Changes of Paradigm in Private International Law of Contracts –A high-level comparison between 1989 and 2024, with tribute to the UNIDROIT Principles, the development of arbitration law and to Simplified Global Contracting–

Paradigmenwechsel im internationalen Schuldvertragsrecht –Ein Überblick von 1989 bis 2024, mit Blick auf die UNIDROIT Principles, Entwicklungen im Schiedsrecht und "Simplified Global Contracting"–

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Abstract: The article on German private law of contracts compares the state of private international law in Germany in 1989 with its state today, in 2024. It demonstrates a change of paradigm by looking at six selected parameters of relevance: (i) the respect of constitutional rights and European fundamental freedoms, (ii) the unitarian European character of private international law of contracts, subject to treaties, (iii) the dissemination of the CISG, (iv) the emergence of the the Unidroit Principles as a sound system of general principles and rules of international commercial contracts, (v) the development of international arbitration, and (vi) the emergence of internet and data platform based comparative legal research.

Regarding the traditional private international law of contracts, as applied by European courts (of member states of the European Union), the author observes that more European uniformity has come at the cost of complexity. At the same time, the emergence and dissemination of the Unidroit Principles – described as "the biggest achievement of the international legal society since the year 534" – has enabled Simplified Global Contracting (i.e. the choice of the Unidroit Principles in combination with an arbitration clause) and thereby more freedom on a global level.

Key words: Spanish roots to German private international law – Organisational structure of private international law in Germany – European roots of the Rome Convention – International company law – CISG – Emergence of the Unidroit Principles – Arbitration (development) – Internet – Fundamental Freedoms (EU) – BREXIT – 1955 Hague Convention (Sales) – Rome I Regulation – General principles of law (Unidroit) - African Principles on the Law Applicable to International Commercial Contracts - US-Chinese transaction under Unidroit – Global arbitration scene - More Uniformity at the Cost of Complexity – Hierarchy of norms – Simplified Global Contracting.

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Zusammenfassung: Der Beitrag zum deutschen internationalen Schuldvertragsrecht vergleicht den Stand des internationalen Privatrechts in Deutschland im Jahr 1989 mit dem Stand von heute (2024). Anhand sechs ausgewählter Parameter wird ein Paradigmenwechsel aufgezeigt. Die betrachteten Parameter sind: (i) die Beachtung der Grundrechte und der europäischen Grundfreiheiten, (ii) der einheitliche europäische Charakter des internationalen Schulrechts (vorbehaltlich vorrangigen Völkerrechts), (iii) die Verbreitung des CISG, (iv) die Veröffentlichung, Entwicklung und Verbreitung der UNIDROIT-Principles als solides System allgemeiner Grundsätze und Regeln für internationale Handelsverträge, (v) die Entwicklung der internationalen Schiedsgerichtsbarkeit und (vi) das Aufkommen internet- und datenplattformgestützter rechtsvergleichenden Recherchemöglichkeiten.

Für das traditionelle internationale Schuldvertragsrecht, wie es von europäischen Gerichten in den Mitgliedstaaten der EU angewandt wird, stellt der Autor fest, dass eine größere europäische Einheitlichkeit um den Preis von erhöhter Komplexität erreicht wurde. Gleichzeitig haben die Entstehung, Entwicklung und Verbreitung der UNIDROIT- Principles - die der Autor als „die größte Errungenschaft der internationalen Rechtsgesellschaft seit dem Jahr 534“ beschreibt – Simplified Global Contracting (d. h. die Wahl der UNIDROIT-Grundsätze in Kombination mit einer Schiedsklausel) und damit mehr Freiheit auf globaler Ebene ermöglicht.

Schlüsselwörter: IPR Reform 1986 – Spanischer Einfluss auf deutsches IPR – Struktur des IPR in Deutschland – Europäischer Ursprung des EVÜ – Internationales Gesellschaftsrecht – CISG – Unidroit Principles – Schiedsgerichtsbarkeit (Entwicklung) – Internet – Grundfreiheiten – BREXIT – Haager Kaufrechtsübereinkommen von 1955 – Rom I-Verordnung – allgemeine Rechtsprinzipien (Unidroit) – Afrikanische Prinzipien für internationale Handelsverträge - US-chinesische Transaktion nach Unidroit – Globale „Schiedsrechtsszene“ – Mehr Rechtsvereinheitlichung um den Preis höherer Komplexität – Normenhierarchie - Simplified Global Contracting.

Sumario: I. Introduction. II. A Glance at the Past: 35 Years Ago. 1. In Germany, the love of a Spanish gentleman to a German lady had led to new legislation on private international law. 2. Private international law was based on only two levels of sources of law. 3. European private international law did essentially not exist. 4. Unified substantive law did exist to a limited extent; the CISG was still emerging. 5. The UNIDROIT Principles of International Commercial Contracts did not exist. 6. Arbitration was an emerging topic. 7. The internet did not exist as an accessible tool. III. The Presence: Changed parameters for private international law of contracts for courts and for arbitral tribunals. 1. Nowadays, private international law in Europe fully integrates constitutional rights and European freedoms. 2. Subject to treaties, truly European unified private international law has become an important and characteristic element of the private international law of contracts. 3. The CISG is by now in force in close to 100 member states worldwide. 4. The UNIDROIT Principles of International Commercial Contracts provide a sound system of general principles and rules of international commercial contracts. 5. Arbitration has become a developed tool with a vivid global scene. 6. The internet and legal data platforms facilitate comparative legal research. IV. Changes of Paradigm. 1. Private international contract law in European courts: More Uniformity at the Cost of Complexity. 2. More freedom on a global level: Simplified Global Contracting. V. Summary Assessment.

I. Introduction

1. The author and the jubilee met first in 1989, 35 years ago, at the Max Planck Institute for comparative and international private law in Hamburg, where Professor Alfonso Luis Calvo Caravaca was doing research. This article in his honour will reflect on the enormous progress which the private international law of contracts has made ever since. A 70th birthday is a good reason to compare the private international law of contracts then, half of the jubilee's life ago, and now. It appears that, as international legal society, we have been slowly but surely progressing towards an enhanced level of freedom during that time span since 1989.

II. A Glance at the Past: 35 Years Ago

2. When we met in 1989, the author was just finishing his work on the 1st edition of his case book for students, co-authored with Joachim Rosengarten, on private international law and international litigation and arbitration.[1] A selection of seven observations summarizes parameters for international contracting at that time:

1. In Germany, the love of a Spanish gentleman to a German lady had led to new legislation on private international law

3. In 1989, we were still fond in Germany that the German legislator had finally revised German private international law in 1986.[2] With this reform, German private international law gave more importance to constitutional rights. It had taken the German legislator 15 years to implement changes needed in our private international law in reaction to a landmark decision of the German Federal Constitutional Court of 1971 relating to the admission of a Spanish-German marriage.[3] A Spanish gentleman had proposed to a German lady. She had been married once before. As her German divorce of 1965 would not be recognized in Spain, the German Registrar (*Standesbeamte*) had refused to proceed with the marriage arguing that, as a result of the non-recognition of the German divorce in Spain, the second marriage of the German lady would result in a forbidden double-marriage. The Appellate Court of Hamm interpreted the German private international law in the then existing old version of article 13 EGBGB, i.e. the introductory law to the German Civil Code which contains German private international law (*Einführungsgesetz zum Bürgerlichen Gesetzbuch,* short EGBGB). It held that Spanish law would not recognize the German divorce and that, therefore, a marriage in Germany was not possible under these circumstances.[4] The Federal Constitutional Court annulled this decision as violating article 6 of the German constitution[5] which protects marriage and family, and which could be invoked also by the Spanish groom.[6] As a result, the marriage became possible. This expressed for the first time clearly that private international law, in this case the application of Art. 13 EGBGB, could violate constitutional law which in turn needs to be considered by the courts when applying national rules on private international law.

2. Private international law was based on only two levels of sources of law

4. In continental Europe, we had a *v. Savigny*-based system with essentially two levels of sources of law. Either an applicable treaty or a national law would determine which connecting factor to use to connect a set of facts with the applicable substantive law and thereby determine the 'choice of law' for a specific question of law. Private international law in public international (treaty) law would take priority over private international law in the national law, i.e the EGBGB in Germany. The big structural points of discussion with regard to the application of private international law were the classification (or characterisation) of the legal issues, *renvoi* in case of application of the EGBGB (i.e. the question if the legal order determined by the connecting factor of the EGBGB would accept its choice or choose another legal order), *ordre public* and – rarely – adaptation of the result on a private international law or a substantive law level.[7] In addition to the *lex contractus,* mandatory law might apply as recognised

[1] E. Brödermann/J. Rosengarten, *IPR/IZVR – Internationales Privat- und Verfahrensrecht* (Private International Law and International Procedural Law)), 1st ed. 1989, in production: 9th ed. 2024.

[2] Gesetz zur Neuregelung des Internationalen Privatrechts, Bundesgesetzblatt I 1986 p. 1142.

[3] Decision of the German Federal Constitutional Court, 1 BvR 636/68, of 4 May 1971, published in BVerfGE 31, p. 58 *et seq.*

[4] Appellate Court of Hamm, 15 VA 4/67, of 3 September 1968.

[5] *Grundgesetz* (literally 'Basic Law'), initially enacted 75 years ago, on 23 May 1949. At the time, the law was meant to be provisional for the time until a German reunification.

[6] *See* note 3 at p. 67.

[7] Structurally, these issues still exist, *see* Brödermann, *supra* note 1, 9th ed. at mn. *[to be supplemented in the proofs; currently with the publisher]*.

already by *v. Savigny*.[8] We had long discussions if foreign mandatory law could also be recognized by a national judge, and if so how (by a special connection "*Sonderanknüpfung*" or otherwise).[9] We had the rule of thumb that embargoes issued by the USA would be upheld by a German court.

3. European private international law did essentially not exist

5. Except for rare rules qualifying as private international law, e.g. in the regulation on European Economic Interest Groupings,[10] private international law was not rooted in the legal order of the European Economic Community.[11] Yet, from the 1989 perspective, first important steps towards the unification of international contract law had just recently been taken. With the reform of 1986, the German legislator had finally implemented in Germany the 1980 Rome Convention on the law applicable to contractual obligations[12] which, for the first time, provided for unified rules on private international law of contracts in Europe.[13] It was combined with a competence of interpretation for the European Court of Justice.[14] Regarding the special topic of *renvoi*, the Rome Convention contained already an explicit exclusion.[15] From a purely technical legal perspective, we were not happy about the technique of the German legislator to integrate the international convention into a national law.[16] Yet, contrary to several South American laws at the time,[17] we had at least the freedom to choose the applicable national law on contracts. The 1980 Rome Convention, albeit an international treaty, was already to a certain extent European because the European Commission had very much pushed its member states into finding an agreement,[18] as a joint private international law on contracts was sensed to be important for the development of the European common market.

6. Regarding international company law (which is relevant for international contracting to determine if the contract partners can engage the companies), the private international law in Europe was

[8] F.K. v. Savigny, *System des heutigen Römischen Rechts* (System of contemporary Roman law), Vol. VIII, reprint 1961, *see* in particular §§ 348, p. 23 *et seq.*, 108 and §§ 349, p. 32 *et seq.*

[9] See E. Brödermann, supra note 1, 1st ed., p. 43, 9th ed. at mn. ____ [*to be supplemented in the proofs; currently with the publisher]*

[10] Regulation (EEC) No. 2137/85, articles 2 para. 1 and 2, 19 para. 1 subpara. 2, 2d bullet point, discussed by *Brödermann*, Teil I, Europäisches Gemeinschaftsrecht als Quelle und Schranke des Internationalen Privatrechts (Primärrecht, Verordnungen, Richterrecht) (European Community Law as a Source and a Limit to Private International Law [Primary Law, Regulations, Jurisprudence]), in: Brödermann/Iversen, Europäisches Gemeinschaftsrecht und Internationales Privatrecht (European Community Law and Private International Law) (1994), at 167-177 (mn. 308-329).

[11] *See* Treaty establishing the European Economic Union of 25 March 1957, amended and finally replaced by the Maastricht Treaty on the Functioning of the European Union of 12 February 1992, in force since 1 November 1993. Anecdotally, when the author started in 1989 his project for a doctoral thesis on the impact of European law on private international law, a professor of European law (G. Nicolaysen) and a professor of private international law (J. Kropholler) joined forces because each of them declared to be able to only judge from their respective perspective.

[12] Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, *see* Official Journal of the European Union, 1980 L 266 p. 1 *et seq.*

[13] Articles 1-37 EGBGB which still play occasionally a role for old cases, *see* E. Brödermann/G. Wegen, "IPR-Anhang I", in: Prütting/Wegen/Weinreich (Ed.), *BGB Kommentar*, 19th Ed. 2024, Art 27–37 EGBGB Vertragliche Schuldverhältnisse (aufgehoben) mn. 2 and www.pww-oe.de (visited on 28 May 2024).

[14] Art 18 1980 Rome Convention, ex. Art. 36 EGBGB.

[15] Art 15 1980 Rome Convention, ex. Art. 35 EGBGB

[16] The German legislator had explicitly declared in the law implementing the Rome Convention that articles 1-21 of the Rome Convention would not be directly applicable in Germany (Art. 1 para. 2 of the *Gesetz zu dem Übereinkommen vom 19. Juni 1980 über das auf vertragliche Schuldverhältnisse anzuwendende Recht* of 25 July 1986, Bundesgesetzblatt 1986 II p. 809). This technique was criticized by the European Commission in *Commission Recommendation* of 15 January 1985 (concerning the Convention of 19 June 1980 on the law applicable to contractual obligations), Official Journal 1985 No. L 44, p. 42-43; discussed at E. Brödermann, *supra* note 11, at mn. 31.

[17] *See* e.g. B. Piltz, Münchener Anwaltshandbuch Internationales Wirtschaftsrecht, § 18 „Gestaltung internationaler Lieferverträge", p. 1423 mn. 38 (giving Uruguay as an example).

[18] Statement of the Commission of 17 March 1980, Official Journal 1980 No. L 94 p. 39; discussed at E. Brödermann, *supra* note 11, at mn. 13.

split. Part of Europe determined the applicable company law by connecting questions of company law with the law of incorporation of the company (*Gründungstheorie*),[19] other parts of Europe used the place of the headquarter, where the decisions of the company would be taken, as the connecting factor (*Sitztheorie*).[20] The European Economic Community ("EEC") included then the UK. In an extreme example, a limited liability company incorporated in the UK with its headquarters in Paris could act and rely on its limited liability in Copenhagen, Denmark (where its law of incorporation would apply) but not in Germany or Spain (where its law of incorporation would not apply).[21] To overcome such divergence in the interest of the development of a European common market it would be helpful – as discussed at that time - to generally connect the company law of any company established within a member state of the EEC to the law of its incorporation as arguably required by article 58 Treaty establishing the European economic community (today: article 65 TFEU).[22] With some of the young visitors and researchers at the Max-Planck-Institute we discussed how to achieve this goal and to generally argue for a connection of the company law with the statute of incorporation if, around the globe, we would all publish in that direction. We were young and full of ideas.

4. Unified substantive law did exist to a limited extent; the CISG was still emerging

7. The unified substantial law on international sale of goods in the 1964 Hague Conventions[23] had not had much success. Following the independence and emergence of so many new states in the 1960s, common rules of international contracts of sales were re-negotiated on the level of the U.N. Commission on International Trade Law in the 1970s, preparing for today's U. N. Convention on Contracts for the International Sale of Goods (CISG).[24] The negotiations of the CISG had been finished in April 1980[25]. It had just come into force on 1 January, 1988, with 10 states compared to its 97 member states today (in 2024). With the CISG, focussing with sales on one of the key kind of contracts (next to service, construction and financing agreements), unified treaty law just entered the attention span of general international contract practitioners, as compared to the specialised law of transportation where unified substantive law has a long tradition.

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[19] For Denmark, Ireland, United Kingdom and the Netherlands *see* E. Brödermann, *supra* note 11, at mn. 148 note 289 with further references

[20] For Belgium, Germany, France, Greece, Italy, Luxemburg, Portugal, Spain *see* E. Brödermann, *supra* note 11, at mn. 149 notes 280-283 with further references.

[21] Both in Germany and in Spain, at the time, the private international law for companies generally would not treat the company established in the UK (then a member of the European Economic Community) under UK law as a duly established company. Rather, both German and Spanish private international law would determine the applicable company law by connecting the entity with its headquarter in Paris, France (*see* for Germany: jurisprudence since 1904 as referenced in detail at E. Brödermann, *supra* note 11, at mn. 101 note 145, as well as in a hidden German statute, *see id.* note 156; *see* for Spanish jurisprudence, statute and literature the detailed references *id.* at p. 92 at mn. 149 note 289 citing *inter alia* Calvo Caravaca).

French private international law would accept the reference to its company law because French private international law also generally uses the place of the headquarter as the connecting factor (Art. 1837 para. 1 Code civil in the version of 4 January 1978; E. Brödermann, *supra* note 11, at mn. 134 note 244 with further references. French law would simply not even consider recognizing a company that has its headquarter in Paris as an existing foreign entity, *see* again E. Brödermann, *supra* note 11, at mn. 134; whereby the issue of "recognition" of foreign companies as distinguished from the determination of the applicable company law shall not be discussed here; *see* on that issue *id.* mn. 129-132 citing *inter alia* at note 226 A.L. Calvo Caravaca, Rev. Gen. Der. (Valencia) 44 (1988) 3679, 3693 who was one of the first scholars to make that distinction).

Absent proper establishment under the law of France, the legal entity established under UK law would not be recognized as a company with limited liability. Post BREXIT the case scenario discussed above has become again a realistic one, *see* below mn. 15.

[22] E. Brödermann, *supra* note 11, at p. 60-165 (§ 4 „Gemeinschaftliches IPR im EG-Vertrag").

[23] Convention relating to a Uniform Law on the International Sale of Goods, done at The Hague, 1 July 1964 (ULIS), Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, done at The Hague, 1 July 1964 (ULF).

[24] United Nations Convention on Contracts for the International Sale of Goods, which was adopted on April 11, 1980.

[25] Id.

5. The Unidroit Principles of International Commercial Contracts did not exist

8. The International Institute for the Unification of Private Law (Unidroit) was already working on the compilation of general principles and rules of international commercial contracts, based on a thorough comparative legal analysis, but we did not know. The concept was still emerging.

6. Arbitration was an emerging topic

9. Arbitration has old roots. One of the historic examples is article 210 of the French constitution of 1791 which grants the right to determine the arbitrator to every party.[26] It took time, however, for arbitration to be generally used in a large scale. By 1989, we already had the great 1958 New York Convention on recognition and enforcement of arbitral awards ("New York Convention")[27] which generally privileged arbitral awards with regard to their enforceability over national judgements, but arbitration was not yet generally taught at law schools. The arbitration scene was small compared to today. It was only during the 1980s that, with the multiple arbitrations at the Iran Claims Tribunal following the Algiers Accords of January 19, 1981 to settle the Iran hostage crisis, the international arbitration community had started to test the UNCITRAL Arbitration Rules[28] in practice. As per 1989, the legislators of only a few states had changed their arbitration law with regard to the 1985 UNCITRAL Model Law on Arbitration,[29] compared to 92 States in a total of 125 jurisdictions as per today.[30] Thus, the model rule in Art. 28 UNCITRAL Model Law on Arbitration admitting the choice of rules of law was not yet enacted in the laws of many states.

7. The internet did not exist as an accessible tool

10. Unknown to us, the internet had just been invented in 1989 and did not yet exist as a generally accessible tool. Global wisdom was not easy to access. The research of even basic information on any foreign substantive or private international law required substantial language skills and research time in libraries. To access a source of law was sometimes a matter of weeks, and even travel. Sometimes such travel to access a book had to be prepared by letters inquiring the availability of the book in a library. Emails did not exist either, let alone artificial intelligence-based translation tools.

III. The Presence: Changed parameters for private international law of contracts for courts and for arbitral tribunals

11. The jubilee and the author met again, with great pleasure and memories of old days, in 2024 at Unidroit in Rome at the occasion of the celebration of 30th anniversary of the Unidroit Principles of International Commercial Contracts, where professor Alfonso Luis Calvo Caravaca is serving as the Spanish member of the Governing Council. This time span shall serve as an inspiration to have a look at some of the big trends and developments in private international law with special regard to the parameters of international contracting. Times have changed.

12. All factors discussed at **II** have developed.

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[26] Art. 210 of the Constitution of 5 Fructidor Year III (1795): »Il ne peut être porté atteinte au droit de faire prononcer sur les différends par des arbitres au choix des parties.«

[27] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force on June 7, 1959.

[28] UNCITRAL Arbitration Rules, initially adopted in 1976, and recommended on 15 December 1976 by the General Assembly of the United Nations (*see* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf, visited on 23 May 2024).

[29] *See* UNCITRAL Model Law on International Commercial Arbitration (1985), meanwhile amended in 2006, at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (visited on 23 May 2024), mentioning for 1989 or earlier only Canada (except for Nunavut and British Columbia), Cyprus and three US states (California, Connecticut, Texas).

[30] *Id.*

1. Nowadays, private international law in Europe fully integrates constitutional rights and European freedoms

13. The integration and respect of constitutional rights and European freedoms is self-evident, also for private international law. It is not anymore something special to mention. In addition, with the EU Charter of Fundamental Rights[31] and the European Convention on Human Rights,[32] there are now also far-reaching legislative value decisions at supranational level that must be taken into account in the creation and application of private international law in addition to the "national" constitutional rights.

14. The European Court of Justice has solved long ago that all companies established in any member state of the EU may benefit of the fundamental freedoms, including in particular the freedoms of establishment (Art 49, 54 Treaty on the Functioning of the European Union, "TFEU"[33]) and of service (Art 56, 62, 54 TFEU).[34] Transposed to private international law, this would require to use the law of incorporation as the connecting factor for all companies established within the EU to determine the applicable company law.[35] Only the EU-wide use of the law of incorporation as connecting factor can ensure that any company which is established in any member state of the EU shall be recognised and can contract in all member states. For companies established in states outside the EU, the German Federal Supreme Court has continued to use the place of administration as the connecting factor.[36]

15. The impact of this difference became evident with the BREXIT, when the protection of EU fundamental freedoms ended for companies incorporated under English law. Several German citizens had set up a Limited Liability Company under English Law in the UK during the membership of the UK in the EU. They did this to benefit from the liberal UK law of incorporation while they administered the companies out of Germany. The office in Germany was thus the headquarter and the place of actual management for these companies. With BREXIT, these UK companies managed out of Germany lost their shield of limited liability and became requalified under German private international law. As of BREXIT, the general German private international company law applies, in the same vein as it is applicable to all companies which are not protected by the EU Treaty or another Treaty requiring to use another connecting factor. [37] Distinctly from the private international law which applies to companies incorporated under the law of another EU member state and which are protected by the TFEU, general German private international company law determines the applicable company law by using the effective headquarter of the company as the connecting factor.[38] As the seat of business of these UK companies managed out of Germany was located in Germany, German corporate law applied according to general

[31] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (last visited on 30 May 2024).

[32] https://www.echr.coe.int/documents/d/echr/convention_ENG (last visited on 30 May 2024).

[33] Official Journal 2012 C 326, p. 1 *et seq.* (consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union).

[34] *See* the chain of jurisprudence in ECJ Judgment of 9 March 1999 – C-212/97 OJ 1999, I-1459 – **Centros** mn. 13; ECJ Judgment of 5 November 2002 C-208/00 OJ 2002, I-9919 – **Überseering** mn. 82; ECJ Judgment of 30 September 2003 – C-167/01 OJ 2003, I-10155 – **Inspire Art** mn. 143; ECJ Judgment of 13 December 2005 – C-411/03 Slg 05, I-10805 – **Sevic**; ECJ Judgment of 16 December 2008 – C-210/06 – **Cartesio** mn. 110; ECJ Judgment of 12 July 2012 – C-378/10 **Vale**.

[35] At least from the German perspective, *se*e e.g. German Federal Supreme Court, Judgement of 8 September 2016 – III ZR 7/15, Neue Zeitschrift für Gesellschaftsrecht 2016, p. 1187; Judgement of 13 March 2003, published in the official compilation of Supreme Court Decisions "BGHZ" 154, p. 185, 190; Judgement of 14 March 2005, published in Neue Juristische Wochenzeitschrift "NJW" 2005, p. 1648, 1649 and Judgement of 12 July 2011, NJW 2011, p. 3372, 3373; as well as e.g. E. Brödermann/G. Wegen, "IPR-Anhang IV", in: Prütting/Wegen/Weinreich (Ed.), *BGB Kommentar*, 19th Ed. 2024, mn. 18.

[36] *See e.g.* German Federal Supreme Court, Judgement of 20 July 2012, published in Recht der Internationalen Wirtschaft "RIW" 2012, p. 807, 810 mn. 27; Judgement of 12 July 2011, NJW 2011, p. 3372, 3373; Judgement of 21 March 1986, BGHZ 97, p. 269, 271; Judgement of 27 October 2008, IPRax 09, 259 (»***Trabrennbahn***«); Judgement of 8 October 2009, ZIP – Zeitschrift für Wirtschaftsrecht 2009, p. 2385.

[37] Example for such kind of treaty based private international company law in Germany: Art XXV para. V of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany (with Protocol and exchange of notes). Signed at Washington, on 29 October 1954, German Law Gazette "BGBl" 1956 II p. 487, 500.

[38] Trite jurisprudence of the German Federal Supreme Court, *see* above note 34.

German private international company law.[39] As the companies had not fulfilled the requirements of German law to limit their liability, the German legal system would not recognise the pre-BREXIT establishment of a limited liability company in the UK. Rather, German law would accept these companies as a business unit (e.g. as a *offene Handelsgesellschaft* or *Einzelkaufmann*) but it would refuse to accept the limitation of liability of the owners.[40]

2. Subject to treaties, truly European unified private international law has become an important and characteristic element of the private international law of contracts

16. Today (in 2024), except for treaty law such as the Hague 1955 Convention on the law applicable to international sales of goods,[41] the private international law of contracts is mainly contained in the Rome Regulation on the law applicable to contractual obligations of 17 June 2008 (EC) No. 593/2008 ("Rome I Regulation"); whereby the EU has meanwhile issued a series of regulations also on other topics of private internation law.[42] The competence for interpreting the European private international law in the Rome I Regulation lies with the European Court of Justice.[43] All language versions have a similar effect.[44] As a result, private international law in European regulations has become a normal phenomenon. Since 2013, with the entry into force of the Maastricht Treaty on the Functioning of the European Union of 12 February 1992, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring *inter alia* the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.[45]

17. Article 3 Rome I Regulation permits a high level of choice of law (with a few restrictions not to be discussed here),[46] restricted however to the choice of "law" in the strict sense of state law.[47] Distinctly form a choice of law pursuant to article 3 Rome I Regulation, Recital 13 of the Rome I Regulation explicitly permits to incorporate a non-state body of law or an international convention. It has become thus possible to agree on the Unidroit Principles (discussed below at **C.IV.**) even in combination with a choice of court clause.[48] In that case, the Unidroit Principles of International Commercial Contracts (Unidroit Principles) will rarely be evicted by mandatory law. As they are based on the underlying principle of good faith and fair dealing, it is hard to imagine any situation in which a rule contained in

[39] Appellate Court of Munich as published by the notary chamber of *Baden* at BWNotZ 2021, p. 397. The Appellate Court *held* explicitly that the EU-UK Trade and Cooperation Agreement of 14 December 2020 (OJ 2021 L 149, p. 10) would not imply an obligation to determine the applicable company law otherwise (*id.* at mn. 21).

[40] *Id.* at mn. 20.

[41] Art. 25-26 Rome I Regulation; Convention on the law applicable to international sales of goods, concluded (in French) on 15 June 1955, see (in English) https://assets.hcch.net/docs/44552963-f729-4ed2-b2cd-b286cdd562d7.pdf (visited on 23 May 2024).

[42] **(i)** Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to **non-contractual obligations** (Rome II); **(ii)** Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to **maintenance obligations**; **(iii)** Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to **divorce and legal separation**; **(iv)** Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of **succession** and on the creation of a European Certificate of Succession.

[43] Art. 267 TFEU.

[44] Art. 55 TFEU; Art. 4 EEC Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 1958 L 17, p. 385.

[45] Art. 81 para. 2 lit. c TFEU.

[46] *See* notably Art. 3 para. 1 sentence 2 and paras. 3-4 Rome I.

[47] This interpretation follows from Recital 13 and the from the history of Art. 3 Rome I Regulation as discussed below at mn. 18.

[48] E. Brödermann, UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary (2d 2023) at 38, Preamble mn. 16, art. 1.4 no. 5 with further references including, in particular, Unidroit, Official Comments Art. 1.4 mn. 3, p. 12 and Progressive Codification, Miscellaneous 18 (1992), p. 19 (*Bonell*).

the Unidroit Principles would violate national mandatory law, applicable pursuant to article 9 Rom I Regulation and taking priority also under the concept of the Unidroit Principles (article 4.1).

18. Nonetheless, it remains a drop of bitterness that, contrary to the initial proposal of the European Commission,[49] the member states of the European Union – including notably my German colleagues from the German Federal Bar BRAK – have voted for a conservative approach and prevented an explicit permission to choose as the applicable contractual regime, alternatively to a state law regime, "the principles and rules of the substantive law of contract recognized internationally or in the Community."[50] On this regard, the private international law of contracts in the European Union, as currently in force, is thus legging behind the international evolution of this subject of law, achieved a few years after the entry into force of the Rome I Regulation, with article 3 of the 2015 Hague Principles on Choice of Law in International Commercial Contracts.[51] It states: "The law chosen by the parties may be the rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."[52] The first enactments of these model rules have been made in South America.[53]

3. The CISG is by now in force in close to 100 member states worldwide

19. The treaty law in the CISG often requires attention. It is generally applicable if both parties come from contracting states or if the applicable private international law determines as applicable the law of a member state.[54] An exception only applies if the parties have derogated its application pursuant to its Art. 6 CISG, in a form which meets the standards of the CISG.[55]

20. As a result of the emergence of the CISG, the international law of sales in Australia, Brazil, China, Egypt, Germany, Japan, Spain, USA is essentially identical, as this is the case with all close to 100 member states to the CISG.[56] Unfortunately, many practitioners still ignore this advantage. In Germany, we had the first reported malpractice case: An insurance company had to pay because the lawyer systematically struck out the CISG according to its article 6 without advising on the disadvantages and risks which substantiated.[57]

4. The Unidroit Principles of International Commercial Contracts provide a sound system of general principles and rules of international commercial contracts

21. In 1994, the International Institute for the Unification of Private Law (Unidroit), established in 1926 in Rome as an off spin of the League of Nations, has first published its compilation of general

[49] E. Brödermann, The Growing Importance of the UNIDROIT Principles in Europe - A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal -, Uniform Law Review 2006, 749, 762.

[50] Id.

[51] Approved on 19 March 2015, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 (visited on 26 May 2024).

[52] Id.

[53] The first was Paraguay in 2015, *see Bonell*, The law governing international commercial contracts and the actual role of the UNIDROIT Principles, in: Uniform Law Review Vol. 23 (2018), 15-41 at p. 27.

[54] Art. 1 para. 1 CISG.

[55] For example, if the exclusion is contained in general terms and conditions, they need to have been properly communicated, safest by attachment, see e.g. Oberster Gerichtshof (Austrian Supreme Court), Judgement of June 29, 2017, case no. 8 Ob 104/16a 29 = CISG-online no. 2845; Bundesgerichtshof (German Supreme Court), Judgement of 26 November 2020, case no. I ZR 245/19 = CISG-online no. 5488.

[56] *See* https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states (with helpful comments on the status of accession and relevant declarations and reservations), visited on 24 May 2024.

[57] Anecdotal evidence; reported via different sources (one professor even wrote to the insurance company to receive confirmation), *see* E. Brödermann, *Die Zukunft der internationalen Vertragsgestaltung*, Zeitschrift für internationales Wirtschaftsrecht 2018, p. 246, 249 note 34.

principles and rules of international commercial contract law, i.e the Unidroit Principles of International Commercial Contracts (Unidroit Principles). The compilation of initially 120 rules has grown via further editions of 2004 and 2010 to 211 rules in the 2016 edition. That last edition amended only a few rules[58] and notably comments to enhance the usability of the Unidroit Principles for long-term contracts as opposed to spot-contracts with single transactions. The Unidroit Principles cover all areas of general contract law like contract formation, validity, performance, non-performance, set-off, assignment, limitation periods, plurality of obligors and obliges.[59] The Unidroit Principles contain, by way of an international compromise, the joint essence of the major contract laws of the world in a way which is compatible with all national legal orders. This is why they have been used in multiple arbitral awards and national court decisions as general principles of contract law[60] or to interpret national law.[61] Several legislators have used the Unidroit Principles when revising their codes on contract of law.[62] In addition, the Unidroit Principles have been used to supplement international instruments like the CISG.[63] They have been officially recommended by the U.N. Commission on International Trade law[64] and by the *Union Internationale des Avocats*.[65] The International Chamber of Commerce has integrated the Unidroit Principles into several model contracts including the ICC Model Contract Commercial Agency[66] and the ICC Model Contract Occasional Intermediary (general conditions for non-circumvention & non-disclosure agreements).[67] There exists thus both an extensive practice under the Unidroit Principles and an emerging *opinio iuris*[68] and recognition by the relevant circles of judges, arbitrators, and academics. By way of example, Klaus-Peter Berger has recently concluded an analysis of two major arbitral awards which have applied the Unidroit Principles with an assessment which documents the emerging *opinio iuris*. He concluded:

> *" ... thirty years after they were first published by UNIDROIT in 1994, there is a growing acceptance of the UPICC [i.e. the Unidroit Principles] as an independent legal system of transnational contract law and not just a restatement-like reservoir of individual principles and rules. [...] At the same time, the UPICC are recognized today, due to their high degree of maturity, persuasive authority, comprehensive scope and acceptance in international arbitration, as binding standards for the resolution of international business disputes by international arbitrators."*[69]

22. Another notable example for the increasing worldwide acceptance of the Unidroit Principles are the African Principles on the Law Applicable to International Commercial Contracts, published in

[58] Preamble and Articles 1.11, 2.1.14, 5.1.7, 5.1.8, and 7.3.7, *see* Introduction to the 2016 Edition at p. vii.

[59] For an introduction to the Unidroit Principles *see* E. Brödermann, *supra* note 47, at p. 1-23 (Introduction, mn. 1-26). For court cases and arbitral awards using the Unidroit Principles see www.unilex.info (last visited on 28 May 2024).

[60] *See*, by way of a recent example, *Ad hoc, Nurhima Kiram Fornan et al. v. Malaysia*, Preliminary Award on Jurisdiction and Applicable Substantive Law of 25 May 2020, at no. 141; accessible via https://jusmundi.com/en by searching "*Nurhima Kiram Fornan et al. v. Malaysia*" (visited on May 4, 2024); K.P. Berger, The UNIDROIT Principles of International Commercial Contracts as a System of Transnational Contract Law: Two Recent Arbitral Awards, *Journal of International Arbitration* 41, no. 3 (2024), at 255, 258-266; E. Brödermann, *supra* note 47, at 46-51 (Annex to Preamble, mn. 12-17 for arbitral awards) and 59-60 (Annex to Preamble, mn. 30 for court cases).

[61] E. Brödermann, *supra* note 47, Annex to Preamble at p. 60-65 mn. 32-34 (use by national courts) and at p. 52-55 mn. 20-23 (use by arbitral tribunals).

[62] *Michaels* in Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts, 2nd Ed. (2015) at p. 100-106 (Preamble I no. 156-167); E. Brödermann, *supra* note 47, at p. 36-37 (Preamble, mn. 13).

[63] E. Brödermann, *supra* note 47, Annex to Preamble, at p. 60 mn. 31 (on use by national courts) and at 51 -52 mn. 19 on use by arbitral tribunals).

[64] Last in 2021: Report of the United Nations Commission on International Trade Law on the Work of its Fifty-fourth Session (28 June - 16 July 2021), Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 at "XIII. Endorsement of texts of other organizations: Unidroit Principles of International Commercial Contracts 2016", pp. 51-52 at no. 267, 268.

[65] Union internationale des Avocats (UIA), Resolution on the UNIDROIT Principles of International Commercial Contracts 2016, issued on July 15, 2020, https://www.unidroit.org/uia-signs-resolution-recommending-consideration-of-unidroit-principles-of-international-commercial-contracts-2016/ (visited on May 25, 2024)

[66] Art. 24.1 lit. c on choice of law.

[67] Art. 13.1 on choice of law.

[68] E. Brödermann, *supra* note 44, at 65-70 (Annex to Preamble, mn. 35-45) with detailed arguments.

[69] K.P. Berger, *supra* note 58, at 255, 269.

2023 by the South African professor *Jan L Neels*. In addition to the choice of a state law, covered in article 3, they propose in article 4 paragraphs 1 to 3, detailed rules on the integration of the Unidroit Principles[70]:

> **"Article 4**
> Choice of rules of law; incorporation by reference
>
> 1. A choice of one or more of the following instruments is recognised on the same level as the choice of the law of a country:
>
> a) the UNIDROIT Principles of International Commercial Contracts;
> b) a treaty, as defined in the United Nations Convention on the Law of Treaties;
> c) the Uniform Customs and Practice for Documentary Credits;
> d) any instrument issued under the auspices of a regional economic integration organisation or an international, supranational or regional intergovernmental organisation, including any instrument issued by the Organisation pour l'harmonisation en Afrique du droit des affaires.
>
> 2. If the parties choose an instrument in terms of paragraph (1)(b), (c) or (d), the UNIDROIT Principles of International Commercial Contracts may be used in its interpretation and supplementation.
> 3. If the parties choose the general principles of law, the lex mercatoria, international commercial law or the like to govern their contract, the following instruments may be applied, where relevant –
>
> a) the UNIDROIT Principles of International Commercial Contracts;
> b) the United Nations Convention on the International Sale of Goods, as interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts;
> c) the Uniform Customs and Practice for Documentary Credits."

23. The Unidroit Principles can be chosen for all kinds of contracts, in all kinds of industries, and for all sizes of contract.[71] A 69 million USD acquisition of software under the Unidroit Principles in 2022-2023 in a US-Chinese M&A transaction (with connection to 84 jurisdictions) evidences the usability of the Unidroit Principles even for high value contract projects in situations of political tensions and of cultural and legal differences. The transaction between Broadcom (NYSE: AVGO), a public company whose headquarters is in Shenzhen, China, which produces computer ships, and the software company VMware involved an asset deal and a long-term IP license contract, both with a choice-of-the Unidroit Principles clause in combination with an arbitration clause.[72]

5. Arbitration has become a developed tool with a vivid global scene

24. The 1985 UNCITRAL Model Law on Arbitration has been further amended in 2006.[73] More importantly, it has widely inspired national legislators.[74] More generally, the world of arbitration as grown during the past 35 years at an incredible level and speed with over 1,000 arbitral institutions around the globe, and with vivid discussions at arbitration conferences on all continents. In this context, multiple soft laws have been developed by lawyers' institutions or arbitral institutions on multiple pro-

[70] J. L. Neels, African Principles on the Law Applicable to International Commercial Contracts (2023) available at: https://library.oapen.org/viewer/web/viewer.html?file=/bitstream/handle/20.500.12657/85129/9781776447411.pdf?sequence=1&isAllowed=y (last visited 28 May 2024).

[71] *See*, e.g., the examples given in E. Brödermann, *supra* note 44, at 3, mn. 3 note 13.

[72] 61 USD in cash and 8 USD in debt, *see* https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/broadcom-s-61b-vmware-buy-ranks-as-3rd-largest-tech-deal-70506762 (visited on May 5, 2024). The author is grateful to William Turner for the information.

[73] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (visited on 28 May 2024).

[74] Above mn. 9.

cedural issues (like evidence[75] or privilege and attorney secrecy[76]) albeit the issue of private international law for contracts, notably the choice of law or rules of law, is contained in the arbitral rules or the national arbitration laws.

25. In particular, Article 28 of the UNCITRAL Model Law on Arbitration explicitly permits the choice of 'rules of law'.[77] As noted at mn. 9 above, it has thus been enacted in 125 jurisdictions. For example, in Germany it was introduced in 1997 in § 1051 German Code of Civil Procedure, so that a special regime for the private international law of contracts (*lex specialis*) applies, if the parties combine their choice of law or of rules of law - like the Unidroit Principles – with an arbitration clause. Furthermore, multiple arbitration institutions have included a similarly liberal rule permitting the choice of rules of law into their arbitration rules.[78]

6. The internet and legal data platforms facilitate comparative legal research

26. Sources of law which used to be difficult to find are now often only a mouse click away. Instead of hours, days and sometimes weeks of travelling and writing letters to inquire about the whereabout of a book, many relevant sources of law can be found quasi instantly (although the data available via internet remain dependant on the input and is thereby not allways reliable; further, with the decline of books and paper, substantial information is only available at restricted web spaces). As a result, it has become possible to access relevant legal sources or to conduct an arbitration from quasi anywhere in the world.

IV. Changes of Paradigm

27. Compared to 1989, the private international law in Europe in general and the parameter of international contract drafting have notably changed and improved. These changes and improvements have been brought about through an evolutionary process. In sum though, when comparing 1989 versus 2004, the changes and improvements are so manifest, fundamental and relevant for international contracting that it appears appropriate to described them as a change of paradigm.[79]

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[75] IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the Council of the International Bar Association on 17 December 2020 (https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b), visited on 25 May 2025.

[76] IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration, adopted by Council resolution of the Inter-Pacific Bar Association of 13 October 2019 (https://ipba.org/sites/main/media/fck/files/2020/IPBA%20Guidelines.pdf), visited on 25 May 2025.

[77] If the parties have not made a choice of law or rules of law, the default rules vary, leaving though generally some discretion to the arbitral tribunal. This special issue shall not be discussed here. *See* e.g. on the one hand Art. 28 para. 2 UNCITRAL Model Law of Arbitration referring to the application of choice of law rules to be chosen by the arbitral tribunal, on the other hand Art. 21 para. 1 sentence 2 ICC Arbitration Rules giving full discretion.

[78] See, by way of example, Art. 21 (1) sentence 1 ICC Arbitration Rules (2021), Art. 29 (1) Arbitration Rules of the *Centro Internacional de Arbitraje de Madrid* ("CIAM Rules" 2022 in their English version, visited last on 26 May 2024), Art. 35 (1) ASEAC Rules (2023, which explicitly also contains the option to choose the Unidroit Principles), Art. 24.1 DIS Rules of the German Arbitration Institute (2018). With effect as of 1 January 2024, the China International Economic and Trade Arbitration Commission (CIETAC), the worldwide largest arbitral institution with regard to the number of cases has changed its arbitral rules with effect as of 1 January 2024 with regard to the "Making of the Award". Art. 52 para. 2 now mentions explicitly principles of law. Properly interpreted, this entails the possibility to choose the Unidroit Principles in combination with a CIETAC arbitration clause. *See* E. Brödermann/B. Etgen, CIETAC Arbitration Rules 2024, Article-by-Article Commentary (2024), Art. 52 mn. 5-14.

[79] For German private international law, the author has noted this once before in German language for the development observed at **IV.1** below, at E. Brödermann, "Paradigmenwechsel im internationalem Privatrecht", Neue Juristische Wochenzeitschift 2010, p. 807-813. In this article, written over a dozen years later, this observation is extended by integrating the arbitration perspective discussed at **IV.2**.

28. Fundamental changes can be observed, *firstly*, on a *European* level with regard to the private international law of contracts which courts of the member states of the European Union apply (hereinafter **III.1**), and, *secondly*, on a *global* level with regard to the relevant private international law for international commercial contract drafting and with regard to the determination of the contractual regime in arbitration (hereinafter **III.2**).

1. Private international contract law in European courts: More Uniformity at the Cost of Complexity

29. As a result of the emergence of European private international law of contracts, i.e. the Rome I Regulation as discussed at **III.2.** (mn. 16), the private international law applicable in court litigations in the member states of the European Union has generally three levels: (i) private international law in Public international (treaty) law; (ii) private international law in European Union Law; and (iii) private international law in national law, which can be either (III.a) harmonized private international law based on European directives,[80] or (III.b) truly autonomous national law.[81]

30. Depending on the source of law, different rules of interpretation apply (and to some extent other judicial bodies are competent): **(i)** To interpret private international law in Public international (treaty) law, Art. 31 of the 1969 Vienna Convention on the law of treaties[82] applies which requires an interpretation according to the principle of good faith. **(ii)** To interpret private international law in European Union Law, especially the Rome I Regulation, the European Court of Justice is ultimately competent pursuant to Art. 267 TFEU. It will apply an *effet-utile* interpretation which strives to give the greatest effect possibly to the European source of law.[83] In the case of the Rome I Regulation, this is strengthening the European judicial area.[84] **(iii)** To interpret national private international law, the applicable rules of interpretation vary depending on whether it is harmonized or truly autonomous national law. In case a national private international rule on contracts originates in a European directive,[85] the competence for the interpretation of the underlying directive lies with the European Court of Justice. In contrast, the interpretation of purely autonomous private international law lies with the national supreme court.

31. This structure with three levels of sources of private international law (or even four because of the subdivision of the national level into harmonised law implementing an EU directive and autonomous law) constitutes a major paradigm change as compared to the status of the law in 1989 as discussed at **II.2**.[86]

32. For students, the structure is quite complex to understand. To simplify, I give my students the picture of a kite.[87] I propose to imagine a kite in a different colour for any subject of law, i.e. contracts, company law, torts etc. Any of these laws is structured according to this same general structure of (i) treaty law, (ii) European Union Law and (iii) national law, the latter with the additional distinction between harmonized law based on European directives and truly autonomous national law. Each kite stands for one subject of law (and therefore for the need of qualification of the question of law to resolve).

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[80] Art. 288 para. 3 TFEU requires that European directives need to be transferred to national law to become effective in a member states.

[81] E. Brödermann in E. Brödermann/J. Rosengarten, *supra* note 1 at mn. ____ *[to be supplemented in the proofs; currently with the publisher]*.

[82] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980; United Nations, Treaty Series, vol. 1155, p. 331.

[83] *See*, for example, the fundamental ruling of the ECJ of 19 June 1990 – C-213/89, OJ 1990, I p. 2433 – Factortame

[84] Recital 6 Rome I Regulation.

[85] Example: Art. 46b EGBGB in Germany (in force since 1 January 2022), which is based on Directive (EU) 2019/771.

[86] *See* above mn. 9.

[87] E. Brödermann in C. Benicke / S. Huber, *National, International, Transnational: Harmonischer Dreiklang im Recht*, Festschrift für Herbert Kronke zum 70. Geburtstag (2020), p. 15-30.

33. These kites are flown by the lawyer in charge to solve the international challenge of drafting a contract, by complex three-chain-ropes in different colours. These ropes stand for the applicable private international law. Symbolized by the three chains of each rope, these ropes reflect the same structure: (i) treaty law; (ii) EU law; and (iii) national law in its two variations, harmonized national private international law and truly autonomous private international law. With the help of characterisation (also referred to as classification)[88] the lawyer decides which kite to fly for any given project. For complex project of international contracting, many kites (and ropes of private international law) are necessary: one for contract, one to determine the existence of the acting companies, one for representation, one for securities etc.

34. In addition to these general (vertical) distinctions, based on the hierarchy of norms, between public international, European and national law, more caution is required. Finding the right source of law for international contracting requires some more "scouting in the jungle" (of private international law) depending on the circumstances. In many situations, the Rome I Regulation will not apply although, according to the general structure, it might apply at first sight. A few examples:

35. For certain subjects unified substantive treaty law, like the CISG, may take priority because of its own rules contained in the substantive law treaty.[89] Due to the impressive enlargement of the member states (as observed above at **III.3** mn. 20), the CISG is relevant more frequently than in 1989. It requires careful examination of the facts to determine if its substantive rules on international sales takes priority, directly via article 1 para. 1 lit a) CISG (thereby evicting the need to apply the Rome I Regulation), or pursuant to article 1 para. 1 lit b) CISG as a consequence of the application of the Rome I Regulation. In my commercial practice as a lawyer, I have observed several times even for large scale projects that the parties simply started a project, intending to also agree on a contract with a choice of a national law excluding the CISG. Business took over and the finalisation of the contract lost priority; disputes arose without a written contract. As a result, the CISG applied because the condition under its article 1 para. 1 for its application were met, and the parties had made no valid derogation pursuant to its article 6.

36. Further, the Rome I Regulation does not cover all contractual subjects. For example, according to an exclusion in its article 1 (2) lit. e it does not apply to arbitration agreements.[90] Here the private international law regime in article V (1) lit. a of the 1958 U.N. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards steps in.[91]

37. The Rome I Regulation does not apply to all European countries. It does not apply to Denmark; pursuant to the Danish reservation,[92] made at its accession to the EU, that such regulations do not automatically apply in Denmark.[93]. Distinctly from the process chosen for the Brussels Ia-Regulation, Denmark and the EU have never concluded an agreement to enlarge the field of application of the Rome I Regulation to Denmark.[94] Further, since BREXIT, i.e. the end of the transition period (31 December 2020),[95] the Rome I Regulation does not apply any more directly in the UK. It continues however to have an indirect effect in the UK because it has been integrated into a UK national law.[96]

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[88] *See e.g.* North / Fawcett, Private International Law, 13th Ed. (1999) at p. 35, fn. 1.

[89] *See* **II.4** at mn. 7.

[90] Art. 1 para. 2 lit. e) Rome I Regulation.

[91] https://www.newyorkconvention.org/media/uploads/pdf/1/2/12_english-text-of-the-new-york-convention.pdf

[92] See Protocol No 22 to the TFEU.

[93] E. Brödermann/G. Wegen, *supra* note 14, Art. 25 Rome I Regulation, mn. 2.

[94] See the explicit agreement to extent the field of application of the Brussels Ia-Regulation to Denmark, OJ 2005 L 299, p. 62 and the acceptance letter of Denmark from 12 December 2012 (OJ 2013 L 79, p. 4).

[95] Art. 126 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019, C 384 I p. 1.

[96] E. Brödermann/G. Wegen, *supra* note 14, Art. 1 Rome I Regulation, mn. 3.

38. Last, but not least, there are several member states in the EU, where the Rome I Regulation does not apply at all to contracts of sale. At its enactment, the Rome I Regulation had to accept priority of existing treaties.[97] Thus, the (partly different) private international law rules in the 1955 Hague Convention of 15 June 1955 on the law applicable to international sales of goods[98] apply when courts in Denmark, Finland, France, Italy or Sweden have jurisdiction.[99] In contrast, the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods has never come into force.[100]

39. Despite these *caveats* to the application of the Rome I Regulation discusses at mn. 33-37 above, the Rome I Regulation has brought about more conformity of the private international law of contracts in Europe, albeit at the cost of more complexity to the system of private international law that students must learn.

2. More freedom on a global level: Simplified Global Contracting

40. Through the development of private international law for contracts in arbitration laws and arbitral regimes of arbitral institutions in the past three decades, it has become widely possible to choose rules of law instead of any domestic law as the legal regime for an international contract. Against this background, the emergence of the Unidroit Principles between 1994 and 2016 has an even more fundamental and *global* impact from the perspective of an internationally practicing lawyer, striving to develop the best and most efficient solutions for its clients at the drafting stage of international commercial contracts.

41. The release of the Unidroit Principles needs to be thus assessed jointly with (i) the increased options in international arbitration and (ii) the developments of the arbitration law and arbitration rules around the world, as observed *supra* at mn. 24-25 (**III.4.** and **III.5**). Using the freedom to choose rules of law under most arbitration rules, it is today possible to agree, in a choice-of-the Unidroit Principles clause, on the choice of the Unidroit Principles in combination with an arbitration clause. This approach did not exist in 1989. It is simple and efficient. It is therefore called Simplified Global Contracting.[101] The contract drafters can thereby rely on all the advantages of a fair and neutral contract regime, [102] subject only to internationally mandatory law (pursuant to article 1.4 Unidroit Principles)[103] and to the agreements reached by the parties on specifics in their contract (which take priority pursuant to article 1.5 Unidroit Principles). In that scheme of action, the parties choose the Unidroit Principles in combination with an arbitration regime. Thanks to the advantages of the New York Convention that scheme ensures that a dispute, if any, is resolved and an award is enforceable in all approximately 170 contracting states of the New York Convention.[104] Thanks to the internet, and the far reaching accessibility of legal rules, knowledge and wisdom from most places of the world, it is possible to combine the choice of the Unidroit Principles with arbitration in many regions of the world.

42. Never before had companies so much alternatives to choose from. In combination with an arbitration clause, the Unidroit Principles provide a real game changer to international contracting which reduces risks and costs.

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[97] Art. 25-26 Rome I Regulation.

[98] https://www.hcch.net/en/instruments/conventions/full-text/?cid=31 (visted on 25 May 2024).

[99] See *id.*

[100] https://www.hcch.net/en/instruments/conventions/full-text/?cid=61(visted on 25 May 2024).

[101] E. Brödermann, *supra* note 44, at 2 (Introduction mn. 2).

[102] In a discussion of the Unidroit Principles on 7 June 2024 at a conference organised by Unidroit the occasion of the 30th anniversary of the Unidroit Principles, Pedro Galici, inhouse counsel of the Italian company ENI, argued that, instead of insisting on one-sided contracts, the choice of the Unidroit Principles as contractual regime would contribute to compliance with modern standards of ethical behavior (ESG).

[103] *See*, Unidroit, Official Comments, Art. 1.4 mn. 4, p. 12; E. Brödermann, *supra* note 49, Art. 1.4 mn. 3-4.

[104] *See* https://www.newyorkconvention.org/contracting-states, last visited on 26 May 2024.

43. In order to enhance the chances that the Unidroit Principles are accepted by the contract partner (who may not know them), it has proven helpful in practice to operate with a more self-explaining choice of the Unidroit Principles clause, e.g.:

This contract shall be governed by general principles and rules of international contract law, as compiled and developed by the International Institute for the Unification of Private Law (UNIDROIT), initially set up as an auxiliary organ to the League of Nations, i.e. the UNIDROIT Principles of International Commercial Contracts (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016), edited 2016, which shall apply as default rules for those issues which are not specifically regulated otherwise in this contract.[105]

V. Summary Assessment

44. In the author's assessment, the Unidroit Principles are the biggest achievement of the international legal society since the year 534 when Emperor Iustinian compiled the Roman law.[106] Further, due to their foundation on the overarching principle of good faith and fair dealing (Art. 1.7), on a very high level they can also be described as internationalising the concept of the Uniform Commercial Code which added, in the 1950s and 1970s, a general principle of good faith and fair dealing to common law.[107]

45. As a result of this considerable achievement of Unidroit to coordinate the compilation and development of the Unidroit Principles over so many decades, 'an independent legal system of transnational contract law'[108] is readily available which simply did not exist when the jubilee and the author first met in 1989. Thanks to the development of arbitration law and in particular arbitration rules, as discussed at **III.5** (mn. 25), it is possible to choose the Unidroit Principles as 'rules of law'. By way of Simplified Global Contracting, the complex three-level-system of the private international law for contracts can be avoided that is otherwise applicable in disputes before state courts in member states of the European Union. In arbitrations, the conservative limitation of choice of law to state law in article 3 paragraph 1 sentence 1 Rome I Regulation (as discussed at **III.2** mn. 17) will generally not apply.[109]

46. Simplified Global Contracting, combining in 2024 a choice-of-the Unidroit Principles clause with an arbitration clause represents a level of freedom which excels by far what we could have imagined in 1989. As international legal society, we have thus made progress towards an enhanced level of freedom during that time span since the first meeting between the jubilee and the author in 1989.

[105] Variation of the clauses first developed in E. Brödermann, "Overcoming Obstacles to the Application of the Unidroit Principles: Proposal for a Descriptive Choice of the UNIDROIT Principles Clause", Uniform Law Review (2021), p. 453, (with detailed reasons for the wording); E. Brödermann, *supra* note 44, Introduction at 12 (mn. 9d).

[106] E. Brödermann, *supra* note 98, p. 454.

[107] In the 2001 version, the UCC, § 1-201 (20) defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing."

[108] K.P. Berger, *supra* note 50, at 255, 269 (as cited *supra* at **III.3** mn. 21).

[109] In some situations, restrictions might follow from applicable treaty law, e.g. Art. VII of the European (Geneva) Convention on International Commercial Arbitration of 1961 Convention. In the same vein, it is at least at first sight not clear to a foreign user of a Spanish arbitration site which role, if any, article 34 paragraph 2 of the Spanish Arbitration Act (speaking of "*normas jurídicas elegidas*") plays with regard to Art. 29 paragraph 1 CIAM Rules (speaking of "*rules of law*" in the English version and of "*normas jurídicas"* in the Spanish version).