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THE NEW MUNICIPAL "PRIVATE" INTERNATIONAL TRADE LAW: THE COMPLEMENT TO SOCIO-ECONOMIC TRANSFORMATIONS

CHARLES EVAN*

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INTRODUCTION

The basic problems analyzed in this paper have far-reaching practical ramifications. They deal with the determination of the limits of applicability, in "private" transnational economic relations, of the general, intrastate, highly nationalized norms of a specific "private" or "civil" municipal law that may be controlling in those relations and,

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1 Notwithstanding the controversies in both the West and East as to the difficult problem of classification of the law as "private" as distinguished from public, or from further subdivisions such as the Eastern "economic law," in the absence of more descriptive terminology these terms had to be used in the analysis which follows. Very generally, for the purposes of this article, the term "private or civil law" is used to describe the vast body of law which traditionally has been incorporated in civil law countries into their Civil Codes and which regulates legal relations between parties (individuals, legal entities and governments acting in a non-governmental capacity) inter se. This private civil law is characterized by the desideratum of equality of parties. On the other hand, the term "public law" is used herein to describe a different vast group of legal relations between the state qua sovereign vis-à-vis the citizen. This public law is characterized by a sort of superiority of the state as the representative of the public interest and by a subordination of the citizen and the citizen's private interest. As to the controversy with respect to such classifications, see, e.g., in Western civil law countries: W. Friedmann, Legal Theory 280-83 (5th ed. 1967); K. von Turegg, Lehrbuch des Verwaltungsrechts (Textbook on Administrative Law) 35 (3d ed. 1956); 1 R. David, Le Droit Francais (The French Law) 8th. (1960); H. Kelsen, General Theory of Law and State 202-03 (1945). In common law countries: W. Friedmann, supra at 281; H.W.R. Wade, Administrative Law 7 (2d ed. 1967); 1 K. Davis, Administrative Law Treatise 54 (1958). In the East: E. Pashukanis, Theory of Law and Marxism, in Soviet Legal Philosophy Series V 20th Century Legal Philosophy Series 292 (1951); H. Kelsen, The Communist Theory of Law 112 (1955). As to some of the more recent problems, see Knapp in 1 Učebnice Československého Občanského Práva (Textbook on Czecho-
if those norms are inapplicable, with the question of what substantive doctrines or rules should be used to fill the resulting “gap.” Thus the problems affect the very core of legal predictability and safety of transnational economic transactions in our era of dramatic, in fact revolutionary, but highly dissimilar transformations, in the municipal laws of both the East and the West, of such traditional legal concepts as “contracts,” “ownership,” “vested rights,” “equality,” and “money.”

The analysis of these problems will not be limited to the traditional “conflict of laws” method. In fact, it tries to demonstrate the frequent inadequacy of the latter in view of what will be described shortly as the novel “intransplantability” of many of the highly nationalized municipal general precepts into a different national or international environment. More particularly, this paper considers, in brief, some of the causes and characteristics of what seems to be evolving as a new branch, and in some countries as an entirely separate system, of municipal laws regulating certain groups of relations that traditionally would have been referred to as “private” economic relations and whose effects transcend the territory of a national sovereign.

This development has created a new kind of a domestic-international dualism. It differs from the nineteenth century civil law kind of limited dichotomy that resulted from the adoption of two separate but complementary basic codes: the civil code and the commercial code. The latter was applicable primarily to acts of “merchants” within the statutory definition of the term and/or to certain objectively or subjectively identifiable trade transactions, irrespective of whether they were wholly national or transnational. In some respects, the new dualism may appear to be somewhat more comparable to the medieval “law merchant,” as developed on the European continent, and to the earlier “jus gentium” applicable to legal relations with aliens. The new dualism, however, is founded on new concepts of our era and will constitute a transnational counterpart to domestic socio-economic.
transformations in the law. It has arisen primarily because of new and
diverse economic and social philosophies which have intensified im-
mensely the involvement and created new “interests” of national
sovereigns in “private law” and particularly in proprietary relations
having a meaningful effect on the national economy or the life of the
members of the national society.

As will be discussed shortly, these novel “legal interests” of the
national sovereigns are supplemented partly by a network of vast and
extremely diverse public-type benefits and takings and partly by direct
governmental economic-commercial operations. Thus, domestically, the
“quid pro quo” of a transaction no longer depends solely on the terms
of the contract. Larger or lesser novel public-type “fringe benefits” or
“liabilities,” arising from the novel legal “interests” of the sovereigns,
may be inseparably intertwined with the transactions. However, trans-
nationally many of these “fringe benefits” may not be, and frequently
are not, available. Such economic balance as may exist domestically
may be broken internationally. Moreover, internationally, the novel
governmental “interests” of the sovereigns may be involved and may,
and often do, conflict in light of their frequently irreconcilable
theories.

Thus in transnational economic relations, as distinguished from
wholly or predominantly national situations, we encounter several
novel problems: “intransplantability” of legal precepts of the con-
trolling law, raising conflict of laws issues; the resulting problem of
“filling the gap,” raising a considerable substantive law question; and,
last but not least, the conflicts of economic, legal and power “interests”
of the sovereigns that may be involved, imposing great risks and un-
certainties on the parties involved in the relations.

The need for a fair adjustment of these complex problems leads to
a new eastern and western movement toward a separate, special regime
of municipal laws, applicable to some of the more internationalized
private-civil relations and particularly to those arising in international
trade, lending, and transfers of estates of decedents.

This new internationalized branch may be applicable to a wide
range of legal relations characterized by the presence of diverse
“foreign elements” which usually do not exist in, and cannot be assim-
ilated with, those arising in wholly national situations. However, these
“foreign elements” are not limited to those which Rabel, for example,
refers to as “subjective” (residence, domicile or nationality) or “objec-

5 See text at notes 54-57 infra.
See also note 29 infra. As to some of the new and old criteria, see text at notes 39-57
infra.
tive" standards (actual or constructive situs of the tangible or intangible "res") such as are determinative—under a strict traditional "juristic" conflict of laws approach—of the presumptive intention of the parties as to which of the conflicting laws of a specific sovereign should control the legal relation. Rabel recognizes that such intent may have been nonexistent and the determination "arbitrary" (willkürlich). He suggests that, for the future, it might be simpler to call to the attention of persons engaged in international commerce "that the general municipal law (Landesrecht) is not applicable to 'international' trade transactions (Geschäfte)."

Some of the various categories of such relations may be tied more and others less closely to one or several utterly different national environments. Some may have become more "domesticated" and others more "internationalized." It is only natural that these developments might have a bearing on the problem of whether—or to what extent—the legal relation should or could be more or less autonomous in light of two coexisting modern phenomena: an extreme intensification of governmental measures converting the national territory into a kind of tight and distinct social, economic, political, ideological and legal environment, and, paradoxically, an increasing transnational interdependence.

At this point it may suffice to mention, as examples of the different categories, the transnational operations of "multinational corporations," export cartels, and, more generally, relations involving actual or constructive transfers of assets, tangible or intangible, across national frontiers. Such transfers may arise in connection with the flow of inheritances and long term "foreign investments," or they may be international sales and "current" transactions, involving goods, services and rights that are a more transitory nature and not intended to be domesticated in a country in this transient stage. This latter group of

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7 Id. at 60.
8 See sections I and III infra.
10 See text at notes 131-37 infra; see especially note 136 infra.
11 See text at notes 188-95 infra; see especially notes 193-94 infra.
12 See text at notes 188-95 infra; see especially notes 190-91 infra.
13 See text at notes 188-95 infra; see especially notes 190-91 infra.
14 C. Schmitthoff, The Export Trade 3-6 (1962), refers to many of these transactions, including the sale of goods abroad exhibiting characteristics not present in wholly
more "current" and less stationary transactions may be, and sometimes actually is, broadly—and, in light of much too narrow and ambiguous provisions of the municipal law, somewhat vaguely—referred to as international trade relations; and the body of law regulating them, as the municipal private international, or transnational, trade law. It is particularly this latter group which seems to be acquiring a more or less autonomous position in the municipal laws. But it is not the only one.

Classification and delimitation of the legal relations may be extremely difficult, but it is most important. Such classification may pro-
vide the criterion as to whether, or to what extent, a special set of norms or a separate regime of the municipal law will be applicable to the relation. It must be mentioned at the outset that there is some question as to whether the novel separate and special substantive norms regulating the respective transnational economic relations are a subdivision of what traditionally has been referred to as "conflict of laws" or "private international law." All classifications are of course dependent on the purposes for which they are made. Moreover, as will be illustrated shortly, the new norms are of different types, with different characteristics, and are applied sometimes as a part of the lex causae, sometimes as precepts of the lex fori or, realistically, as sort of ad hoc, ill-definable compounds trying to accomplish a result which is just according to the philosophy of the court or judge in question.  

In any case, whatever their classification may be, the feature which all of the new norms have in common with the conflict of laws is that they are devised to regulate transnational subject matters. However, as distinguished from the traditional conflict of laws approach, some of them, and particularly those applicable to international trade, not only do not attempt to assimilate transnational to wholly national legal relations within a specific state, but they try to avoid such nationalization, both within their own and, insofar as practicable, in any foreign jurisdiction. They do not presuppose an actual "neutrality," "universality," or transnational "transplantability" of various "private" or "civil" law doctrines and norms devised primarily to regulate wholly national situations.  

On the contrary, the new precepts are special municipal substantive norms for certain transnational legal relations and situations that may not exist in purely intrastate matters. They were devised to cure, at least to some extent, the transnational ill-effects of two modern developments: the extreme "nationalization," or what is sometimes referred to as the "politicization" or "socialization" of a vast part of the municipal, private-civil law devised for wholly national situations; a unified world may become the compelling task of the jurist of tomorrow. On the difficulty of the problem, see P. Jessup, Transnational Law 11, 70 (1956).  


18 See text at notes 182-95 infra.  

19 See sections I-III and VI-VII infra.  

20 Miller, Toward the "Techno-Corporate State"? 14 Vill. L. Rev. 1, 46, 56 (1968) (referring to politicization of the law); 1 R. Pound, Jurisprudence 429-56 (speaking of the socialization of law), and at 432-56 (enumerating some of its manifestations); Hazard, Socialist Law and the International Encyclopedia, 79 Harv. L. Rev. 278, 279-80 (1965), discussing what appears to be the impossibility of unification or harmonization of the general part of the law, as distinguished from such relations as international sales.
and certain transnational maladjustments and risks of another and different “nationalization” that may arise in different degrees of intensity under the traditional conflict of laws methods and solutions. They rely less on abstract notions of “legal quality” of norms and artificial fictions of situs, and more on the content and economic and social functions of the norms and legal relations. Where applicable, they do not endeavor to replace but to complement conflict of laws doctrines and, insofar as it may be proper, they themselves are complemented by those doctrines.

I. THE INCREASING INTERNATIONAL “INTRANSPLANTABILITY” OF HIGHLY NATIONALIZED NORMS

To a considerable degree, the newly evolving domestic-international dualism in the municipal laws is a by-product of an enormous intensification of the role, power, “interests” and “involvement” of modern positive states in all economic and social relations of some significance, and of the novel methods used by the states in those relations. No longer do they only supervise and enforce the observance of what the philosophy of eighteenth and nineteenth century economic liberalism considered to be a sort of God-given, natural and immutable system of “private law” principles, containing a built-in and almost automatic self-regulating mechanism which did not tolerate any, or only the barest minimum of, governmental intervention.

21 E. Steindorff, supra note 16, at 262, correctly points out that the coherence of the norms of a national legal system and of the legal relations (Rechtsverhaltnisse) within a society have proved to be phenomena opposed to the classical conflict of laws (Private International Law) approach; see also notes 70, 180 infra, and text at notes 57-59 infra.

22 See section II infra, discussing the views of Neumeyer. For a critique of Neumeyer’s unsociological rejection of the legal content (Rechtsinhalt) of a norm as a criterion and his elevation of its “legal quality” (Rechtsqualität) as an element determining its applicability or nonapplicability, see M. Gutzwiller, Geltungsbereich der Wahrungsvorschriften (The Scope of Applicability of Currency Regulations) 21ff. (1940). Some of the points of the critique may be extended to some conclusions in H. Kelsen, Pure Theory of Law 105-07 (1967).

23 See text at notes 131-37 infra.


25 See also W. Blackstone, Commentaries on the Laws of England 4 (4th ed. 1938), stating, in part: “[A] man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker’s will. This will of his Maker is called the law of nature.” On the nineteenth century assumption of its universality, as incorporated in the French Code Civil, see R. David, Les Grands Systèmes De Droit Contemporains (The Contemporary Great Systems of Law) 5 (1964).

26 As to the laissez faire era’s doctrine of guidance of the national economy by an “invisible hand,” see A. Smith, The Wealth of Nations 433 (1937); but even Adam Smith recognized the need for exceptions for the encouragement of domestic industry, such as the British Act of Navigation (12 Ca. II, c. 18) giving “the sailors and shipping of Great Britain the monopoly of the trade of their country” because in his view this
Rather, in both the West and the East, in accordance with new and varied economic, social and political philosophies, and in light of changed technological and other conditions, the sovereigns are creating de jure and de facto new and different legal precepts. The overwhelming majority are highly, if not extremely, "nationalized"; they are designed to organize, reorganize, or change the economic, social, political and legal structure of relations within the boundaries of the sovereign's national territory. As will be illustrated shortly, this development creates a highly integrated special and distinct environment, frequently diametrically different from that of other states, to which many of the new municipal legal concepts may be almost inextricably tied. The cursory outline which follows does not suffice, and is not intended to describe, and even less to analyze, the nature of the vast range of "transformations," which have been elaborated upon by others from...
different but interrelated aspects of their disciplines, including law, economics, sociology, political science and philosophy.\textsuperscript{30}

In the process of this nationalization the state does not rely solely on the earlier and—in light of the liberal era's philosophy—de facto limited legislative, administrative and judicial powers within their former strict sense. Not only are those powers now enormously intensified, but the state uses additional methods, based in part on its “new interests,” in part on novel and much expanded “givings” and “takings”—a new social “quid pro quo”—and it engages in the most varied direct economic operations. These developments in turn have led to profound and dissimilar socio-economic transformations of many fundamental legal concepts in various municipal laws.\textsuperscript{31}

For example, in both the West and East, although in varying degrees, the modern doctrines of the social function of “ownership” have basically changed the nature and content of the eighteenth and nineteenth century institute, or legal concept, of the same name\textsuperscript{32}. In fact, many new and differently limited legal institutes, still collectively referred to by that term, sometimes accompanied by various qualifying adjectives, have come into existence.\textsuperscript{33} They, or some of them, may have no parallel outside of a particular country. Their “intransplantability” into another sovereign’s national environment will be discussed shortly.

Equally profound are the transformations affecting such institutes as “contract,” “freedom of contract,” “equality,” and money. We still apply the term “contract” (again sometimes with a qualifying adjective that may be wholly incompatible with the former meaning of the institute) to legal relations into which—sometimes in view of other integral parts of the national system, which may not exist in or be comparable

\textsuperscript{30} Those cited in note 27 supra and others herein are just a few examples.

\textsuperscript{31} See section IV infra.

\textsuperscript{32} As to the latter, see W. Blackstone, supra note 25, at 78-85, describing the “absolute right, inherent in every Englishmen,” i.e., “that of property” which “consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only the laws of the land . . . is probably found in nature”; and for which the regard in law for private property is so great “that it will not authorize the least violation of it; no, not even for the general good of the whole community.” But compare this view with that of Ulric Huber (1636-1694), who, writing a century before Blackstone, stated that “property of private persons is a subject to the common good; so that the sovereign has power for reasons of general necessity or the benefit of the citizens, to take away from persons the free control of their property; also to compel them to sell their goods, or, in case of necessity to go without them for no payment, but no longer than the necessity continues”; and that this “right of the sovereign is called overriding ownership.” 1 U. Huber, Jurisprudence of My Time 8 (1939 trans.). See also the contemporary view of B. Schwartz, supra note 27, who states in his preface that the “institution of property is, from a constitutional point of view, utterly unlike what it was as recently as a generation ago.”

\textsuperscript{33} See section IV infra, especially at notes 77-107.
with those in another country—the “party” may be de jure and de facto required to enter. The terms and content of such “contracts” may not be negotiable, and many essential elements characterizing the former institute may be completely missing. They are hardly suitable for international trade.

Perhaps, for our purposes, the most useful illustration of the profound transformations occurring may be the changes wrought in the meaning of “equality” and “equal protection.” As distinguished from the former abstract and in many respects conclusively presumed “equality” of contracting parties—a presumption made notwithstanding the frequent gross inequality of their bargaining positions, permitting the one wielding greater economic or other power to dictate the terms—the metamorphoses that have occurred, require precise classification. The evolving concepts try to avoid applying equal standards to unequal socio-economic and legal situations.

As will be demonstrated below, the entire development of separate and special, more or less broadly conceived, substantive rules for various groups of transnational economic relations results from the difference of their natures and the intensity of “interests” of the sovereigns that may be involved, and thus also requires classification.

The nature of the new “interest” may include proprietary, semi- or quasi-proprietary, governmental, or political interests, or may constitute a sort of inseparable mixture of such interests. Sometimes it may even be referred to as “ownership” of one of the new types—for

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84 R. Savatier, supra note 27, at 21ff., describes what he refers to as the bursting (éclatement) of the traditional concept of contract. The author also enumerates some examples of new concepts still referred to as “contracts,” although the party or parties may not be free to determine whether they wish to enter into the legal relation and/or what the terms thereof should be. He discusses several new concepts which have developed out of the traditional notion of contract: contrat collectif (collective contract), id. at 28; contrat force (mandatory contract), i.e., that of public carriers, several types of agricultural “contracts” and “contracts” into which the parties who are involved are required to enter, id. at 28-29; contrat reglemente (regulated contract, the terms of which are imposed by the law), id. at 84; contrat fictif, in which by force of necessity and difference of power positions, a retailer is required to take what a wholesaler makes available to him, at such prices as the latter may charge, id. at 91; contrat autorise (depending on whether a license would be granted), id. at 83. A more recent French phenomenon, les contrats de programme, was explained in XXIII Int'l Fin. News Survey 346 (1971), citing La Politique des Prix et le Contrat Anti Hausse, Sept. 5, 1971, refers to a system of contracts with the Patronat, the overall French employers organization, limiting the rise of industrial prices.

85 R. Hale, Freedom Through Law, ch. II (1951); Address by Chief Judge Henry Friendly, Some Equal Protection Problems of the 1970s (N.Y.U. School of Law, 1970) at 819, where it is noted that the “greatest equal protection concern of the 1970's will be legislation prescribing equal treatment for people differently situated,” or in other words “whether the equal protection clause, in addition to forbidding unequal classification without sufficient reason, requires unequal classification for unequal conditions.” See also R. Harris, The Quest for Equality 65-66 (1960).

86 See text at notes 120-33 infra.
example, the ownership inherent in the hierarchically-organized, shifting tenure of the new Soviet-type system. It may be based on the rights and interests of the sovereign's citizens, residents or legal entities that are considered to be its nationals; or it may be grounded on the fact that the sovereign's national currency or currency resources are involved. Or it may be claimed to be derived from the actual physical or—what makes the problem more difficult—the constructive situs of the property or some of its incidents within the sovereign's territory. Depending on their extent and intensity, particularly in the levels of greater economic and/or social importance, the demarcation line between "private" and "public" becomes thinner. Many hazy subdivisions of "ownership" seem to be emerging. At least to some extent those divisions apparently could be, and sometimes actually are, classified. Again, their nature will depend on the environment in which they developed; and they may be inextricably tied to the pertinent closed national social, economic, political and ideological system.

These new concepts of ownership may be closely related and perhaps complementary to the new social quid pro quo. Neither western nor eastern governments restrict themselves to those types of social welfare and similar benefits designed to assure physical survival of individuals, including the Soviet-type "personal ownership" which exists prior to transition to a single communist ownership out of which, to the extent recognized by the sovereign, all material and cultural

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87 Many of the hierarchically organized new concepts of the Soviet-type law have no parallel in the traditional Western Law, and the use of the term "ownership," accompanied by a qualifying adjective or phrase, such as "socialist," "cooperative," "personal," "private," "personal use," or "operational administration" are most important innovations. See section IV infra and the materials cited therein. See also Czanadi, Das Eigentumrecht im Ungarischen Zivilgesetzbuch (The Law of Ownership in the Hungarian Civil Code), Das Ungarische Zivilgesetzbuich in Fueng Studien (The Hungarian Civil Code in Five Studies) 113-17 (1963).


89 See some of the conflicting doctrines of constructive "situs" used as criteria for a State's power to tax discussed in B. Schwartz, supra note 27, at 311-23. The conflicting doctrines can be easily projected into the international arena. As to other problems arising transnationally, see text at notes 120-33 infra.

90 R. Savatier (2ème série), supra note 27, at 44, points out that even without nationalization, government control may be such as to make it difficult to say to what extent ownership is still private. See also A. Shonfield, Modern Capitalism: The Changing Balance of Public and Private Power 244 (1965); Miller, supra note 20, at 20. As to some of the Soviet-type shifting tenures, see section IV infra.

91 This is one of the features of the present Soviet-type "Socialist" shifting tenures existing prior to transition to Communism; see Evan, supra note 13, at n.6.

92 See text at notes 92-106 infra, discussing the derivative nature of the Soviet personal ownership and its dependence on Socialist ownership.
needs of the individuals would be satisfied. Rather, the modern governments also dispense economic benefits to assure the economic survival or expansion of economic enterprises owned by legal entities or individuals who are members of their national society and whose activities are important to the national economy. These benefits may include the most varied types of subsidies, whether given by direct payments or, somewhat less directly, by tax exemptions, tax reductions and "fiscal dividends"; as incentives, loans, and guarantees; or by payments for scientific and technological research and assumption of what is sometimes referred to as "social costs," including, for example, cleaning up the polluted environment and construction of highways. Such payments may in turn increase the value of the "private," "semi-private" or more public investment and/or its profitability.

The nature, allocation, distribution and availability of this new "giving"—the quid pro quo—frequently may depend on the status of the subjects—the bearers of rights and duties—and on the economic or social role in the national structure of the relations involved, rather than exclusively, in legal terms, on contracts, the traditional civil law concepts of "obligations," or on "vested rights." Nor do they depend solely on what, from an economic aspect, used to be a "free market."

43 See section IV infra, especially at notes 92-103.
46 Regarding the United States guarantees, insurance, coinsurance and reinsurance of transactions involving American exports of goods and related services, see Export-Import Bank Act of 1945, 12 U.S.C. §§ 635(b),(c) (1970). The Bank appears to be permitted to have outstanding at any one time loans, guarantees and insurance aggregating to $27,500,000,000, id. at § 635e. See also the interpretation in pamphlet of the Bank, Export-Import Bank Act of 1945, as amended through Aug. 17, 1971, at 11 n.26; Evan, supra note 8, at 81, 88. On proposals of uniform export subsidy and adjustment assistance to smaller companies and groups of workers injured by import competition, see Summary of the Recommendations of Commission on Trade, N.Y. Times, Sept. 14, 1971, at 24, col. 3 (hereinafter cited as Strategy for the Seventies).
47 For a discussion of this concept see K. Kapp, The Social Costs of Private Enterprise (1950); and text at notes 198-99 infra.
48 See generally B. Schwartz, supra note 27, at 202-06; H. Wade, Administrative Law 254 (3d ed. 1971); and W. Friedmann, supra note 24, at 233.
“free competition” or “free enterprise.” Unfortunately, in many respects the legal aspects of this novel give-and-take and of the newly emerging institutes, such as the “plan,” under which the new quid pro quo may be effected, are undeveloped or underdeveloped. The new quid pro quo may sometimes arise in a state of relative wilderness, becoming a sort of largess from which the more powerful may gain and the weaker lose.

However—and it is this characteristic that is most important for the purposes of this paper—the new quid pro quo may not be, and frequently is not, available outside of the territory of the national sovereign, or at least not to the same extent. Thus while domestically measures involving some “taking,” such as depreciation of money, may to some extent be balanced, transnationally they may be unbalanced and one-sided.

In addition to all this, modern governments also engage in economic—including commercial—activities directly. Through the combination of their enormous powers the sovereigns control, influence or manipulate the market, the value of money, rates of interest, and prices. They may make goods, money, and working opportunities more or less abundant and take other measures based partly on their legislative and administrative powers, partly on their novel, ill-defined “interest,” and modus operandi.

As a result of this much tighter economic, social, and legal integration, they become distinct and separate social, economic and legal entities. In the extreme each sovereign becomes a sort of a nationwide government-enterprise in which practically the entire production and

49 P. Samuelson, supra note 45, at 37, refers to the present economy of industrial nations, with the exception of the Soviet system, as a “mixed economy in which both public and private institutions exercise economic control.” He also concluded that the economy “is a mixed system of monopoly and competition.” Id. at 39.


51 W. Friedmann, supra note 24, at 90, mentions “a new kind of immobility resulting from the profound changes produced by the social welfare responsibilities of the modern state. . . .”

52 See, e.g., notes 44-46 supra.

53 With respect to the Soviet economy, Vilaghy, The Legal Concept of the Hungarian Economic Reform and the Legal Status of the Socialist State Enterprise, 1969 Hungarian L. Rev. 5, 8, points out that “a socialist state differs from all other earlier types of state by the unification of the executive power and the ownership of the means of production in one hand” and also states that “no clear-cut line can be drawn between the direct and indirect means of economic policy.” Id. at 10. With respect to the West, see P. Samuelson, supra note 45, at 44-45, and 143, stating that with the exception of the USSR, the “United States government is the biggest business on earth.” See also, A. Shonfield, supra note 40, at 66, 67.

54 Pliva, Majetková Samostatnost Státních Prumyslovců Podniku (Proprietary Independence of State Industrial Enterprises), 14 Acta Univ. Carol., Iuridica 335, 337
distribution—in fact, the life of the members of the society, for better or worse—is in the hands of the sovereign. The entire national law may be geared to this end.

It follows, then, that the tearing out of a municipal “legal concept” from such an integrated natural habitat, which may resemble an extremely sophisticated and delicate machine or instrument, for which the norm or concept was specially built, may destroy its intended meaning, purpose or function. There may be no complementary or integrated “counterpart” or “counterparts” required for its intended function in the different economic, social, legal and—last but not least—ideological machine or environment of another sovereign.  

In fact, transnationally the straight application of many of the highly nationalized municipal norms may become one-sided and discriminatory. Many such mutations may be only partially “transplantable” or wholly “intransplantable” into a foreign and different national environment. They may be partially, or wholly, unsuitable for regulating international trade and many other transnational economic relations. A sort of distortion in reverse may result from an attempted “transplantation” of a traditional concept, such as private ownership, into a highly socialized foreign milieu which does not tolerate and has no room for such institutes. This novel problem may arise, for example, with regard to estates of domestic decedents with foreign heirs or beneficiaries. Of course, the extent and intensity to which these developments may be occurring, or have occurred are matters that differ as much as do the diverse national systems. Such differences, and some of the more radical metamorphoses involved, will be considered further below.

II. The Liberal Era “Neutrality” of “Common Concepts”

With this introductory review in mind, even before elaborating on the much intensified international economic interdependence, it may be useful to consider further, at least to some extent, the relative position of the formal choice of law norms on the one hand and, on the other, the separate municipal substantive norms for legal relations involving a “foreign element,” the effect of which transcends...
the territory of its national law, as was mentioned above and will be discussed further below. Nothing contained herein is intended to belittle the continuing great importance of the conflict of laws norms in transnational economic relations. However, what is sometimes referred to as a “crisis” or “revolution” in the conflict of laws\(^{58}\) (and, in civil law and Soviet-type law countries, in “private international law”—notwithstanding the nondescriptiveness of the name generally and the idiosyncrasy of Soviet doctrines with regard to the term “private”) seems to be due, at least in part, to problems of limited “transplantability” or of “nontransplantability” of many concepts devised to operate solely within the domestic milieu of the national sovereign. The eighteenth and nineteenth century doctrines of “private international law,” synonymous with the conflict of laws, were based on what has been referred to from the viewpoint of that liberal era’s economic philosophy as the “neutrality” and “universality” of many common concepts.

Thus, trying to explain the theory, which found wide acceptance, that a foreign forum’s “public law norms” as distinguished from its “private law norms” are not enforced in another forum, Professor Karl Neumeyer mentioned in his foreword to the fourth volume of his *Internationales Verwaltungsrecht* how in the summer of 1893, during the early period of his legal career, he began thinking of whether there were similarities between private international law and international administrative law.\(^{59}\) By 1936, when the elaborate (and in many respects still valuable) fourth volume of his work was published, his findings as to the characteristics of private law norms seemed to have become in considerable measure obsolete. Expressing his views in fairly general terms, he still believed that the state had no interest in the subject matter of private transactions of other parties. He explained that the reference (*Verweisung*) to a foreign private law and its applicability under the conflict rules “is possible in private law in view of the unstateliness of the relations of life (*Unstaatlichkeit der Lebensbeziehungen*) regulated thereby”; and that “the subject matter thereof exists between private parties, the State is not in it, but above it,” and pointed out that the situation is different in the “totality of public law.” In the latter, Professor Neumeyer added, no one owes taxes, is punishable or can sue in a vacuum. These public law rights and obligations, he explained, exist


only with respect to a certain state, and each state can regulate only its matters.\textsuperscript{60}

In the late fifties, we still find in outstanding legal works, although somewhat more cautiously expressed, the view that “ordinarily” private law rules “are simply neutral” so that all that is needed in the conflict of laws is not interpretation of the statute but a rule of private international law to accompany and to delimit the rule of private law.\textsuperscript{61} Finally, even in the legal literature of the last few years we may still find considerable though somewhat more guarded reliance on the “neutrality” feature of “private law norms.”\textsuperscript{62}

On the other hand, a growing number of legal writers on the conflict of laws and the substantive law applicable to international trade relations or to other international situations, do recognize the novel public interest sweep in our modern law, and/or the frequent unsuitability of foreign municipal law norms, intended primarily for purely domestic situations, for regulating international economic, and particularly trade, relations.\textsuperscript{63}

Under Neumeyer’s doctrine, which served fairly well in the prior era, the conflict of laws problem was relatively simple and suitable for some mechanization. He classified the norms applicable to public law as “one-sided” (\textit{einseitig}), and those applicable to private law as “two-sided” (\textit{zweiseitig}).\textsuperscript{64} Since there can be no vacuum in the law, he concluded that each factual situation is controlled by either the domestic or the foreign law, simultaneous control by several conflicting private law norms of different jurisdictions being impossible.\textsuperscript{65} On the other hand, in the sphere of public law the situation is different. Here there is no such “either-or” (\textit{entweder-oder}). The confrontation is not: “domestic or foreign law, but: the law of the home state or noninvolvement of the home state (\textit{Unbeteiligkeit des Inlands}).”\textsuperscript{66} Thus, under that formula, the cleansing process was believed to be: eliminate the public law norm and give effect to the applicable private law norm of one of the conflicting jurisdictions.

\textsuperscript{60} Id. at 115.
\textsuperscript{61} E. Rabel, supra note 29, at 103; cf. id. at 102.
\textsuperscript{62} Kegel, supra note 58, at 198; cf. id. at 183. See also A. Ehrenzweig, supra note 58, at 63, who criticizes Currie for ignoring “the all important fact that ‘governments’ are, outside the law of admiralty, ‘interested’ in the solution of conflicts problems only in such exceptional cases as tax on currency matters. . . .”
\textsuperscript{63} B. Currie, supra note 29, at 417, concludes that “states, like individuals act primarily for the furtherance of their own interests and the interests of their people.” See also id. at 548, 549, 482 et seq., Kratochvil, supra note 28, Vallindas and Goldstajn, supra note 29, and Eörsi, Regional and Universal Unification of the Law of International Trade, 1967 J. of Bus. L. 144.
\textsuperscript{64} Neumeyer, supra note 59, at 116.
\textsuperscript{65} Id. at 120.
\textsuperscript{66} Id.
Such a belief presupposed a relatively great "neutrality" or "transplantability" of the foreign norm, or in Neumeyer's words, a "two-sidedness." For example, in the field of monetary law, the belief in the effectiveness of a kind of automatic mechanism—the classical gold standard, expected to protect the owner of money or the creditor against excessive governmental intervention—was a natural complement to the "neutrality doctrine" of that bygone era. However, besides many doubts concerning and/or outright rejection of some aspects of such sweeping "territoriality," our era has seen the modern transformations of legal norms mentioned above, and the state is almost omnipresent.

If ever there was "neutrality" of the law, it was only relative. At best, it was neutral only from the viewpoint of very similar economic philosophies. As long as the overwhelming majority of municipal private-civil laws of so-called civilized countries were based on the abstract concepts of economic liberalism and minimum governmental interference, their precepts were fairly "neutral" in light of that philosophy. Much less frequently than today, the "transplantation" of a norm may have caused substantial injustice in light of that philosophy. What is "just," however, depends on the philosophy-ideology from which the law or doctrine in question is viewed. There is a question as to what extent the conflict of law doctrines themselves are neutral.

61 Zweigert, Droit International Privé et Droit Public (Private International Law and Public Law), 54 Rev. Crit. D.I.P. 645, 654-55 (1965). See also E. Steindorff, supra note 16, at 206 et seq. After reviewing numerous materials and considering the distinction between refusal of enforcement of foreign political laws and giving them some effect, Steindorff concludes, citing Wengler, Uber die Maxime der Unanwendbarkeit Auslandischer Politischer Gesetze (On Principles of Inapplicability of Foreign Political Laws), 1956 Int'l Recht u. Dipl. 191, 203 (1956), that there is no unity as to when foreign political norms will or not be applied, asserting that the criterion for the differentiation in the decision has not yet been found. Id. at 217. Cf. notes 70 and 131 infra and accompanying text, and the materials cited therein.

68 W. Friedmann, supra note 17, at 72, refers to the theory of several civil law countries limiting the concept of ownership to only tangible property, and points out that this theory may have lead to some misunderstanding. That view, attributed to the nineteenth century German pandectists, has not been generally adopted in the civil law countries. See Austrian Civil Code §§ 6, 291, 292, 353, 355 (1811). See also Rouček-Sedláček, 2 Komentář k Československému Obecnému Zákoníku Občanskému (Commentary on the Czechoslovak Civil Code) 210 passim (1935). The new interest of the sovereign in all proprietary rights is thus all-embracing.

As to the illusory "neutrality" of the state in the West, see Miller, supra note 14, at 11. He points out that the "state has never been neutral to economics," mentioning various forms of subsidies (tariffs, land grants to railroads, etc.) or private law decisions, which in effect favored business (such as the tort doctrines of contributory negligence and assumption of risk). Id. at 23. See also 1 R. Pound, supra note 16, at 429, citing Jhering: "Formerly high valuing of property, lower of the person. Now lower valuing of property, higher valuing of person."

69 L. Lunz, supra note 17, at 24, frankly states that the collision norms applied in
Our modern laws regulating what formerly were strictly “private” or “civil” law relations are based on extremely diverse philosophies and various diverging subdivisions thereof. Moreover, the presence of the sovereign in what formerly were strictly private relations is no longer achieved solely by a sort of circumscription by public law norms, i.e., indirectly. The former private-civil law norms are also being transformed directly, from within. The public interest features are frequently built in. In fact, this built-in nature of the public interest feature is one of the basic characteristics of many modern transformations.

There has been an enormous expansion and intensification of public-administrative norms within the primary jurisdiction of the executive branch of the government and its various agencies, a development affecting the rights and duties of the parties within the scope of such jurisdiction. Speaking of the novel governmental measures in the field of administrative law, Professor Kenneth Culp Davis points out that they affect “nearly everyone in many ways nearly every day” and that the average person is much more frequently affected by the administrative process than by the judicial process. Professor Jaffe observes that the administrative process is “an instrument of political and economic reform” and that “jurisdictional transfers and transformations frequently register the transfer of power among social and economic classes.” But, as Professor Davis explains—and both he and Professor Jaffe seem to agree—although the administrative process has a wide range of flexibility and is politically colorless, depending upon the programs to which it is attached, the Soviet Union “follow from the general tasks of Soviet foreign policy . . .” and that this “purpose also determines their content.” However, eastern, as well as western conflict law, operates with such criteria as to whether the foreign law is “in harmony” with that of the forum, or is contrary to its “public policy,” whether it is a law of a foreign “friendly” country (see Regazzoni v. Sethia, Ltd., [1957] 3 All E. R. 286, 289), or whether there is a prohibition in forum law. See Boisevain v. Weil, [1950] All E.R. 728; Bethlehem Steel Co. v. Zurich General Accident & Liability Ins. Co., 307 U.S. 265 (1939)). There is even a question as to what extent such cases as Zschemig v. Miller, 389 U.S. 429 (1968), rehearing denied, 390 U.S. 974 (1968), which criticizes the ideological approach of some lower courts, can do much more than decide whether the lower courts’ philosophy was proper, or excessive, or whether it is the function of the legislative or executive branch of the federal or state government of the forum, rather than the courts, to determine the philosophy. On “the ferocity—characteristic of border warfare—of some of the disputes” in the conflict of laws, see generally J. Honnold, Unification of the Law Governing International Sales of Goods 3, 32-33 (1966).

1 K. Davis, Administrative Law Treatise 7 (1958).

2 L. Jaffe, Judicial Control of Administrative Action 3 (1965).
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it is "always a tool for positive government, never a tool of laissez faire." It permits governmental regulation of the entire national economy, including production, distribution and welfare of all members of the national society."

But such developments are essentially indirect methods of transformation. As was mentioned above, the modern transformation and "publicization" (i.e., the implantation of public interest elements) of many concepts are also effected directly. The concepts involved are those referred to—more correctly in the past than in the present—as norms of "private" law as distinguished from "public" law, and which remain primarily within the jurisdiction of the regular courts of law. In the process of transformation, the former concepts may be superseded by new concepts which may not have existed in the traditional eighteenth and nineteenth century law. As already indicated, this change is frequently obscured by the use of the old terminology no longer descriptive of the new institutes. The cause of the resulting terminological muddle may be psychologico-political. A truly descriptive name may be avoided and a politically more acceptable label affixed; or the concept may be mislabelled. Thus the main source of confusion may stem from the use of identical terms for extremely dissimilar legal relations or institutes. In our modern law the value of dictionaries has been greatly reduced. Analysis and description, then, are unavoidable.

Of course, as will be illustrated below, these direct and built-in transformations are by far more comprehensive and profound in the

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73 1 K. Davis, supra note 71, at 14-15, and Jaffe, supra note 72.
74 1 K. Davis, supra note 71, at 7-8, lists a wide range of economic matters regulated by the government. L. Kohlmeier, The Regulators, Watchdog Agencies and the Public Interest 30 (1969), mentions that each year the government regulatory agencies issue more than 100,000 rulings of two kinds: rules that apply with the force of law to all concerned, and rulings in the traditions of court decisions. 1 F. Cooper, State Administrative Law Treatise 2-3 (1958), states as "a conservative estimate" that "more than 2,000 state administrative agencies are exercising legislative and judicial functions," and mentions the wide range of fields affected thereby. W. Friedmann, supra note 24, at 349, refers to the contemporary United States as "the administrative State par excellence."
75 A. Shonfield, supra note 40, at 145, reminds the reader that "planning," initially during the post war period and in some countries throughout the 1950's, was a dirty word. Eörsi, Regional Unification of the Law of Sales and Possibility of their Harmonization 3 (1964) (paper presented at the N.Y.U. Law Center Colloquium of Int'l Ass'n of Legal Sciences) mentions the new problems of qualification, in which the Western forum starts "from the spirit of the capitalist legal system," thus completely distorting the different socialist legal system. See also Hazard, Socialist Law and the International Encyclopedia, 77 Harv. L. Rev. 279, 285 et seq. (1965), citing another of Eörsi's papers. Eörsi, Comparative Analysis of Socialist and Capitalist Law, 2 Co-Existence 139, 145 (1964), refers to "the confusion of identical denomination of essentially different notions."
76 Thus, from a traditional law aspect, the Soviet style law concept of "personal ownership" is wholly non-descriptive, in fact, misleading. See text at notes 90-107 infra.
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East. However, they also exist in the West, although in the latter the metamorphoses more frequently, but not exclusively, arise indirectly by circumscription, by what could vaguely be described as administrative measures. However, the two methods, direct and indirect, may be so intertwined that the question of which are direct and which are indirect may be blurred. The characteristic of both seems to rest in their new socio-economic, ideological or political, though differing, purposes. In the East the methods tend to be more general, mechanical and sweeping. In the West they may be less drastic, more sophisticated, selective and flexible, tending towards recognition of great diversity of a large number of socio-economic groups of relations to which special rules are applied.

The feature which they have in common is that they are devised primarily in order to organize, reorganize or regulate wholly national legal relations which may be diametrically different from those arising in international trade. Thus, for example, among the built-in rules developed in this country for the protection of the economically weaker party are special provisions applicable to legal relations involving "consumer goods" and retail installment sales and the protection of tenant against landlord, and broad and far-reaching protection against unconscionable contracts and clauses.

Through such not easily definable combinations of regulatory measures, partly direct (such as measures built into the modern legal concept of a national currency unit), partly indirect (such as governmental economic interventions differentiating between the numerous categories of economic, social and legal relations in which "money" is relevant), modern sovereigns more or less successfully regulate the content or quantum of rights within the institute of their national currency unit—whether it be the dollar, mark, franc or ruble. The mechanics utilized in these measures raise problems falling into several fields of learning, notably economics, political science, psychology and of course the law. Within each of these disciplines considerable controversies arise as to the effects which the mixture of various component parts may have on diverse economic, social and legal relations within the two distinct arenas, one domestic, the other transnational.

Consider, for example, the impact of such measures

77 As to some of the Western transformations see the materials cited in E. Stein-dorff, Sachnormen im Internationalen Privatrecht (Substantive Laws in Private International Law) 224-26 (1958), on the transformation (Umgestaltung) of the content of obligations (Schuldverhältnisse) through the incorporation of social elements and public law norms, including art. 20(1) and art. 28 of the Basic Law (Grundgesetz) of the German Federal Republic.

78 As to the divergent views of "monetarists" and others referred to by Samuelson as the "eclectic majority," see P. Samuelson, supra note 45, at 309-10 and 324-26. The problem is frequently covered in the financial sections of the daily press, see, e.g.,
as an increase or reduction of the supply of money, the lowering or raising of the discount rate, a requirement that larger reserves be held by the banks, interventions in the foreign exchange markets by the government as a buyer or seller of its and/or other currencies, or imposition of foreign exchange restrictions. Notwithstanding their imperfections, these devices have become important tools of modern governmental monetary, fiscal, economic, social and political policies regulating the quantum of rights or content within the legal institute of a national currency unit.

Not only does this have far reaching ramifications in widely varying legal relations but, quite frequently, the reduction of the quantum of rights of the owner through monetary measures enables the government to escape the traditional type of constitutional restrictions of takings without due process of law\textsuperscript{79} and the constitutional separation of powers.\textsuperscript{80} In fact, "money" and other assets (goods and services) stand at opposite ends of the legal scale. Through its nominalistic doctrine, the law frequently mandates more or less conclusively the partial or complete disregarding of the well-known fact that the value of our modern fiat moneys is not static but fluctuates according to various yardsticks—e.g., the purchasing power of supplies for human existence or subsistence as measured by the costs-of-living within a specific region or the national environment on the one hand or, on the other, as measured transnationally in terms of the rate of exchange vis-à-vis other national currencies.\textsuperscript{81} In fact, most frequently the law operates with a factually untrue but well-established legal presumption that the value of its national currency unit is static. In this country, for example, under the Joint Resolution of

\textsuperscript{79} Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 305, 307ff. (1934), pointing out that the Fifth Amendment referred only to direct appropriation and not to the indirect effect of prohibitions of valorization clauses—the devaluation of the dollar—on contractual obligations; see also Ling Su Fan v. United States, 218 U.S. 302, 310 (1910). See also Juiliard v. Greenman, 110 U.S. 421, 448-89 (1884), and text at notes 85-86 infra on de facto devaluation prior to or without any congressional enactment.

\textsuperscript{80} Regarding the constitutional separation of powers see Address by Pierre-Paul Schweitzer (Managing Director of International Monetary Fund), Institute of Science and Technology at University of Cardiff, Nov. 5, 1971, XXIII Int’l Financial News Survey, 377, 378 (1971), where it is pointed out that perhaps the reason why in the United States there has been greater belief in and dependence on monetary policy may rest in “the fact that the Constitution of the United States, born in the eighteenth century, applies very firmly the principles of Montesquieu for the three-fold division of powers of government,” and that the “strict separation of the Executive from the Legislature makes it extremely difficult for the U.S. administration to use the fiscal instrument effectively in the short run.”

\textsuperscript{81} Juiliard v. Greenman, 110 U.S. 421, 449 (1884).
Congress of June 5, 1933, with respect to dollar obligations the untrue presumption seemed to have become conclusive and irrebuttable, irrespective of whether the underlying relation was wholly domestic or transnational.

Some of the inequities which arise from this development, such as the disregard of the law for the fact that during an inflationary period the real value of money saved for the rainy days of old age has been reduced or shifted away to other more favored groups, are sometimes, at least in theory, mitigated domestically by the novel "public type benefits" mentioned above, such as cost-of-living increases in pensions or social welfare benefits or increased tax exceptions.

The nominalistic doctrine leads to the further untrue but frequently mandatory legal presumption that all price increases come from the side of nonmonetary assets such as goods and services. This presumption in turn may call for widely differing adjustments in situations in which different foreign elements are involved. For example, one country's competitive position in a foreign or the domestic market may have deteriorated, and that deterioration may in turn have an adverse domestic effect on, for example, employment, economic growth, and the balance of payments. The national sovereigns may then respond to those developments by resorting to such imperfect remedial measures as subsidies to exporters, duties and taxes on imports, suspension of convertibility of the national currency into gold or into other reserve assets, and/or de facto or de jure changes of the rate of exchange.

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82 31 U.S.C. § 463 (1970), declaring all valorization clauses freezing the value of the dollar to be contrary to public policy, and providing that every obligation payable in United States currency "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." As to the constitutionality of this provision see Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1934).


84 P. Samuelson, supra note 45, at 255, points out that modern research suggests that the greatest redistribution of income resulting from inflation is from older to younger people, and that it tends to favor debtors and profit receivers at the expense of creditors and fixed-income receivers. On purchasing power shrinkage of the dollar see A. Okun, H. Fowler and M. Gilbert, Inflation: The Problems It Creates and Policies It Requires 14 et seq. (1970).

85 For a brief discussion on the temporary suspension of convertibility of the dollar into gold or other reserve assets and other measures announced in President Nixon's Address of Aug. 15, 1971, see N.Y. Times, Aug. 16, 1971, at 14, col. 1. See also notes 45 and 47 supra, and note 86 infra.

86 For a discussion regarding the immediate realignment of the exchange rates of
However, most frequently, the sovereigns are far less sensitive, or simply insensitive, to the transnational effects of their monetary, fiscal and other policies and of the effects of the depreciations and devaluations of their national currencies on the honest contractual quid pro quo to which a foreign party to a bona fide executory transnational trade or loan relation is entitled. Despite the fact, then, that inequities may be alleviated with respect to some domestic transactions—although this is not true of executory international trade and lending relations—the national law mandating the nominalistic treatment becomes transnationally discriminatory, one-sided, and in fact, dishonest.

Accordingly, as will be described further below, groups of more transient executory transnational legal relations, in which otherwise the necessary equilibrium of the mutual promises would be broken, require separate substantive municipal norms for the preservation of that balance. It is with regard to this category of relations that gradually—and unfortunately much too slowly—in the enlightened self-interest of the national sovereigns, special municipal law rules are evolving, to implement the highly nationalized transformations of domestic legal concepts.87

This new autonomous branch or system of the municipal law does not prevent the state from using its highly nationalized law for the regulation of the social, economic, political and legal structure within its national environment. Rather, the state tries to limit the scope of applicability of that highly nationalized law to those relations for which it was devised—namely to such relations as are wholly or predominantly integrated into the distinct separate social, economic, political and legal national environment of a specific sovereign.88

IV. THE EASTERN METAMORPHOSES

For the purposes of this paper, it will be useful to demonstrate the effect of the new direct and/or indirect novel transformations in the international arena by briefly summarizing some of the develop-

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87 See sections VI-VIII infra.

ments in the Soviet-type law, notably in Czechoslovakia. The basic codes which came into effect in or about the 1960's contain sweeping built-in provisions transforming the traditional private-civil law concepts.89

Since it is impossible in this paper to treat in depth the new basic and very instructive doctrines of Soviet-type law, the few examples which will be mentioned should not be considered to be an exhaustive exposition. This caveat appears to be necessary in view of the frequent oversimplifications in western legal writings dealing with the "convergence" or "divergence" of the western and eastern systems or of some of their legal concepts.

The civil codes of the countries of the so-called Soviet bloc are not identical, and the differences are not insubstantial. Outwardly, for example, the Czechoslovak Civil Code of 1964 appears to be much more radical than the others. Such differences notwithstanding, this writer agrees with Professor Knapp of Czechoslovakia and other authorities that it is possible to derive from the codes "a common concept of the socialist civil law, i.e. a civil law, which is based on socialist economic relations and serves their realization."90 The Czechoslovak Civil Code does indeed reveal, outwardly and ostensibly, greater radicalism of form and arrangement; for example, it lacks a separate part treating the matter traditionally categorized in the civil law system as the "law of obligations," which still appears in the civil codes of other countries with the Soviet-type systems. However, it is an open question whether the Code is more radical in fact. It is likely that it only expresses with somewhat greater clarity than do the other civil codes the meaning of the new concepts in their transition from "Socialism to Communism."91

Thus, we may start with the new Soviet-type concept of "personal

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89 The most important of these basic codes, aimed primarily at the regulation of wholly national legal relations and the transition from "Socialism to Communism," are the 1964 Czechoslovak Civil Code, No. 40 Czechoslovak Collection of Laws (1964), and the 1964 Economic Code, No. 109 Czechoslovak Collection of Laws (1964), as amended.

90 1 Účebnice Československého Občanského Priva (Textbook on the Czechoslovak Civil Law) 10 (1965), a collectively written textbook for law students, approved by the Czechoslovak Ministry and Culture (hereinafter referred the Official Textbook on Czechoslovak Civil Law. All translations from that work appearing herein are by this writer). See also Blagojevic, Some Characteristic Private Law Institutions in the Socialist Countries 2-5 (1964) (a mimeographed paper presented at the 1964 New York Colloquium of Int'l Ass'n of Legal Science), and Hazard, Marxian Socialist Law as an Instrument of Comparison 5-8, 16-17 (Jan. 1971) (a paper distributed at Conference of Parker School of Foreign and Comparative Law at Columbia Univ.).

91 Constitution Proclamation in Czechoslovak Constitution of July 11, 1960, No. 100 Czechoslovak Collection of Laws (1960), defines the principle of Socialism as: "Everybody according to his ability, to everybody according to his work"; and the principle of Communism as: "Everybody according to his ability, to everybody according to his needs."
ownership" (which is not to be confused with the traditional concept of personal property, as distinguished from real property), the so-called "derivative nature" of that new concept, and several other closely intertwined concepts. Eastern writers point out that personal ownership is a "type of ownership typical and specific in the socialist society, which does not exist and has no parallel in the bourgeois society" and that it may be characterized, in part, by "its inseparable tie to the socialist social ownership." In fact, it is diametrically different from the traditional liberal era concept of "ownership." It is a new Soviet-type law institute of a severely restricted temporary use of a very limited and fluctuating quantum of things, functionally preconditioned for the satisfaction of material and cultural needs of the citizen, his family and household." Within those limits it may be inherited. The fluctuating quantity of things which may be in such temporary use is strictly tied, in the Czechoslovak Civil Code, to the economic (supply) situation at a given moment. The Civil Code provides that the quantum of such satisfaction of material and cultural needs of citizens is made dependent on "the development of the socialist economy and with respect to each citizen primarily on the contribution of his work toward this development." As soon as either the need of the individual, his family and household (sometimes referred to as the subjective criterion) changes or terminates, or the country’s supply situation (sometimes referred to as the objective criterion) undergoes a change in light of which the quantity of things exceeds the socially permissible (justifiable) quantity of consumption (satisfaction of needs), a spontaneous and automatic transformation of what may have been "personal ownership" into a wholly different and moribund institute referred to as "private ownership" takes place by operation of the law.

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92 2 Official Textbook on Czechoslovak Civil Law, supra note 90, at 25.
93 Id. at 26.
97 Plank, 2 Official Textbook on Czechoslovak Civil Law, supra note 90, at 39, writes: "In many instances, the very quantity of things will be the distinguishing element for classification of the things in personal ownership. The quantity will have to be considered not only from the subjective aspect of the owner himself and the members of his family, but also from the objective aspect of the society. This means, that it is necessary to examine, whether the personal need of certain things is not in a given situation in conflict with the interest of the society." He further points out that "for instance, it is necessary to view differently a situation in which someone bought 100 kilograms of flour.
The latter, not to be confused with the traditional institute of "private property," was reduced by other basic doctrines of Soviet-type law to a more or less empty shell, devoid of most if not all of its former content. It is clearly destined to extinction. It does not enjoy any constitutional protection or assurance of inheritance. Nor does the Civil Code assure its "inviolability" or "compensation" in the event of governmental takings. Rather, the new concept appears to have become a vehicle moving toward reversion and further transformation into Socialist social ownership, that is, a reversion to the state.

In light of these and other doctrines, some of which will be further mentioned, the Czechoslovak Civil Code, in which the so-called derivative nature of "personal ownership" is firmly anchored, provides that "things destined for personal use of citizens are transferred from the Socialist social ownership into their personal ownership, or are made available to them as personal use." The difference between the two kinds of holdings is relatively small.

It is this temporary carving out of personal ownership and sub-
sequent reversion to the state, in conjunction with other devices, including those mentioned above, which constitute the basic elements distinguishing traditional from Soviet-type "ownership." Under the traditional law, if a lesser right is "carved out" from the totality of private ownership, upon termination of the lesser right, the carved-out part reverts and consolidates into a more total private ownership. In Soviet-type law, as is quite natural in view of its ultimate aims, upon the termination of a subjectively and objectively preconditioned temporary use, referred to as "personal ownership," the thing, if not consumed, by operation of the built-in features is driven toward reversion to the state. This appears to be the true core and meaning of its "derivative nature" and dependence on Socialist social ownership.

It should be added that one of the most frequent oversimplifications regarding the concept seems to be the assumption that the idea of Socialist ownership is concerned solely with the means of production and that domestically the takings are wholly one sided. In fact, there is a "quid pro quo." On its way to what the doctrine refers to as transition from "Socialism to Communism," it aims at the creation of a single Communist "ownership" out of which individual needs of the citizens, to the extent recognized by the state, would be satisfied.

Obviously, with perhaps negligible exceptions, it is available only domestically. Transnationally, the transformations in fact do become "one-sided." In short, disregarding the details of some seemingly transitional legal structures, in conjunction with such measures as the ownership of means of production, the state becomes a tight economic and social "establishment."

The above doctrines, together with others, some of which are mentioned above, raise the question of who is the true "owner" within the traditional meaning of the concept. In the East, it appears to be the Soviet-type state, sometimes subject to the limited temporary and shifting use or right of the citizen. In the West, the answer still appears to be different. The holder of title, whether a physical person or legal entity, is the bearer of the "totality of rights" of seemingly different sorts of "ownership," subject to the ill-defined and also shifting "interests" of the sovereign; in fact, the "totality of rights" is in various ways reduced or increased by public interest.

Obviously, this transformation of the institute of "ownership" has

104 This is sometimes referred to as the "elasticity" of the western concept of ownership. See Roucek-Sedlacek, supra note 68, at 199.
105 Law of the USSR No. 525, Dec. 8, 1961, Principles of Civil Legislation of the Soviet Union and the Union Republics Preamble (1962), states that Soviet Civil Legislation helps to secure the Socialist economic system, Socialist property and the evolution of its various forms into a single form of property. See also 1964 Czechoslovak Civil Code, Preamble, No. 40 Czechoslovak Collection of Laws (1964).
106 See notes 91 and 103 supra.
far-reaching ramifications in transnational economic and legal relations. Since it is impossible to analyze this problem within the limits of this article, the reader himself may wish to consider the problems created: for example, the positions and inequalities of eastern and western parties in connection with the passage of title, depending on whether that passage occurs in the territory of one sovereign or another; constructive situs of intangible rights; inheritances which would move from West to East and, in a different respect, from East to West; and the problems of so-called foreign investments.

There are other, quite numerous Soviet-type civil law institutes and doctrines which are wholly unsuitable for international economic relations.

The Czechoslovak Civil Code of 1964, which no longer contains a separate branch labeled the “Law of Obligations,” elaborates on the nature of some of the new mutations. Two of these important newly-labeled concepts are those of “services” and “civic aid.” The former is wholly unrelated to the identical term as used in western law or in the common dictionaries. It embraces a vast range of dealings of individuals with “socialist organizations,” ranging from “sales in shops” to the making of repairs and alterations, storage and bailment, bank deposits, bank loans, insurance, transportation, and legal counseling. The important elements of “services” are the following: they are rendered by socialist organizations to citizens for the satisfaction of their “socially justified” material and cultural needs; they are not necessarily based on “contracts”; they may be for payment or free; and they, like all other civil law relations, are subject to such special Soviet-type law general doctrines as incorporation into law of the changing commands of centralistic economic plans by way of the binding “rules of Socialist conduct,” limitation of protection to such rights as are exercised in harmony with the interest of society, and the novel and conclusive presumption of harmony of interest of the society with that of the citizen and the effect of that presumption on interpretation.

The other of the two new institutes, “civic aid,” arises in relations between two individuals. (It should be noted that the distinction between this concept and “services” is based on the subject, the bearer

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108 Id., §§ 384-89.
109 Id., § 223.
110 Id., § 224.
111 Id., § 225.
112 Id., § 384-86.
114 Id., § 384-86.

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of rights.) It embraces relations which formerly constituted loans between individuals and services or work by one individual for another.\footnote{118} As is indicated by both its name and an emphasis even greater than in other relations on the requirement of conformity with "rules of Socialist conduct,"\footnote{117} in some respects it comes close or closer to a mere moral obligation, limiting compensation in a manner eliminating expectation of profit. Referring to the novel institution of "civic aid," the Czechoslovak Deputy Minister of Justice explained that "rights and obligations may arise from such relations too, but principles of Socialist morality are a more important factor here than economic considerations," and that the Civil Code expressed this fact by stating that the "provision of civic aid shall be in keeping with the rules of Socialist conduct."\footnote{117}

It should be added that, as already indicated, Czechoslovak jurists point out that "the Civil Code proceeds from the unity of interests of society and its individual members," so that it protects individual rights only if they are exercised in harmony with the interests of the society.\footnote{117} In fact, the doctrine of identity of interest of the society and of the individual constitutes an important conclusive presumption of the Socialist law. It requires that the changing "interest of the society," which is subject to formulation by the central authority under the doctrine of "democratic centralism"—frequently embodied in the plan and other measures controlled by those who speak for the Communist Party—be deemed identical with the individual’s own interest.\footnote{119}

Distinguishing the western principles of interpretation of the will of the parties from those of the Socialist Civil Code, the official Czechoslovak textbook on Civil Law explains that bourgeois law is based on a "subjective, individual approach of interpretation of the expression of will" of a party, while the Socialist Civil Code "proceeds from an objective aspect." It is pointed out that in a society building Socialism,
the relations have the character of "comradely cooperation and socialist assistance" and that "in our society aiming at Socialism" it may be demanded that citizens act in accordance with the rules of Socialist conduct.\textsuperscript{120}

Obviously, these general principles are wholly incompatible with the requirements of international trade which are founded on different principles: equality of parties, stability—based upon the traditional principles of \textit{pacta sunt servanda}, freedom of contract, and at least some realization that "interests" of not only one, but of several and different sovereigns are involved.\textsuperscript{121} To a considerable, although still inadequate extent, this incompatibility has been recognized by the Czechoslovak law itself. Its transformed but—notwithstanding the absence of the label—still existing "law of obligations" brings into existence a differentiation of "obligations" based domestically on the character of the subjects or bearers of rights, and depending accordingly on whether the bearer of rights is the state, a Socialist or similar organization or an individual and, transnationally, on whether the transactions involved are to be classified as international trade relations within the meaning of the new and separate International Trade Code, discussed below.\textsuperscript{122}

\section*{V. THE ADMINISTRATIVE AND PRIVATE MUNICIPAL INTERNATIONAL TRADE LAWS}

However, before further considering this fairly comprehensive and separate municipal International Trade Code\textsuperscript{123}—a seemingly separate system,\textsuperscript{124} regulating what traditionally would have been referred to as "private" international economic or trade relations—and the emergence of much more limited special municipal substantive norms of a similar category in other countries, it is necessary to distinguish them from another enormously expanding group of the municipal laws also applicable to economic legal relations involving a foreign element. In the absence of a more descriptive term, for the purpose of this paper, this other vast group may be referred to as a part of the public administrative law of the sovereign, or, perhaps more specifically, as the municipal administrative international trade law.

This latter group includes extremely varied types of administrative

\begin{footnotesize}
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\item \textsuperscript{122} See note 14 supra.
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law norms and measures, including governmental currency, payment, export, import, foreign investment and other restrictions of international trade and private law relations. They may be known as restrictions, taxes, duties, quotas, or otherwise, or—in countries with a centrally planned economy—they may be a part of the "economic plan," which also has the force and effect of law. Frequently they may be intertwined with other measures. It may not be easy to determine how they should be classified—whether, for example, as currency restrictions or export and import restrictions—although such classification may be important in law as to whether or what type of relief may be available.\textsuperscript{121}

Other public law measures in this category, also enacted to promote the narrower economic, social or other aims of the sovereign, may consist, for example, of different types of direct or indirect subsidies, premiums, tax exemptions or refunds, or multiple rates of exchange practices. They too may be distinguished by diverse names of their own or be intertwined with other provisions of the national law.

The public law measures of one sovereign may provoke other sovereigns to develop countermeasures of their own.\textsuperscript{126} Domestically, for example, a party to a particular transaction subject to the jurisdiction of the restricting state may be prohibited by law or regulation from performing the primary obligation, either within the sovereign's territory or abroad, and a violation of such law or regulation may constitute a punishable crime.\textsuperscript{127} However, in some instances—domestically, abroad or both—even under the restricting country's own law, that party may be required to make restitution on quasi-contractual grounds, and/or the party may be permitted to assume, or may be deemed to have assumed, a more absolute obligation which gives rise to an obligation to pay damages in the event of nonperformance. The private law effect of the transaction will depend to some extent on such questions of law and fact as whether the restriction was in existence at the time of contract or supervening, or whether it was known to one or both parties. That effect may range, then, from nullity or illegality to impossibility of performance, frustration, or unenforceability, with


\textsuperscript{126}With such practices in mind, the IMF Agreement, Dec. 27, 1945, art. I, 60 Stat. 1401 (1946) T.I.A.S. No. 1501, enumerates among its purposes: "To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation"; the IMF Agreement also recognizes the need for "elimination of exchange restrictions which hamper the growth of world trade"; id. at iv, and refers to some of its aims and facilities devised "to correct maladjustments" in the members' "balance of payments without resorting to measures destructive of national or international prosperity." Id. at v.

\textsuperscript{127}Such actual and hypothetical situations were considered in Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie A.C., [1939] 2 K.B. 678, 690, 698.
or without quasi-contractual relief and/or damages. The law enacting
the prohibition may itself contain provisions as to the private law effect
thereof; if not, the answer may have to be found in the more general
or special provisions of the law of contracts or obligations, whether
embodied in civil or commercial or other codes or whether a part of the
common law, and all of which are primarily a part of private law.

Internationally, the public law enactments may or may not be
violative of public international law or an international treaty obliga-
tion and may have different international public law effect.28 In private
law relations the transnational ramifications of these enactments may
range from another forum’s refusal to enforce them or to give to them
any effect whatsoever29 (which may raise the problem of filling the
resulting gap), or they may be given similar or only limited effect, as
compared to the range of private law effects within the restricting state,
mentioned above. The degree to which a foreign forum will give effect
to these public law enactments will depend on questions of law and fact
(including their content and socio-economic purpose), the more or less
settled or unsettled and possibly internationally conflicting municipal
conflict of laws doctrines, and their harmony or disharmony with impor-
tant economic, social or political precepts or interests of the forum.
Thus, domestically the effect of a prohibition may be to render illegal
the performance of the obligation, possibly preventing even quasi-
contractual relief, while internationally it may cause only impossibility
or impracticability of performance, giving rise to quasi-contractual
relief—with or without an additional right to claim damages—or to
unenforceability, with or without any further relief.130 The outcome,

128 Different consequences result in private law, depending on whether the gov-
ernmental measure is to be classified as violative of the GATT or the provisions of the
IMF Agreement art. VIII, § 2(b), discussed in Evan, supra note 125, at 110. The possible
public law effect of violations of such provisions as art. IV of the IMF Agreement on
maintenance of par value and unauthorized currency depreciations is analyzed by Evan,
Do IMF "Par Values" Protect Private Parties Against "Unauthorized" or Other
Ass’n, 52, 54-55 (1967-68).

129 The distinction between enforcement of foreign governmental restrictions, on the
one hand, and the limited effects of these restrictions on the other, was considered in
many cases. See Evan, supra note 125, at 113, citing Banco do Brasil S.A. v. A.C. Israel
out that there is nothing contrary to the established rule in the Bretton Woods Agree-
ment that one State does not enforce the revenue laws of another), and Regazzoni v.
discussing the distinction between enforcement and “taking notice” in order to give some
effect as may be proper. Cf. note 67 supra.

130 H. Batiffol, Droit Int’l Prive (Private International Law) 666 (2d ed. 1955)
concludes that from the French contract law aspect what may cause “illegality” domes-
tically may be treated in France as “contra bonos mores,” unless even that becomes im-
possible, if the foreign law is repugnant to French public policy. See also the views of
K. Neumeyer, Internationales Verwaltungsrecht, Allgemeiner Teil (International Admin-

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therefore, may be an unpredictable ad hoc decision based on what the judge (without adequate research facilities) may deem just in the absence of precise doctrine.

Obviously, this situation causes great uncertainties and hampers transitional trade relations. It leads to the risks of forum shopping, attempts to escape from the regular courts of law and clamors for governmental assistance whether by way of insurance, guarantees, subsidies, countermeasures, or political interventions.

In fact, the limitation or modification of the transnational effect of foreign administrative law measures (leading to the indirect transformation of private law concepts, mentioned above) and of the new built-in socio-economic features of the transformed "private" or "civil law" norms pertaining to wholly national legal relations, together with other measures aimed at internationalization, are among the most important features of the new municipal special substantive norms for private transitional economic, and particularly, trade relations. Admittedly, numerous still existing municipal laws fail to recognize the need for such domestic-international dualism, which would permit a sort of "autonomy" for international trade relations. Such recognition requires an awareness of the need for an adjustment of (a) two different interests of the sovereign itself—namely, one concerning wholly national, the other concerning some transnational economic relations—and (b) the conflicting new interests of the sovereigns inter se. Both logic and the actual trend of events appear to tend in that direction.

It is in this connection that the frequent transnational conflicts resulting from the two different criteria from which the new "interests" of the sovereigns are derived must be further briefly considered. As already mentioned, they are often based on one or more of the following different and almost inevitably conflicting actual and/or construc-

\begin{footnotesize}
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\item\textsuperscript{121} See note 121 supra; Eörsi, Regional and Universal Unification of the Law of International Trade, 1967 J. of Bus. L. 144, 156 mentions the attempt "to by-pass the method of conflict of laws"; Schlesinger and Gündish, Allgemeine Rechtsgrundsätze als Sachnormen in Schiedsgerichtsverfahren (General Legal Principles as Substantive Law Norms in Arbitration Proceedings), 28 Rabels Z. 4, 58 et seq. (1964), discussing the insufficiency of pure conflict of law solutions in international contractual relations.
\item\textsuperscript{122} Kalenský and Kopáč, supra note 118, at 153, point out that the basic criterion for distinguishing the subjects by the provisions of the three Czechoslovak Codes, the International Trade Code, the Civil Code and the Economic Codes "is the respective interest protected by the law." The latter two codes deal primarily with wholly domestic situations. See also note 121 supra.
\end{enumerate}
\end{footnotesize}
tive foundations. One rests on the actual or constructive "situs" of a thing or right in the national territory of the sovereign; the other on the residence, domicile and/or nationality of the "bearer of rights," whether it be an individual or a legal entity.\textsuperscript{133}

Unfortunately, particularly with respect to "intangible" rights, which in our era have become extremely important, and to rights of legal entities in transnational relations, any attempt at their "localization" may be highly artificial.\textsuperscript{134} In fact, in international economic relations, the rights and duties frequently cannot be geographically localized at all. They may be, so to speak, freely floating in space, radiating in different degrees into purely constructive or imaginary spheres of interests based on legal fictions of the various municipal laws.\textsuperscript{135} It is not uncommon that under some fictions the "situs" may be deemed to be in the territory of one sovereign, and under others in the territory of another.

Further problems may arise with regard to the other criterion, which looks to the "bearers of rights," particularly to those that are legal entities. There may be conflicting doctrines not only as to their nationality but also as to whether the interests of the stockholders, in addition to or in lieu of that of the legal entity as such, are proper—although, perhaps, conflicting—standards for laying the foundation for the new "interests" of its, his or their respective national sovereigns.\textsuperscript{136}

\textsuperscript{133} See text at notes 35-45 supra.
\textsuperscript{134} See Evan, supra note 130, at 76, 77; see generally Zwack v. Kraus, 93 F. Supp. 963 (1950), and In re United Railways of Havana & Regla Warehouses, Ltd., [1960] 2 All E.R. 332. As to the question of discharge of obligation and/or chattel mortgage in view of conflict between the law of the situs (Cuba) and the potential, or what the English forum held to be the proper law of an American state, see H. Kegel, Internationales Privatrecht (Private International Law) 936 et seq. (2d ed. 1964).
\textsuperscript{135} M. Gutzwiller, Der Geltungsbereich der Währungsvorschriften (The Extent of Applicability of Currency Regulations) 5-6 (1940), expresses doubts as to the doctrine of Savigny, and refers to the statement of Aloys Brinz that most legal relations, particularly those based on contracts, sit on "two chairs." He concludes that fixing their "situs" is frequently wholly arbitrary and that an objective supernational connecting link relevant for such "situs" may not be found. He cites Regelsberger, pointing out that legal relations have no physical existence and no place in space and that solely the facts which create, change or terminate legal relations, the persons whom it concerns, and the things which it affects are visible phenomena having a relation to a territory of a country. Cf. E. Rabel, Das Recht des Warenkaufs (The Law of Sales of Goods) 60 (1957).
\textsuperscript{136} See Vagts, The Multinational Enterprise: A Challenge to Transnational Law, 83 Harv. L. Rev. 739, 740 (1970), discussing temptations of sovereigns of parent corporations to extend their authority over foreign subsidiaries, and, on the other hand, the difficulty host countries have ignoring foreign control over their corporations and treating them on parity with locally owned enterprises. S. Pisar, Coexistence and Commerce 135-37 (1970), present examples of some actual problems of interpretation of United States Treasury Regulations under the Trading with the Enemy Act as applicable to activities of subsidiaries of American corporations in Canada (contract for delivery of trucks to Communist China; or prevention of use of equipment manufactured in the
MUNICIPAL "PRIVATE" INTERNATIONAL TRADE LAW

It would be an illusion to expect any sudden solution of these problems. However, the development of new special municipal norms creating an autonomous regime and imposing a sort of self-restraint on the national sovereign, and depending on the different socio-economic nature and interests involved in the more "transient," less "domesticated" and more "internationalized" legal relations, may considerably reduce the dangers discussed above. Whether this is ostensible or real, such norms as those applicable to international trade in the Czechoslovak International Trade Laws\textsuperscript{137} and some other codes may contain in embryo a private law standard of justice in international trade.\textsuperscript{138} This should be distinguished from the international public law standard of justice,\textsuperscript{139} although the two are complementary.

In light of this development, both in the East and West, the question of the extraterritorial legal effect of governmental indirect and built-in "public law" measures is being readjusted by special, more substantive norms applicable to the more mobile groups of transnational economic relations. These special norms try to assure greater economic and legal safety by a much fairer apportionment of risks and by making the outcome of disputes more predictable.\textsuperscript{140}

VI. THE FIRST INTERNATIONAL TRADE CODE AND OTHER EASTERN SPECIAL INTERNATIONAL TRADE NORMS.

The above outline may permit us to consider briefly what appears to be the first experiment in codifying the municipal international trade law in what has become a fairly comprehensive Czechoslovak International Trade Code (CITC).\textsuperscript{141} The Code was enacted as a part of an entire series of new basic codes. Its 726 elaborate sections make it substantially more voluminous than the Civil Code\textsuperscript{142} which contains 510 sections. The former regulates international trade relations within ostensibly much broader, but in fact much too narrow, hazy, express limits.\textsuperscript{143} According to commentators seemingly expressing the official

\textsuperscript{137} See note 14 supra.


\textsuperscript{140} Evan, Socio-Economic Groupings, supra note 130, at 79, 80; Evan, supra note 125, at 113-15.

\textsuperscript{141} See note 14 supra.

\textsuperscript{142} See note 28 supra.

\textsuperscript{143} "The subject matter" of its regulation defined as "relations arising in international trade contacts within the meaning of this Act" are set forth in §§ 2(1)(a)-(l).
view there are additional implied limits particularly with respect to "ownership" mentioned below.\textsuperscript{144} However, within what remains of the ambit of the CITC, the applicability of the Civil Code and the Economic Code has been excluded.\textsuperscript{145}

The latter two codes, intended to regulate the national system with the declared purpose of transforming it into Soviet-type socialism on its way to transition to Communism, are based on what may be referred to as the domestic Soviet-type doctrines. On the other hand, the CITC is based on diametrically different legal doctrines, to a considerable degree patterned after the nineteenth century liberal era concepts formulated in abstract terms, including equality of the parties. Except for the haziness of the definition of its narrow ambit, and alleged further limitations resulting from most serious ideological problems, it does not contain express norms as heavily weighted as those in the Civil Code in favor of the state and its organizations, which increase, reduce or eliminate rights and obligations, depending on, and differentiating as to whether the party and bearer of rights or subject thereof is the state, Socialist or similar organization or an individual; nor does the CITC contain a multitude of other direct and indirect devices, some of which are described in this paper, aimed at abolishing most of what traditionally was understood to be "private" economic rights and creating of a single Communist ownership.

Although some of the indirect devices still appear to be built-in, the CITC solemnly proclaims that "it is the purpose of this Act to regulate comprehensively property relations in international trade on the basis of full legal equality and inadmissibility of any discrimination by any of the parties in international trade, to foster thereby the development of economic relations of the Czechoslovak Socialist Republic with all countries, irrespective of their social or state system. . . .\textsuperscript{1146} To rely on this very general introductory statement could

Subsection (2) contains several ambiguous exclusions and subsection (3) excludes acquisition of real estate. Section 4 excludes from the ambit of the Code relations differently regulated by an international treaty. See also note 154 infra.

\textsuperscript{144} See text at notes 157-54 infra.

\textsuperscript{145} International Trade Code, § 723, No. 101 Czechoslovak Collection of Laws (1964), Economic Code § 389(2), No. 109 Czechoslovak Collection of Laws (1964). Kalenský and Kopčí, supra note 118, at 152, state that Czechoslovakia has abandoned the traditional method "prevalent particularly on the European Continent and based, as a rule on a single, fundamental law—the civil code—which is applied always, unless special regulations govern a particular question in a different manner." But see text at notes 163-64 infra.

\textsuperscript{146} International Trade Code, § 1, No. 101 Czechoslovak Collection of Laws (1963). But cf. text at notes 156 and 163-64 infra. The economic, ideological and legal structure and the modus operandi in the East are so different from those of the West that such solemn proclamations—common in both parts of the world—would require a reappraisal in the light of reality, regarding the extent to which equal treatment and reciprocity are assured in fact.
prove to be most misleading in many situations. However, the unsuit-
ability to international trade relations of many of the provisions of
such basic codes as the Civil Code and the Economic Code, which are
based on the Soviet-style domestic doctrine, has been clearly recog-
nized. The CITC does contain and define numerous principles pat-
terned upon and updating many concepts of the era of economic liber-
alism. They may be a part and forerunner of separate and distinct
international trade doctrines of Soviet-type law, basically different from
the domestic.

What makes the Code most important is that this interpretation
does indeed appear accurate and that the Code was enacted with
Soviet blessings. It became law at a time when Czechoslovakia ap-
peared to be, and had the reputation of being, the most faithful mem-
ber of the Soviet bloc. The series of important new codes, including
the three mentioned above, all of which came into effect in the first
half of 1964, were enacted in accordance with a Resolution of the
Central Committee of the Communist Party of Czechoslovakia. In
fact, Czechoslovakia appears to have become at that time an advanced
experimentation ground of Soviet-type legislation, actually or osten-
sibly appearing to be more radical than the Soviet Union itself.

The other members of the Soviet bloc did not, in their codification
era in or about the early 1960's, go so far as to enact separate and
comprehensive international trade codes and did not admit such do-
mestic-international dualism of their national law to the extent that
Czechoslovakia did. However, there is clearly in evidence the exis-

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147 See notes 121-22 supra.

148 On the Eastern recognition of the usefulness of most of the traditional law
concepts for their international trade relations (as distinguished from wholly national
situations), see Rajski, The Law of International Trade of Some European Socialist
Countries and East-West Trade Relations, 1967 Wash. U. L. Q. 125, 130 (1967); Trammer,
The Law of Foreign Trade in the Legal System of Countries of Planned
Economy, The Sources of the Law of International Trade (1964); A. Goldstaín, Int'l
Convention and Means of Escaping from the Application of Municipal Law, the Sources

149 Proclamation in Czechoslovak Constitution of July 11, 1960, No. 100 Czechoslovak
Collection of Laws (1960), where reference is made to the “victory of the Great
October Revolution,” to be kept in mind as the example; and resolving to continue
“hand in hand with our great ally, the fraternal Union of Soviet Socialist Republics
and all other friendly countries of the Socialist world system, of which our Republic is
a firm link.”

150 Kratochvil, supra note 117, at 23.

151 D. Genkin, The Law Governing Foreign Trade of the USSR (International
Trade and its Regulation in the USSR), chs. XII-XIII et seq. (1963), discussing the
unity of Soviet Civil Law; A. Goldstaín, supra note 148 at 111, who, while recognizing
the existence of a dualism in COMECON countries, argues that in Yugoslavia there is
“no duality of rules governing internal and international contracts of sale.” Further, he
attempts to explain that “the legal structure of economic enterprises and their functions
is one thing and the techniques used by these enterprises another.” But see Eorsi, Regional
tence of a somewhat limited but expanding number of special norms and doctrines applicable solely to legal relations in international trade, as distinguished from domestic relations, and based on a much more positive, or at least, less negative approach to equality of the parties and acquisition of private rights by others.\(^{152}\) The predominantly negative attitude of the domestic Soviet-type law with respect to the traditional liberal era concepts of private economic rights, makes that law unsuitable for regulating international trade relations not only with non-Communist countries but, to a considerable degree, also with other members of the Soviet bloc. The adoption in their positive law of fairly comprehensive legal norms applicable to "trade" among COMECON member countries clearly proves this undeniable fact.\(^{153}\) However, being based on the Soviet doctrines of "Socialist division of labor," including "coordination of planning," and designed for the special economic, social, political and ideological environment of the COMECON territory, many of the underlying doctrines of these norms are not suitable for general world trade and are different from those embodied in the CITC.\(^{154}\)

The scope of this paper does not permit a description or analysis of the most interesting provisions of the CITC. As already mentioned, it may be said to be based at least ostensibly, on an intensification of the doctrine of \textit{pacta sunt servanda}. Thus, for example, the Code provides that a supervening restriction resulting in the "absence of an official license which is required for the performance of the obligation of the obligor," making performance impossible, does not exclude the obligor's responsibility for damages.\(^{155}\)


\(^{152}\) Eorsi, supra note 151, at 10, refers to the "effort encountered in several socialist states to enact separate codes on foreign trade, which contain provisions different from those laid down in the law of obligations of Civil Codes." See also Principles of Civil Legislation of the Soviet Union and the Union Republics § 3(3), Law of the USSR No. 525, May 1, 1962. "Foreign trade relations are governed by the special foreign trade legislation of the USSR and the general civil legislation of the USSR and the Union Republics." D. Genkin, supra note 151, at 2-5.


\(^{154}\) See note 155 infra (difference in intrabloc and extrabloc regulations).

\(^{155}\) International Trade Code, § 252(2), No. 101 Czechoslovak Collection of Laws (1953). However, see the different regulations under § 68, especially subdivisions (2) and (3) of General Conditions of Delivery between COMECON Member Countries, note 153 supra, which exclude liability for nonperformance where caused by force majeur, or supervenient circumstances which were unforeseeable to and could not be prevented by the party; or where, among other grounds, this follows from the law of
It is not surprising that this limitation of the extraterritorial effect of foreign governmental restrictions originates in the East. Where foreign trade becomes a state monopoly, and each transaction is carried out by the sovereign's alter ego, the role of trade and payment restrictions declines in direct proportion to that increase in state control, because the state acquires much greater, in fact, all-embracing direct control.\(^{166}\)

In order to assure stability of the value of the monetary consideration, the CITC contains provisions on protective contractual gold,\(^ {157}\) currency\(^ {158}\) and escalator\(^ {159}\) valorization clauses. It even provides for a sort of statutory revaluation by operation of the law in the event of some devaluations or depreciations of currencies in terms of gold and/or another money.\(^ {160}\) Moreover, quite generally, but subject to some vague limitations, it extends its liberal principles to international trade relations within its meaning by providing that “if the rights and duties regulated by this Code, cannot be determined under the literal wording of this Act nor under the meaning of its respective provisions, the principles by which this Act is governed are to be applied.”\(^ {161}\) This provision, and a substantial exclusion of the Civil and Economic Codes as subsidiary general norms, make the Code considerably though not fully self-regulating. Its principles seem to have become a matter of public policy with respect to international trade relations, a factor important in choice of law problems.\(^ {162}\)

However, there are various uncertainties regarding the scope of the CITC’s applicability. Some result from the much too narrow, and in some respects hazy, definition of what the Code considers to be “relations in international trade.”\(^ {163}\) Others stem from the view of some Czechoslovak writers that there are additional exclusions. They assert that the International Trade Code “does not affect the extent of ownership, because this question goes beyond the scope of regulations governing international trade,” that “the content of the right of ownership acquired in international trade relations, if governed by Czechoslovak law, will emanate from the Civil Code and the Economic Code . . .

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\(^{156}\) See Evan, Socio-Economic Groupings, supra note 130, at 80.


\(^{158}\) Id., § 403.

\(^{159}\) Id., § 401.

\(^{160}\) Id., §§ 341-46. For a brief summary, see Evan, Socio-Economic Groupings, supra note 130, at 78-79.


\(^{162}\) Where Czechoslovak law is to be applied the International Trade Code is to be used for international trade relations as defined by the Code. Id., § 3.

\(^{163}\) See note 143 supra.
although the International Trade Code does not expressly refer to them; and that the problem of defining the right of ownership is governed by the *lex rei sitae* and involves a situation with respect to which there can be "no compromise" between two social systems. Depending on whether the actual or constructive "situs" would be in the East or West, this interpretation could make the norms "one-sided" and disrupt the balance of equality.

**VII. THE WESTERN SPECIAL SUBSTANTIVE NORMS FOR TRANSNATIONAL PRIVATE ECONOMIC RELATIONS**

In the West, too, new socio-economic considerations have greatly affected or transformed some of the private economic rights and/or created new rights and duties based on widely varied factual and legal classifications. However, it appears clear that the western law has preserved to a far greater extent the positive approach to "private" economic rights and, in the lower stratum thereof, where they seem to merge with and become basic human rights and "freedoms," it appears to have greatly reinforced the latter. Because of this feature, less substantial adjustments may be required to make western norms "transplantable." It should be stressed, however, that western metamorphoses caused by direct (built-in) and indirect (administrative law) transformations are also vast. A few examples of western special municipal substantive norms for regulation of some transnational subject matters may illustrate, at least to some extent, their nature and the more or less successful realization of their objectives. Some of them are applied as a part of the *lex causae*. To this group seems to belong that subdivision of the New York (or, perhaps, federal) "two-rule" doctrine on valuation of foreign money obligations which, where proper, tries to indemnify the creditor for losses arising from devaluations or depreciations of the foreign money of account after a default in payment." To the extent permissible under the doctrine of consequential damages, by

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165 To a considerable extent, but without referring to new dualism, the problem was analyzed in Evan, Rationale of Valuation of Foreign Money Obligations, 54 Mich. L. Rev. 307 (1956). He illustrates that "substantive conversions" of foreign currency into another currency (domestic or foreign), in order that the creditor will not be unnecessarily harmed are based on the doctrine of consequential damages of the controlling (substantive) *lex causae*; and he distinguishes them from "judgment-day conversions" of the foreign money in obligation into U.S. dollars, as the national currency of the forum, based on the *lex fori* requirement of the provisions of 31 U.S.C. § 371 (1970), and N.Y. Judiciary Law § 27 (McKinney 1954).
operation of New York law, if controlling, the original (primary) foreign money obligation is converted into such other currency (money of damages) and at such rate of exchange as to place the injured party in the same position as if there had been no default. 167 This rule takes into consideration the risks of the relativity of transnational fluctuations of value of our modern fiat moneys. 168 Where proper it tries to stabilize the obligation.

The other rule of our dual system, requiring a conversion of the ultimate foreign money obligation into dollars at the trial-judgment date rate of exchange, is a special norm of our lex fori. It is based on provisions of our law construed to impose on our courts a duty to express their judgments in our national currency. 169 By converting an ultimate foreign money obligation into dollars (money of judgment) at the trial-judgment date rate of exchange, it gives the creditor the exact dollar equivalent as of that date. Unfortunately, from that moment on, it imposes on the parties the risk of fluctuation of the value of the newly-substituted dollar yardstick not intended to be assumed by the parties. 170 It changes the very substance of the original obligation, which it seems to have been expected to stabilize.

The special English rule also requiring that judgments based on foreign money obligations be expressed in its national currency, the pound sterling, 171 may cause even greater though again unintended disruption. It also is held to be a special norm of the lex fori. However, due to overconfidence in the pound, it requires a conversion at the wholly unrealistic and distant “breach or maturity” day rate of exchange and considers losses from depreciation of the foreign money of account to be too remote and not recoverable. 172 Depending on whether the foreign money of account depreciates in terms of the pound or vice versa, even on the date of trial judgment and thereafter, it may either result in a windfall 173 or deprive the innocent party of


168 For a discussion of the importance of such “relativity” due to the fact that depreciations or appreciations of national currencies are not uniform and proportioned see Evan, supra note 166, at 308-09.


170 Evan, supra note 157, at 336 & nn.123, 126 (e.g., a “soft currency” may be thus converted and stabilized in terms of a “hard currency,” or a “harder currency” destabilized by conversion into a “softer currency”).

171 Id. at 323-25, 354-58 & nn.159-61.

172 Id. at n.160. See also Di Ferdinando v. Simon, Smits & Co., [1920] 3 K.B. 409.

173 Evan, supra note 166, at 316-17. In Di Ferdinando an Italian plaintiff who sustained a loss in the amount of 48,000 lire obtained a judgment for a sum of pounds sterling of the value of about 96,000 lire at the rate of exchange at the time of the judgment.
receiving a true equivalent. Rather than stabilizing the obligation, the rule allows outcome to become a matter of chance.

These regrettable results, more so under the English purely mechanical "breach-day rule" than under the American "judgment day rule," where applicable, are caused by the obsolescence of both. They fail to recognize the changed socio-economic and legal nature and function of our modern fiat moneys and the possible transnational disruptions of balance, resulting in "one-sidedness." This frustrates the expectations of the parties.

In contrast, these changes of the modern concepts of money have led to the much more enlightened compensatory conversion of the American lex causae; the CITC provisions protecting the stability of the monetary consideration mentioned above, and the French special doctrine permitting protective valorization clauses stabilizing the value of foreign money in "international loans" within the meaning of the French law, as distinguished from domestic. In purely domestic contracts, French law does not permit "freezing" of the value of money. The autonomy granted by the French law to such "international contracts" seems to have acquired such strength as to be applicable either as a part of the French lex causae, or, if not so applicable, as the paramount lex fori as a matter of French public policy.

Lerebours-Pigeonniere explains that the different treatment is justified by economic circumstances which transnationally are not identical with those arising in wholly national relations and that the French approach constitutes a reaction against international monetary laws which disregard the necessities of international life by failing to create two legal orders, one for domestic monetary circulation, the other considering the export trade. He states that the French doctrine constitutes a reaction "against the normal procedure in private

174 In re United Railways of Havana & Regla Warehouses, Ltd., [1960] 2 All. E.R. 332. Due to the defects of the rule, the amount of dollars owing by an English debtor to American creditors under a contract controlled by the law of an American jurisdiction, upon reconversion of the sterling award (the money of judgment) into dollars, would have been reduced by about 30% of the sum of dollars as was owing.

175 Evan, supra note 166, at 307-12; the problems of valuation of foreign money obligations are also analyzed in Evan, The ILA Draft Convention on Payment of Foreign Money Obligations, 85 J. du Droit Int'l 406-53 (1958).

176 See text at note 157-64 supra.

177 See note 15 supra.

178 Lerebours-Pigeonniere, supra note 138, at 4-29; A. Nussbaum, Money in the Law 262-279 (1950); G. Delaume, Legal Aspects of International Lending and Economic Development 114-16 (1967); Evan, Socio-Economic Groupings, supra note 130, at 75-76. As to some of the newly evolving exceptions, see Malaurie, 97 J. du Droit Int'l 74-77 (1970), and the materials cited therein.

179 Lerebours-Pigeonniere, supra note 138, at 4.

180 Id. at 13.
international [meaning conflict] law placing any legal relation in international life under the control of the domestic law of a specific State," and points out that the French law took the "fortunate initiative" of laying down "a special legal order, expressing what it considers the minimum international order."

Very generally, Professor Schnitzer of Switzerland noted\(^\text{182}\) that it may have been frequently overlooked that valuation of foreign money, exchange control and clearing restrictions may not involve questions of the formal choice of law norms (\textit{Kollisions-recht}) but rather special substantive law for international situations. By no means are such special substantive norms of the forum limited only to monetary law; they merely illustrate the dichotomy under discussion.

The numerous, extremely diverse special municipal norms may be a part of what is sometimes referred to in French as "\textit{les règles de droit international privé matériel}" or "\textit{règles substantielles}"\(^\text{183}\) and in German as "\textit{Sachnormen im internationalen Privatrecht}".\(^\text{184}\) They result from the need to respond to international fact situations which may, perhaps, never arise domestically in any country or jurisdiction, and with respect to which the rule of any jurisdiction which may be applicable under the "formal" conflict of laws norm of the forum may be wholly unsuitable and would cause injustice.\(^\text{185}\)

Sometimes the situation requiring special substantive law solutions may arise in connection with the problem of "filling the gap" resulting from a formal conflict of laws refusal to adopt or apply an otherwise controlling foreign substantive norm or a foreign law rule of decision.\(^\text{186}\) Referring to such situations, some jurists use such terms as "adjustment" or "assimilation" of the foreign or domestic rules.\(^\text{187}\) Such "assimilation" may be, in reality, the creation of special substantive

\(^{181}\) Id. at 23. See also text at notes 137-40 supra.


\(^{185}\) von Overbeck, supra note 183, at 364. See also G. Kegel, Internationales Privatrecht (Private International Law) 107 (2d ed. 1964).

\(^{186}\) G. Kegel, supra note 185, at 189. Cf. A. Ehrenzweig, Private International Law (1967), where the author refers to this as one of the solutions recommended by some jurists. While Kelsen's doubts as to the existence of such "gaps" are questionable he is right that their filling constitutes a "law creating function." H. Kelsen, Pure Theory of Law 245-50, 355 (1967).

\(^{187}\) In French, sometimes referred to as "adaptation," "harmonisation," or "coordination des règles internes," von Overbeck, supra note 174, at 364; in German, "Angleichung," id. However, Kegel expresses some doubts or refinements as to such classification. Kegel, supra note 185, at 255, see also A. Von Mehren and D. Trautman, The Law of Multistate Problems, ch. III (1965).
rules of the forum not used domestically in any of the “concerned” countries or jurisdictions.

Considerable credit for the discovery, about three quarters of a century ago, of the emergence of such “substantive conflict norms of the forum” (as distinguished from formal norms, the latter dealing with the question of finding which jurisdiction’s substantive law should be chosen) is given to the Dutch professor Josephus Jitta. Since then, and particularly in the last ten years, it has been elaborated upon by others. However, since the time of Jitta, and particularly within the last fifty years, truly revolutionary transformations of the traditional private law concepts have taken place, creating a situation in which schematic application of “formal” conflict rules may cause great injustice.

Among the very numerous municipal special substantive norms for some transnational situations involving one of the numerous “foreign elements” is, for example, the federal act of state doctrine, applicable as a part of the lex fori. Another such norm, although the nature thereof requires clarification, is Section 2218 of the New York Surrogate’s Court Procedure Act. Where the intended “ownership” becomes “intransplantable,” Section 2218 tries to assure—by temporary payment into court, if necessary—a foreign legatee’s or beneficiary’s use, benefit and control of his share, some aspects of which may have to be classified as substantive, and others as adjective; or they may have to be classified as wholly substantive and interpretative of the decedent’s or testator’s intent of making the legatee or distributee, rather than his government, the true beneficiary.

188 von Overbeck, supra note 183, at 365, and the materials cited therein.
189 Kegel, supra note 185, at 238-51.
191 Its subdivision (2) provides in part: “Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto . . .” Subdivision (3) places the burden of proof on the alien beneficiary or the person claiming from, through or under him. Its constitutionality appears to have been upheld. See Goldstein v. Cox, 396 U.S. 471 (1970); In re Estate of Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968), appeal dismissed, 397 U.S. 148 (1970).
192 The court decisions appear to be in a sort of disarray. To a considerable degree this seems to be due to inadequate facilities for the research of the exceptionally difficult conceptual comparative and classification problems of diametrically different legal systems devised to function in different social, economic and legal environments, and the new “intransplantability.” E.g., compare In re Estate of Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968), In re Reid’s Will, 23 App. Div. 2d 171, 239 N.Y.S.2d 217 (1965) (the latter recognizing the safety of transfers of legacies to Czechoslovakia due to absence of evidence to the contrary); Queen v. Gastan, 5 Ohio App. 2d 278, 215 N.E.2d 248 (Ct. App. 1965) (reaching in substance a conclusion to the contrary); In re Shefick’s Estate, 50 Misc. 2d 293, 270 N.Y.S.2d 34 (Sur. Ct. 1966) (considering transfer
The special substantive norms of many countries exempting "export cartels" from antitrust provisions applicable to intrastate activities or operations within the area of multinational regional groupings are further important examples of the new dualism. There are many additional examples, some statutory or based on international treaties, other decisional. Their systematic organization (including the secondary norms that may be a part of the new "lex mercatoria" mentioned below) would reveal the magnitude of this new branch of the municipal laws. They show a much greater tendency toward "universality" and "transplantability" than do their counterparts, devised to regulate wholly national situations. Their analysis involves a consideration of novel socio-economic and, consequently, also of newly-developing legal criteria and classifications.

VIII. PRIVATE AND PUBLIC MULTINATIONAL UNIFICATION EFFORTS

This paper describes only the emergence of what may be referred to as a new municipal domestic-international dualism in what were traditionally private-civil law relations and some of its causes. Except

195 For example, see the Export Trade Act (Webb-Pomerene Act), 15 U.S.C. § 62 (1970), exempting so-called "Webb Associations," entered into for the sole purpose of engaging in export trade from some general antitrust provisions of the municipal law as are applicable to wholly national situations; provided that, among other conditions, "such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." See also L. Ebb, Regulation and Protection of International Business 630 (1964). For a discussion of various exemptions of some of the transnational activities, of so-called export cartels from the more or less general antitrust provisions of numerous other industrial countries, see V. Mund, Government and Business 163-64, 185-89 (4th ed. 1965).

144 For a discussion of the European Coal and Steel Community (ECSC) under the Treaty of Paris of April 18, 1951, and the European Economic Community (EEC) under arts. 85 and 86 of the Treaty of Rome, see V. Mund, supra note 193, at 180, 182.

100 The special provisions of Uniform Commercial Code § 2-614(2) on extraterritorial effect of domestic or foreign governmental exchange control regulations affecting discharge; and on "any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid" as an excuse for delay in delivery or non-delivery under a contract of sale, § 2-615. For an analysis of the different provision of art. VIII, § 2b of IMF Agreement, which has the full force and effect of law, 22 U.S.C. § 286h (1970), and a discussion regarding the unenforceability of some "exchange contracts," see Evan, Need for Harmonization of IMF Agreement with General Principles of Law, Proceeding and Comm. Rep., Am. Branch, Int'l L. Ass'n 110 (1965-66); Evan, New Socio-Economic Groupings and the Expanding Domestic-International Dualism in the Light of Some Newer Monetary Law Developments, Proceeding and Comm. Rep., Am. Branch, Int'l L. Ass'n 73, 79-80 (1969-70).

for some examples, its limited scope makes it wholly impossible to enumerate and, even less, to elaborate on the nature of the newly developing substantive, municipal norms of that branch of "private-civil-law" or even to mention the multitude and vastness of additional international, bilateral, or multinational (governmental or private-scientific) or supra-national unification or internationalization efforts. Some are substantive, others adjective; some are in the field traditionally referred to as "private," while others are of a "public law" nature.

Only one further important point seems to require being at least mentioned. The new municipal domestic-international dualism includes a wide range of norms, sometimes vaguely referred to as the new lex mercatoria or the new law merchant. Some norms thereof may have acquired the force and effect of law. Others may not have the rank of law by themselves; they may be only within the group of usages of trade. These latter norms become a part of the law only by incorporation into a norm of the municipal law (primary norm), being themselves, so to speak, secondary norms. Notwithstanding the fact that by themselves they may not be law strictissimo iure, their importance is enormous. However, all of these matters require separate treatment.

**Conclusion**

It is submitted that the preceding review demonstrates some of the characteristics of the modern nationalization, socialization or publicization of the former traditional basic private-civil law concepts. They are no longer abstract, but are highly functional.

An overwhelming majority of the new mutations became instruments of a social and economic reorganization and regulation of a changing structure of the sovereigns' own national societies. In the course of this change, whose many causes include technological, economic and ideological factors, the countries generally, and particularly those in the East, are becoming much more compact social and economic entities. Many norms regulating what may have developed into a fairly tightly knit nationwide economic social and legal establishment, become—in the liberal era terms—less "neutral." The modern state with its varied ill-defined new "interests" is more or less directly involved in most, if not all legal relations. It is omnipresent.

The transformations of the extremely heterogeneous modern

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municipal legal norms are no longer brought about solely by circum-
scription through administrative-public law type precepts. New socio-
economic concepts, elevated to become new legal concepts, are also being built directly into the novel metamorphoses. Moreover, de jure and de facto, domestically they are affected and implemented by new kinds of vaguely classifiable groups of “public type benefits”—a new “give-and-take”—and by direct economic operations of the gov-
ernments acting as manufacturers, buyers, sellers, insurers, and in other such roles.

In the light of the numerous diametrically different national philosophies-ideologies and their distinct subdivisions, and the vari-
ous degrees of development and different physical, economic and social conditions in the specific countries, the novel municipal norms may be considered as reasonably balanced domestically. However, trans-
nationally, outside of the sovereign's special national environment, the “giving” may not be, and frequently is not, available. The essen-
tial complementary social and economic counterparts of the national norm may either be non-existent or be basically so different as to disrupt the purpose and function of the new nationalized norm. The balance may be broken. The newly transformed norms become only partially “transplantable” or “non-transplantable” and therefore unsuitable for regulating transnational “private” economic relations in a basically different national or international milieu. The formal choice of law norms, though very important, may not suffice to solve the problems of this new “nontransplantability.”

New and separate substantive (and it should be added, also ad-
jective) norms are therefore emerging in the municipal law for regulation of some of the more mobile, transnational, economic, pri-

cate-civil law relations. The extent of their “autonomy” seems to depend on their different socio-economic nature and the intensity of governmental interests which they affect. This may be closely tied to the question of whether the relations are more stationary and “domesticated,” or more “transient” and “internationalized.”

Where the “intransplantability” of the bulk of the basic “civil code” reaches such proportions that both its general and special parts

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100 For a discussion of the great and increasing importance of international trade arbitration in both West and East, see table prepared in connection with Arbitration Research Project of Univ. of Chicago Law School, Domke, The Law and Practice of Commercial Arbitration 11-12 (1968). See also Schlesinger and Gündish, Allgemeine Rechtgrundsätze als Sachnormen in Schiedsgerichtsverfahren (General Legal Principles as Substantive Law Norms in Arbitration Proceedings), 28 Rahels Z. 4 (1964); Grzybowski, supra note 153, at 204-11 (commercial arbitration in COMECON member countries); and Bystricky and Collective, Pravo Mezinarodního Obchodu (International Trade Law) 119 (1967) (on arbitration tribunals for international trade matters with compulsory jurisdiction for enterprises of COMECON countries and facultative jurisdiction based on arbitration agreements, organized in all Socialist countries).
become almost unusable for regulating the vast group of more mobile legal relations, vaguely referred to as "international trade," it may require the enactment of an almost all-embracing separate, systematic and considerably self-regulating international trade code, covering what traditionally has been the subject matter of the general and special parts of civil codes. This has happened in Czechoslovakia. In other countries, in which the special norms have not reached the state of codification, those norms could be organized and presented as parts of the newly-evolving branch of the municipal substantive law for private economic relations involving one of the varied foreign elements, or—as it may be termed somewhat less accurately—of a municipal special private international trade law.

If any of the characteristics of this evolving body of legal norms could be singled out in order to describe its different nature, as distinguished from that of the more domestic norms, it would be its much greater reliance on the traditional liberal era concepts of "sanctity of contracts," with its trend toward limiting the extraterritorial effect of supervenient governmental regulations, and the different, more formal or abstract concept (if not, indeed, a considerably conclusive presumption) of "equality of parties." Notwithstanding the differences of their extent and intensity, such special norms exist and are becoming more and more important in both the East and the West.

Paradoxically, in comparison with the fate of the medieval law merchant, history does not seem to repeat itself. While the law merchant became a part of the national law, bringing about its greater internationalization,200 the new "nationalization" of the municipal law is reducing or eliminating that law's international "transplantability." It leads to the new domestic-international dualism of the municipal laws. Their international branch, or at least that part which is applicable to the more mobile transnational economic relations, such as international trade and loans, and which is being devised to regulate the transnational rights of parties inter se (including economically substantial entities and individuals) clearly reveals an important, characteristic trait. Notwithstanding many still-existing difficulties and the existence of various obsolete doctrines, the new municipal special private law norms tend to be more "neutral," "two-sided" or balanced and "transplantable" in the international milieu. Consequently, they increase the safety of the contractual quid pro quo and render international trade more predictable and functionally rational. If the new norms are not more "private-civil," they are more "civilized."
