regularly applied by its specialized business and corporation courts.[198] Indeed, some scholars argue that it is Delaware's courts, rather than its law, that is the true source of its success.[199] If this is true, then merely enforcing a choice-of-law clause may not be enough. States would, in addition, have to negotiate and ratify separate treaties stipulating that courts must enforce forum-selection clauses ex ante, and any judgments rendered by the court selected ex post. These caveats notwithstanding, the consistent enforcement of choice-of-law clauses is a crucial step in facilitating the development of an international market for commercial law. The choice-of-law treaty, which establishes a clear rule in favor of enforcing choice-of-law clauses and delineates exceptions to this rule, is an essential tool in realizing this end.

C. OBJECTIONS AND COUNTERARGUMENTS

The notion that parties should be given the power to choose the law that will govern their contracts in most cases has generated some controversy. Critics argue that a market for commercial law will not lead jurisdictions to try to improve their law (a race to the top) but rather will encourage states to weaken their law or rewrite key provisions of that law so as to benefit one group at the expense of many others (a race to the bottom). In a different vein, some critics claim that commercial law treaties of both types—substantive as well as choice-of-law—are unnecessary in light of the alternative means that international actors have for mitigating risk in international transactions. Each of these critiques is briefly addressed below.

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[198] Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 918 (1990).

[199] *See id.* (discussing the advantages resulting from "the small, expert, and nondiverse" court system for corporate cases in Delaware); Fisch, *supra* note 14, at 1064 (attributing Delaware's success to the "unique lawmaking function of [its] courts").

1. The Race to the Bottom. This critique posits that choice-of-law treaties represent an undesirable encroachment on the power of the state to enforce its laws.[200] Specifically, these critics charge that the routine enforcement of choice-of-law clauses will result in the underenforcement of efficient national mandatory laws.[201] By directing national judges to enforce the parties' choice of law, the state loses the ability to ensure that its laws are properly enforced.[202] On this view, the widespread enforcement of choice-of-law clauses will inevitably lead to a race to the bottom as states compete to lower their standards in an effort to entice commercial actors to choose their laws.[203]

In the United States, there is a vast literature debating this question in the corporate law context.[204] Even after decades of academic debate, however, no consensus exists as to whether the ability of a corporation's managers to "choose" the law of a particular jurisdiction is more likely to result in a race to the top or a race to the bottom in the market for corporate charters. Given

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[200] *See, e.g.*, Ribstein, *supra* note 188, at 255–56 (evaluating the claim that enforcement of choice-of-law clauses facilitates evasion of mandatory rules).

[201] *Id.*

[202] *See id.* at 255. Efficient mandatory rules are rules that the parties may not contract around and yet are still efficient because they are well-suited to "individual parties or transactions that are subject to the law." O'Hara & Ribstein, *supra* note 55, at 1156. Antitrust laws are an example of such rules. Although these laws may limit the ability of contracting parties to enter into wealth-enhancing transactions, they are efficient because the gains to society as a whole arising out of their enforcement are greater than the losses incurred by the parties. *See* John K. Palchak & Stanley T. Leung, *No State Required? A Critical Review of the Polycentric Legal Order*, 38 GONZ. L. REV. 289, 325 (2003).

[203] *See* Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 151 (2004) (arguing against the idea that "regulatory competition" will lead to a "race to the top").

[204] *Compare* William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (suggesting that competition for corporate charters leads to a race to the bottom and advocating for the passage of a federal law), *with* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977) (suggesting that competition for corporate charters leads to a race to the top). For arguments favoring the race-to-the-top hypothesis, see ROMANO, *supra* note 179, at 12; Romano, *supra* note 176, at 279–81. For arguments favoring the race-to-the-bottom hypothesis, see Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437 (1992); *see also* Kahan & Kamar, *supra* note 174, at 683 (identifying a number of areas in which the corporate charter analogy has been invoked).

the challenges in determining an answer to this question in the corporate context—where there are actual state corporation statutes to analyze and decades of corporate practice to observe—it is simply not possible to know in advance how things are likely to play out in the commercial law context. There are at least three reasons to believe, however, that a race to the bottom will not occur.[205]

The first reason derives from the structural nature of the commercial transaction. In the corporate context, the structural incentives said to lead to a race to the bottom derive from a perceived misalignment of incentives between corporate managers and shareholders.[206] On this account, the managers choose to incorporate in the jurisdiction whose law is most favorable to their interests rather than to the interests of the shareholders.[207] Inefficiencies in the market for corporate control, in turn, make it difficult for market forces to constrain these self-serving choices, which have a negative impact on firm value. In the commercial context, by comparison, there is a very different dynamic at play.[208] Unlike in the corporate context, the two groups with the most at stake in the choice of sales law routinely change roles; all buyers are also sellers, and all sellers are also buyers. In the sales context, at least, neither buyers nor sellers have strong incentives to lobby the legislature of a given state to produce commercial law that is clearly pro-buyer or pro-seller because they realize that

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[205] At least one commentator disagrees with this view. *See* Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 43 (1995) (suggesting that under some circumstances, competition for commercial law is more likely to result in a race to the bottom than competition for corporate law). In reaching this conclusion, Dreyfuss posits that commercial law is principally concerned with the relationship between the merchant and the customer. *Id.* In fact, most commercial law is made in the context of merchant-to-merchant exchanges. To the extent that commercial law impacts consumers and other natural persons, the carve-out for consumer contracts in the proposed choice-of-law treaty should preserve the status quo, so that consumers are no worse off under the treaty regime than they were before.

[206] *See* Bebchuk, *supra* note 204, at 1456 (noting a "possible divergence between managers' and shareholders' interests" in the corporate context).

[207] *See id.* ("[M]anagers are likely to seek rules that maximize shareholder values with respect to certain identifiable issues but not with respect to [others].").

[208] *See* Dreyfuss, *supra* note 205, at 43 ("[T]he desire to please third parties—is not usually present in commercial litigation.").

they may be on the other end of a given transaction at some future date.

The second reason to suspect that a market for commercial law will not lead to a race to the bottom is national. Any national commercial law will most typically be applied in the context of resolving domestic disputes arising out of domestic commercial transactions. While a state may undertake to revise this law to modernize it and to make changes that will make it more attractive to international parties, the state is aware that this same law will frequently be used to resolve purely domestic disputes. Since the state is presumably comprised of an equal number of domestic buyers and sellers, the risk that the law will take on a pronounced "pro-seller" or "pro-buyer" cast seems remote because the local commercial establishment would rebel against such a development.[209] Thus, while states are likely to try to improve their commercial law to entice market actors to choose it to govern their international contracts, their willingness to undertake a wholesale gutting of contractual protections in the spirit of market competition is likely to be checked by domestic commercial actors.[210]

Third, if a state perceives that its ability to enforce its own laws is threatened by a given international instrument, it will simply make the political decision not to ratify it. In order for a choice-of-law treaty to have a realistic chance at widespread acceptance, therefore, it must strike a proper balance between (1) respecting the autonomy of parties to choose their governing law and (2) protecting the ability of states to enforce mandatory laws. Indeed, the choice-of-law treaties proposed in recent years have standardized several exceptions to the general rule of enforcing choice-of-law clauses so as to protect state interests.[211] While these carve-outs may leave room for some evasion of some national regulations, they offer a powerful means of balancing the efficiency

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[209] Ribstein, *supra* note 188, at 255 ("While a state might attempt to benefit its residents by allowing them to victimize non-residents in oppressive deals, the application of a state's law to its own residents reduces states' incentives to engage in this sort of conduct.").

[210] *Id.*

[211] *See supra* notes 158–59 and accompanying text.

gains that may come through choice of law against the interests of the state in enforcing its mandatory laws. The solution to the problem of evasion of efficient national regulations presented by the widespread ratification of a choice-of-law treaty can, in short, be the treaty itself.[212]

2. Arbitration Treaties as an Alternative. Another possible criticism of choice-of-law treaties—and, indeed, of all commercial law treaties—is that they are simply unnecessary in light of the widespread success enjoyed by arbitration treaties such as the New York Convention[213] or the Inter-American Convention on International Commercial Arbitration.[214] These arbitration treaties enable the parties to (1) choose the (arbitral) forum in which the dispute will be heard, (2) choose the law that will be applied (by selecting arbitrators predisposed to enforce choice-of-law clauses), and (3) enforce any judgment ultimately rendered by the tribunal in the national courts of states that are parties to the treaty.[215] If arbitration treaties make it possible to simultaneously mitigate legal risk, forum risk, and enforcement risk, then what is the use of a commercial law treaty that only addresses the problem of legal risk?

While a comprehensive response to this critique is well beyond the scope of this Article, there is at least one compelling reason to prefer commercial law treaties to arbitration treaties: commercial law treaties are far more likely than arbitration treaties to generate published judicial decisions that clarify the content of a given state's commercial law.[216] Whereas a national court will, in

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[212] *See, e.g.*, Rome I, *supra* note 59, art. 9, at 13 ("Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.").

[213] New York Convention, *supra* note 190.

[214] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Inter-American Arbitration Convention].

[215] *See* New York Convention, *supra* note 190; Inter-American Arbitration Convention, *supra* note 214.

[216] In the absence of precedents that provide insight into the content of a particular state's law, so the argument goes, commercial actors may find it more difficult to structure their

most cases, publish a reasoned decision explaining why it decided a case in favor of a particular party, an international arbitral panel will, in most cases, publish nothing at all.[217] Indeed, one of the reasons why some parties may prefer international arbitration is precisely because they do not want the details of their dispute to be made public.[218] Where disputes are resolved by arbitration rather than litigation, therefore, there will be fewer published decisions and, consequently, less certainty as to the content of a state's commercial law.[219] Some commentators argue that widespread use of arbitration can actually "lead to a deterioration of the law" of a given state to the extent that "the rules of law applied in [the unpublished arbitral] cases cannot be easily

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international contracts effectively. While those published decisions arising out of disputes between exclusively national actors may help to compensate for any reduction in international cases that are arbitrated, these national cases may be factually dissimilar and may not present certain issues that arise more frequently in the context of international contracts.

[217] Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003) ("Although certain sources for arbitral decisions exist, . . . they are but the tip of the iceberg of all the cases produced."); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 655 (2005) [hereinafter Ginsburg, *Bounded Discretion*] (noting the "positive externalit[ies] to non-parties" associated with published decisions); *id.* at 655–56 (observing that the publication of decisions by the Iranian-U.S. Claims Tribunal "provided significant spillover effects, guiding future dispute resolvers and states trying to coordinate their behavior" and contrasting these published decisions with "the private international arbitration regime, where a lack of publicity makes it impossible to know whether decision makers . . . are deciding like cases alike").

[218] HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 20 (1992) (discussing the advantages of secrecy in arbitral decisions).

[219] A report prepared by the State of Colorado in 2000 stated:

> The trend toward resolving commercial cases outside the judicial system exacerbates [the] scarcity of precedent. Associations such as the American Arbitration Association now process thousands of business disputes entirely outside of the judicial system. When cases are diverted from the judicial system and resolved by private parties, these cases are lost to the development of the common law because privately resolved cases do not create binding precedent.

GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, REPORT OF THE COMMITTEE ON BUSINESS COURTS 15 (2000), *available at* http://www.state.co.us/cjrtf/report/download/report1.doc.

determined, scrutinized, or applied to similarly situated litigants."[220]

A choice-of-law treaty has the capacity to redirect at least some international commercial cases away from arbitration and into national courts because, in the absence of a treaty, parties perceive national courts as unreliable when it comes to the subject of choice of law. Gary Born has written, for example, that international commercial actors choose arbitration in part "to avoid the jurisdictional and choice of law uncertainties that arise when international disputes are litigated in national courts."[221] This dissatisfaction with the state of choice-of-law rules in many national courts was captured in a survey of members of the ICC conducted in January 2007.[222] In that survey, only 58% of the respondents reported that choice-of-law clauses in international commercial contracts were upheld in national court proceedings in "virtually all cases," while 80% of the respondents voiced their desire for a binding international treaty to govern choice of law.[223] More consistent enforcement of such clauses would make national courts relatively more attractive places to resolve disputes, which would in turn generate more published judicial decisions that clarify the content of a given state's commercial law.[224]

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[220] *See* Dreyfuss, *supra* note 205, at 34–35; *see also* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979) (observing that arbitrators have "little incentive" to publish opinions or establish precedents); *cf.* Ginsburg, *Bounded Discretion*, *supra* note 217, at 655–56 (noting the "positive externalit[ies] to non-parties" associated with published decisions in the international context).

[221] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 24 (1994).

[222] HAGUE CONFERENCE FEASIBILITY STUDY, *supra* note 63, at 7–8.

[223] *Id.*

[224] None of this is not to suggest, of course, that litigation before national courts should always be preferred to arbitration; it is merely to point out that litigating in national courts can generate benefits for third parties. *See* MORRISSEY & GRAVES, *supra* note 16, at 32 (discussing the relative merits of arbitration as compared to national litigation). Nor is it to suggest that widespread ratification of a choice-of-law treaty would by itself bring about a dramatic shift in commercial actors' preferences for arbitration vis-à-vis national litigation; it is entirely possible that the effect would be modest. It is simply to point out that there are structural reasons why one might prefer that litigants resolve their disputes before national courts rather than before an international arbitral panel and that a choice-of-law treaty would facilitate dispute resolution in that particular forum. Dammann &

CONCLUSION

J.S. Hobhouse once wrote that "[o]nly conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of [a given] country."[225] This Article suggests that choice-of-law treaties may better satisfy the well-proven needs of the commercial community than do substantive commercial law treaties. Accordingly, the conventional wisdom that substantive commercial law treaties represent the better solution to the problem of legal uncertainty in international commercial transactions, and hence should be given legislative priority, may need to be rethought.

Hansmann, *supra* note 177, at 4 ("[W]hen it comes to offering principled adjudication, public courts enjoy a number of structural advantages over private arbitration services.").

[225] Hobhouse, *supra* note 72, at 535.