Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates

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TABLE OF CONTENTS

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I. INTRODUCTION

The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons[1] is an exceptionally complex document with the avowed purpose of radically altering the choice of law rules in the succession field that have traditionally guided all common law jurisdictions[2] as well as many civil law regimes.[3] To date, the conflicts revolution that has engulfed other fields of law such as contracts and torts[4] has barely intruded into the realm of property and succession law.[5] In large part, this has been attributable to the nearly absolute adherence of judges and legislators[6] to the relatively simple, straightforward standards that have held sway for centuries.[7] The ambivalence of conflicts theorists has also been an important factor. For example, while several have sought to depart from the complete inflexibility of the present situs rule with respect to real property,[8] they have at the same time recognized that considerations such as efficiency, simplicity, and predictability are essential when dealing with the transfer of title to property and that a state must be able to exercise some control over the determination of who shall be entitled to inherit land within its borders, on what terms, and subject to what

1. See Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, 28 I.L.M. 150, reprinted in 2 Proceedings of the Sixteenth Session of the Hague Conference on Private International Law 515 (1990) [hereinafter Convention].

2. See infra text accompanying notes 14 & 18-20.

3. See infra notes 21-22.

4. See, e.g., Alfred Hill, The Judicial Function in Choice of Law, 85 Colum. L. Rev. 1585 (1985); Friedrich K. Juenger, Conflicts of Law: A Critique of Interest Analysis, 32 Am. J. Comp. L. 1 (1984); Albert A. Ehrenzweig, A Counter-Revolution in Conflicts Law? From Beale to Cavers, 80 Harv. L. Rev. 377 (1966).

5. See, e.g., Robert Alden, Note, Modernizing the Situs Rule for Real Property Conflicts, 65 Tex. L. Rev. 585 (1987). See also Robert A. Sedler, Across State Lines 75-83 (1989); Eugene F. Scoles & Peter Hay, Conflict of Laws 713 (Lawyer's ed. 1982).

6. See Scoles & Hay, supra note 5, at 715.

7. The traditional choice of law rule is the law of the situs for real property and the law of the domicile for personal property. See infra text accompanying notes 14-15.

8. See, e.g., Russell J. Weintraub, Commentary on the Conflict of Laws 412-48 (3d ed. 1986).

restrictions.[9] The Convention sets its own course—it upends the prevailing system, but in doing so, totally disregards the interests of both the situs and domicile states. Instead, it proposes a novel, untested potporri of choice of law rules to be applied worldwide.

This Article will first examine critically the general operation of the Convention. An evaluation will be made of the arguments in support of the proposal to eliminate the situs rule for real property and the consequences from both a choice of law and wealth transfer perspective which are likely to flow from the substitution of new and arbitrary rules. The Article will then undertake a similar review of the Convention's departure from the domicile standard with respect to personal property.

Following this consideration, the Article will evaluate the Convention's likely impact on estate planning and the efforts of mobile individuals and those with multijurisdictional estates to predetermine the rules by which their wealth will be disposed. The Article then proceeds to examine other fundamental issues of choice of law that are raised by the Convention and its quixotic quest for uniformity and a unitary choice of law rule, specifically: proof of foreign law, debate among scholars as to the proper approach in identification and resolution of conflicts of law, renvoi, incidental questions, what is a "conflict," and the viability and scope of the public policy exception to choice of law rules.

With these issues in mind, the Article considers a technical solution to the problems raised by the Convention. It then proceeds to discuss the broader issue of choice of law uniformity raised by the Convention. The conclusion is reached that this primary goal of the Convention is an elusive and unattainable one. Furthermore, in the futile attempt to achieve this objective, a set of conflicts rules is being proposed which is as rigid as the existing ones, but do not have their predictability.

II. CHOICE OF LAW CONSIDERATIONS

A. *The General Operation of the Convention*

The Convention generally sets forth certain uniform rules determining which country's law governs matters of intestate and testate

9. See, e.g., Hill, supra note 4, at 1628; Moffatt Hancock, Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo, reprinted in Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles 327, 332-33 (1984); Brainerd Currie, Full Faith and Credit to Foreign Land Decrees, 21 U. Chi. L. Rev. 620, 658 (1954).

succession.[10] It makes at least four major changes in the choice of law principles observed by most, if not all, states[11] with respect to transfers of wealth at death. First, the Convention eliminates reference to the law of the situs with respect to real property. Second, the determinative law of personal property is changed from that of the decedent's domicile at death to that of the decedent's nationality and habitual residence, standards which no American states currently employ.[12] These same standards are also applied to real property. Third, the Convention forecloses certain voluntary choice of law options that are presently available in an estate planning context. Fourth, the Convention applies separate choice of law rules for multistate estates, as opposed to multinational estates. As a result, attorneys must carefully evaluate whether to apply the current choice of law rules or those under the Convention for their clients with international contacts.

A careful reading of the Convention and the Explanatory Report by the Reporter for the Draft Convention, Professor D.W.M. Waters,[13] reveals technical flaws and unsettled issues. For now, however, the process of review should focus on the broader question of whether the United States should support the major changes wrought by the Convention. These key changes and their overall implications for choice of law are considered below.

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10. See Convention, supra note 1. This Article does not focus directly on that segment of the Convention that relates to "succession agreements," an arrangement far more common in civil law systems.

11. The references to "state" throughout this Article relate to the American states, although the Convention itself uses the term to refer to sovereign countries. Misunderstandings have previously been engendered in conflicts analysis, especially between European and American commentators as a result of the failure to clarify the meaning of the term. See Herma H. Kay, A Defense of Currie's Governmental Interest Analysis, 215 Recueil des Cours 19, 90-92 (III 1989).

12. In addition, there are three even more amorphous subsidiary standards that apply in certain circumstances—the state with which the decedent had the "closest connection," the state with which the decedent was "more closely connected," and the state of which the decedent was "resident" (as opposed to "habitually resident"). This heirarchy of choice of law rules has been crticized as creating "complexity and uncertainty." See Peter M. North, Reform But Not Resolution: General Course on Private International Law, 220 Recueil des Cours 19, 281 (I 1990). Professor North concludes that, "What is far from clear is that there is real evidence, in the common law world at least, that the international problems are so significant that the need for international harmonization outweighs the defects of the Convention as a compromise measure and a complex one at that. The case for the Convention does not seem to have been made out." Id. at 282 (footnote omitted).

13. See Donovan W. M. Waters, Explanatory Report (May 1989), reprinted in 2 Proceedings of the Sixteenth Session of the Hague Conference on Private International Law 525 (1990) [hereinafter Report].

B. *The Elimination of the Situs Rule for Real Property*

The traditional Anglo-American rule that governs succession to real property has been that the law of the situs controls.[14] On the other hand, the law of the domicile has traditionally controlled the succession to personal property.[15] Although some academics and theorists have urged adoption of a unitary rule for real and personal property,[16] the adherence to the situs rule for real property disposed of by will or intestate succession has remained virtually monolithic in this country.[17] In addition to the United States, the component jurisdictions of the United Kingdom,[18] as well as various other Commonwealth countries, such as Australia[19] and the Canadian provinces,[20] France,[21] and a number of other countries apply the situs rule to real property.[22] Admittedly, other nations apply a unitary choice of law

14. Restatement (Second) of the Conflict of Laws § 239 (1971); Joseph Story, Commentaries on the Conflict of Laws § 424, at 358; § 463, at 390 (1834). See also Clarke v. Clarke, 178 U.S. 186 (1900) ("It is a doctrine firmly established that the law of a State in which the land is situated controls and governs . . . its passage in case of intestacy."); McGoon v. Scales, 76 U.S. (9 Wall.) 23, 27 (1869) ("It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which the land is situated must we look for the rules which govern its descent, alienation, and transfer, for the effect and construction of conveyances."). For a consideration of the origins of the situs rule, see Alden, supra note 5, at 587-91.

15. Restatement (Second), supra note 14, § 263.

16. See, e.g., Scoles & Hay, supra note 5, at 713-14.

17. Under the Uniform Probate Code, § 2-703, 8 U.L.A. 1 (1991 Supp.) [hereinafter UPC], the testator may designate a different law for various purposes, but absent a designation or in cases other than those involving the spouse's elective share, UPC states generally adhere to the situs rule. See, e.g., In re Estate of Swanson, 397 So. 2d 465, 466 (Fla. Dist. Ct. App. 1981); In re Estate of Wimbush, 587 P.2d 796, 799 (Colo. Ct. App. 1978). See also In Re Estate of Clark, 772 P.2d 297, 298 (Mont. 1989). See also the recently enacted provisions of the Louisana Civil Code relating to conflict of laws. La. Civ. Code, art. 33 (West 1991).

18. See, e.g., Royal Bank of Canada, Ltd. v. Krogh, [1986] 1 All ER 611. See generally Lawrence Collins, Dicey & Morris on the Conflict of Laws 1005 (11th ed. 1987 & 1990 Supp.).

19. See generally Edward I. Sykes & Michael C. Pryles, Australian Private International Law 717-23 (2d ed. 1987).

20. See, e.g., Moisan v. Morency, [1983] C.S. 481(Que.) (the law of Florida controls the disposition of a Florida condominium owned by a domiciliary of Quebec, a province that generally follows the French model). See also Chochinov v. Davis, [1980] 113 D.L.R.3d 715 (Man.) (reaching the same result under the English common law model).

21. See C. civ., art. 3, para. 2; Judgment of June 4, 1941, Cass. Civ., [1944] S. Jur. I 133; Judgment of Jan. 29, 1948, Trib. Civ. Seine, [1949] Rev. Crit. de Droit Int. Priv. 521. See generally Yvon Loussouarn & Pierre Bourel, Droit International Prive 664 (3d ed. 1988).

22. For example, in an important development, the European Community has recently endorsed application of the situs rule in a number of contexts involving real property. See infra text accompanying note 76. Historically, a number of civil jurisdictions have recognized a scission in choice of law and have applied the situs rule to immovables. These include Belgium, Luxembourg, Austria, Hungary, and Romania. See also Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19, arts. 44 & 45 (abandoning scission and applying the law of the situs to movables, as well as immovables);

rule, although they often observe an exception regarding real property located in a foreign country.[23] Contrary to the contention of the American representative to the Hague Conference, Professor Eugene Scoles,[24] neither the UPC nor New York law endorses a general unitary rule. The UPC does not address the matter, except with respect to section 2-602 pertaining to governing law clauses, and section 2-201, relating to the spouse's elective share rights. Indeed, states that have adopted the UPC continue to apply the common law situs rule.[25] As for New York, Estates Powers and Trusts Law section 3-5.1(b)(1) expressly states that the law of the situs controls with respect to issues concerning the testamentary disposition of real property.[26]

Strong academic arguments have been made in opposition to a rigidly applied situs rule. All such arguments, however, have recognized the continuing, legitimate interests of the situs and the fact that its

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Civil Code for the Federal Dist. and Territories, Prelim. Provs. art. 14, reprinted in Mexican Civil Code (Michael W. Gordon trans. 1980). See generally Martin Wolff, Private International Law 567-568 (2d ed. 1950 & photo reprint 1977). The Hague Conference itself has endorsed the situs rule in the past. See, e.g., Convention Relating to Conflicts of Laws with Regard to the Effects of Marriage on the Rights and Duties of Spouses and with Regard to their Estates, Jul. 11, 1905, 199 Consol. T. S. 17 (1980), art. 7 (adopted by a number of countries).

23. See Jan Kropholler, Internationales Privatrecht 371-72 (1990) (discussing Germany's approach); Kurt Siehr, Das Internationale Erbrecht nach dem Gesetz Zur Neuregelung des IPR, 1987 IPRAX 4. Pursuant to certain bilateral treaties, Germany has adopted the situs rule for real property. See, e.g., the German-Turkish Consular Treaty of 1929, May 3, 1930, RGBI 1930 II 748. See also Ulrich Drobnig, American-German Private International Law 151-152 (2d ed. 1972). See generally Introductory Act of the German Civil Code and Marriage Law of the Federal Republic of Germany, art. 28 (Ian S. Forrester ed. 1976) (former article 28 deferred to the law of the situs of property if that country applied local law. Even though the Introductory Law was recently amended, article 28 in essence was retained). See Siehr, supra at 5. See generally Heinrich Schönfelder, Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB) Deutsche Gesetze (1991); Rainer Gildeggen and Joehen Langkeit, The New Conflict of Laws Code Provisions of the Federal Republic of Germany: Introductory Comment and Translation, 17 Ga. J. Int'l & Comp. L. 229 (1986). For an impressive consideration of the German situation, as well as the many other deviations from a unitary rule in favor of the situs law in matters of inheritance, see 4 Ernst Rabel, The Conflict of Laws: A Comparative Study 251-57 (1958).

24. Eugene Scoles, Comments on Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Memorandum to John Wallace, Director, Probate and Trust Division, Section RPPT, ABA (Sept. 19, 1989).

25. See, e.g., In re Estate of Swanson, 397 So. 2d 465, 466 (Fla. Dist. Ct. App. 1981). In *Swanson*, the court of appeals expressly held that the UPC did not set forth choice of law rules as to substantive issues. Accordingly, the established situs common law rule, as reflected in the Supreme Court decision in Clarke v. Clarke and the Restatement (Second), supra note 14, remain the law.

26. N.Y. Estates, Powers and Trusts Law § 3-5.1(b)(1) (Consol. 1991). The New York provision, § 5-1.1(a)(8), cited by Professor Scoles, relates to the separate issue of whether the computation of the spouse's elective share will be based on all property, wherever situated, including foreign real estate.

interests must be taken into account.[27] The Convention would entirely disregard the situs' interests.

Such disregard could have some very harmful economic, political, and social effects and is entirely antithetical to any rational conflicts resolution process. For example, if an Arab investor in Texas real estate dies, Texas has a very real interest in assuring that its land will not be unduly fractionalized, burdened for generations, or distributed in a manner that favors one gender, based on Islamic law. Furthermore, it has an interest in assuring that the attorneys, the local probate judge, the title insurers, and representatives of subsequent purchasers are not burdened with having to master the intricacies of this religious inheritance law.[28] The state also has an interest in protecting local creditors and mortgagees, who otherwise may be placed in an untenable situation under a foreign law[29] that may be far more

27. Virtually every commentator who has criticized a strict situs rule has, nevertheless, recognized the vital interest a state has in such matters as the title system and restrictions on alienation. See, e.g., Sedler, supra note 5, at 87; David F. Cavers, The Choice of Law Process, 197 & n.31 (1965); Leflar, infra note 46, at 474-75; Brainerd Currie, Full Faith and Credit to Foreign Land Decrees, 21 U. Chi. L. Rev. 620, 642 (1954); Hancock, supra note 9, at 329; Richman & Reynolds, infra note 91, at 219-20; Scoles & Hay, supra note 5, at 714, 768, 770. Of course there are other commentators who are more favorably inclined to a situs rule as a result of general inclination towards definite rules. See, e.g., Ely, infra note 70, at 213; Brilmayer, infra note 70, at 396-97; Willis Reese, Choice of Law: Rules or Approach, 57 Corn. L. Rev. 315, 331-34 (1972); Restatement (Second) of Conflict of Laws 223-43 (1971); Hill, supra note 4, at 1628-30; Albert Ehrenzweig, A Proper Law in a Proper Forum, 18 Okla. L. Rev. 340, 342 (1965).

28. In this regard, a determination would have to be made before the Convention was applied as to the branch of Islam to which the investor belonged. Suppose he was a Sunni. There are four schools of Sunni jurisprudence alone. See, e.g., Herbert Liebesny, The Law of the Near and Middle East 21-22 (1974); Asaf A.A. Fyzee, Outlines of Muhammadan Law 33-35 (4th ed. 1974). See also J.N.D. Anderson, Recent Reforms in the Islamic Law of Inheritance, 14 Int'l & Comp. L.Q. 349 (1965). Islamic law imposes major restrictions on testamentary freedom, typically permitting only one-third of the estate to pass by will. The other two-thirds are distributed pursuant to a highly complex and gender-biased law of intestate succession that tends to fractionalize the estate. See Liebesny, supra at 174-82. In response to the dissatisfaction with limits on testamentary freedom and fractionalization, various institutions such as the Wakf have developed. This Islamic trust avoids the problems mentioned, but has its own drawbacks. In particular, it is not limited by any period of perpetuities. Largely because of this, it has been reformed or prohibited in several countries, although it is still valid in others. See id. at 226-27.

29. Apparently, the Convention is not intended uniformly to govern creditors' rights, which are deemed a matter of estate administration and not succession. See Report, supra note 13, cl. 76, at 565. Article 7(2) specifies the particular areas covered by the Convention. See infra note 57. Creditors' rights are not included. Article 1(2) specifies particular areas not subject to the Convention. Again, creditors' rights are not included. Thus, the matter of creditors' rights in fact falls within a "gray" area. In this regard, article 7(3) permits a forum to apply the Convention to matters in addition to those explicitly covered. Moreover, the Convention's application to matters of "succession" is defined by each forum independently. See infra note 56. See Report, supra note 13, cls. 17 & 18, at 533; cl. 24 at 535; cl. 74 at 563. It is noteworthy

concerned with respecting the rights of distant relatives or religious institutions in the Texas land than it is in protecting the rights of those who lend money.[30]

Despite Professor Scoles' suggestion that great confusion has resulted from the "scission" in the treatment of real property and personal property,[31] he presents no hard evidence or statistics. More importantly, there is no rationale offered for the "unitarist" approach or why a unitarist approach must entirely ignore the interests of the situs or other interested jurisdictions.[32] A Convention that overturns fundamental and historical[33] choice of law rules should not be ratified without persuasive evidence that the current regime produces irra-

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that in many civil law countries "succession" encompasses matters of estate administration. Thus, depending on the forum, creditors rights might be implicated. Then, if the applicable law under the Convention so provided, the rights of creditors might be overridden. Curiously, the forum is able to expand the scope of the Convention, but not necessarily to determine the substance of the law once it does so. That law is prescribed by the mandatory choice of law provisions of articles 3, 4, 5, and 6.

30. Difficulties might also be encountered if the property had been left to a person of a particular racial background who was prohibited from owning such property under the foreign law, although this violated fundamental principles of federal and state constitutional law. It is far from clear that a public policy exception justifying nonapplication of the Convention's choice of law could be claimed by the American state in which the property was situated. For a discussion of the public policy exception, as well as the possible role of the Supreme Court, see infra text accompanying note 262. Of course, the Convention could be challenged on federal constitutional grounds as, for example, denying equal protection of the law. However, the very fact that discriminatory rules might be countenanced under the Convention demonstrates the serious drawback of adoption of rigid, valueless choice of law standards that fail to take account of fundamental forum values. The enormous policy differences that exist among countries on substantive succession issues will very likely lead to the routine invocation of the public policy exception and the undermining of the Convention's objective of uniformity in choice of law.

31. See supra note 6. See also supra note 12 (comments of Professor North).

32. The best the Report does is state that "the arguable distinction between movables and immovables, and the ease with which one can be converted into the other, make scission today much less defensible than in the days of land and interest on bonds." The Report correctly notes that though "[m]any people, including authors on the conflict of laws, regard the connecting factor of situs in the case of immovables to be practically inevitable . . . it has been widely recognized in the scissionist jurisdictions that the rule of the situs is open to serious criticism." See Report, supra note 13, cl. 24 at 535. Still, this does not support ignoring the situs state's interests. Furthermore, the fact that certain conversions from real to personal property are possible, and that characterization problems can arise, hardly argues for the rigid, objective rules of the Convention.

33. The situs rule in the United States is traceable back at least to Joseph Story and his territorial theory of law. See Story, supra note 14, §§ 1-16, at 1-18; § 428, at 361; § 463, at 390. Justice Story relied largely on English common law and expressly rejected the conflicting views of certain European scholars. For a further consideration of the historical roots of the situs rule, see Hancock, supra note 9; Alden, supra note 5, at 587-91. In its recent decision in Burnham v. Superior Court, 110 S.Ct. 2105 (1990), involving the related area of personal jurisdiction, the Justices of the Supreme Court appeared to recognize the importance of tradition and continuity of practice in rulemaking.

tional or unjust outcomes either theoretically or practically, and that ratification of the Convention will rectify the situation.[34]

If the Convention applied to the succession to real estate, a thorough evaluation of the law of a foreign country might have to be made before title could pass reliably.[35] Even before that evaluation could be made, one would have to ascertain which country's law applied. Since probate initially involves notice to the persons entitled to contest or to take by intestate succession,[36] whether there is a will or not, a determination would have to be made in the case of every estate as to whether there are any international conflicts. If there were, the identity of the heirs and next-of-kin would very possibly change, thereby altering the persons who must be notified. Furthermore, the inquiry would presumably have to be made by the county clerk or local attorney for the decedent's estate. In many cases they would have neither the expertise nor access to resources to delve into foreign law.[37]

These persons would initially confront the Convention's intricate rules for ascertaining which country's law governs. First, a determination regarding the country of which the decedent was a habitual resident at the time of his death would have to be made. Second, they would have to consider whether the decedent was also a national of that country at the time of death. If so, the law of that jurisdiction would govern.[38] Third, if the person did not die with a coincidence of habitual residence and nationality at death, then a further determination would have to be made whether the decedent had been a resident of his country of habitual residence at death for at least the five years preceding his death, in which case, that country's law would govern.[39]

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34. See infra text accompanying notes 37-48.

35. Professor Waters recognizes that problems could be created for title companies, which would face the far more difficult task of ascertaining the validity of a particular disposition under a foreign law rather than under local law. Report, supra note 13, cl. 74, at 563.

36. See 3 William J. Bowe & Douglas H. Parker, Page on Wills § 26.11 (3d ed. 1964 & Supp. 1991).

37. The implications for lawyers practicing in this field could be substantial and might well involve a significant increase in probate expense as well as a redistribution of wealth from local, nonspecialized lawyers to larger, more sophisticated "international" practitioners. This might prove appealing to certain estate planners who have recently lost considerable business due to changes in the tax law, family wealth patterns, and the competition from non-lawyers. See, e.g., John H. Langbein, Taking a Look at the Pluses and Minuses of the Practice, Tr. & Est., Dec. 1989, at 10. See also Jeffrey Pennell, Introduction: Whither Estate Planning, 24 Idaho L. Rev. 339 (1987); J. Thomas Eubank, A.D. 2001: Estate Planning in the Future, 21 Inst. on Est. Plan 2000 (1986). Cf. John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108 (1984).

38. Convention, supra note 1, at art. 3(1).

39. Id. at arts. 3(2) and 19(7). The question as to when a person gains or loses an habitual

Fourth, if the decedent had not been a resident for the requisite period, then with the exception of certain limited situations, reference would have to be made to the law of his nationality.[40]

With respect to this last standard, many countries either do not permit voluntary relinquishment of citizenship or nationality or place severe restrictions on such relinquishment.[41] An individual with international contacts, whom the Convention is ostensibly intended to assist,[42] might well be found to have any number of nationalities. Sig-

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residence, as opposed to just a residence, borders on the metaphysical. It has provoked a fair amount of comment in the United Kingdom, with a great deal of disagreement. See, e.g., infra note 94. Obviously, the distinction is important because mere residence at death will not invoke the Convention's habitual residence choice of law rule. On the other hand, if a person was a mere resident for five years prior to death, but was then deemed an habitual resident on the date of his death, the Convention would require application of the law of the habitual residence. See also infra text accompanying notes 105-107.

40. See Convention, supra note 1, at art. 3(3).

41. See, e.g., Code de la Nationalité art., 87 to 97-1, reprinted in C. civ. 43-44 (Dalloz 1990-91). In the United States, the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980) and that case's progeny, have made anything short of a highly formalistic and unequivocal renunciation of American citizenship of questionable validity. In some countries, where citizenship is based on family relation and not physical presence at birth, descendants of persons who emigrated to this country may not even be aware that they are still deemed citizens or nationals of the foreign country from which their parents or grandparents emigrated. See also infra note 120.

In one interesting example of enduring nationality, the nationality law of Spain was read liberally to permit issuance of passports to certain Jews in the United Arab Republic. Passports were issued to descendants of families that had been expelled from Spain during the Inquisition in the fifteenth century. See Daniel Turack, The Passport in International Law 225 (1972). The significance of the passport is itself highly uncertain and further complicates the inquiry into nationality. For example, an American passport has been described as "attest[ing] that the holder is a lawful citizen." On the other hand, it appears to raise only a rebuttable presumption of nationality, and does not constitute conclusive proof. Id. at 18, 230-32. Moreover, one country can apply its own law in determining the weight to be accorded another country's passport, at least when the issuing country has violated international norms as to whom a passport can be issued. Id. at 231. Recently, a technique has developed by which residents of Hong Kong have sought to gain entry into the United States. A 1990 presidential order grants temporary asylum to citizens of the People's Republic of China. The order was not intended to cover Hong Kong. Since Chinese law regards Hong Kong residents as Chinese citizens, China has been granting passports to residents of Hong Kong who, ironically, are asserting their Chinese nationality to escape to the United States before 1997, when Hong Kong is formally incorporated into China. A case is pending in federal district court in San Francisco as to whether a person who is a national of China under Chinese law and holds a Chinese passport is necessarily a Chinese national for American law. See Legal Times, S. Freinkel, To Win U.S. Asylum, Hong Kong Native Changes Countries 2, Aug. 19, 1991. *Quaere* how these sorts of issues would be dealt with under the Convention.

The validity of the process by which a particular person was naturalized might also be called into question. If a question as to the national status or naturalization process of a decedent were raised during probate or upon a title search, an inquiry would have to be made based on the intricate nationality and naturalization laws of the relevant countries.

42. See Report, supra note 13, cl. 15, at 533 & cl. 21, at 535.

nificantly, the Convention provides no guidance[43] as to the proper choice of law in this very typical case.[44]

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43. See Report, supra note 13, cl. 51, at 547, acknowledging that the Convention "does not give a specific rule for dual nationality." The question of a person's nationality and the resolution of the dual nationality problem is to be left to the forum for resolution. See 1 Ernst Rabel, The Conflict of Laws: A Comparative Study 130 (2d ed. Ulrich Drobnig 1958) for some solutions that are currently employed. For example, if the forum is one of the national states, it might apply local law. However, if it is not, any one of a number of other approaches might be taken. There is no clear-cut judicial or theoretical solution to the problem. See Nissim Bar-Yaacov, Dual Nationality 59-62, 159-73 (1961).

44. If a purpose of the Convention is to impose uniformity, reliance on the forum to develop an approach to varied dual and plural nationality cases actually threatens to undercut the entire effort toward uniformity. Indeed, certain international commentators have pointed out that choice of law uniformity will be defeated as a result of precisely such allocation of decisionmaking to the forum. See, e.g., Kurt Nadelmann, Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, 24 Am. J. Comp. L. 1 (1976).

Adair Dyer, a member of the Permanent Bureau of the Hague Conference on Private International Law, maintains that instances of dual nationality "are relatively scarce and are easily handled by the use of common sense." See Adair Dyer, Memorandum of Oct. 12, 1989 ¶ 9, accompanying letter of Oct. 13, 1989 to Rodney Houghton, Esq., a member of the Advisory Committee on Private International Law of the United States Department of State. Contrary to Mr. Dyer's assertion, in this author's view, "common sense" would dictate that in an increasingly mobile and interconnected world, the problems associated with dual nationality will likely increase. Certainly, the Hague Conference has recognized the question as a serious problem for some time. See Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws, 179 L.N.T.S. 89. See generally Rabel, supra note 43, at 129-31. See also Jeffrey Schoenblum, Multistate and Multinational Estate Planning § 9.04 (1982). Many personalities retain dual nationality. For example, not long ago it was reported that film star Arnold Schwarzenegger retains both American and Austrian citizenship. See The Independent, Aug. 26, 1990, at 25. In a world in which political boundaries and nations are being reshaped, e.g., Germany, Hong Kong, the Soviet Union, Yugoslavia, and Sri Lanka, affiliation with a particular country seems in many cases a dubious theoretical and practical proposition. But see Juenger, supra note 4, at 39 (arguing that the country that issues a passport has as much an interest as the country that issues a driver's license).

A nationality standard is also flawed because it fails to take account of the millions of stateless persons. Again, the Convention leaves this last matter entirely to the forum, which, apparently can decide "whether a nationality can and should be deemed to be his". Report, supra note 13, cl. 51, at 549. If the decision is that an individual is stateless and at the time of death he had no habitual residence for five years, then there would appear to be no applicable choice of law rule under the Convention. For a country of immigrants and refugees, such as the United States, this is a highly unpalatable result. Would the traditional choice of law rules of the various American states apply to such persons? Article 1(1) of the Convention makes clear that "[t]his Convention determines the law applicable to succession to the estates of deceased persons." It does not appear to exclude any deceased persons or permit application of the local choice of law rule.

A recent article estimated the number of stateless persons of Indian origin in Sri Lanka alone at one million. See Financial Times, Oct. 20, 1988, § 1, at 4. Other Indians may become newly stateless when Hong Kong is returned to China. John Elgood, British Government Faces Crucial Test on Hong Kong, Reuters Library Report, April 18, 1990. Certainly, many prominent and wealthy persons are stateless. See, e.g., Chi. Trib., Feb. 9, 1990, at 1 (reporting

Fifth, this nationality choice of law is overridden if the decedent, at the time of his death, "was more closely connected with another state."[45] The precise meaning of this phrase is left undefined, and there is no specific guidance of how various factors affect its determination.[46] Indeed, the Report[47] acknowledges that at least two or more

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that the world renowned cellist, Mstislav Rostropovich, has been a politically stateless person since being expelled from the Soviet Union in 1974). Indeed, the Twentieth Century has been characterized by mass denationalizations. For documentation and description of this phenomenon, see Paul Weis, Nationality and Statelessness in International Law 119-20 (2d ed. 1979); Rabel, supra note 43, at 132. The problem engendered an international response in the form of the Convention Relating to the Status of Refugees of Jan. 31, 1967, 606 U.N.T.S. 267. See also Hannah Arendt, The Origins of Totalitarianism 293 (1951); Alexander Aleinikoff, Symposium on Law and Community: Theories of Loss of Citizenship, 84 Mich. L. Rev. 1471, 1480 (1986). See generally Peter Mutharika, The Regulation of Statelessness Under International Law (1989); see also Schoenblum, supra at § 9.08.

45. See Convention, supra note 1, at art. 3(3).

46. A preliminary report of a Special Commission associated with the drafting of the Convention states that: "The difficulty with this term, for those unaccustomed to working with it, is that it appears almost as a no-rule." Hague Conference on Private International Law, Preliminary Report cl. 28, Preliminary Draft Convention Adopted by the Special Commission and Report by D.W.M. Waters, Preliminary Document No. 12 for the Attention of the Sixteenth Session (Mar. 1988), reprinted in 2 Proceeding of the Sixteenth Session of the Hague Conference on Private International Law 239, 253 (1990) [hereinafter "Preliminary Report"]. This Preliminary Report "constituted a critical assessment of the preliminary draft for the benefit of governments," whereas "the present Report is essentially an explanatory document." See Report, supra note 13, cl. 11, at 531.

The Report indicates that "more close connection" [actually the Convention uses the term "more closely connected"] is determined by

> discovering whether the centre of the personal and family life of the [decedent] was in one place more than another. Once again, the considerations are his nationality, the location of his immediate family, his personal ties, the nature and location of his employment or business, the permanence of his place of residence (his apparent home), the principal situs of his personal assets, and his journeying and the reasons for the same.

See Report, supra note 13, cl. 51, at 549; cl. 54, at 551. This standard suffers from intolerable ambiguity on at least two levels. First, the geographic locus of many of these factors will be highly debatable in particular cases. Second, there is no methodology for assigning values to these factors. In this regard, the test is subject to the same harsh criticisms leveled against the "center of gravity" choice of law theory, of which the Convention's "more closely connected" standard is one version. Referring to the theory, Brainard Currie wrote:

> the trouble with [the] theory is that the quest . . . that it enjoined was not implemented by any standard according to which significance could be determined . . . . The contacts are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is the more significant. The reasons for the conclusion are too elusive for objective evaluation.

Brainerd Currie, Comment on Babcock v. Jackson, 63 Colum. L. Rev. 1233, 1233 (1963); Brainerd Currie, Conflicts, Crisis and Confusion in New York, 1963 Duke L.J. 1, 40 (1961). See also Robert Leflar, L. McDougal III & Robert Felix, American Conflicts Law 264-67 (4th ed. 1984) (distinguishing the Restatement (Second) of Conflict of Laws and its "most significant relationship test" on the ground that that test focuses qualitatively on policy-weighing rather than quantitatively on contacts). Id. at 266. Whether this suffices to overcome a similar

jurisdictions may at the same time qualify as "more closely connected." It suggests in this case that the country with "the closest connection" should be referred to, although it also notes that no such term is used in the Convention itself. This explains the concern in the Preliminary Report, that "[i]n common law jurisdictions a strict construction of article [3(3)] would not permit the court to determine the closest law as between two closer laws."[48] How, then, would such a determination be made?

It is accordingly difficult to see how these proposed changes enhance the prompt and efficient administration of estates and distribution of real property. The new standards appear to be litigation-breeders, far removed from the simplicity of a rule that tells the attorney always to look to the law of the jurisdiction in which the real property is situated. Thus, from both the standpoint of planning and of distribution of probate assets, the current rule seems preferable.

Admittedly, a strong argument can be made for a more flexible approach. Such an approach might respect the interests of the situs and the desire for predictability, while taking account of other interests that might dominate certain cases. The Convention, however, fails to take such an approach, but instead simply substitutes a more complex structure of hierarchical rules for the straightforward, existing rule.[49]

One argument in favor of the proposed change that has some merit is that difficult characterization issues would be avoided in the case of assets that could arguably be classified as either real or personal property. However, in the vast majority of cases, a classification is easy to make.[50] Even when the classification is not readily apparent, the categorization of an asset as real or personal would not be nearly as diffi-

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criticism of the Restatement itself is debatable. Unquestionably, there is substantial ambiguity associated with any gravity of contacts test, especially when no hierarchy of values or policy principles are stated. In this regard, the Convention itself does not even list the factors to be considered. The guidance offered by the Report, as noted, is virtually useless. Moreover, the precise authority of the Report is unclear. Could the forum ignore some or all of the factors listed in the Report? Could it introduce other factors? There seems little hope for uniformity in decisionmaking, only in the ambiguous standard being applied. See also infra text accompanying note 53.

47. See Report, supra note 13, cl. 54, at 551.

48. See Preliminary Report, supra note 46, cl. 24, at 249.

49. See infra text accompanying note 66.

50. See James Pedowitz, Report to the Real Property Division of the Section of Real Property, Probate and Trust Law of the American Bar Association 7 (Sept. 11, 1989). Mr. Pedowitz was liaison of the Section with the American Land Title Association. He was formerly chief counsel for the Title Guarantee Company. The chairmen of all relevant real property committees of this Section of the American Bar Association [hereinafter ABA]

cult as choosing the proper law under the Convention rules.[51]

The principal argument for, and the primary objective of, the Convention is unity of choice of law rules.[52] However, the Convention would not accomplish a true unification. To begin with, the resolution of choice of law questions in the case of conflicts exclusively among the American states is purportedly not affected by the Convention.[53] The scission between real property and personal property will also persist even after the Convention enters into effect because the Convention specifically excludes from its reach "issues pertaining to matrimonial property"[54] as well as "property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature."[55] Apparently, trusts would also not be covered.[56] In sum, the Convention does not eliminate separate

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concurred in Mr. Pedowitz's Report, which not only questioned the significance of the characterization issue, but was deeply critical of the proposed abandonment of the situs rule.

Another technical criticism of the situs rule related to the characterization issue concerns the "escape device" of equitable conversion, that is, that real property can be simply converted to personal property by the creation of an equitable obligation, such as a contract of sale, or by holding the property in corporate, partnership, or trust form. Thus, the argument goes, a distinct choice of law rule for real property reflects an undue obeisance to formalism. In fact, the success of a particular attempt at conversion is often open to doubt. Moreover, for various purposes, notably taxation, a person may choose to own real property outright. See, e.g., Robert Hudson, Post-1989 Tax Planning for Foreign Direct Investment in the United States: The Era of the Non-Corporate Vehicle, in International Estate Planning: Principles and Strategies 215 (Donald P. Kozusko & Jeffrey Schoenblum ed. 1991). As to the conversion issue generally, the classic work is Hancock, supra note 9, at 293. Professor Hancock recognized that the equitable conversion theory was an escape device used by judges to avoid undesirable outcomes resulting from a strict application of the situs rule for real property. On the other hand, he also recognized that situs law might well be the proper choice of law and that the equitable conversion theory ought not to be applied as an escape device when the law of the situs was the appropriate choice. Id. at 317-18.

51. Usually there is a statute, case law, or some administrative ruling giving guidance on the characterization of a particular property interest. See generally Schoenblum, supra note 46, at §§ 19.05.9, 20.05.1. On the other hand, the Convention procedures form difficult characterization issues of its own. See infra note 56.

52. See Report, supra note 13, cl. 23, at 535: "What the Convention does is aim to produce *unity* by ending scission, and by introducing a *single objective connecting factor* for choice of law" (emphasis in original).

53. But see Convention, supra note 1, at art. 21.

54. Id. at art. 1(2)(c).

55. Id. at art. 1(2)(d).

56. Id. The Convention does not apply to *inter vivos* trusts, since they are "property rights, interests or assets created or transferred otherwise than by succession"; furthermore, under the terms of article 14, the Convention does not apply to testamentary trusts. Since the Convention only applies to matters of "succession," the scope of that term is obviously of critical importance. Apparently, it does not apply to formal validity of a will, article 1(2)(a), renunciations and disclaimers by beneficiaries, Report, supra note 13, cl. 39, at 541, questions of capacity, article 1(2)(b), construction and interpretation of a will, Report, supra note 13, cl.

choice of law rules with respect to real property in terms of the estate lawyer's overall concern with the client's total assets.[57] Because much, if not most, wealth is presently disposed through testamentary substitutes,[58] the introduction of new choice of law rules with respect

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37, at 541, and matters of administration and transmission of assets, as opposed to the devolution of assets. Id. cl. 24, at 535. See also article 7(2) which sets forth the precise subject matter of the Convention: the succession rights of various parties, article 7(2)(a); disinheritance and disqualification by conduct, article 7(2)(b); advancements and the like, article 7(2)(c); the disposable share and restrictions on dispositions at death, article 7(2)(d); and the material validity of testamentary dispositions, article 7(2)(e). If a matter is not mentioned in article 7, then it is beyond the scope of the Convention, although the forum might choose to apply the Convention's choice of law rules to any of these other matters as well. Convention, supra note 1 at article 7(3). See also Report, supra note 13, cl. 24, at 535.

While the Report notes the characterization problem that sometimes arises in distinguishing real and personal property, see supra text accompanying note 32, a far more troubling issue of characterization is raised by the Convention itself. Inasmuch as so many issues related to wealth transfer have been excluded from Convention coverage and will be subject to other choice of law rules or processes, numerous controversies may arise as to whether a particular issue is within the scope of the Convention or outside its scope. Each forum will decide these controversies and may reach quite different conclusions. See Report, supra note 13, cl. 38, at 541. Furthermore, forum-shopping may be utilized in an effort to obtain a favorable result by selecting the forum that applies a preferred substantive law and characterizes the pertinent issue as fitting within a category not covered by the Convention. For example, an issue might be characterized as one of construction, administration, or even formal validity, thereby avoiding application of the Convention. Forum-shopping would be accomplished by situating assets in jurisdictions that could be predicted to adopt the desired approach and/or in jurisdictions not party to the Convention. Experience with forced heirship and taxation strongly supports the conclusion that persons with "international" estates will go to great lengths to shift the situses of assets in order to obtain the application of favorable rules. See, e.g., the following papers, all published in International Estate Planing: Principles and Strategies (Kozusko and Schoenblum, eds.), supra note 50: Schoenblum, An Introduction to Nontax Aspects of International Estate Planning, at 1; Lawrence, Planning to Protect Against Forced Heirship, Sovereign Acts and Creditors, at 65; Armstrong, Selections of a Tax Favored Jurisdiction for U.S. Investment: Analyzing the Protection and the Costs, at 441; Hughes, Preferred Jurisdictions for Establishing Investment Pools and Private Trust Companies, at 465; Chopin, Designing a Multifaceted Flight Structure Choice of Jurisdiction and Choice of Entity, at 471.

57. Note should also be taken of the fact that questions of formal validity are assumed to have been addressed by the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. See 510 U.N.T.S. 177 (1964). Since almost thirty years have gone by without any widespread adoption of this Convention by nations, the probability is that conflicts over the form of a will will also not be subject to uniform law. In the author's view, a more sensible strategy would be to assure adoption of a uniform rule as to form before proceeding to substance or, alternatively, a coordination of form and substance provisions in a single convention ought to be pursued. See also note 275 for some progress on a uniform form of will.

A word on "capacity" is also required. While mental capacity and age limitations are all excluded from the Convention, undue influence, duress, fraud, and mistake may or may not be covered by it. Each forum, apparently, is to decide whether such matters are, based on its own law, "matters of capacity," and thus outside the Convention, or "matters of consent," and thus within the scope of article 7. See Report, supra note 13, cls. 42 & 43, at 543.

58. See Report, supra note 13, cl. 20, at 24. See also Langbein, supra note 47.

to a decreasing segment of an individual's wealth seems odd when, perhaps, the majority of wealth held in other forms will continue to be governed by the existing rules.[59]

Scission would also continue, despite the Convention, because the situs rule persists in related areas, such as estate administration as well as state and federal death taxation. Indeed, the Supreme Court has long held that *only* the situs state can tax real property.[60]

The treatment of real property under bilateral international death tax conventions is also of considerable relevance. These treaties have been in effect for years and thus represent a model that appears, from at least a practical standpoint, to work in an international, albeit, bilateral setting. Furthermore, because so much of the wealth transfer at both the domestic and international levels is driven by tax factors, there ought to be a strong interest in harmonizing the tax and non-tax aspects of international wealth transfer.[61] The tax treaties permit the United States and another country to tax its citizens and domiciliaries and those having certain other strong affiliations, even if their property has a foreign situs. Under the older treaties,[62] the country taxing on the basis of the strongest personal affiliation has to allow a credit for an assortment of property interests situated in the other country, including real property. Under the newer treaties[63] these creditable property interests, based on situs, have been curtailed. However, because of particularly strong links of real property to the situs, the United States or its treaty partner must still credit the death

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59. Much criticism was leveled due to the fact that the Convention "appears not to be meeting the needs of those who are concerned with estate planning." See Preliminary Report, supra note 46, cl. 13, at 243. The Preliminary Report specifically noted the failure of the Convention to address *inter vivos* transfers.

60. Curry v. McCanless, 307 U.S. 357, 363 (1939).

61. The failure of the Convention to come to terms with the wealth transfer concerns of real life testators is apparent. The Report states that:

> for estate planning purposes testators are particularly anxious to have the local law apply in that place where their foreign assets are located. Multiple wills are a direct product of this desire to have local law apply to local assets. Administration is then more swift, more inexpensive, and much more likely to be free of error. Notaries, solicitors and attorneys know best their own local laws. The effort, however, [to introduce the *lex situs* into the Convention] was not successful, so keen was the majority of delegations to secure unity.

Report, supra note 13, cl. 27, at 537. Unity for the exclusive sake of unity is hardly a desirable policy objective and, indeed, in terms of choice of law theory, as well as in terms of its impact on practical estate planning, has palpable shortcomings. Although the response of the Report is that the freedom the Convention accords a testator to designate governing law goes a long way to ameliorate the estate planning concern, this conclusion is open to considerable doubt. See discussion of article 6, infra text accompanying notes 140-181.

62. See Schoenblum, supra note 44, at 567-70.

63. Id. at 570-72.

taxes of the country in which the real property is located. In short, while the newer tax conventions tend to depart from a general situs rule with respect to other types of property, they adhere, *without exception*, to the rule that the situs country in the case of real estate has the primary taxing authority.[64]

C. *The Absence of a Persuasive Theoretical Basis for the Unqualified Abandonment of the Situs Rule*

The Convention's approach to the choice of law question with respect to real property represents a most unfortunate development from the standpoint of conflicts law. Even the questionable conclusion that the traditional situs rule ought not be inflexibly applied, leaves unanswered the question of what rule or process of conflicts resolution should be substituted in its place.

Even academic proponents of more freewheeling choice of law approaches than the straightforward rule recognize the potentially important interest of the situs state.[65] They simply argue that in some cases the interest of the situs state is minimal or nonexistent and that one must take account of interests and contacts of other states and their citizens, as well as concerns for comity, federalism, and the multistate system. While no clear coalescence of views on an appropriate substitute seems to have emerged, there is, as in other areas of choice of law, a belief that a fresh, more flexible approach is desirable. Unfortunately, the Convention does little more than install a new set of rigid rules based on individual affiliation rather than situs and, as such, is susceptible to precisely the same critique offered of the situs rule—it fails to take account of other relevant interests, contacts, and concerns. As with any talismanic methodology, it impedes the development of a more probing conflicts analysis.[66]

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64. Because of these credit provisions, if the situs country's tax on the real property is greater than the United States tax attributable to the property, the United States retains no net tax with respect to the real property, even if the decedent was a citizen, domiciliary, and habitual resident of the United States. United States income tax treaties follow a similar pattern. Income from real property is treated as having its source at the situs of the real property. Even though residence is the usual basis of taxation, in the case of income from real property, the primary taxing authority is allocated to the situs country via a credit system, just as with the more recent estate tax conventions. See, e.g., Convention and Protocols between the United States and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, signed Sept. 6, 1980, with Protocols signed July 14, 1983 and Mar. 28, 1984, art. VI, 1986-2 C.B. 258.

65. See supra note 9 and infra notes 68-69.

66. A comment by Brainerd Currie in connection with one multistate succession case is pertinent:

> We begin with a practical problem and imperceptibly get lost in disputations about

The Report indicates that the desire for uniformity of choice of law rules for succession to real and personal property fueled the change.[67] Still, the objective of uniformity does not dictate adoption of new rules which are no more flexible, and far less predictable, than the present rules. The Convention's habitual residence-nationality-more close connection tests blatantly ignore what could prove to be overriding interests of other jurisdictions, not the least of which are the situs *and* domicile countries, as well as the interests of the relevant individuals.

Curiously, the Convention's choice of law solution also *blatantly* ignores every modern choice of law theory. Indeed, there is no mention of any of these in the Report. Many of these theories would point to an important, if not determinative role, for the situs. For example, if the focus is on state interests, the interests of the situs state are of considerable magnitude. These interests include: protecting the integrity and effectiveness of the title recording system,[68] assuring the proper use of the land, promoting free circulation of real estate by prohibiting perpetuities and the like, protecting the environment, creating reliable procedures that encourage transfers at minimal transaction cost,[69] and confirming the sovereignty of the state through its control of its own territory. Not all of these factors will be relevant in every case and in some they all may be absent. In other cases, how-

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> the principles of domicile and nationality as universal rules for choice of law. We forget that what we are deciding is whether a particular wife shall be conceded testamentary freedom or whether her husband shall be conceded an indefeasible right to half her movable estate.

Brainerd Currie, The Disinterested Third State, 28 Law & Contemp. Probs. 754, 784 (1963).

67. See Report, supra note 13, cl. 23, at 535.

68. This interest should not be underestimated nor should the problems that would arise if the approach of the Convention were adopted. As noted in Leflar, supra note 46, at 474-75:

> The title searcher at the situs cannot be expected to know the laws of all the other states in which parties may be domiciled or instruments may have been executed and other elements in transactions may have significant contacts. Some of these locations may not even be identified in the recorded documents. In many situations, especially where bona fide purchasers are involved, the predictability consideration will be the dominant one, and the only state under whose law this consideration can normally be effectuated is the state of situs.

Under the Convention, great uncertainty would be created since any probated will could not pass title safely unless all those who could challenge it had been given an opportunity to be heard. That would require first a determination of the assets in decedents' estates, the relevant law, the substance of that law as to heirs, and proper notice. At present, all that is typically required is notice to heirs as determined by local law.

69. Beneficiaries and potential purchasers must be confident that the procedures used and rules relied upon will not be upset elsewhere by application of some other law. See Amos Shapira, The Interest Approach 131-33 (1970); Max Rheinstein, Ehrenzweig on the Law of Conflict of Laws, 18 Okla. L. Rev. 238, 241-42 (1965).

ever, some or all may be of overwhelming concern and should not be cavalierly and absolutely cast aside, as the Convention does.

Predictability[70] has also received widespread attention from scholars who agree that it should be a crucial element of any conflicts theory.[71] Arguably, the Convention does give some recognition to predictability in the sense that an individual may, under limited circumstances, designate a law as controlling the disposition of property.

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70. Proponents of an interest analysis approach do not deny the legitimacy of the goal of predictability. However, they elevate other values, such as fairness, due process, and protection of a state's fundamental policies. See Alden, supra note 5, at 597. Of course, not all theorists are convinced interests analysis accomplishes these goals. See John Hart Ely, Choice of Law and the State's Interest In Protecting Its Own, 23 Wm. & Mary L.Rev. 173 (1981); Lea Brilmayer, Interest Analysis and The Myth of Legislative Intent, 78 Mich. L.Rev. 392 (1980).

Predictability, itself, probably ought not be regarded as a monolithic concept. In William F. Baxter, Choice of Law and The Federal System, 16 Stan. L.Rev. 1, 2-4 (1963), the author discusses three types of predictability. Primary predictability involves the ability to predict the legal consequences in the future of particular conduct, such as the drafting of a will. Id. at 3. Secondary predictability entails the ability to predict the position a particular state will take as to past conduct once it reaches the litigation stage. Baxter describes a third type of predictability as doctrinal uniformity among jurisdictions. In many instances, any number of forums may be accessible. The availability of various forums can weaken primary predictability, unless there is substantial doctrinal uniformity of law.

Taking Baxter's analysis at face value, in the case of an immovable in the United States, the prospect of forum-shopping will not be relevant in succession matters, since the situs state has exclusive control over the property and will, thus, be, in most instances, the forum. (But see infra note 84 for certain exceptions.) As such, doctrinal uniformity is not necessary for predictability. Moreover, the Convention alternatives to situs severely undercut predictability. See infra note 266. Still, primary predictability, assured as it may be by the situs rule, fails to afford any normative basis for selecting the law of the situs as the proper choice of law. Possible justifications for the application of situs law are considered supra text beginning at note 65. Nevertheless, since any number of alternatives could be equally justified, perhaps it is sufficient to accept the situs rule because it fosters predictability and has been widely accepted in this country.

Note also that predictability must be differentiated from the expectations of the parties. The parties can develop new expectations as to the governing law and the way it is identified. Fulfilling expectations goes to the issue of fairness, whereas predictability focuses more on fulfillment of testamentary intent. See also Alden, supra note 5, at 596-97. Of course, while the parties could learn to "expect" ambiguity and uncertainty in the transmission of wealth, they would surely prefer to "expect" certainty and to have the ability to determine for themselves the disposition of their wealth.

71. See, e.g., Leflar, supra note 46, § 103, at 290; Reese, Conflict of Laws and the Restatement Second, 28 Law & Cont. Prob. 679, 686 (1965) (indicating that predictability is most essential in matters involving validity of wills and intestate succession). More recently, other commentators have emphasized the value of predictability. See e.g., Brilmayer, supra note 70, at 407; Ely, supra note 70, at 213; Amos Shapira, "Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy, 77 Colum. L. Rev. 248, 254, 259-60 (1977). See also Drion, The Lex Loci Delicti in Retreat, in Festschrift für Otto Risse 235 (1964), stating that governmental interests analysis is "too cumbersome to apply for the average lawyer in the average lawsuit . . . . [A]s a practical legal tool it is as fit for the day to day handling of legal problems as is a scalpel for the cutting of meat."

However, not only is the right to choose a governing law or laws seriously circumscribed under the Convention, but also it fails to take account directly of the interests of the state whose land is being affected. Assuming those interests are important, they should not be entirely dependent upon the willingness of a testator to invoke the situs state's law via a governing law clause.[72]

Finally, the choice of law issue cannot be divorced from the subject of jurisdiction. In the United States, the Supreme Court has made clear that with respect to actions *in rem*, the location of the property will typically support the assertion of jurisdiction by the situs state.[73] Of course, meeting the test for jurisdiction does not mean that the situs state can or should always apply its own law.[74] Still, it does suggest a recognition in constitutional jurisprudence of very substantial interests of the situs state. For example, the Supreme Court emphasized in *Shaffer v. Heitner*:

> The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction as would the likelihood that important records and witnesses will be found in the State.[75]

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72. Indeed, the individual is not likely to do so if the situs state's law is detrimental; yet, that is likely to be precisely when the situs state would want its interests protected. Of course, the interests of private parties is an important consideration that is largely ignored in traditional, governmental interest analysis. Inflexible, rule-oriented approaches that choose law based on situs or personal affiliation also ignore these concerns, although they may serve them indirectly by facilitating predictability. Thus, a number of commentators have emphasized considerations of private parties as an essential ingredient in determining choice of law. See, e.g., Arthur T. Von Mehren & Donald T. Trautman, The Law of Multistate Problems, 246-50, 253-54, 284-85, 292-93 (1965).

73. See Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977). See also Leflar, supra note 46, at 128-32. Of course, there must be satisfactory notice and the cause must relate directly to the property and not simply be an action quasi-in-rem. For the uncertain status of quasi-in-rem jurisdiction, see Peter Hay, Transient Jurisdiction, Especially Over International Defendants, 1990 U. Ill. L. Rev. 593, 595 (1990).

74. Indeed, for choice of law purposes, in order for the choice of a particular law to be made, there must be "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). The question of what constitutes "significant contacts" remains unsettled. The matter was addressed recently by the Supreme Court in Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985). In that case, which involved thousands of class action plaintiffs, the Court held unconstitutional the mass application of Kansas law to all plaintiffs' causes of action, since many involved mineral rights in other states. In particular the Court emphasized that expectations as to governing law were an important due process concern.

75. 433 U.S. 186, 208 (1977).

While these jurisdictional interests do not demand a local governing law, they nonetheless merit some recognition in the choice of law context. An absolute rejection of the situs state's law cannot be justified. It creates the anomalous and asymmetrical circumstance in which the situs state is the principal one with the authority to adjudicate rights in real property, but it is not permitted *ever* to conclude that its interests may be substantial enough to justify application of its own law.

In this regard, the trend in civil law systems, even those that previously did not recognize a scission between real property and personal property, has been toward enhancing the authority of the situs country and even giving it exclusive jurisdiction over real property.[76] Particularly notable in this regard has been the European Communities' Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[77] Not only does this Convention

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76. See generally Peter Hay, The Situs Rule in European and American Conflicts Law: Comparative Notes, in Property Law and Legal Education 109, 109 (P. Hay & M. Hoeflich ed. 1988). See also Donald Trautman, Book Review, 99 Harv. L. Rev. 1101, 1110-11 (1986) reporting the intransigence of civil law countries in insisting on overall control by the situs in the case of trusts of local property governed by the Hague Convention on the Law Applicable to Trusts, reprinted in 23 I.L.M. 1389 (1984) (opened for signature on October 20, 1984). Article 12 of the trust convention permits a trustee to register immovable assets, or documents of title to them, in his capacity as trustee or in such other way that discloses the existence of the trust. However, the same article explicitly conditions this right "in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought . . . ." The American delegate, Professor Donald Trautman, has explained this in terms of the unease civil law delegates felt about introducing unfamiliar trust instruments into their recording systems. See Trautman, supra. The Succession Convention being considered by this article lacks any registration provision similar to article 12. In this regard, it should also be contrasted with the Uniform Disposition of Community Property Rights at Death Act, 8A U.L.A. 124 (1983), which has been enacted in a number of states. The Act deals with the rights of spouses in property acquired in both community and common law property systems. Although community property generally retains its character as between the parties, § 6 of the Uniform Act excuses a good faith purchaser or lender who takes security from undertaking an inquiry and such person may rely on apparent title. As the comment following the section indicates, the relative rights of spouses must not be permitted to complicate the "ascertainment of title and disposition of assets where adequate consideration is paid." Id. at 132-33. Moreover, § 4 relieves the personal representatives, heirs, or devisees of any duty to determine the surviving spouse's rights in the property, unless specifically demanded to do so by the spouse or her successor. The Convention fails to establish similar mechanisms to assure the efficient operation of the market. It also places the court, to the extent that it is required to advise parties of their rights, at risk of liability. Indeed, § 4 of the Uniform Act discussed above is designed "to eliminate such Court's liability for failing to discover the community rights and to advise the interested party of his rights." *Quaere* whether a court that fails to identify and notify the appropriate persons under foreign law of their rights in local real property would face liability if the Convention were in force.

77. 1978 O. J. Eur. Comm. (No. L304). See also 1988 O.J. Eur. Comm. (No. L319/9) (extension of Convention to non-EC European countries).

establish exclusive jurisdiction at the situs "in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property,"[78] but it also "assumes application of the lex rei sitae."[79] Similarly, the European Communities' Convention on the Law Applicable to Contractual Obligations[80] links a contract with the country with which it has its "closest connection". Under the Convention there exists a rebuttable presumption that the situs has the closest connection, in the case of real property, when the claim involves issues of title or use of the property.[81] The new German conflicts statute also incorporates this approach.[82]

The Report refers to the mobility of persons within the European Community as a justification for its anti-scissionist approach.[83] Yet, the trend in European Community matters involving real property seems to be in precisely the opposite direction. The linkage by the European Community of jurisdiction and choice of law in the case of real property and the linkage of both to the law of the situs in the budding European federation suggests that the existing American scissionist system may actually be serving as a a model for the emerging confederal and federal systems.

That is not to say that in American jurisprudence, the situs rule has always been determinative of individuals' rights in real property. Nonsitus courts historically have shown a willingness to address the rights of individuals *inter partes*, while not interfering with the situs' *in rem* authority to apply its own law with respect to the property.[84] In order for its judgment to be effective, the court must obtain personal jurisdiction over the relevant individuals—not always a simple task, especially with respect to particularly peripatetic persons situated in far-flung reaches of the world. Nonetheless, in many cases, personal jurisdiction has been attainable. A second obstacle is that the situs country is not required to give full faith and credit to a for-

78. See Convention, supra note 1, at art. 16(1) (the general preference accorded domicile is overridden).

79. See Hay, supra note 76, at 116.

80. 1980 O. J. Eur. Comm. (No. L266/1).

81. Convention, supra note 1 at art. 4(3). As a result, the general preference otherwise accorded the habitual residence is overridden.

82. Einführungsgesetz zum Bürgerlichen Gesetzbuche, art. 28(3). See also supra note 23.

83. See Report, supra note 13, cl. 14, at 531-33.

84. See, e.g., Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454 (Miss. 1983); Dority v. Dority, 645 P.2d 56 (Utah 1982); In re Estate of Janney, 446 A.2d 1265 (Pa. 1982); Ivey v. Ivey, 439 A.2d 425 (Conn. 1981). Indeed, the situs state as forum may on rare occasions even defer to the law of the domicile. See, e.g., Rudow v. Fogel, 426 N.E.2d 155 (Mass. App.Ct. 1981). See also Kane v. Kane, 646 P.2d 505 (Mont. 1982). See generally Weintraub, supra note 8, at 426-27.

eign personal judgment, as would be true in the interstate context. Foreign judgments, however, in many cases are given recognition, especially if deemed fair by American due process standards.[85]

A more systemized approach that gives credit to the situs country's interests without according them undue credit should be the focus of the Convention. There are any number of ways to do this. The European Communities' convention might serve as models.[86] Alternatively, the situs of property might be deemed one of several relevant factors to be considered in resolving a conflict, just as it is in the case of the Hague Trust Convention.[87] The important point is that the situs state's interest[88] should not be absolutely excluded from the formulation, whatever it might be. Doing so represents a striking departure from existing American and European law. Furthermore, the substitute proposed totally ignores the tumultuous debate and novel approaches that have recently dominated American conflicts theory and which have attracted much attention in Europe.[89]

D. *The Elimination of the Domicile Rule for Personal Property*

The complex and nebulous choice of law rules of the Convention have already been discussed in connection with real property. The Convention's objective to unify choice of law rules is not accomplished, however, by reliance on the law of the domicile, the standard consistently used in the United States with respect to personal property. Instead, under the Convention, personal property, as well as real property, are to be governed by a mixed habitual residence-

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85. See, e.g., Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972); Cherun v. Frishman, 326 F. Supp. 292 (D.D.C. 1964). But see, e.g., In re Estate of Steffke, 222 N.W. 2d 628 (Wisc. 1974); Julen v. Larson, 101 Cal. Rptr. 796 (Cal. Ct.App. 1972). In Hilton v. Guyot, 159 U.S. 113 (1895), the Supreme Court legitimated retaliation if a foreign jurisdiction did not recognize American judgments. The approach has largely been rejected. See generally Leflar, supra note 46, at 250. The Restatement (Second), supra note 14, at § 98, urges a due process test for recognition of foreign judgments.

86. See supra note 80.

87. See supra note 76, art. 7(b). The situs of assets is listed as the second factor after the place of trust administration designated by the settler.

88. See supra text accompanying notes 11-14, 68-69, and 75.

89. Several of the participants in and summaries of the general debate over the appropriate choice of law theory are referred to supra note 27. See also Cavers, supra id., in particular his "seventh principle of preference," which recognizes broad autonomy of parties to choose law that even overrides the forum's mandatory rules. However, he explicitly rules this approach out in the case of land, due to "the importance from a functional standpoint of preserving the integrity of the land law . . . ." For the European reaction to the American debate, see Edoardo Vitta, The Impact in Europe of the American "Conflicts Revolution," 30 Am. J. Comp. L. 1 (1982) (and ensuing papers); North, supra note 12, at 23.

nationality-closest connection-more closely connected-residence approach.[90]

Although interpretation of "domicile" has generated a great deal of litigation in the United States,[91] there now exists a large body of common law to serve as a guide. The cases are fact-oriented and there is general agreement on the parameters of the concept itself.[92] There is, however, no American jurisprudence concerning the meaning of the concept of "habitual residence."[93] Indeed, consistent with other Hague Conventions, this Convention purposely leaves the term undefined.[94] This would be fine if the concept had a fairly well understood

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90. See supra text accompanying notes 37-48.

91. See generally William M. Richman & William M. Reynolds, Understanding Conflict of Laws 5 (1984). In the area of inheritance there have been a number of illustrious cases in which courts of different states have reached different conclusions as to domicile. Ordinarily, the finding of a local domicile has justified the imposition of inheritance tax. See, e.g., In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932) and In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (Prerog. Ct. 1934), aff'd, 13 N.J. Misc. 168, 176 A. 902 (1935), aff'd, 13 N.J.L. 362, 184 A. 743 (Sup. Ct. 1935). The United States Supreme Court refused to resolve the dispute, denying certiorari in each case, 288 U.S. 617 (1933) and 288 U.S. 678 (1933). Earlier, the Court had denied a motion to file original action by New Jersey against Pennsylvania, 287 U.S. 580 (1933). A few years later, in Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937), the Court stated that "neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of the different states as to the place of domicile, where the exertion of state power is dependent upon domicile within its boundaries." See also Leflar, supra note 46, at 33. Conflicts scholars have long argued further that the term "domicile" does not have a "unitary" meaning and that the meaning of the term could vary with the purpose for which it is being used. See generally Walter W. Cook, The Logical and Legal Bases of the Conflict of Laws, ch. VII (1942); Willis L.M. Reese, Does Domicile Bear a Single Meaning?, 55 Colum. L. Rev. 589 (1955). The Restatement (Second), supra note 14, at § 11(2), comment m, recognizes differences in application for different purposes and states that: "A person may have no more than one domicile at a time, at least for the same purpose."

92. See, e.g., Leflar, supra note 46, at 19 ("The standard rules concerning the concept of domicile are fairly firm.").

93. This author could find no American case interpreting the term. See also Leflar, supra note 46, at 10, noting that the concept "has not caught on in America." The Report also makes clear that the term habitual residence, as used in the Convention, is definitely not intended to have the same meaning as domicile. See Report, supra note 13, cl. 51, at 549. At best, one vague standard with at least several hundred years of common law development, domicile, would be replaced with another vague standard, habitual residence, having no common law to provide guidance.

94. See Report, supra note 13, cl. 51, at 549. On the other hand, the Report, in an example of self-contradiction, also seeks to flesh out the term. Id. at 549. A sharp division exists among conflicts scholars as to whether habitual residence ought to remain an amorphous concept. Professor de Winter sought to define its parameters. See L.I. de Winter, Nationality or Domicile? The Present State of Affairs, 28 Recueil des Cours 347, 430-36 (III 1969). He actually argued in favor of two distinct concepts, "social domicile" for use in matters of personal status and "habitual residence" for use as a substitute for domicile in certain spheres of law. He recognized that habitual residence, "just like the concept of domicile—may well vary in substance as the underlying reasons for the connection differ". Id. at 436.

and uniform meaning. However, this is not the case.[95] There are many unresolved problems with habitual residence: Is it equivalent to ordinary residence, and, if not, how not?[96] Does it have an intent component, as does domicile?[97] Can there be more than one habitual residence?[98] Can there be no habitual residence?[99] Which factors are

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Furthermore, the concept of habitual residence might not require the same degree of social integration in the community as a social domicile would. Indeed, de Winter believed that habitual residence ought not have a precise definition. Cavers also emphasizes this point. The reason given by him for not defining habitual residence is to avoid the concept becoming the focus of inquiry. Rather he argues that interest analysis should be used to identify the appropriate jurisdiction and then "habitual residence" should be employed merely as a descriptive term to denominate the jurisdiction selected. In this way, the analytical trap of searching for the "habitual residence" is avoided. See David F. Cavers, "Habitual Residence: A Useful Concept?" in The Choice of Law: Selected Essays, 1933-1983, 244, 254-57 (1985). Of course, predictability is sacrificed by this approach. Furthermore, it presents the difficult task of identifying the appropriate law without satisfactory normative standards that can order or weigh competing interests.

95. For widely varying views on the meaning of habitual residence, compare Ronald Harry Graveson, The Conflict of Laws: Private International Law 194 (7th ed. 1974) ("midway between domicile and residence"); Joost Blom, The Adoption Act 1968, and The Conflict of Laws, 22 Int'l Comp. L.Q. 109, 136 (1973) ("settled headquarters at the moment"); Cavers, supra note 94, at 255 (disagreeing with the "headquarters" theory and viewing it instead as an undefined connector varying in meaning depending on the case; Cavers also noted that, in the area of succession, it might be desirable to adhere to the concept of domicile); Jean Gabriel Castel, Canadian Conflict of Laws 101 (2d ed. 1986) (a watered-down version of domicile lacking the requirement of intent); Council of Europe Resolution 72(1): Standardisation of the Legal Concepts of "Domicile" and "Residence" (factual inquiry of residence maintained on an habitual basis; no intent required, so that a prison is the habitual residence of a prisoner); and Cruse v. Chittum, [1974] 2 All E.R. 940 (landmark English decision: "a regular physical presence which must endure for some time" and which entails "an intention to reside").

96. The Report, supra note 13, cl. 51, at 549 indicates that the term is not intended to equal ordinary residence: "It is a regular physical presence, enduring for some time, and a clearly stronger association than 'ordinary' or 'simple' residence, of which the [decedent] may have had two or more."

97. Report, supra note 13, cl. 51, at 549 indicates that it does, but to a lesser degree:

> Intention appears to play a more muted role as an element in habitual residence than it traditionally has done in domicile, and this is why lawyers who are accustomed to working with domicile as a connecting factor hesitate before accepting the term, habitual residence, as an equivalent, but finally accept it as a possible alternative.

However, the precise nature of the requisite intention is not addressed. For example, "the manifest hopes and plans of the [decedent] are also elements that may be legitimately considered by the person who would have to know which State is the habitual residence." Id.

98. See Cavers, supra note 94, at 244, 253. ("Two habitual residences would be possible for the person who is a city dweller from Monday till Friday but a country dweller the rest of the week . . . ."). But see infra note 99.

99. According to the Report, supra note 13, cl. 51, at 549, "A person can have only one habitual residence, because it is the centre of his living, the place with which he is most closely associated in his pattern of life. For the purpose of determining this place, his family and personal ties are particularly important elements." But see supra note 98.

The description of habitual residence in the Report closely resembles the description of the terms "more closely connected" and "most closely connected." It raises a serious question as

decisive in determining habitual residence?[100] When does habitual residence, as contrasted with residence, begin and end?[101] Can an habitual residence, as with domicile, be adopted immediately, or does it entail a time element?[102]

Not surprisingly, the prestigious Law Commission of England and the Scottish Law Commission, in a 1987 joint report,[103] reached negative conclusions with respect to the use of habitual residence in the area of succession law and recommended against its adoption as a general standard in choice of law matters.[104] The Commissions recommended instead a revised domicile standard that generally parallels the current American conception of domicile.[105]

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to the need for all of these concepts. For further consideration of the "more closely connected" and "most closely connected" concepts, see supra note 46 and accompanying text.

100. See, e.g., supra notes 96-97.

101. Habitual residence under the Convention may definitely begin and end at different times than ordinary residence. See Report, supra note 13, cl. 54, at 551. Presumably, the determination of actual dates would involve a detailed factual inquiry after an understanding was reached as to the factors relevant to habitual residence and the relative weight, if any, to be accorded them. The discussion in the Report leaves unclear whether habitual residence may persist despite absence from the country. An example is given of a person who returns to his country of nationality for a year to tend to certain matters. The Report indicates that even though the center of the individual's life had been one country for five years prior to his death, he had been away from that country for one year during the five year period. Thus, he had not been "resident" there for five years prior to his death as required by article 3(2). The Report does not clarify, however, whether the individual was habitually resident for the entire five year period. Id.

102. The Report indicates that an habitual residence can be obtained promptly. The example given is that of an immigrant who dies shortly after his arrival in his new country and is deemed to have been an habitual resident of that country. Note, however, that because he was not a resident for five years prior to his death, the law of his national state, the country from which he fled, may well apply. See infra text accompanying note 106.

103. Law Comm. No. 168 and Scot. Law Comm. No. 107, reprinted in a joint report entitled "Private International Law: The Law of Domicile," (Sept. 1987).

104. The Law Commission's Report acknowledged the use of "habitual residence" in certain English statutes relating to jurisdiction and recognition of judgments in family law matters. Importantly, habitual residence is being used typically in these cases as an alternative to, rather than a substitute for domicile, and the purpose is to expand the reach of the forum's jurisdiction. But when these considerations are not relevant, the Report concludes that habitual residence should be rejected as a connecting factor. After setting forth an examplé of an English oil man working in Saudi Arabia and noting that succession would be governed by Saudi law if habitual residence were the law-determining affiliation, the Report concludes:

> It can be seen from this that the exclusive use of habitual residence would cut the links between many temporary expatriates and their homeland, isolating them and their dependents from its law and courts despite their remaining closely connected with that country. The results would be particularly dramatic where the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien to the culture of the person's own country.

Id. at 10.

105. Id. at 43 (in particular, they recommend the abandonment of the English common law concept of domicile of origin).

Although distinct concepts, habitual residence and residence are inextricably linked under the Convention. If a person dies an habitual resident of one country and a national of another, the law of the habitual residence governs, but only if the individual was a resident (not necessarily habitual resident) for five years prior to death.[106] If the person was physically present in another country for a year, the Report indicates that the five year test is not met.[107] This example suggests the slippery slope of even shorter absences. Suppose the individual were gone for a day, a week, a month. The fact that the individual maintained his family and other vital interests at the place of *habitual* residence and had an intention to return would, apparently, not alter the result. If, in fact, this is the case, the Convention makes habitual residence a hostage to daily, continuous physical residence. Thus, the instances in which habitual residence is likely to apply when there is no confluence of habitual residence and nationality at death are likely to be fewer than expected.

If this is correct, then, the Convention seems to be a victory for those arguing for nationality as the predominant law determining personal affiliation, since in cases of less than five years residence prior to death, nationality will apply. Unfortunately, the problems of habitual residence are mirrored by the problems associated with the nationality standard. To begin with, nationality historically has not been favored by immigrant nations.[108] To do so would create the curious anomaly of applying the law of the country from which the individual

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106. Convention, supra note 1, at art. 3(2). See also supra note 101.

107. See supra note 101. The Report, supra note 13, cl. 54, at 551 gives the following troubling example:

> As another alternative, let it be supposed that the deceased spent a first year in State H (his immigrant country) and then returned for a year to his country of nationality in order to care for an elderly parent, leaving his spouse, children, and new home in State H for this time. Thereafter he returned to State H, but after four years died in State H, being then habitually resident there. The one year and the four years cannot be added together to make the necessary five.

108. See, e.g., Kurt H. Nadelmann, Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus Domicile, in Conflict of Laws: International and Interstate 49, 82 (1972); Law Commission, supra note 103, at 55. See also Friedrich K. Juenger, American and European Conflicts Law, 30 Am. J. Comp. 117, 130 (1982), where the author states:

> Whatever one might say about attempts by emigration countries to retain some hold over their citizens abroad, nations that attract large numbers of immigrants clearly court trouble if they disregard the very real nexus that group of their population has with their new homeland. Stubborn insistence on nationality as the only legal tie that matters is bound to swamp their courts with foreign-law issues. Since it is more difficult, more expensive and more time-consuming to apply foreign law than local rules, immigrants are bound to receive a lesser, costlier and slower type of justice. (footnotes omitted).

Indeed, the nationality principle is reported as "receding" in one of its principal strongholds,

departed or fled.[109] The application of national law would be particularly pernicious if the individual's country of nationality was totalitarian in nature and severely restricted testamentary freedom. Indeed, the Preliminary Report confirms that a political refugee, who has been in this country for less than five years and harbors hopes of returning to his home, would have his succession governed by the law of the very country from which he fled.[110] Because of the refugee's desire to return, the report would deem him "more closely connected" with that country.[111] Furthermore, the personal representative of the immigrant who plans to stay in the United States would have the burden of establishing that nationality should not apply because the immigrant was more closely connected with a particular American state.

As noted, the Convention leaves unresolved the issue of dual nationality. Since dual nationality is quite common,[112] even, for example, in the United States-Canadian context, this is a striking omission. Apparently, the issue of dual nationality may be resolved by the forum,[113] thus carving out another exception to the Conven-

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Germany, now that that country is confronted with more than four million *Gastarbiters* ("guest" workers from abroad). Id. at 131.

109. See, e.g., Alexander E. Anton, Private International Law 160 (1967), cited in Law Commission, supra note 103, at 11. The noted English conflicts scholar commented on the problem:

> The principle of nationality achieves stability, but by the sacrifice of a man's personal freedom to adopt the legal system of his own choice. The fundamental objection to the concept of nationality is that it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life.

110. See Preliminary Report, supra note 46, cl. 27, at 251 ("By contrast the political refugee from the country of his nationality but hoping one day to be able to return, would remain more associated with that country than any other, unless the evidence showed otherwise."). If the evidence shows that the decedent was more closely connected with another country, the nationality standard is overridden. The burden of proof, however, is on "those who would argue that the connecting factor of nationality was not at the death apposite." Id. The relevant evidence would, apparently, include "personal and family ties, etc." Report, supra note 13, cl. 54, at 551. But the very status of the political refugee would seemingly not be relevant. See Preliminary Report, supra note 46, cl. 27, at 251.

The situation under the Convention might well replicate the experience encountered under German law, which followed a rule of the most recent nationality, with respect to Russian emigres after the Bolshevik Revolution. The immense problems raised compelled a special treaty relating to succession. See Rabel, supra note 43, at 133-34.

111. Under article 3(2), the nationality standard can be overcome by showing the decedent was more closely connected with another jurisdiction. But see supra note 110.

112. See supra note 44. The term "dual national" is actually a misnomer. A person may have more than two nationalities. Dual and plural nationality is an extremely common occurrence.

113. See Report, supra note 13, cl. 51, at 547-49. For other possibilities, see infra note 118.

tion's objective of simplified, uniform choice of law rules. Since each forum in which particular assets are situated may reach an independent conclusion as to the decedent's nationality, there can be no certainty as to which law will be applied under the Convention in the disposition of particular assets.[114]

Suppose the alternative choice of the jurisdiction with which the decedent is "more closely connected" is used.[115] What does this phrase mean? As previously discussed,[116] the Report recognizes the vagaries of the concept. The Preliminary Report draws an unfavorable comparison with nationality and habitual residence, which themselves suffer from a lack of precision: "The essence of nationality or citizenship is rule; the essence of "close connection" appears *prima facie* undiscoverable because the term describes nothing. Unlike 'residence' and its adjective, 'habitual', it has no touchstone."[117] These latter views echo those of the great comparativist, Ernst Cohn, who described "closest connection" as "less than 'habitual residence' but more than mere 'abode,' " and ultimately concluded that "[a]ll this is disputed."[118]

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114. The Report, supra note 13, indicates that in most cases dual nationality should not pose a problem since the dual national is likely to die habitually resident in one of his countries of nationality. Id. Under article 3(1) that country's law would govern. Contrary to the Report's conclusion, however, the author believes that there are likely to be many cases in which this will not be the case. One example would be a dual national of Canada and the United States who dies while employed and habitually resident in a third country at the time of his death.

115. Under article 3(3) this rule would apply if the decedent were more closely connected with a country other than his country of nationality and the preceding habitual residence tests of article 3(1) and 3(2) had not been met. See supra text accompanying notes 37-48.

116. See supra note 46.

117. See Preliminary Report, supra note 46, cl. 28, at 253.

118. Joseph Ernst Cohn, Manual of German Law § 8.12 (2d ed. 1971). More recently, similar views have been expressed by a prominent American scholar. See Juenger, supra note 110, at 128, stating: "It is obviously a delusion to believe that the words 'most closely connected' as used by Europeans have any more meaning than our Second Restatement's 'most significant relationship.' " Even worse, unlike the Restatement (Second), supra note 14, § 6, no principles are set forth in the Convention for determining the more closely connected country. A comparison in this regard should also be made with the Hague Convention on the Law Applicable to Trusts and on their Recognition, Hague Conference on Private International Law, 15th Sess., Final Act (Oct. 20, 1984). See supra note 76. Article 7 of that convention sets forth four factors to be resorted to in determining the country that is "most closely connected" to the trust.

In the case of a dual national who does not die habitually resident in either country of nationality, the Report and Preliminary Report give conflicting signals as to the appropriate choice of law. The Report, supra note 13, cl. 57, at 551, notes that other Hague Conventions have left the issue to the forum. However, it does not compel this result. It goes on to state that "[r]eference to the United Nations Conventions on dual nationals and stateless persons may usefully be made." The Preliminary Report, supra note 46, cl. 29, at 253, indicates that

One further problem arises because there is no succession law of the United States. Each state has its own law.[119] This lack of a national successor law is difficult to square with the nationality concept under the Convention. Of which state is the American a national?[120] That is, under the Convention, which American state's law would apply? The Convention would look to the state of habitual residence, or if none, the "closest connection" at the relevant time.[121] Although the rule seems fairly straightforward, on closer analysis it proves to be a dead-end. Under article 3(3) of the Convention, the law of the state of nationality is to be applied when there is no confluence of habitual residence and nationality at death[122] and when the decedent did not reside at the deathtime habitual residence for at least the five years preceding death.[123] Nationality is essentially equated with habitual residence in the United States context. Yet, a reference to nationality would be made under the Convention in a case in which the decedent did not have an habitual residence in any state of the United States at death. Thus, article 19(3)(b), which provides for a reference to the state of habitual residence to determine "nationality", is meaningless.[124] This, inevitably, leads one to the alternative under that same

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"for the purposes of article 3(2) a court might well take the predominant nationality, which normally would be the nationality later acquired . . . ." However, it then refers the reader to cl. 69, at 279, which in a revealing statement recognizes that:

> [t]here seems to be nothing in the terms of the Convention which would require the practitioner or the court to look solely to the later acquired, or to the dominant, nationality. However, article 3, paragraph 2, could cause difficulties. If a citizen of State A, and of State B, was working with a contract in State C when he died, and the court concludes he was not 'more closely connected' with State C than A or B, which 'nationality law' constitutes the applicable law?

119. The Supreme Court has recognized the primacy of state law over probate matters and the states' control of property within its territory subject to probate. See, e.g., Waterman v. Canal-Louisana Bank & Trust Co., 215 U.S. 33 (1909). See also In re Estate of Nilheim, 760 P.2d 718, 721-22 (Mont. 1988); Nichols v. Marshall, 491 F.2d 177, 181 (10th Cir. 1974).

120. Note that nationality and citizenship are not necessarily the same. Citizenship typically entitles a person to certain rights and status domestically. Nationality entitles a person to diplomatic protection, rights, and identification internationally with a certain country. See Maximilian Koessler, "Subject," "Citizen," "National" and "Permanent Allegiance", 56 Yale L.J. 58, 63-67 (1946). See generally Richard Plender, International Migration Law 29-48 (rev. 2d ed. 1988); Weis, supra note 44, at 4-5; Bar-Yaacov, supra note 43, at 1, 16. Furthermore, while each country ordinarily defines who is one of its nationals, certain principles of international law may impact on the often complex determination. Plender, supra, 38-42.

121. Art. 19(3)(b). In an example of tautology, the state of "closest connection" is defined in article 19(4) as meaning the "state with which the deceased was most closely connected."

122. If there is a confluence, article 3(1) governs. See Convention, supra note 1, at art. 3(1).

123. Article 3(2) governs if there was an habitual residence for the five years preceding death. See supra note 39.

124. For example, an American national dies while habitually resident in London. He was,

provision, the undefinable standard of "closest connection."[125] In other words, in the case of Americans living, working, or even serving in the military abroad at the time of death, the tried and workable tests of situs and domicile are being abandoned for what appears to be a far more amorphous and unpredictable standard. Does this really serve the individual's interests and expectations or, for that matter, advance a rational theory of choice of law?

Furthermore, the foregoing rule marks an unjust result for nationals of federal countries who at death have had residence abroad for less than five years. The law chosen will be that of the American state with which the decedent was most closely connected, even if he is far more closely connected with another country where, for example, he is domiciled and has chosen to make his life. In contrast, a decedent who is a national of a non-federal country, such as France or Japan, would have his estate distributed in accordance with the law of the country with which he truly was "more closely connected."[126] In short, having relinquished his ties with his mother country, the Japanese or Frenchman would, unlike the American, have applied to his succession the law of the country in which his life is centered.

E. *The Absence of a Persuasive Theoretical Basis for the Unqualified Abandonment of the Domicile Rule*

Unquestionably, domicile has not been an entirely commodious concept, at least when the objective has been predictability and the availability of a standard that readily points to a single jurisdiction for choice of law purposes. As has been demonstrated, however, neither habitual residence nor nationality fit the bill.[127] Furthermore, despite

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however, not resident there for five years. Since there is no confluence of habitual residence and nationality and there is no residence for five years, nationality law governs. The problem is that there is no *American* law of succession. The Convention requires, therefore, a reference to the state of habitual residence at death. Since the decedent died habitually resident in England, there is no American state habitual residence. Therefore, reference must be made to the state of closest connection. If the decedent was most closely connected with England, and his life centered there, which American state should be selected and on the basis of what criteria?

125. See supra note 46. See also supra note 124 for an example.

126. Convention, supra note 1, at art. 3(3). This assumes that the preliminary rules of article 3(1) and 3(2) do not apply.

127. See supra text accompanying notes 96-114. The principal rationale offered for a shift from domicile to habitual residence is that the latter concept is not encrusted with the centuries of particularized jurisprudence that each country using the domicile standard has attached to that term. See, e.g., Sir Otto Kahn-Freund, General Problems of Private International Law, 143 Recueil des Cours, 139, 191-92, 392-97 (III 1974). Habitual residence, or any similar term, being pure of such encrustments, is regarded as a means of attaining a

the Convention's goal of setting forth "*a single objective connecting factor*,"[128] it offers up a menu of amorphous, manipulable concepts[129] of habitual residence and nationality and entwines them with other speculative connecting factors, such as the country of the "closest connection" and the country with which the decedent was "more closely connected." A Rube Goldbergesque contraption for choice of law determination is offered up pursuant to which certain desiderata prompt the application of one choice or another and where the ascertainment of the proper law both before and after death is likely to be nothing short of "Delphic."[130]

Instead of building their more intricate, but less useful, "mousetrap," the Convention drafters ought to have struggled with a more pressing issue—what price uniformity? Should the price be the sacrifice of all semblance of predictability and respect for the expectations of interested parties?[131] Had these qualities of the present system

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uniform, worldwide connecting factor with a singular meaning, thereby avoiding a condition under which an apparent identity of choice of law rules conceals actual diversity. This condition, characterized by Franz Kahn as the Kollision der Anknüepfungsbegriffe, Kahn-Freund, supra, at 393, is, unfortunately, not avoided by simply adopting a new connecting factor. Since each forum has the authority to define the term, the varying meanings of domicile internationally will simply be replicated by the adoption of a new term such as habitual residence. Even worse, the current understanding of what the operative term means domestically in a particular jurisdiction will be lost for those engaged in planning, since there will be absolutely no jurisprudence upon which to rely. As for nationality, it has not received a particularly warm reception from scholars urging adoption of habitual residence as the key connecting factor. See, e.g., Kahn-Freund, supra, at 190, in which the commentator criticizes nationality as an example of "continental European parochialism" and considers its use the reason for the "lack of success" of five earlier Hague Conventions on family law. Other leading European scholars have been equally critical. See, e.g., Hans Neuhaus, Note to the Decision of the Constitutional Court of the Federal Republic of 3 June 1971, 36 Rabels Zeitschrift 372 (1972) in which the author refers to the "obsolete, rotting principle of nationality which endangers the whole of private international law"; Edoardo Vitta, International Conventions and National Conflicts Systems, 126 Recueil des Cours 113, 136 (I 1969), in which the author strongly criticizes the nationality standard as inappropriate for conventions involving "plurilegal" or "composite legal systems" like the United States or the United Kingdom. See also supra notes 44, 108, and 109; Law Comm. Report, supra note 103, at 11 (finding nationality superior to habitual residence as a connecting factor, but still inferior to domicile).

128. See Report, supra note 13, cl. 23, at 535.

129. See text accompanying supra notes 97-119.

130. The term has been used by Professor Andreas Lowenfeld to describe a similarly uncertain use of connecting factors in the Rome Convention on the Law Applicable to Contractual Obligations. See Andreas F. Lowenfeld, "Renvoi" Among the Law Professors: An American's View of the European's View of American Conflict of Laws, 30 Am. J. Comp. L. 99, 107 (1982).

131. See, e.g., Convention, supra note 1, at art. 22(1), which goes to the extreme by applying the Convention to succession to the estate of any person who dies after the Convention has entered into force. The facts that the individual's estate was planned on the basis of choice of

been abandoned for a rational attempt to introduce a more contemporary conflicts approach to succession law, it might be justified. No such outcome appears from the terms of the Convention or the accounts of its proceedings. Rather, one amorphous connecting factor, "domicile," has been replaced by several equally amorphous terms. All of these terms tend to reify judicial thinking and impede the analytical process by which a determination ought to be made of the appropriate controlling law.

The argument might be made that habitual residence is a more flexible standard than domicile and implicates a state that truly has an interest. Even if habitual residence were the only standard used in the Convention, which it is not, this argument is not very persuasive. Assuming habitual residence is a better standard, it would be better, under an interest analysis, only to the extent that it did not force an abstract choice of law, utterly detached from the particular policies and interests implicated in the case at hand. To the extent there is more than one jurisdiction which has a stake, and predictability has been discarded as a guide in fashioning a choice of law rule, each such jurisdiction's policies ought to be considered, not just the jurisdiction of habitual residence.

Arguably, the preeminent interest ought to be validation of wills and effectuation of the testator's intent. This is certainly the guiding principle in American succession law. It might be contended, however, that while such an application makes sense in the interstate context, it does not address the different policy configuration in the international setting.[132] In this setting, there is often not the same respect given to the value of testamentary freedom.[133] A choice of law approach that elevates that value, therefore, fails to take into account conflicting values accorded greater weight by certain other jurisdictions. On the other hand, to the extent these conflicting values

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law connecting factors that had been in force for hundreds of years or that the individual is later incapable of changing his will are deemed irrelevant. The Convention would apply, even though the testator's reasonable expectations and validity of his will would be entirely undermined. The application of choice of law rules that run afoul of the reasonable expectations of parties may face a serious constitutional challenge based on a violation of the due process clause. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985).

132. Professor Russell Weintraub, for example, has urged a validation approach in the interstate context. Yet, he recognizes a possible difference in the international setting: "It is likely, at least as between states of the United States, that the difference in the laws will be one of detail rather than basic policy . . . . If, however, the difference in laws is basic and no substantial inequity would result from invalidation, both states should agree that invalidation is the proper resolution of the conflict." See Weintraub, supra note 8, at 56.

133. See, e.g., supra note 28 and infra note 145.

are placed on an equal footing, the contemporary conflicts conundrum of how to balance those interests against one another must be confronted.[134]

Nevertheless, this author believes that there is much to be said for the validating approach, even in the international setting. Putting a premium on validation of wills ought to be a key objective of American policy, since it is an historically shared consensus value of the states, the source of American succession law.[135] That is not to say it is the only value to be taken into account. Even in the United States, there are certain restrictions on testamentary freedom, such as the elective share or the rule against perpetuities. The Convention ought to delineate precisely those very few limitations permitted to intrude on testamentary freedom and the jurisdictions having sufficient interest to demand that such limitations be imposed. This would be an appropriate approach for an international convention—agreement on and assurance of the worldwide implementation of a shared multinational goal, rather than an agreement on contact points that may or may not advance the interests of the testator or the policies of inter-

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134. In a well-known example of this, Brainerd Currie, the father of interests analysis, and Michael Traynor disagreed on the state with the superior interest in Clay v. Sun Ins. Office, 363 U.S. 207 (1960) (involving an insurance contract). Compare Brainerd Currie, The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. Chi. L. Rev. 258, 290-94 (1961), reprinted in Michael Traynor, Conflict of Laws: Professor Currie's Restrained and Enlightened Forum, 49 Calif. L. Rev. 845, 852, 867-71 (1961). See also Leflar, supra note 46, at 268 n.3.

135. See Athanassios N. Yiannopoulos, Will of Movables in American International Conflicts Law—A Critique of the Domiciliary "Rule," 46 Cal. L. Rev. 185, 186-87 (1958), in which the author concluded, after an exhaustive review of all American international succession cases, that even the domiciliary rule is finessed by courts, if necessary, in order to "give effect to the intention of the testator and to the domestic and conflicts policies of the forum." But see Symeon Symeonides, Louisiana's Draft on Successions and Marital Property, 35 Am. J. Comp. L. 259 (1987), who endorses a rigid domicile rule, since it:

> satisfies two important substantive policies: ensuring a uniform treatment of the estate as a single unit in successions encompassing movables in more than one state; and promoting the justified expectations of the deceased who, in making or not making a testament or a particular disposition, is more likely to have relied on the law of his domicile than on any other law.

Id. at 264. Earlier, Professor Cavers, while endorsing habitual residence as an additional tool in conflicts analysis, thought that domicile probably ought still be retained for succession purposes. Unlike habitual residence, which Cavers felt there might be more than one of, domicile was still useful, because "we may still think a rule desirable that excludes all but one jurisdiction as a source of law for the distribution of a decedent's intestate personalty." See Cavers, supra note 94, at 262. Cavers' comments also reflect his own acceptance of a scission between personal and real property. See Cavers, supra note 89, at 197. Admittedly, his comments do not take into account the possibility of states arriving at different conclusions regarding domicile. See supra note 91. Still, this would be less of a problem than with habitual residence.

ested states.[136]

With respect to intestate succession, the testator's intent is more obscure. The goal here should be effectuating the decedent's *probable* intent. Admittedly, the proper process for ascertaining that *probable* intent is a matter that needs to be carefully considered.[137] Nevertheless, any reasoned approach along these lines would be a vast improvement over an approach that blindly applies a contact-based choice of law rule detached from the intent of the decedent or the policies of all of the jurisdictions involved. In this case, where planning is not involved and the decedent's expectations of the applicable law were probably nonexistent, an approach that favored a more flexible interest analysis might be in order.[138]

Of course, the truth may be that certain other jurisdictions simply are unprepared to advance the overarching value of testamentary freedom and effectuation of the testator's intent. If this is the case, the question must seriously be asked whether a convention with such countries is even desirable in the area of succession law.[139]

While compromises must be struck whenever reasonable and workable agreements are entered into, the United States ought not be prepared to surrender bedrock policies.[140] Compromises of fundamental principles tend to have a number of negative consequences. Such compromises lead forum courts to undermine the convention by forced interpretations of particular provisions or by giving a wide

136. This validating approach was actually developed by several conflicts theorists decades ago in the context of contract law. See generally Albert A. Ehrenzweig, Contracts in the Conflict of Laws—Part One: Validity, 59 Colum. L. Rev. 973 (1959); Ernest G. Lorenzen, Validity and Effect of Contracts in the Conflict of Laws, Parts 1 & 2, 30 Yale L. J. 565, 655, 673 (1920-21). Since wills, even more than contracts, are voluntary in nature and do not involve issues of unequal bargaining position, the argument for party autonomy is especially strong.

137. The current assumptions of many state intestate succession statutes have been challenged by scholars. See the discussion of several of these works in Jesse Dukeminier & Stanley M. Johansen, Wills, Trusts, and Estates 78 (4th ed. 1990).

138. A court might receive evidence to establish the decedent's assumptions as to governing law, such as in a case in which he died unexpectedly before executing his will.

139. In this regard, it is especially noteworthy that the Convention binds a signatory country to apply the law of a country as determined under the Convention, even if that country is not party to the Convention. See Convention, supra note 1, at art. 4. This provision is especially troubling in light of the fact that the Hague Conference has refused membership to certain countries with unstable or undeveloped legal systems. See René David, The International Unification of Private Law, No. 376, at 143 (1973), in 2 International Encyclopedia of Comparative Law ch. 5.

140. In this regard, see the criticisms of compromises struck in connection with other Hague Conventions in Michael F. Sturley, International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation, 27 Va. J. Int'l L. 729 (1987); not surprisingly, few Hague conventions have received broad acceptance.

berth to escape devices contained in the convention itself. Second, they discourage ratification of the convention. Third, if one convention is ratified, ratification of subsequent international agreements is averted so as not to repeat the "mistake". Thus, the long-term interest in worldwide legal cooperation in the private realm is best served by honestly addressing basic issues and, if the divergence of policies is too great, simply not forcing the issue.

F. *The Convention and Party Autonomy in Choice of Law*

At present, a testator is free to choose the law of any jurisdiction with respect to the construction of his or her will.[141] This is true whether real or personal property is involved. In many jurisdictions, such as those that follow the UPC, this is also true as to issues of legal effect.[142] Legal effect would encompass such matters as mortmain limitations, lapse provisions, elective share rights, and forced heirship rights. Furthermore, a will can have several governing law clauses, thereby opting for the law of a jurisdiction that is most favorable on a particular issue.[143]

The first point about the Convention is that it limits the voluntary choices of law a person can make. The language of the Convention in this regard is not altogether clear. However, it appears that with respect to "mandatory rules," choices would be limited to the jurisdiction of which the individual was an habitual resident or national at the time of the designation of the desired law or at the time of death.[144] "Mandatory rules" are not defined nor are they described in the Report. There is, however, some basis for concluding that the

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141. See UPC, supra note 17, § 2-703; Restatement (Second), supra note 14, § 264, comment e. Note that construction is not within the scope of the Convention. See supra note 56. The choice of law in this area would remain unaffected and would continue to be determined by traditional rules.

142. See, e.g., UPC, supra note 17, § 2-602.

143. This concept of depeçage may also apply when there is no governing law clause. When several issues are involved, different states' laws may be applied to different issues, depending on the particular interest of the state on that issue. Depeçage comports with modern approaches to conflicts that look to state interests on particular issues rather than broadly consigning all issues to a single state's law simply because the property has a situs there or a relevant party has a particular contact with that state. See generally Richman & Reynolds, supra note 91, at 124-26. In terms of a governing law clause, an analogous approach would permit the testator to opt for the most favorable law with respect to a particular provision in the will, rather than having to choose a single law for the entire will. A single choice of law might be helpful on some issues, but detrimental on others and, therefore, would not further the accomplishment of the testator's intent with respect to the disposition of his assets.

144. Convention, supra note 1, at arts. 5(1) and 6. Obviously the "mandatory rules" would differ from one habitual residence or country of nationality to another.

concept was intended to encompass, even if it is not synonymous with, family protection provisions.[145] This would restrict the current flexibility available to estate planners in certain states. For example, suppose a French citizen and resident dies leaving much of her assets with a New York bank. Under the Convention, the law of New York could not generally be applied to override the French forced heirship rules.[146] A choice of law clause in her will opting for New York would not be given effect, at least if the testator had not been an habitual resident of New York when she made her designation.[147] As a result, provisions designed in large part to attract foreign capital would be seriously undercut.[148]

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145. See, e.g., Memorandum from Eugene F. Scoles, U.S. Delegate to John Wallace, Director, Probate and Trust Division, Section Real Property Probate & Trust Law, American Bar Association at 4 (Sept. 18, 1989). See also Report, supra note 13, cl. 69, at 561 (delegates opposed to giving the testator freedom in choice of law feared "that the protection of the family, another object of the Convention, would in fact suffer, because the unscrupulous could site their assets in States with no family protection laws."). See also Convention, supra note 1, at art. 24(1)(d).

146. Forced heirship is the doctrine followed in many civil law systems, but only in Louisiana in the United States, which entitles surviving children, just like a surviving spouse, to a share of the testator's estate. The doctrine has recently come under attack in Louisiana as well, where it has been limited to children under age 23 or incapable of caring for themselves. See La. Civ. Code art. 1493 (West 1991)). This would create the curious situation of American acceptance of a Convention having as one of its principal objectives, a family protection scheme that every single state has now repudiated.

147. Apparently, a designation need not be made in the will itself and may even be oral. These very technical provisions are examined in the Report, supra note 13, cl. 73, at 563. The intricacy of these provisions ought to be seen as another drawback to their use.

148. See N.Y. Est. Powers & Trusts Law § 3-5.1(h) (Consol. 1991). Furthermore, the general principle established in the famous *Renard* case would be reversed, although the result in *Renard* itself would be the same due to the testatrix's connections with New York in that case. In re Renard, 437 N.Y.S.2d 860 (1981), aff'd mem. 447 N.Y.S.2d 573 (1981), aff'd mem., 56 N.Y.2d 973 (1982). In *Renard*, a French domiciliary, who had been a legal secretary at the law firm of Sullivan & Cromwell, left substantial assets in New York to persons other than her son. He challenged the will and claimed a forced heirship right under the law of France. The New York Court of Appeals affirmed the lower courts in holding that no such right existed. In addition to the statutory provision, the court engaged in interests analysis. Specifically, it emphasized New York's strong interest in testamentary freedom, the fact that Louisiana was the only American state recognizing forced heirship, that the son was not living in France, and that the domicile rule is no longer inflexibly applied. See generally Robert A. Hendrickson, Choice-of-Law Directions for Disposing of Assets Situated Elsewhere than the Domicile of their Owner—The Refractions of Renard, 18 Real Prop., Prob. & Tr. J. 407 (1983); Barbara C. Spudis, Avoiding Civil Law Forced Heirship by Stipulating that New York Law Governs, 20 Va. J. Int'l L. 887 (1980). See also Leflar, supra note 46, at 549 & n.12 (citing favorably to the result); Yiannopoulos, supra note 135, at 206 ("Whenever the will does not violate superior policies of the forum essential validity is governed by the law upholding the will" in international conflicts cases); Weintraub, supra note 8, at 33 n.2. See also Albert Ehrenzweig, Conflict of Laws 677 (1959), in which the conflicts theorist notes the traditional use by American courts of various devices and legalisms to avoid choosing to apply a foreign law involving forced heirship rights.

With respect to non-"mandatory rules," the testator, under the Convention, is free to designate the laws of any jurisdiction and can have different governing law clauses for different assets of her estate. This seems to parallel UPC § 2-703 (formerly 2-602), but a closer analysis of the Convention reveals a far more limited right. Indeed, the application of the UPC in this respect would be cut back in states that have enacted it.

Specifically, article 19(5)(a) of the Convention makes clear that if a person designates the law of a state of the United States as controlling and at the time of the designation or death he was an American national, the designation will not be valid unless at some time he was an habitual resident of the state designated. In other words, a lifetime Floridian, who might under the UPC designate a more favorable New York law as governing for certain matters, could no longer do so with respect to property covered by the Convention.[149] Likewise, a foreigner can designate now under the UPC the law of any state to govern the meaning and legal effect of a will disposing of property being administered in a UPC state. Under article 19(5)(b) of the Convention, only the law of the state of the foreigner's habitual residence at the time of designation could be used. If he had only a residence in a state, rather than a habitual residence, he could designate its law, but only if he had once been an habitual resident in that state.

Furthermore, if a testator, whether an American or a foreign national, indicates in his will that the law of "the United States" is to govern, the question remains as to which state's law will be applied. There is no United States succession law. Article 19(6) states that, in this case, reference is made to the law of the states in which the various assets are located, absent a contrary showing of intent. Thus, if a testator wished that his United States situs property be governed by situs law, he would provide that "United States" law controls. Only by this stilted, legally incorrect choice of law could he assure that the local state law of the situs of the particular property would apply.

This artifice, however, could not be employed to override the mandatory rules of his habitual residence or nation, as determined under articles 3 or 5(1). With respect to such rules, the testator could choose only between the law of his habitual residence or nationality at

149. As discussed infra text accompanying note 225, the Convention may well apply to many, if not most, predominantly domestic American estates. As such, the more liberal rules of the Uniform Probate Code and those followed even by non-UPC states, will be overridden. Since an estate planner will not know at the time of drafting or at any later time prior to death whether the client will have an "international" estate, the Convention will have the *in terrorem* effect of discouraging liberal use of choice of law clauses.

the time of the designation of governing law or death. Thus, in the earlier example of the Arab investor acquiring Texas real estate,[150] the fragmentation and burdening of the land, as well as the gender discrimination that are consequences of mandatory rules of certain schools of Islamic inheritance law[151] could generally not be avoided.[152]

There are other idiosyncratic dimensions to the Convention's provisions regarding choice of law clauses. Under article 5, if a single law is designated to govern the "whole of his estate," the testator must designate either the law of habitual residence or nationality at the time of designation or at death.[153] On the other hand, if he designates the law or laws of one or more countries to govern the succession "to particular assets in his estate," article 6 applies and he is not limited to countries of habitual residence or nationality. Thus, if a will is drafted so that it mentions the particular law that is to apply to specific "assets," article 5's restrictions as to choices of law can be bypassed. There does not seem to be any technical or policy reason for this result,[154] which will prove an unfortunate trap for the unwary

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150. See supra text accompanying note 28.

151. See generally supra note 28. This aspect of the Convention is criticized by North, supra note 12, at 279-80, who points out that no provision is made for resolving a conflict of mandatory rules that may exist between the countries of habitual residence and nationality.

152. Furthermore, the problem is not limited to land. The attempt to avoid restrictive rules at the domicile, for example, can presently be accomplished by selecting a more hospitable law. The classic use for such provisions is the defeat of forced heirship claims. See supra text accompanying notes 146-48.

153. UPC § 2-703 imposes no such requirement. Note also that under article 24 of the Convention a signatory can make a reservation not to apply article 5 if the decedent was not an habitual resident or national at death or if a spouse or child would be deprived of family protection to a substantial degree.

154. The explanation offered in the Report is that article 6 represents something of a compromise finally accepted in order to accommodate the common law countries. Indeed, article 6 was a late substitute after an unsuccessful effort "to secure recognition of the *lex situs* as a third possible applicable law, in addition to the laws of the nationality and of the habitual residence." The position of the proponents of this "situs" position was that "testators with assets in two or more jurisdictions want to invoke the local law for local assets, because lawyers know best their local law, and the whole process of administration is consequently quicker, more reliable, and less expensive. Multiple wills are popular in common law jurisdictions for this reason." The opponents were concerned that the central object of the Convention, elimination of scission, and a second object, "protection of the family," would be undercut. See generally Report, supra note 13, cl. 69, at 559-61.

The compromise finally reached was to permit limited party autonomy. However, the law chosen would have to be regarded as rooted in the article 5 substantive law, in accord with the concept of *materiellrechtliche Parteiverweisung*. Consequently, any designation of a governing law could not offend the mandatory rules of the article 3 or article 5(1) country whose law is indicated under the terms of the Convention. See Report, supra note 13, cls. 68-71, at 559-61.

or uninformed. It will also require redrafting of the will each time assets of value are acquired.

In affording the more flexible choice of law option under article 6, the purpose was, in part, to provide a substitute to multiple wills.[155] Multiple wills are commonly employed in international estate planning.[156] The technique involves separate wills drafted consistently with local rules for assets situated in each jurisdiction in which assets will be administered. Multiple wills would no longer be feasible under the Convention, since the law of the habitual residence or nationality would control, rather than that of the local jurisdiction in which relevant assets are situated. Article 6 is intended as a substitute. It permits selection of situs law with respect to particular assets. Those assets, however, may have to be expressly referred to in the will. Article 6 specifically states that "[a] person may designate the law of one or more states to govern the succession to *particular* assets in his estate."[157] The use of the term "particular" could be read as requiring an actual identification of the assets to be covered.[158] On the other hand, the Report suggests that the designation would suffice if it referred, for example, "to my assets in North Carolina."[159] However, since the testator cannot be certain in many cases what assets he will own at death or where they will be located, article 6 is likely to prove of limited utility in the planning of estates.

The uncertainty regarding the proper designation for article 6 purposes is reinforced by article 5(4). That article specifies that the chosen law will apply to the entire estate, "in the absence of an express contrary provision by the deceased." The express contrary provision is made under the authority of article 6. However, the form that the "express contrary provision" should take is never indicated; nor is the law determining its validity. Thus, the "magic words" could very well differ from one forum to the next. For example, assume a testator has Florida and French wills. The Florida will is executed one

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See also Ole Lando, Contracts No. 25, at 13 (1976) in 3 International Encyclopedia of Comparative Law ch. 24.

155. See supra note 154.

156. See 1 Schoenblum, supra note 44, § 16.16.3; Henry S. Ziegler, Typical Plan, in International Estate Planning: Principles and Strategies, supra note 50, at 193, 198-200.

157. Emphasis added.

158. The manner in which such assets would have to be identified is left unanswered. See infra text accompanying notes 159-161.

159. See Report, supra note 13, cl. 73, at 563, which also states that, in view of article 5(4)'s requirement of an "express" designation, a designation might not be express if it "does not particularize that it is to apply to assets or the particular assets in the particular situs only." In contrast, UPC, supra note 17, section 2-602 requires no such specification of assets.

week before the French will and states that Florida law is to apply. The French will says that French law is to apply. Each will expressly limits its scope to assets in the respective jurisdictions, but neither will expressly states that the law otherwise applicable to the estate under the Convention does not apply. In this case both the Florida and the French designation would be valid as long as the decedent was not an habitual resident or national of one of the two jurisdictions at the time of designation or death.[160] If he was, however, then that jurisdiction's law would govern the entire estate because no "express contrary provision" was made.[161]

Semantic traps lie in wait even if only one will exists. Suppose the testator designates the law of "my habitual residence to govern succession to my estate." At death, he is an habitual resident, nonnational of Italy, but was not an habitual resident or national of that country at the time of designation of the governing law. The choice of law clause will not be given effect, even though his center of interests is clearly in Italy and he intended its law to apply. The designation is invalid because it does not point to a chosen law. Specific reference would have to be made by name to the country or by reference generally to the law of the country of habitual residence or nationality, "at the time of designation" or "at the time of death."[162] Instead, article 3 will control and Italian law would apply only if the testator in the example had been an Italian resident for the five years prior to his death.

Far from resolving conflicts and simplifying problems, the Convention, with its highly mechanistic and technically complex[163] choice of governing law provisions, will have the effect of driving people to use

160. In this case, article 5 does not come into play. Instead, article 6 would be regarded as replacing article 3, which determines the law when a designation for the entire estate has not been made. When article 3 is being overridden by a governing law clause the assumption is that the article 6 choice only applies to the assets covered by the particular will. See Report, supra note 13, cl. 73, at 563.

161. Article 5(4), thus, assumes, absent a contrary directive, that the law of habitual residence or nationality, if designated in *any* will, applies to the entire estate.

162. See Report, supra note 13, cl. 62, at 555.

163. See supra text accompanying notes 37-48. Other difficult issues would include the effect of a revocation by a later will of a will with a designation of governing law in it; the ability to designate or change a governing law by codicil; and the relevant law for determining the validity of the designation itself. For example, the formal validity of an article 6 designation would be governed by the article 3 or article 5(1) law incorporating it and not by forum law. See Report, supra note 13, cl. 65, at 557. On the other hand, the forum would decide whether the article 6 designation is "express," so that a general article 5(1) designation can be overridden with respect to particular assets. See id. cl. 73, at 563. See also the complex chart in the Report setting forth the numerous permutations regarding designations of choice of law. Id. cl. 72, at 561.

alternatives to the will.[164] In this way, individuals will preserve maximum flexibility in terms of choice of law and avoid the restrictions on testamentary freedom that their home jurisdictions might impose.

For the American with property in other states as well as other countries, drafting choice of law clauses could prove especially sticky. Far more choices of law could potentially be made for assets situated in other states than for property situated abroad. Thus, fixing the location of various assets on a regular basis would become critical.[165]

From the foregoing, the conclusion is unavoidable that the choice of law designations permitted by articles 5 and 6 of the Convention are wholly inadequate. As with other aspects of the Convention, too much emphasis was placed on compromises at the expense of a sound choice of law approach. The purpose of limiting the testator's freedom to choose governing law is protection of the family.[166] It is submitted, however, that a convention concerned with choice of law in the field of international succession *is not* an appropriate vehicle for addressing the substantive issue of family protection. This is especially the case, because different societies and, sometimes, cultures within those societies have strikingly diverse conceptions of the family and the obligations of its members. Certainly their conceptions could differ from those of the United States or other Western societies. The Convention pertains "to the law applicable to succession" and, thus, should not have as a principal objective the worldwide, indiscriminate, institutionalization of "family protection."[167]

The restrictions imposed by the Convention are especially troubling because the American states, in particular, have a long history of opposing the concept of forced heirship, whereby children are absolutely entitled to a share of their parents' estates.[168] American courts have consistently avoided enforcement of such rights, even when conflicts analysis would have suggested enforcement.[169] As noted, certain

164. See Report, supra note 13, cl. 61, at 555. The Report states: "Designations are not to be made lightly, and professional advice is obviously an advantage, particularly for an institution like this which is so new. Long passages of time should never be allowed to pass before a will is reviewed, but applicable law designation is now another instance of where review is very important." Id. cl. 63, at 555.

165. Fixing the location of assets can prove an extremely frustrating task that yields no reliable conclusion. See Schoenblum, supra note 44, §§ 11.04, 16.07, 19.05.

166. See supra text accompanying note 145.

167. There is no evidence that any serious consideration was given to the relative merits of different family protection systems. Indeed, the Report indicates an interest in determining which country's protection system applies, not which one is superior. See Report, supra note 13, cl. 19, at 533.

168. See supra text accompanying notes 146-48.

169. See id.

American jurisdictions have enacted explicit provisions to attract foreign capital of individuals seeking to escape such restrictions on testamentary freedom.[170] The Convention's decision to favor those restrictions was, apparently, undertaken without any review of the economic or social consequences of the decision by leading domestic experts in these fields. Not insignificantly, the one American state that has recognized forced heirship rights—Louisiana—has recently circumscribed them.[171]

The appropriate course, in this author's opinion, would have been to steer clear of more disputable substantive judgments and to institute a choice of law methodology that would determine on a case by case basis whether the overarching principle of testamentary freedom should be overridden.[172] In contrast, the Convention chooses policies relating to "family protection", whatever they may be in a particular case, over the preeminent common law policy of testamentary freedom. Because a number of countries have rather extreme limitations on such freedom and use the concept of "family protection" to enforce patterns of ownership that are actually discriminatory on a racial, gender, religious, or economic and class basis, the Convention is likely to result in entrenchment of archaic restrictions on the free flow of wealth across international borders and unjust treatment of many individuals.

There is a flip side to what has just been discussed. Arguably, not all restrictions on testamentary freedom through choice of law are indefensible.[173] Every society imposes some. If there are certain widely accepted norms, such as spousal protection, they should not be enforced only when imposed by the habitual residence or country of nationality, as the Convention does. The situs state, domicile, or even some other jurisdiction may be able to demonstrate the sort of fundamental interest to justify ignoring a governing law clause and enforcing an appropriate restriction.

Admittedly, if all designations of choice of law by the testator under the Convention were limited to the habitual residence or

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170. See supra text accompanying note 148.

171. See supra note 146.

172. See supra text accompanying notes 135-36.

173. See id. Even if defensible, they may not be administrable. For example, certain countries give courts broad discretionary authority over determining what the spouse needs and should receive. Under the Convention, would the forum have to exercise discretion on a continuing basis as would a judge in the country where its law is applicable? What if there is no forum provision granting continuing jurisdiction? See J.G. Miller, Family Provision on Death—The International Dimension, 39 Int'l & Comp. L.Q. 261, 286-87 (1990).

nationality at death, such choices would at least be consistent with the Convention's preferences as to the law that should govern succession. The Convention, however, also permits a designation of the law of a nationality or habitual residence *at the time of execution of the will.* There appears to be no persuasive principle supporting this option. These jurisdictions have no particular significance in terms of testamentary transfers under the Convention's rules or any choice of law system. Article 6 of the Convention goes even further, it negates the proposition that a testator need have even this inconsequential connection with the jurisdiction that is to have its law applied.[174] Under article 6, no such connection is required. Article 6, however, can be invoked only if the testator refers to *particular* assets and not to the entire estate.

The absence of a coherent theoretical approach regarding designation of governing law is also apparent in article 6's requirement that a choice with respect to any assets will not be permitted to prejudice the application of the "mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1."[175] As was previously noted, the Report gives family protection laws as a prime example of such rules. Nowhere in the Convention or the Report, however, is the broader meaning of "mandatory rules" defined. In fact, the term could include any sort of limitation on testamentary freedom.[176] Essentially, it could cut the substance out of article 6, as the very reason for selecting a different choice of law is to avoid the "mandatory rules" of the otherwise governing law.[177] The failure to define or give guidance

174. There has been an ongoing debate, primarily in the context of contract law, as to the extent of party autonomy to choose the governing law. Many of the same issues would seem to apply in the area of succession law. Specifically, commentators have expressed two major concerns. The first is the undue surrender of law-making authority to the party. See, e.g., H. Batiffol, Contrats et Conventions, No. 45 in Encyclopedie Dalloz, 1 Repertoire de Droit International (1968). The second is the fear that a party may "evade the policies of the state whose laws would otherwise be applicable." David F. Cavers, Re-Restating the Conflict of Laws: The Chapter on Contracts, in The Choice of Law: Selected Essays, 1933-1983, supra note 94, at 59, 72.

175. Convention, supra note 1, at art. 6.

176. The concept of "mandatory rules" has received wide recognition in Europe and has been incorporated into a number of international conventions. Its ill-defined parameters in the context of the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. Eur. Comm. (No. L 266/1), have been criticized. See, e.g., David F. Cavers, The Common Market's Draft Conflicts Convention on Obligations: Some Preventive Law Aspects in the Choice of Law: Selected Essays, 1933-1985, supra note 94, at 263, 272-79 (1965); Lowenfeld, supra note 130, at 104-06. See also Rodolfo De Nova, Historical and Comparative Introduction to Conflict of Laws, 118 Recueil des Cours 434, 531-38 (II 1966).

177. For a consideration of the effect of "mandatory" legislation on the unilateralist theory of private international law, see Pierre Gothot, Le Renouveau de la Tendance Unilateraliste en

as to what are "mandatory rules" is a very troubling aspect of the Convention, because it contributes to the Convention's general bias against international testamentary freedom and in favor of the wooden rules of articles 3 and 5 for identifying the governing law in matters of succession.[178]

Choice of law clauses in wills are often most effective if drafted on an issue by issue basis. For example, a choice of one state's law may be made because it has the most favorable rule as to gifts to charity. Another state's law may be selected on the matter of the rule against perpetuities. Finally, a third law may be designated for issues of trust administration. Here, too, the Convention falls short. It does not appear to permit such multiple designations. Instead, it permits the choice of all of the law of a jurisdiction, even though sophisticated estate planning and the effectuation of a testator's intent necessarily involves an issue by issue approach.[179] Indeed, the fundamental

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Droit International Privé, 60 Rev. Critique Droit Int'l Privé 1, 209, 415 (1971). See also Cavers, supra note 176, at 276. In commenting upon the Common Market's Draft Conflicts Convention on Obligations, supra note 80, Cavers raises the following cautionary note: "If the convention should become effective with article 7 [the mandatory rule provision] intact, conceivably we may observe an epidemic of national laws labeling their protective laws as compulsory and exclusively applicable." Cavers, supra, at 276. Cavers relied in part on the writings of Arthur Nussbaum. See Arthur Nussbaum, Principles of Private International Law 69-73 (1943) who presented the argument that mandatory rules, which he termed "spatially conditioned internal rules," were not conflicts rules at all. Indeed the "spatially conditioned internal rule as far as it goes overrides a Conflict rule to the contrary." Id. at 72. Based on positive policies of the forum and a spatial relationship to the forum, the choice of law the forum might otherwise make is not made. The corresponding French concept is that of "directly applicable rules" (*regles d'application immediate*) and the German civil code, in the Introductory Law art. 30, sanctions bypassing the prescribed choice of law when it is against the purpose of a German statute (*"gegen den Zweck eines deutschen Gesetzes"*). Lando, supra note 154, No. 73, at 38 n.319. The Convention appears to take this mandatory rule theory one step further and in a way that dislodges it from its theoretical foundation. The mandatory rules that the testator's reliance on article 6 cannot override are those of the countries of habitual residence or nationality, not necessarily those of the forum. As a result, the mandatory rule concept becomes just one more facet of the choice of law process and not a case of the forum choosing to apply its own dominant internal rule. Once the mandatory rule concept is cut loose from the forum, however, there is no longer a compelling reason why the policies of the countries of habitual residence and nationality should be given precedence over the policies of other interested countries. Moreover, the habitual residence or nationality country is being given the opportunity to neutralize the party autonomy rule of article 6, without any obligation to balance the importance of their internal policies against their prior concurrence in the multilateral endorsement of testamentary freedom and party autonomy as represented by article 6.

178. See supra text accompanying notes 131 and 137.

179. Had the Convention limited article 6 to a single choice of law for all assets, this would have been at least explainable as a repudiation of depeçage. Indeed, most countries in the contract setting reject depeçage. See Lando, supra note 154, No. 2, at 3. Lando opposes depeçage on the ground that it artificially divides the agreement, which ought to be upheld and

approach of modern conflicts analysis is precisely this issue-oriented methodology.[180]

This detachment from the practical and efficacious design of choice of law clauses is also evident in the lack of concern for the duplication of effort that would be called for under the Convention. For matters of construction, as well as for areas of law such as trust administration, the limitations of the Convention on governing law clauses will not apply. Thus, the same will may be required to have an assortment of choice of law clauses, some more restrictive than others, without any logical basis for distinction. Obviously, this will exert considerable pressure on courts to classify the subject matter in ways that will either expand or contract the scope of the clauses.[181] For example, an effort might be made by a forum sympathetic to testamentary freedom to classify issues as questions of construction and estate or trust administration so as to bypass the one choice-per-asset rule of the Convention or simply to exclude the matter entirely from the scope of the Convention. Once a decision has been made to permit the testator to choose, there is no plausible explanation for limiting the choice to one per asset rather than one per issue.

Certainly, the Convention approach would deviate sharply from that of the UPC. The UPC, representing the principal reform effort in American succession law during the last generation, has taken a

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enforced as an integrated unit. Any other position, he maintains, leads to difficult problems of characterization of issues. Id. No. 24, at 12. Despite this position, there is a long tradition of depeçage in civil law systems. Von Savigny emphasized in the area of contracts that the seat of the contractual obligation was the governing law, regardless of the forum. Thus, in a bilateral contract involving performance by the parties in different countries, the result could be different laws being applied to different obligations or issues arising under the contract. Id. No. 22, at 11.

180. See generally Richman & Reynolds, supra note 91, at 124-26; Lando, supra note 154, Nos. 19-20, at 9-10. The Restatement (Second), supra note 14, § 188 adopts this approach. Some authors have actually suggested going beyond depeçage to resolution of particular issues by the shaping of a new rule after consideration of the policies of all concerned states. See, e.g., Russell J. Weintraub, Beyond Depeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code, 25 Case W. Res. L. Rev. 16 (1974); Arthur T. von Mehren, Special Substantive Rules for Multistate Problems: Their Role And Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347 (1974). See also Joseph W. Singer, Real Conflicts, 69 B.U. L. Rev. 1, 47-59 (1989) (giving thorough consideration to the arguments of those favoring a choice of "better" law). See also supra note 143.

181. In short, while the testator cannot plan issue by issue, the limited scope of the Convention indirectly fosters precisely this result. It should be emphasized that issue by issue choice of law has been the traditional approach in succession, with issues of will formality, capacity, substantive validity, legal effect, construction, and interpretation being treated distinctly. See Restatement (Second), supra note 14, §§ 260-264. See also Dicey & Morris, supra note 18, ch. 27 (for a consideration of the similar English approach).

more liberal approach to choice of law clauses, consistent with its general furtherance of testamentary freedom and the testator's intent. Section 2-703 of the Code allows the testator to choose the law that will govern a disposition in a will. Unlike the Convention, the Code does not require an express reference to *particular* assets in order to be able to designate freely a jurisdiction's law as governing. Nor is there a limit of one choice of law per asset, rather than per issue. Technical obstacles of this sort are not imposed by the Code and any law can be chosen to apply to the *entire* estate, not just that of the habitual residence or nationality. While there are restrictions preventing avoidance of elective share, exempt property, or family allowance provisions, and any other public policy restriction, the restrictions are those of the forum jurisdiction.[182]

G. *Additional Concerns—Proof of Foreign Law, Renvoi, and the Incidental Question*

1. Proof of Foreign Law

One of the most complex areas of choice of law, especially when a foreign country is involved, is the proof of that law, once a choice of its law is indicated. The topic justifies distinct treatment in a separate article, although some of its implications for the Convention will be explored. The crucial point is that identifying the applicable law under the Convention is only the first step. A highly technical and conceptually dubious process of implementation will have to be undertaken. While this is true of the choice of law process generally, the Convention will exert new pressure on the process. For the first time in this country, proof of foreign law with respect to succession to real property will have to be established. Furthermore, the application of that law will hinge on prior determinations of foreign law and facts regarding habitual residence and nationality. Finally, the stated objective of the Convention—uniformity in choice of law—will be shown to be an entirely unattainable goal, because the approach of many forum courts will be simply to apply their own law. On the other hand, because the testator cannot be certain of this, the actual law likely to govern will appear entirely incapable of prediction at the planning stage.

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182. UPC § 1-301 which provides in relevant part that the Code applies to decedents domiciled in the state and the property of "nonresidents" (presumably meaning nondomiciliories) located in the state. One aspect in which the Convention goes further than the UPC is that § 2-703 appears only to apply to legal effect and not to the substantive validity of a will.

These consequences are not limited to real property. At present, the law of domicile is well defined. Thus, facts can be marshalled to ensure that the law of a particular state or country—*qua* domicile—will be applied to the disposition of personal property. On the other hand, the concept of habitual residence may purposely remain ill-defined.[183] Moreover, foreseeability as to one's final residence is largely impossible and if time is spent in two locales, entirely uncertain. As for nationality, the laws of the diverse countries can be so arcane as to make the task of proof awesome.[184] Preliminary choice of law questions as to which country's law determines status would also have to be surmounted.

In addressing the proof of foreign law issue, a brief summary of current jurisprudence is in order. The topic has been highly controversial, sharply dividing courts. Traditionally, a large number of states have considered the matter a question of fact.[185] Thus, the issue has been one for jury determination or for the court as trier, with the burden on the party seeking to establish foreign law. In the absence of satisfactory proof, the presumption of identity of foreign law with forum law has ordinarily been invoked.[186] The underlying premises for this presumption are varied and, in fact, have often been ignored by courts relying on it. The presumption generally does not extend to other countries' statutes.[187] For most states, it also does not apply to the law of countries with different legal systems.[188] In these cases, varying approaches have been taken to the application of local law. Some courts have directed verdicts or have dismissed cases on the ground that an essential fact has not been adequately proved.[189]

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183. See supra text accompanying note 94.

184. See, e.g., supra notes 41, 44, & 108.

185. Indeed, this is the common law position. See Leflar, supra note 46, at 356-57. Proof of foreign law is typically established by the testimony of experts knowledgeable of the foreign law. Id.

186. The origins of this presumption are traceable to Lord Mansfield in his opinion in Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1028 (K.B. 1774), reiterated by Chief Justice Marshall in Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804). See generally Scoles & Hay, supra note 5, at 404.

187. See, e.g., Cuba Rail Road v. Crosby, 222 U.S. 473, 479 (1912); Philp v. Macri, 261 F.2d 945, 948 (9th Cir. 1958). See also In re Marriage of Osborn, 564 N.E.2d 1325, 1327 (Ill. App. 1990).

188. See id. See generally Leflar, supra note 46, at 358.

189. See, e.g., Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956) (directed verdict in absence of proof of Saudi law); Riley v. Pierce Oil Corp., 156 N.E. 647 (N.Y. 1927) (dismissed in absence of proof of Mexican law). Cf. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 859 (2d Cir. 1987), cert. denied, 459 U.S. 976 (1982).

Other courts have simply applied forum law[190] or maintained that the parties have acquiesced in application of forum law.[191] On the other hand, certain courts have extended the presumption of identity of law to cases involving the law of a foreign country with a different legal system.[192] Whatever the escape device, these are all dissembling techniques for avoiding choosing a foreign law and clearly do not bode well for a convention founded on uniform choice of law rules to be applied by all signatories.

Some efforts have been made to standardize the approach to the reception of foreign law. For example, the Uniform Judicial Notice of Foreign Law Act, proposed in 1936, has been adopted in a large number of states.[193] While still an issue of fact, foreign law is treated as a matter of judicial notice to be decided by the judge, with the assistance of opposing counsel.[194] While a few states have made the law applicable to foreign countries,[195] the Act itself does not extend that far.[196] In contrast, the Uniform Interstate and International Procedure Act[197] does apply to the law of other countries as well.[198] Moreover, the court is empowered to ascertain foreign law in a manner akin to that pursued by civil law judges.[199] In this regard, the decision of the trial court is reviewable on appeal as a question of law.[200]

With respect to federal courts, Federal Rule of Civil Procedure 44.1 is modeled after the Uniform Interstate and International Procedure Act, but also has distinctive requirements. Regarding the law of foreign countries, a district court can make the determination of foreign law after notice by counsel. The burden of proof is on the party relying on foreign law and failure to prove or raise the issue will result in application of local law. The normal rules of evidence are inapplicable and a wide-ranging inquiry is permitted.[201]

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190. See, e.g., Bayer v. Lovelace, 90 N.E. 538, 539 (Mass. 1910).

191. See, e.g., Watts v. Swiss Bank Corp., 265 N.E.2d 739, 743 (N.Y. 1970).

192. Tidewater Oil Co. v. Waller, 302 F.2d 638, 641 (10th Cir. 1962); Louknitsky v. Louknitsky, 266 P.2d 910, 911 (Cal. Ct. App. 1954).

193. 9A U.L.A. 553 (1965).

194. Id. § 5.

195. See, e.g., N.J. Stat. Ann. §§ 2A:82-27 to 2A:82-33 (West 1991); Md. Cts. & Jud. Proc. Code Ann. §§ 10-501 to 10-507 (1988).

196. Supra note 193, §§ 1, 5. See also Milwaukee Cheese Co. v. Olafsson, 162 N.W.2d 609 (Wis. 1968).

197. 13 U.L.A. 459 (1980).

198. Id. §§ 4.01-4.04.

199. Id. § 4.02. See also Scoles & Hay, supra note 5, at 408.

200. Id. § 4.03.

201. Fed. R. Civ. P. 44.1 provides in relevant part: "The court, in determining foreign law,

The picture abroad is at least as varied as in the United States. As a general matter, English law regards foreign law as a question of fact;[202] so too does French law.[203] In Scotland[204] and in most civil law countries the situation is otherwise. Foreign law is a question of law. Moreover, the court must make the determination *ex officio*, often without the assistance of the interested parties.[205]

The Convention blithely ignores the diversity of approaches to the proof of foreign law question, even though resolution of the question is central to the accomplishment of the goal of international uniformity in choice of law. Until the processes of proof of foreign law are unified, the designation of rules of choice of law can never be more than an abstract accomplishment of uniformity, that is, devoid of substance in the real world. Indeed, even if uniformity in approach to proof of foreign law were incorporated in the Convention, the conclu-

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may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

202. See Dicey & Morris, supra note 18, at 217. But see the recent decision in Furness Withy (Australia) Pty. Ltd. v. Metal Distributors (U.K.) Ltd. (the "Amazonia"), [1989] 1 Lloyd's Rep. 403 (Q.B.), aff'd [1990] 1 Lloyd's Rep. 236 (C.A.). The court held that a mutual mistake as to the governing law and its effect was a mistake of law and not of fact, even though the mistake involved the applicability of Australian law. Furthermore, a method for certifying the question to a court of the foreign jurisdiction exists for commonwealth and former commonwealth countries. See British Law Ascertainment Act, 1859, 22 & 23 Vict. c. 11.

203. For a thorough discussion of the historical and jurisprudential development of the French position, see Stephen L. Sass, Foreign Law in Civil Litigation: A Comparative Survey, 16 Am. J. Comp. L. 332, 354-55 (1968). There has been, however, some departure from this fact characterization of foreign law. Id. at 355. See generally Imre Zajtay, Zur Stellung des Ausländischen Rechts im Französischen Internationalen Privatrecht 136-44 (1963). Henri Batiffol, the distinguished French conflicts scholar, has opposed this trend. Henri Batiffol, Droit International Privé 374 (4th ed. 1967).

204. Elliot v. Joicey, [1935] A.C. 209, 236. See also Scoles & Hay, supra note 5, at 406 n.2.

205. See generally Sass, supra note 203, at 356-71. Not all civil law countries have taken this approach, notably Spain, Greece, Turkey, and certain Swiss cantons. Many Latin American countries also regard the matter as one of fact. The prototype has been the Argentine Civil Code of 1869, which provides in relevant part in article 13: "The application of foreign law . . . shall never take place except at the instance of the interested party, upon whom shall be the burden of proving the existence of these laws . . . ."

Notwithstanding the foregoing, the evidentiary rules for determining foreign law are not as restrictive as in the common law and judges are more active, despite the statutory prohibition quoted above. Also, several countries, such as Argentina, have entered into the Montevideo Treaties of 1889 and 1940 or adopted the Bustamente Code of 1928, which provide for *ex officio* application of foreign law with respect solely to matters involving countries party to these regional treaties. Sass, supra, at 353. In some of the other countries mentioned above, the courts have taken an ambivalent approach in practice and often actively inject themselves into the process. See id. at 353 nn. 68 & 69. Note should also be taken of the European Convention on Information on Foreign Law, Europ. T.S. No. 62 (1968), which establishes a mechanism for obtaining responses from another country as to its law. However, the response received is not binding on the judicial authority making the request. Id. art. 8.

sion that "foreign law" would actually be applied would be a self-deception. As the distinguished private international law scholar Otto Kahn-Freund has stated, in commenting on the proof of law issue: "Are we not deluding ourselves in thinking that international harmony, however desirable, can ever be more than an ideal to be approached as close as possible, but never fully to be translated into reality?"[206]

Kahn-Freund goes on to address a number of perplexing problems in connection with proof of foreign law.[207] For example, there is the "inter-temporal" issue of at what point in time the foreign law is determined. Political changes have redrawn national boundaries. Does the sovereign law in force at the time a will was executed or at the time of death apply, regardless of whether the sovereign is different? Even if the geographic contact of the individual is not affected, are ethnic, racial, cultural, or other affiliations relevant? These questions are particularly pertinent when contact points such as habitual residence and nationality are determinative of governing law.

A second problem area relates to the authority of judicial precedent.[208] The issue is especially noteworthy when distinct judicial systems, such as common and civil, are involved. In common law courts, the judge "makes" the law as he or she decides the case; precedent is valued. In civil law countries, this is not true to the same extent. In light of this, should a common law judge rely on civil law precedent or, instead, as a civilian judge might do, resort to the views of scholars, who often occupy nearly as influential a role in setting the course of future decision-making?[209] The question suggests the far more delicate issue of how a judge from any one society, with a particular education and conception of his other role, can ever replicate the decision of a judge from another society.[210] Further, the authority to be given decisions of lesser foreign courts and agencies, and validity of

206. Kahn-Freund, supra note 127, at 440.

207. Id.

208. Id. See also Shapira, supra note 69, at 144-45.

209. See Kahn-Freund, supra note 127, at 446-49. See also Shapira, supra note 69, at 144.

210. Even on the American domestic legal scene, much has been written in this regard. For example, there has been widespread recognition that judges bring their own predilections and values into the decision-making process. This view prevails in schools of thought such as critical legal studies and feminist legal theory. Additionally, the proper approach to the interpretation of statutes and the materials to be utilized in undertaking an inquiry into the law are currently being vigorously debated and no broadly accepted methodology exists. See, e.g., Symposium, A Reevaluation of the Canons of Statutory Interpretation, __ Vand. L. Rev. __ (to be published Mar. 1992); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353 (1989); T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20 (1988). If there is no consensus in this country, how can a

law under a foreign constitution, are unavoidable issues raising severe doubts as to the possibility of obtaining anything more than a hazy image of foreign law.[211] If there cannot be replication of foreign law, the question must be asked: why not just apply forum law? This rhetorical thrust is most compelling when, as with the Convention, the forum is the situs and begins with a strong physical, historical, and political link with the property, even if its overall interests may not be as pronounced as those of the foreign jurisdiction whose law ought to be applied. Why not simply apply the law of one interested state that can be determined more definitely and more efficiently, rather than look to another state whose law can never truly be captured?[212]

Of course, the Convention could have avoided these problems, as well as several others, by taking a different tack. For example, it might have provided for a certification or declaratory order from the relevant jurisdiction as to the foreign law. Much delay, cost, and controversy could have been avoided in this manner, and a closer approximation, albeit not precise replication, of the foreign law could have been achieved.[213]

2. *Renvoi*

The striking failure of the Convention even to address the complex issue of proof of foreign law is magnified by the treatment it gives the renvoi question. Renvoi has received more than its fair share of comment.[214] The debate will not be replayed here. Rather, the shortcomings of the Convention's approach, as set forth in article 17, will

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foreign judge be expected to make a sound judgment or even to understand the ongoing debate?

211. See generally Kahn-Freund, supra note 127, 446-51. See also Miller, supra note 173, raising the spectre of a forum court having to exercise continuing jurisdiction over an estate pursuant to a foreign applicable law.

212. See Shapira, supra note 70, at 160-61, recognizing the problem and urging an approach that "always starts from the premise that the *lex fori* is *prima facie* applicable." Id. at 161. This premise affords assurance to parties and counsel that domestic standards will be invoked unless a different pattern is affirmatively established. Shapira and other interests analysts sensibly eliminate the "baffling problems traditionally subsumed under the heading 'pleading and proof of foreign law' [which] are inevitable by-products of a doctrine postulating the imperative governance of territorially designated laws." Id. at 160. Instead, the party urging application of foreign law "must come up with a convincing showing of a paramount interest claimed by a foreign jurisdiction." Id. at 161.

213. In this regard, see the discussion of potential prototypes in the form of the British Law Ascertainment Act and The European Convention on Information on Foreign Law, supra notes 202 and 205.

214. See Kahn-Freund, supra note 127, at 431, 458 n.62. See generally Leflar, supra note 46, § 7, at 11-13; Scoles & Hay, supra note 5, §§ 3.13, 3.14, for a thorough discussion and citation of numerous other authorities.

briefly be examined. That provision, following the models of the Italian Civil Code[215] and earlier Hague Conventions,[216] regards the reference by the forum to another country's law as a reference to its internal law, and not "whole" law.

The theory represented by this approach has been the subject of criticism.[217] While it may tend to simplify the inquiry,[218] it does so at a high price. Specifically, application of the internal law of the habitual residence or the nationality country creates a tidy but artificial result that does not reflect the true law of the habitual residence or nationality country, except when such countries also reject renvoi. Consequently, the outcomes reached under the Convention are no more compelling and certainly less the law of any "connected" jurisdiction than when the situs applies its own law as the forum.[219]

Admittedly, renvoi might justifiably be cast aside if the choice of

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215. Ch. II, art. 30. See also Greek Civil Code of 1940, art. 32; United Kingdom Wills Act, §§ 1, 2, 1963, c. 44.

216. E.g., Hague Convention on the Law Applicable to Traffic Accidents, 1971, art. 3; see also Benelux Uniform Law relating to Private International Law, art. 11, reprinted in 18 Am. J. Comp. L. 424 (1970).

217. See, e.g., Leflar, supra note 46, at 13; Scoles & Hay, supra note 5, at 68-69. See also Erwin N. Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165, 1182 (1938).

218. See Leflar, supra note 46, at 11-12.

219. Despite the general reluctance of American courts to employ renvoi, there are two noteworthy exceptions—cases involving transfers of real property and matters involving succession to both real and personal property. See Restatement (Second), supra note 14, §§ 223, 260, 263. See generally Leflar, supra note 46, at 475-76 (with respect to land cases). Leflar seems disposed to an escape from renvoi through application of the internal law of the relevant jurisdiction when simplification of the court's task is the predominant concern. However, he recognizes that when uniformity in title holdings is the primary objective, as with land title cases, renvoi is necessary. By its use, the nonsitus state approximates the result that the situs state, which controls the property, would reach. Id. at 12.

Concern for simplification of the judicial task tends to produce a negative attitude towards renvoi because of the circularity problem that may arise if the whole law of the relevant country makes a reference or *remission* to the forum. This concern, however, may be overstated. First, the relevant country may not remit to the forum, but rather look to the law of a third country. Second, the forum may not employ renvoi. Thus, if there is a remission to it, the forum's own internal law will be applied, without a further look to the law of the other country. For an excellent discussion of the problem, see Wolff, supra note 22, at 199-204. See also Scoles & Hay, supra note 5, at 69. Suppose, however, the "vicious circle" has to be confronted because both countries apply renvoi. A common solution has been that of the English courts, in which the forum court steps into the shoes of the foreign court and applies its rule. This "foreign court theory" has the effect of a concession by the forum of its own renvoi rule, but it eliminates the circularity problem. See In Re Annesley [1926] Ch. 692. See generally Kahn-Freund, supra note 127, at 433-34. While appearing expedient, this result can be rationalized. Most notably, the reference back under the foreign country's law indicates a disinterest on the part of that country in having its law applied over that of the forum. Scoles & Hay, supra note 5, at 69-70.

law process employed were some sort of interests analysis.[220] The Convention, however, does not take this approach. Renvoi, with all its flaws, assists, at least indirectly, in coming closer to the true law of the designated country when contact points are utilized rather than an interests analysis. However, by artificially restricting the inquiry to the internal law of a country, the Convention is self-defeating. The law chosen is not, and can hardly claim to be in many cases the "law" of the designated jurisdiction under the Convention. The artificial law applied certainly lacks the authority and germaneness of the forum's own law.

3. *The Incidental Question*

A final matter unaddressed by the Convention, but of considerable significance, is the issue of the incidental question.[221] Because each forum can determine what is an issue of succession,[222] certain countries may choose to adopt a single approach with respect to inheritance *and* status matters. Other countries might not do so. This situation will, as in the case of proof of foreign law and renvoi, have the consequence of defeating the very uniformity sought in the disposition of the estate. Consider one example: The decedent dies an habitual resident of England, with assets in that jurisdiction and in France. He was married to his niece. Assume under German law, the country of his nationality, as well as under French law, marriages involving this relationship are not permitted, but they are permitted under the law of England. The decedent dies without a will. Suppose the Convention requires application of the law of habitual residence.

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220. Were an interests analysis approach to be undertaken, there would be no need for renvoi. Rather, the question would be which state had the predominant interest in having its local law applied. Indeed, while there may be legitimate "transnational" concerns implicated that might override a balancing of parochial interests, they have *not* been carefully developed to date. Certainly, the choice of law rules of particular countries are not at this point shaped to advance these "transnational" interests, and are more nearly dictated by over-generalized theories of contact points, territorial sovereignty, efficiency of application, predictability, and uniformity. See Shapira, supra note 69, at 140-41. Some commentators have recognized a role for renvoi in the event of a transition period to a purer and less chauvinistic interests analysis. See Arthur T. von Mehren, The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem, in XXth Century Comparative and Conflicts Law 380, 393-94 (1961). See also von Mehren & Trautman, supra note 72, at 551-52; Comment, Conflict of Laws—Two Case Studies in Governmental-Interest Analysis, 65 Colum. L. Rev. 1448, 1454 (1965). At present, however, "a functional analysis probably best proceeds without assigning decisive importance to the choice-of-law rules of the other jurisdictions concerned." Von Mehren, supra, Renvoi at 391. See also Cavers, supra note 89, at 106. But see Weintraub, supra note 8, at 577-78.

221. See generally Wolff, supra note 22, at 206-11; Kahn-Freund, supra note 127, at 437-40.

222. See supra note 29.

The spouse will take an elective share under English law if the validity of the marriage is regarded as governed by the succession law. Such an approach by the French forum arguably favors international harmony.[223] On the other hand, if France regards marriage as a distinct issue not incidental to the succession then it will apply its own choice of law rule relating to marriage. Assuming this is a nationality rule, the marriage will be invalid, as determined by German law. The same would be true if the French forum applied its own *ordre public*.[224] Accordingly, the assets will not be distributed in the same manner as will assets of the decedent that are located in England. In the latter case, the spouse will be awarded her elective share. The consequence of a "scission" of these choice of law matters, then, is the frustration of the unitary treatment of the estate. Thus, despite its goal of a single law governing the disposition of the estate, the Convention fails to address the recurring problem of the incidental question that is likely to yield the very lack of uniformity the Convention seeks to eliminate.

H. *The Scope of the Convention—The Meaning of "Solely," "Succession," and "Conflicts"*

One of the most troubling aspects of the Convention is its failure to define its own scope. The Convention has been billed as purely applicable to "international" estates.[225] This limitation is critical for proponents of the Convention, because any extension of the Convention's uniform and novel choice of law rules to purely multistate conflicts would likely be viewed as an unwarranted intrusion into areas of "domestic" law traditionally left to the states.[226]

Uncertainty about the scope of the Convention could also generate substantially increased probate litigation. Estates would be tied up as litigants disputed whether the novel rules set forth in the Convention

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223. See Wolff, supra note 22, at 208-09. Of course, the price of such international harmony is dissonance in domestic law. That is, certain marriages will be recognized for some purposes, but not for other purposes. This is precisely what has happened in certain American cases. E.g., In re Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (two Indian wives entitled to share in husband's estate).

224. See infra text accompanying note 255.

225. See Report, supra note 13, cl. 131, at 601. See also Scoles, supra note 24, at 11.

226. Indeed, Professor Scoles, the American representative to the Hague Conference, noted in his memorandum to the American Bar Association that "[s]ince the United States is a federal nation, this distinction between interstate and international cases is appropriate." Scoles, supra note 24, at 11. For a discussion of the different approaches to choice of law in the interstate and international contexts, see, e.g., Albert A. Ehrenzweig, Interstate and International Conflicts Law: A Plea for Segregation, 41 Minn. L. Rev. 717 (1957); Peter Hay, International Versus Interstate Conflicts Law in the United States, 35 Rabels Zeitschrift 429, 471-77, 485 (1971).

or the forum state's traditional choice of law rules applied. To the extent the Convention was found to apply, its more complex factual inquiry compelled by the Convention's law-determinative connectors would slow down probate and increase its costs.

Despite the foregoing, the fact is that there is no way of discerning from the Convention what its limits are. Article 1(1) simply states that the "Convention determines the law applicable to succession to the estates of deceased persons." It does not speak in terms of persons having contacts with, or property in, more than one country.[227] The Report also fails to take note of any such limitation. Articles 3, 4, and 5 of the Convention set forth choice of law rules, indicating which jurisdiction's law is to apply, based on the contacts of the individual. However, there is no indication when these choice of law rules, as opposed to the ones currently in force in the various American states, come into play.

In fact, one provision does appear to prevent the wholesale application of the Convention to purely interstate conflicts, but it does so in a most indirect and unsuccessful manner. Article 21 states that "[a] Contracting State in which different systems of law or sets of rules of law apply to succession shall not be bound to apply the rules of the Convention to conflicts solely between the laws of such different systems or sets of rules of law."

The foregoing makes clear that the United States would not have to apply the Convention in the purely multistate context, but leaves unclear whether it must manifest its decision not to do so. For example, would the United States be required to make a formal declaration to the depositary nation? Could the decision be made by local courts on a case-by-case method? On the other hand, could these courts choose to apply the Convention to purely interstate conflicts? While they are not bound to do so, they are also not prohibited from doing so.[228]

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227. The American representative views the Convention as being limited to the following categories:

> succession of property at the death of United States citizens who die while living abroad for an extended time for business, personal or retirement reasons; and of United States citizens who, while remaining in the United States own assets abroad; or of former United States citizens who emigrate. It also concerns citizens of other countries who come to the United States to live for extended periods or to immigrate as well as foreigners who only own assets in the United States.

See Scoles, supra note 24, at 11. Nothing in the Convention supports this type of limitation; nor does the Report.

228. But see Report, supra note 13, cl. 131, at 601, which indicates that purely interstate conflicts are "beyond the reach of the Convention." This comment suggests that the

Assuming that purely domestic conflicts could be exempted from the Convention as part of the ratification process or are automatically exempted by the Convention itself, there is the more fundamental problem raised by article 21 of what is an "international" conflict. Under article 21, a federal state such as the United States is not bound to apply the convention "to conflicts *solely* between the laws of such different systems or sets of rules of law."[229] The use of the term "solely" indicates that any conflict that implicates laws of jurisdictions beyond the borders of the United States is within the scope of the Convention. As a result, the identification of the jurisdictions privy to the conflict is vital. In every probate matter, a determination will have to be made whether there is a conflict "solely" between the states in order to determine whether the Convention applies.

In ascertaining whether there are solely interstate conflicts, one first has to know what a "conflict" is. After an initial failure to address the question in the Preliminary Report, the Report attempts to answer the question. Its response is quite troubling. For example, "if the assets of the deceased's estate are in state P, save for one asset which is in state Q, the Convention applies . . . ."[230] In this case, the Convention would apply to succession to the entire estate of the decedent and not just to the single foreign asset. One problem with this approach is that it puts new emphasis on the metaphysical search for the situs of assets.[231] Since much wealth is owned in intangible form, disputes will increase as to the situs of various intangibles. Furthermore, choice of law issues will arise and have to be addressed regarding which country's situs-identification rules prevail. For a Convention that uniformly repudiates the interests of the situs jurisdiction and its choice of law rules, this new focus on situs represents a rather ironic and disturbing twist.

Another problem with the delineation of the Convention's scope is that many Americans who have predominantly domestic estates may inadvertently find their estates "internationalized" by the ownership at death of a single asset of minimal value having a foreign situs. There will be no way to plan for this eventuality, especially if the individual's portfolio is constantly changing. Even in the unlikely sce-

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Convention would not apply to such conflicts, and that as a matter of internal law the United States would have to legislate the Convention's application to interstate conflicts.

229. Emphasis added.

230. Report, supra note 13, cl. 131, at 603. The reference to "state" here is intended to mean foreign country.

231. See 1 Schoenblum, supra note 44, § 16.07 & 2 Schoenblum, supra note 51, §§ 19.05 & 20.05, for a consideration of the difficulties in pinpointing the situs of assets.

nario of a static portfolio, events beyond the testator's control, such as the merger of a domestic corporation into a foreign entity, might bring the Convention into play. The acquisition of a foreign obligation for charitable purposes, such as an Israeli Bond, could convert an owner's entire estate into an international estate. The idea that the relevance of the Convention will be determined by such a haphazard and shifting test is quite troubling and raises serious concerns about fairness and respect for fulfillment of the expectations of testators within this country.

Instead, the Convention might have set forth an explicit delineation of what constitutes an international conflict. For example, only those particular assets deemed by the *forum* to have a foreign situs might have been subjected to the Convention. In this way, at least the existence of a "foreign" asset would not have implicated the entire estate. The domicile or situs state theoretically would have preserved its own choice of law rules with respect to wholly domestic assets, while the Convention retained its entirely "international" character.[232]

From the language of the Report, the term "solely," as used in article 21, is to be taken quite literally, so that it "must surely mean that no foreign jurisdiction is involved at all in the whole fact situation, save perhaps for a fact or facts that have no legal significance or do not fall as to subject-matter within article 7(1) or 7(2)."[233] The foregoing language emphasizes another controversial issue in identifying the conflicts within the scope of the Convention—that is, the conflict must pass a subject matter test involving "succession." Articles 7(1) and 7(2) describe the topics to which the choice of law provisions of articles 3 and 5 apply.[234] At one point, the Report indicates that "succession issues" involving more than one country constitute a relevant conflict and thereby internationalize the entire estate.[235] The meaning of "succession" is left to the forum to determine under the Convention.[236] At another point, however, the Report appears to contradict the foregoing position. Significantly, it emphasizes that the fact that a family member is asserting rights under a forced share law does not internationalize the conflict; the Report explicitly states that

232. Of course, many assets are truly of mixed character. The Convention's applicability should not turn on fanciful and wholly abstract conclusions as to the national character of an asset.

233. Report, supra note 13, cl. 131, at 603.

234. See supra notes 29 and 56.

235. See supra note 29.

236. See Report, supra note 13, cl. 24 at 535. At a minimum, succession includes the matters listed in article 7(2). Beyond this, the forum is given freedom to make its own determination as to the scope of the term and, accordingly, the coverage of the Convention.

this is not a matter of "succession."[237] This conclusion is puzzling, because enforcement of forced heirship rights is a prime objective of the Convention[238] and appears to be within the subject matter of article 7(2). The Report, however, offers the following example: "Where all the assets and the [decedent] and his close family are in state P, but one child is in state Q, that child may have forced share rights under the law of state Q, but that is of no consequence because the 'succession' is totally contained in state P. The matter is not international."[239]

This example is patently incorrect. If a child is not part of the decedent's "close family," who is? Certainly, by any standard of contemporary interests analysis, the conflict is "international" in that the laws of several jurisdictions with some interest in the issue may differ on the rights of a child to inherit property or to interfere with the rights of others to inherit. This would seem precisely the sort of situation the Convention, in light of its objective of family protection, would seek to address.

In addition to "solely" and "succession," the term "conflict" itself must be given meaning before the scope of the Convention can be fully understood. Because "conflict" is not defined in the Convention, and the Report only creates confusion on the matter, a consideration of the basic premises underlying conflicts theory ought to be considered.

In the broadest sense, a conflict exists whenever an issue having multijurisdictional contacts is raised.[240] Nevertheless, some conflicts scholars would exclude from this the notion of "false conflicts." Proponents of the Currie school of governmental interests analysis may argue that no determination as to whether a conflict exists at all can be made until an analysis of the interests and policies of potentially interested jurisdictions is completed. Thus, if the person or matter at issue has contacts with more than one country, the interests of these

237. See Report, supra note 13, cl. 131, at 603.

238. See supra text accompanying notes 145-147.

239. Report, supra note 13, cl. 131, at 603.

240. See, e.g., Leflar, supra note 46, at 3 ("Any case whose facts relate to more than one state or nation, so that in deciding the case it is necessary to make a choice between the relevant laws of the different states or countries, is a conflicts case."); Ehrenzweig, supra note 148, at 1 ("The law of Conflict of Laws is usually described, though not defined, as the body of rules dealing with the effect of foreign 'contacts' on the decision of a civil case. When will a court in the United States apply the law of a sister state or of a foreign country? When may it do so, when must it do so? These are the problems of Choice of Law."). See also Weintraub, supra note 8, at 1 (a conflict exists when "the elements of the problem have contacts with more than one jurisdiction"); Restatement (Second), supra note 14, § 2.

countries would have to be considered. If one country has a dominant interest, despite formal contacts by another country, there is a "false" conflict. A false conflict is, fundamentally, equivalent to the existence of no conflict at all.[241]

In fact, as many present day Currie adherents would acknowledge,[242] there is a difference between saying that one jurisdiction's interest is predominant and saying that no conflict exists.[243] From a practical standpoint, it might be argued that a conflict exists whenever it is alleged. Even when the forum decides that a particular contact of another jurisdiction with the matter is of minimal significance, it is actually deciding the conflict. The conflict arises when a party to the proceeding asserts that the law of some jurisdiction other than the forum's own law should be determinative. Assuming that the allegations are not entirely specious, the fact that a particular contact of one jurisdiction was not accorded the weight of the contact of another jurisdiction whose law is ultimately applied does not mean there was no conflict, but rather that the conflict has been resolved in favor of the latter jurisdiction.[244]

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241. See Leflar, supra note 46, at 271, describing this position and then dismissing it. The authors state: "An interpretation of the term which implies that no choice-of-law problem is present in any 'false conflicts' case creates difficulty when differences of opinion arise as to whether a given state does have a 'governmental interest' in the facts." Id. at 271 n.1. Furthermore, the authors emphasize:

> The fact that the relevant choice-influencing considerations, including governmental interests, largely favor one state rather than another does not mean that there is no choice-of-law problem in the case. When an event or transaction has contacts with two or more states whose laws are different, and each state's contacts are sufficient under the Federal Constitution to permit its law to be applied, a real (not a false) choice-of-law problem is presented. It may be that the court's basis for choice between the differing state laws will make the choice an easy one.

Id. at 271 (footnote omitted). See also von Mehren & Trautman, supra note 72, at 76 (indicating that a conflict of law arises any time that multiple jurisdictions have "expressed some interest in regulating an aspect of the multistate transaction"). Moreover, these authors warn that similarities or differences in the domestic policies of diverse states may not be reflected in their approach in the multijurisdictional context. Id. at 76-77. Thus, facile comparisons of laws or policies may not reveal the existence of true conflicts.

242. See, e.g., Weintraub, supra note 8, at 1.

243. Id. Ely, not a Currie adherent, in his oft-noted article, Choice of Law and the State's Interest in Protecting its Own, supra note 70, seeks to debunk the whole concept of false conflicts as resting on an unjustified forum bias for its own citizens. In his view, once this chauvinism is delegitimized as a proper approach, "most of what appear on the surface to be conflicts of law are just that, and cannot be dissolved *either with or without* the premise that states are unusually interested in helping their own." Id. at 179 (emphasis in original). But see Singer, supra note 180, at 65-74, criticizing Ely's overall analysis.

244. In many instances, the Convention could easily be manipulated. Minimal, but real, international contacts could be alleged in order to bring the Convention into play and change the choice of law rule in overwhelmingly *interstate* conflicts cases. See also Larry Kramer,

A further aspect of the conflicts problem arises when there are no palpable differences existing in the laws of the relevant states. In this situation, there is no real dispute. But is there a conflict? A number of commentators have argued that the choice of law analysis must still be undertaken even though the internal laws of the jurisdictions are the same, since each state may have different multijurisdictional policies or interests or there may be a "supernational" outcome that ought to be reached.[245]

The determination of whether there is a conflict offers other opportunities for manipulation. Professor Westen has argued that the attempt to postpone conflicts analysis until the truly interested states have been identified is misplaced, because there will be much potential for bias and widespread disagreement as to which states are truly interested.[246] For example, even when two states are interested, the law of one may be construed narrowly by the forum, so as to make it inapplicable to the particular multistate case. Commentators, however, have disagreed as to whether these apparent conflicts should be treated like false conflicts and equated with a no conflict situation.[247] Depeçage[248] might also serve as a technique for neutralizing conflicts. If issues are sufficiently fractionalized, there may be only one state with a predominant interest in having its law applied to each discrete issue.[249] As a result, there may not be conflicts under this approach.

Other situations also raise unresolved issues as to whether there is a conflict. For example, a situation may arise in which neither the forum nor any other states' interests are truly implicated. A choice of law will have to be made nonetheless if the court has assumed jurisdiction.[250] The reception of foreign law as pure evidentiary datum is another problematic situation. In the process, there is likely to be an unstated, preliminary resolution of choice of law.[251]

Interests Analysis and the Presumption of Forum Law, 56 U. Chi. L. Rev. 1301 (1989) for an excellent consideration of how the litigation process itself determines whether there is a conflict.

245. See, e.g., Luther L. McDougal III, Toward Application of the Best Rule of Law in Choice of Law Cases, 35 Mercer L. Rev. 483, 496 (1984). See also Peter K. Westen, Comment, False Conflicts, 55 Cal. L. Rev. 74, 107-08 (1967) for a superb inquiry into this and related issues. See generally von Mehren & Trautman, supra note 72, at 76; supra note 241.

246. Westen, supra note 245, at 81-84.

247. Id. at 90.

248. See supra note 143.

249. See Westen, supra note 245, at 96.

250. Id. at 104. See also Currie, supra note 66, at 774-79; von Mehren & Trautman, supra note 72, at 407-08.

251. See Westen, supra note 245, at 116-20. See also supra text accompanying notes 201, 205-06.

The question of whether there is a conflict and, thus, whether the Convention is to apply, will undoubtably generate substantial controversy. This issue invokes a most fundamental, unsettled debate among conflicts scholars.[252] From a planning standpoint, especially on the interstate level, the task will prove unjustifiably frustrating, because there will be little certainty as to the Convention's impact. On the international plane, forums will have vast discretion, through their definition of "conflict," for delimiting the applicability of the Convention locally. Once again, it is apparent that, while the Convention strives for uniformity, considerable lack of uniformity, manipulation, and forum-shopping will be the order of the day.

Even if the parameters of "conflict" could be drawn with precision so that article 21 would have a clear meaning, the premise underlying this provision poses a severe political problem likely to foster nonobservance through various escape devices. The premise requires a foreign jurist thousands of miles away to apply the law of an American state because an international conflict is involved, while a judge of a sister American state will not have to follow suit, inasmuch as an interstate conflict is involved.[253] This sort of outcome over time is likely to breed cynicism on the part of the foreign signatories to the Convention and their jurists, who may not feel especially obliged to enforce faithfully the Convention, when their American brethren and those of other federal nations, are able to ignore it in the context of the identical estate.[254] It may also breed cynicism at home. Suppose two lifetime habitual residents of Kentucky own land in Tennessee. One also owns a dollar's worth of foreign currency. The disposition of Tennessee land of one Kentuckian will be governed by Tennessee law, while the Tennessee land of the other Kentuckian will be governed by Kentucky law, as a result of the Convention's applicability.

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252. See, e.g., supra notes 241-43. Even articles by distinguished individual conflicts scholars may suggest an anmbivalence on this point. See, e.g., Russell J. Weintraub, A Method for Solving Conflict Problems, 21 U. Pitt. L. Rev. 573, 574, 577 (1960) (at one point describing the "classic" conflicts problem as one in which two states having "contacts" with the parties or occurrences would reach different outcomes; at another point, explaining that there will be "no conflict" when a thorough analysis reveals that "one of the domestic rules is not rationally applicable . . . ."). Id. at 577. Compare Leflar, supra note 46 ("conflict" where there are multistate contacts) with Leflar, Choice-Influencing Considerations in Conflicts Law, 91 N.Y.U. L. Rev. 267, 290 (1960) (if the laws would produce the same result, "there is no real conflict of laws at all").

253. See supra text accompanying note 226.

254. The difference in treatment between choice of law issues at the interstate and international level has been explored in a number of articles. The most notable are Ehrenzweig, supra note 226, and Hay, supra note 226.

I. *The Convention's Public Policy Exceptions—Self-Defeating Escape Mechanisms*

Article 18 of the Convention provides that the Convention's choice of law rules "may be refused only where such application would be manifestly incompatible with public policy (*ordre public*)." On the surface, this public policy exception might appear a severely limited escape device, especially in light of the logic of the Convention, the use of the word "manifestly" in article 18, and the hostile jurisprudence that has developed in connection with the public policy exception.

Commencing with the last of these factors, for more than a half century American courts have grappled with the theory and application of the public policy exception. At one point, any statute of one jurisdiction that was "substantially" dissimilar to the forum's own law was rejected as contrary to local public policy. In *Loucks v. Standard Oil Company*, Judge Cardozo sought to repudiate this rule, stating that "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[255] His view appears to have prevailed.[256]

Nevertheless, each state is the final judge of its own public policy and what offends it.[257] If certain foreign laws are excluded by local courts on the ground that they violate public policy, there is little that typically can be done.[258] This represents the central irony of the public policy exception—any choice of law problem inevitably implicates a foreign rule that does not conform precisely to local standards. The greater the divergence in laws, the greater the need for an impartial choice of law. Precisely in this situation, however, there is more of an inclination to ignore choice of law and invoke the public policy exception.[259]

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255. Loucks v. Standard Oil Co., 120 N.E. 198, 201 (1918). Following Cardozo's departure from the New York Court of Appeals, that court reverted to a totally parochial approach in Mertz v. Mertz, 3 N.E.2d 597 (1936). As has been noted by Professor Weintraub, Judge Lehman's "definition of public policy [in *Mertz*] was so parochial that, if applied literally, all conflicts analysis would be ended." Weintraub, supra note 8, at 82.

256. See generally Leflar, supra note 46, at 144-45.

257. See id. at 145.

258. See, e.g., Sedler, supra note 5, at 18-20. On the other hand, the "public policy technique" ought not foreclose the bringing of the suit elsewhere, since a dismissal on this ground is not on the merits.

259. For Ernest G. Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L.J. 736, 747 (1924), the public policy doctrine demonstrated "that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based." Thus, in cases where there are essentially rigid choice of law rules, such as those

Undoubtedly there are extreme or outrageous extrastate laws that are simply too intolerable by local standards to be applied. This should rarely occur in the interstate context, since the legal rules and culture are similar, if not identical, throughout the United States.[260] With respect to the Convention, the matter is not so clear.[261] There is enormous diversity from one country to another as to succession laws. Thus, forum courts in the United States might seek to opt out of the Convention by invoking article 18. In these cases, the Supreme Court would have a vital role to play in defining the bounds of the public policy exception.[262] In doing so, however, the Court would be inquir-

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set forth in the Convention or as are currently followed in most states with respect to succession, he asked:

> Is it not strange to argue in the first place that state A has no choice in accepting the original rule and then to admit that it has the power to set aside the effect of that rule whenever it pleases on the plea that such recognition or enforcement would violate its public policy?

Id. Taking up this theme, Monrad G. Paulsen & Michael I. Sovern, in "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 1016 (1956), criticized the public policy technique as an evasive method that allows courts to avoid addressing head-on in a dispassionate manner whether the forum's interest in the case is so strong that it, in fact, overrides the otherwise indicated application of foreign law. See also David F. Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 183-84 (1933).

260. See, e.g., Weintraub, supra note 8, at 463, 438-39 (urging recognition of the law that favors validity in succession to decedents' estates, thereby effectuating the shared value of carrying out the testator's testamentary intent).

261. This potential interstate-international distinction was recognized by the distinguished conflicts scholar, Judge Herbert F. Goodrich. In his article, Foreign Facts and Local Fancies, 25 Va. L. Rev. 26, 35 (1938), he wrote:

> As among our states, the sight of the courts of one state refusing to apply the law of another because the second state's rule shocks the morals of the forum, is one to make the judicious grieve. . . . A mutual tolerance for each other's little idiosyncracies does not seem a great deal to ask from members of a family of states which have so much in common as we have. Such mutual tolerance is all that is necessary in order to get rid of the public policy argument altogether in Conflict of Laws among the states of this country. . . . As among ourselves and foreign nations, the case is not so strong.

262. The Supreme Court in the past has focused principally on the constitutional limits to a state's invocation of public policy in order to avoid providing a forum for a cause of action recognized by another state. Although there is ambivalent language in the key case of Hughes v. Fetter, 341 U.S. 609 (1951), that case can be read as holding that there is no absolute defense of public policy. In *Hughes*, Wisconsin refused, in accordance with its laws, to permit a cause of action for wrongful death based on an Illinois statute. The Court stated that the "strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states" required Wisconsin to recognize the cause of action. Id. at 612. Later, however, the Court suggested that its language meant little more than that sister state causes of action, if similar to those recognized locally, could not be the subject of discrimination. Wells v. Simonds Abrasive Co., 345 U.S. 514, 518-19 (1953). Indeed, in diversity cases, the Supreme Court has long recognized the validity of the public policy argument. See, e.g., Bond v. Hume, 243 U.S. 15, 21 (1917) (where enforcement of the foreign law would be "repugnant to good

ing as to whether the applicable choice of law under the Convention was manifestly incompatible with forum state law.[263] That is, in order to enforce federal law—the Convention—the Court would be required to serve as the ultimate arbiter of the local state's own public policy. Is the Court capable of properly performing this function? Ought the Court to assume the posture of second-guessing local values, especially if the state's own high court has spoken to the contrary? On the other hand, if the Court abstains, will unrestrained state courts accord article 18 undue influence, and thereby subvert the Convention?[264]

One potential restraint on this last possibility might appear to be

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morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought"). See also Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932) (where enforcement of the law "would be obnoxious to the public policy of the forum"). See generally Paulsen & Sovern, supra note 259, at 1012-15.

263. The principle that a federal court should apply the public policy doctrine of the state in which it sits in diversity cases was set forth in Griffin v. McCoach, 313 U.S. 498 (1941), consistent with the *Erie* doctrine. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937). Thus, to the extent the approach of the state is otherwise constitutional, see supra note 262, the federal courts are not to create their own choice-influencing principles. Cf. Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975) (per curiam). The *Griffin* case was remanded to determine local Texas law. On remand, the federal court of appeals eventually held that Texas public policy would be violated if an assignee without an insurable interest were allowed to collect on a "New York" insurance policy. Griffin v. McCoach, 123 F.2d 550 (5th Cir. 1941), cert. denied, 316 U.S. 683 (1942).

264. Of course, federal courts have long had to apply state law and, in so doing, determine what that law is. See 19 Charles Alan Wright et al., Federal Practice and Procedure § 4507 (1982 & 1991 Supp.) for a compendium of cases dealing with the numerous legal issues associated with this process of discovering state law. Significantly, however, the public policy issue would prove even stickier, since the inquiry would likely have to go beyond the statutes and case law of the forum, and involve an exploration of the moral and social standards of the community. One response to the foregoing difficulties is that the Supreme Court and the lower federal courts might fashion their own nationwide standard as to when the Convention's outcomes would be unacceptable. One can argue that the policies of the states are sufficiently consistent to justify this approach. See supra text accompanying note 260. Furthermore, when federal questions have served as the basis for federal court jurisdiction, many courts have ignored the diversity-case rule. Instead, not being bound by *Erie*, see supra note 263, and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), they have invoked a federal common law of conflicts. See, e.g., Edelmann v. Chase Manhattan Bank, 861 F.2d 1291, 1294 (1st Cir. 1988); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987). But see, e.g., Elmas Trading Corp., 683 F. Supp. 743 (D. Nev. 1987) (holding that state choice of law ought to be applied to cases founded on federal question jurisdiction where state law controls the issue to be decided). See generally Note, Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases, 68 Harv. L. Rev. 1212, 1227-29 (1955). Despite this idea of a federal public policy exception under article 18 of the Convention, the Report, supra note 13, cl. 121, at 593, makes clear that the forum may "apply its own public policy considerations . . . ." Because succession issues typically arise initially when state courts probate wills, the forum will almost certainly be a state court and will have a decidedly state outlook in defining "its own public policy considerations." Would the Supreme Court then overturn the state court's perception of public policy or set limits on the use of the technique?

article 18's use of the term "manifestly incompatible." The experience with the "substantially dissimilar" language utilized by American courts earlier in this century, however, suggests otherwise. In those cases, the use of the term "substantially dissimilar" had little effect on constraining forum courts in their invocation of the public policy exception.[265] The use of the term "manifestly incompatible" should engender no greater respect with regard to the Convention.[266] Indeed, the term is essentially redundant, since any foreign inheritance rules that are against forum public policy ought to be regarded as "manifestly" against public policy.

While the precise impact of article 18 is unclear at this point, the logic of the Convention certainly argues for minimal tolerance of the provision's utilization. The Convention's very objective—to signal, by way of uniform rules, which of any number of quite diverse systems and rules of law ought to apply to succession[267]—would otherwise be further undermined. Indeed, the Convention's repudiation of the situs rule with respect to real property could itself be regarded as violative of traditional public policies of common law jurisdictions that support forum control over local land.[268]

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265. See generally Leflar, supra note 46, at 143. Intense skepticism has long persisted as to the realistic possibility of defining or limiting the public policy doctrine. See, e.g., Lorenzen, supra note 260, at 746-47. See also John Kosters, Public Policy in Private International Law, 29 Yale L.J. 745 (1920).

266. The Report, supra note 13, cl. 121, at 595, states that in revising article 18, there was no intention of "encouraging States to apply public policy (*ordre public*) exceptions lightly.". While not intended to be an exclusive list, the Report indicates that possible bases for invoking article 18 would include "national security or political concerns to foreign ownership of waterfront property, border lands, and utilities and other enterprises of great significance to the economy of the jurisdiction." Id. Although apparently designed to narrow the scope of article 18, these examples afford ample precedent to clever lawyers and judges to use the public policy doctrine in precisely the manner criticized by many distinguished conflicts scholars—as a doctrinal tool for widespread evasion of the choice of law rules that would otherwise have to be applied under the Convention. As such, it would greatly enhance unpredictability, because there would be no certainty as to when article 18 would be successfully invoked. From an estate planning standpoint, it would prove an entirely unhelpful doctrine. No estate, for example, could be planned with the assurance that the forum would override the rules of the Convention on public policy grounds. The real test of the public policy exception might come with respect to the imposition of foreign racial, gender or religious restrictions or preferences. See supra note 30 for a typical example. Article 18's public policy exception might have to serve as the principal escape device from the Convention's rigidly applied rules in these circumstances. But see Report, supra note 13, cl. 110, at 587, in which the Report condones gender discrimination by the forum-situs state, interpreting article 15 of the Convention as permitting a deviation from the Convention's otherwise prescribed choice of law rules on the basis of gender preference in inheritance. Thus, Americans would not necessarily be protected from discrimination with respect to their property situated abroad.

267. See Report, supra note 13, cl. 23, at 535; cl. 29, at 539.

268. Article 15 of the Convention appears to recognize this possibility. The Report also

The unpredictability inherent in article 18 is exacerbated by article 15. The latter provision affords special protection for "certain immovables, enterprises, or other special categories of assets," where there is a "particular inheritance regime" regarding such assets because of "economic, family or social considerations." Again, the precise parameters of this provision are entirely unclear,[269] as is its purpose in view of the public policy exception of article 18.[270]

Professor Scoles, the American representative, has publicly acknowledged that article 15 might permit exempting broad classes of

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refers to foreign ownership of various types of real property and enterprises, but apparently, would have it governed by article 18 and not article 15. Report, supra note 13, cl. 111, at 589; cl. 121, at 595. The Report does not indicate whether article 18 would support application of a forum-situs rule barring foreign ownership of land.

269. The Report, supra note 13, cl. 113, at 591, indicates that article 15 is to apply to "special situations where there are overriding interests at stake." Despite attempts to limit the article's language, expansive terminology survives in the final version. For example, the Convention can be sidestepped in order to protect an inheritance regime at the situs arising out of "economic, family, or social considerations." Id. at 589. Recognizing the potential use of this language as a major escape device from the Convention's choice of law rules, the Report, supra note 13, cl. 112, at 589, states:

> [I]t was not the intention of the Commission [drafting the Convention] that these [considerations] should imply a wide span of potential meaning which the courts might freely construe as a means of giving effect to what are conceived in the situs as desirable local policies. It was the intention of the Commission that the phrase contained here should be strictly construed, and not be regarded as an invitation to States or courts to bring within situs control any subject having broad economic, family or social connotations. To understand this phrase one has to return to the fundamental concerns of the Convention itself. The Convention is concerned with the protection of the family's indefeasible inheritance rights, with economic wealth that affects people when that wealth passes from generation to generation, such as in the form of small family businesses, and with social concerns such as the well-being of groups of peoples within society. Social concerns would also be reflected in the attempt of the estate to maintain the standards and values of society as those elements are reflected in laws concerning inheritance and the family.

Although this statement attempts to narrow the scope of article 15, it is itself hopelessly vague and open-ended. It demonstrates again the shortcoming of hard-and-fast choice of law rules coupled with a public policy exception. Furthermore, it tends to convert a choice of law convention into a multilateral agreement on preferred familial and social norms. If this is what the Convention is about, then far more rigorous exploration by experts in the relevant substantive fields of law ought to be required before ratification. See supra text accompanying notes 166-71.

270. Article 18 seems to be a more general public policy provision. The Report does not make clear why article 15 was also needed other than to indicate that the article is an independent conflict of law rule pertaining to succession, whereas article 18 is an exception to the Convention's choice of law rules and would apply to concerns such as national security and foreign ownership of certain types of property. See Report, supra note 13, cl. 121, at 595. In practice, both articles 15 and 18 appear to be little more than escape devices intended to return to the forum and situs the autonomy otherwise deprived them by articles 3 and 5. See North, supra note 12, for further criticism of these provisions.

real property from the Convention.[271] Indeed, the Convention's Report gives as examples the devolution of farmland and family-owned businesses.[272] It stresses that this might be in terms of the imposition by the forum of discriminatory limits on the line of descent[273] and on the fractionalization of the property.[274] Thus, while the Report emphasizes that broad exceptions are not intended, the language of the Convention and the Report's own examples and explanation strongly suggest otherwise. This is the fundamental problem with the approach of the Convention. It reflects a return to the discredited system of rigid rules accompanied by a poorly conceived, but potentially sweeping public policy escape device—all of which affords neither sufficient predictability for planning nor a methodology for careful and fair consideration of the relative interests of the various states and the system.

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271. Comments of Eugene F. Scoles to Council, Real Property, Probate & Trust Law Section of the American Bar Association, Colorado Springs, October 9, 1989. A similar position was apparently taken by the U.S. delegation in deliberations during the drafting of the Convention. See Report, supra note 13, cl. 112, at 589. Nevertheless, efforts to narrow the language were defeated. Id. The German experience with the situs exception to its nationality choice of law rule suggests that deference to the situs may well occur by broad construction of statutory language. See supra note 23.

272. For example, the Report, supra note 13, cl. 110, at 587, states that "the situs may legislate that with regard to family-owned farms at or under a given size the farm is to devolve as one unit by way of the male line of proprietor." If article 15 applies to family farms, it could presumably be applied to all farms. That is, there might be a particular inheritance regime that favors farming generally due to the economic, family or social considerations of the forum. Of course, article 18 might apply as well in this case on the theory that American ownership of farmland is a manifest public policy. The example of farmland applies as well to family-owned businesses, and could readily be extended to environmentally sensitive real property, water and mineral rights, and any number of other assets. However, some "special order of inheritance" would be required. Id. This might permit and encourage states, the political subdivision at which succession law is enacted, to pass legislation exempting, for example, much if not all of certain major categories of assets of their citizenry from the Convention pursuant to some "special order."

273. See Report, supra note 13, cl. 110, at 587. More generally, should the United States be party to a Convention that permits itself to be overridden in furtherance of the bias-laden inheritance policies of various signatories to the Convention? Why should article 15 protect gender, race or religious bias imposed by some other signatory state, but not testamentary freedom in the United States? Put another way, could article 15 be read as excusing an American forum from enforcing foreign forced heirship rights of children based on the theory that economic, social and family considerations in the United States support a different, freer, more capital-attracting inheritance regime in this country? Note that the Report itself sanctions gender-based discriminatory inheritance. See supra note 266.

274. See Report, supra note 13, cl. 110, at 587-89. This exemption based on a concern for fractionalization could be read as applying to virtually any foreign pattern of succession differing from standard American patterns.

III. CONCLUSION

A. *A Technical Solution*

The Convention itself holds the seeds for a technical solution that addresses the concerns raised in this Article, without preventing the United States from ratifying the Convention. While this technical solution should not be seen as an answer to the broader issues raised in the Article, it is a useful approach that can also be pursued in connection with other private international law agreements that raise similar federalism concerns. Pursuant to article 27 of the Convention,[275] a country that has territorial units with different systems of law is not required to have the Convention apply to all of its territorial units. This provision, intended for the benefit of Canada,[276] could be resorted to by the United States, since Louisiana has a civil law system, unlike the common law system in effect in the other states.[277] Under article 27, each territorial unit, that is, American state, would be free to decide for itself whether to adopt the Convention. Article 27(1) simply would require the United States at the time of signature or later ratification to signify that the Convention applies "only to one or more" of its states. Furthermore, this declaration could be altered from time to time.

Article 27 is not clear as to whether at least one state must have declared its acceptance before the United States could signify its own acceptance or ratification. Presumably, the United States could interpret the article as simply requiring a signatory country to notify the

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275. Article 27 of the Convention, supra note 1, provides:

> 1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all of its territorial units or only to one or more of them and may alter this declaration by submitting another declaration at any time.
>
> 2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
>
> 3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

276. See Report, supra note 13, cl. 149, at 615.

277. Technically, article 27 requires that the systems of law differ with respect to "matters dealt with in this Convention." See supra note 276. Because an issue-by-issue analysis is surely not intended, it must mean that in broad outline the succession laws must differ, even if they have similar provisions. Inasmuch as Canada is given as an example of a country to which article 27 might apply, see supra text accompanying note 277, the analogy between Quebec and Louisiana would seem to support the article's application to the United States as well.

depositary country that it is invoking article 27. Admittedly, article 27(2) requires that a declaration by a signatory country state expressly those "territorial units to which the Convention applies." Initially, the United States could declare that the Convention does not yet apply to any states. As states enacted the provisions of the Convention, the United States could notify the depositary country, consistent with article 27(1). If a state rescinded or otherwise amended Convention provisions, the depositary country could be notified that one fewer territorial unit was subject to the Convention.

Moreover, even if articles 27 (1) and (2) do require at least one state enactment before the United States can become a party to the Convention, this should not be regarded as a drawback. Until at least one state is prepared to enact the Convention, the United States should not ratify it, because the total absence of state approval indicates the lack of any palpable public support. The fact that some time may transpire before support for the Convention coalesces and manifests itself in the form of state legislation should not be troubling. The United States need not rush to ratify.[278]

Approaching the Convention in this manner serves a number of objectives. The traditional state autonomy in probate and choice of law are preserved. More time for a careful analysis of the Convention is obtained. The experience of the states initially adopting the Convention can be observed. Furthermore, state-by-state enactment replicates a familiar pattern of domestic law reform through uniform acts, one that has been especially noteworthy in the probate field.[279] Those states with more doubts about the Convention than other states will not be subjected to legal and social structures especially detrimental to their interests. As circumstances change, states can enter and exit the fold—a wise approach in light of the Convention's deviation from traditional rules as well as contemporary conflicts theory. Although uniformity may suffer, it must be remembered that the Convention itself, by way of article 27, does not expect such uniformity in federal countries and recognizes that, in effect, the individual territorial units,

278. The example of other private law conventions is illuminating here. For instance, the much less controversial Convention of October 26, 1973 Providing a Uniform Law on the Form of an International Will was endorsed by the ABA Board of Governors in a Resolution of April 12, 1980. It was finally ratified by the United States Senate on Aug. 8, 1991. See also S. Exec. Rep. No. 102-9, 102d Cong., 1st Sess. (July 30, 1991) (accompanying Treaty Doc. 99-29). The text of this convention is reproduced in Kurt H. Nadelmann, The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will, 22 Am. J. Comp. L. 365, 379 (1974).

279. The prime example, of course, is the Uniform Probate Code.

rather than the federation as a whole, can be the relevant sovereign entities for purposes of ratification.

The Washington Convention of 1973 Providing a Uniform Law on the Form of an International Will[280] offers an appropriate model for how reception of the Convention in this country ought to proceed. A number of states, as well as the UPC,[281] have incorporated its provisions into their laws. Although the Washington Convention itself had not been ratified by the Senate until this year, this did not prevent those states wishing to adopt its provisions from doing so. Article XIV of that international agreement, like article 27 of the Convention, permits a federal country to leave it to its individual territorial units to decide whether the Convention will apply in that unit. Moreover, despite ratification, each state retains its autonomy in deciding whether to adopt the provisions of the Washington Convention.

B. *The Convention and the Search for Uniformity in Choice of Law*

Apart from the technical solutions discussed, the Convention raises very important questions about choice of law and succession to wealth in a world in which wealth of individuals transcends political boundaries. The Convention places a premium on uniformity in choice of law and the elimination of scission between real and personal property. This effort to resolve conflicts of laws by uniform choice of law rules, however, has been shown to be a fruitless and deceptive exercise. The goal of uniformity, even if it were an admirable one, simply leads to the question of what the uniform rule should be. Since conflicts scholars, courts, and different legal systems are in utter disagreement about the appropriate rules, whatever rules are adopted are likely to carry little normative legitimacy and to be weighted down with various, often illogical and impracticable exceptions. Moreover, the idea of "rules" is itself vulnerable to attacks of process-oriented conflicts theory, and if the focus is on process, there is no common ground as to what that process should be.

Even if uniform rules could be agreed upon, their implementation could only be achieved in the most formalistic and superficial manner. The exceptions incorporated into the Convention, all standard conflicts escape devices, such as the public policy exception, renvoi, and the incidental question, afford significant leeway to the forum and

280. See supra note 278.

281. See, e.g., UPC, supra note 17, § 2-1001.

assure that the reality of implementation will differ substantially from the abstract statement of a rigid, rule-oriented system.

Suppose, however, that true and unswerving application of uniform rules as to choice of law could be achieved throughout the world, would the end result be the application of the chosen law? Almost certainly, this would not be the case. The barrier that jurists from one system or culture face when called upon to transmogrify themselves into jurists or lawmakers of another system or culture cannot be overcome.

Indeed, a strong dose of humility and doubt ought to accompany any attempt at a "grand" solution to conflicts issues, especially in an area such as succession, which is so uniquely associated with the social, political, and economic structures of the various nations. Development of an orderly, predictable system of wealth transfer worldwide first requires a coalescence of views on substantive principles and underlying policies, not on the phantasm of an arbitrary and easily-evaded system of rules. It may also require regional solutions or agreements, limited in application to countries with shared legal, social, economic, and political structures.

The search for common ground on fundamental principles, such as testamentary freedom or, perhaps, family protection is not an easy one. It is likely to be a long and disappointing process. Still, if countries cannot agree on the basic premises of succession law, then it is not especially in their interest to agree on a new system of choice of law rules. Uniformity in choice of law makes a fine incantation, but uniformity for uniformity's sake is a dangerous exercise when it fails to take account of the internal, substantive law consequences of a system of international choice of law rules. Moreover, to the extent that the objective in the realm of succession law should be predictability rather than shared substantive norms, then simpler rules than those proposed by the Convention are available. As long as each country's rule is clear-cut, there is no need for uniformity.

Additionally, a uniform, international convention of choice of law rules must come to grips with American constitutional and federalism concerns. These concerns represent significant obstacles in terms of substance and process. The concerns transcend succession law and involve such disparate matters as the allocation of jurisdiction between federal and state courts, the protection of individual rights, and congressional bicameralism.[282]

282. The author hopes to explore these issues in a subsequent Article.

This Article recognizes that international choice of law in the succession area cannot be divorced from interstate choice of law, despite the Convention's attempt to do so. The effort to draw a totally effective and workable distinction in today's world of global investment and travel between "interstate" and "international" succession matters is doomed to fail. Likewise, artificial lines drawn by the Convention between wealth passing by succession and by other modes, between "succession" and administration, between validity of wills and their construction, and between nontax and tax issues are arbitrary foundations on which to build a "uniform" system of choice of law. They are entirely outmoded and theoretically unsound responses to the realities of contemporary ownership and transfer of individual wealth.

While there are certain differences in detail, all American states agree on the preeminent goal of effectuating the wealth owner's plan and assuring testamentary freedom with respect to the bulk of the estate. This substantive uniformity should not be jeopardized as a result of a quixotic search for worldwide uniformity in choice of law rules.