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Bridge over Troubled Waters for International Commercial Contracts—The UNIDROIT Principles 2016, An Overview from a Long Time User*

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Based on findings made during the research for a book,[1] *this Article will review how the UNIDROIT Principles of International Commercial Contracts 2016 (also referred to as*

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Editor's Note: Because many sources cited throughout the Article are only available in a foreign language and official translations could not be located, our editorial staff was unable to verify the substance. However, we have no reason to doubt the expertise of the Author. All other content has been verified for accuracy.

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1. ECKART BRÖDERMANN, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, AN ARTICLE BY ARTICLE COMMENTARY (2018) [hereinafter BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY]; reviewed, *inter alia*, by Klaus Peter Berger, *UNIDROIT Principles of International Commercial Contracts—An Article-by-Article Commentary, Eckart J.*

"UNIDROIT Principles") contribute to bridging differences between legal systems, especially between the common law and the civil law world of thinking, but also between different common law systems.[2] *This Article is especially pertinent to the perspective of U.S. lawyers practicing a common law system, which, distinctly from English law, includes a general good faith component. In seven Sections, it will describe the UNIDROIT Principles 2016 as a bridge over troubled waters (Part II). The starting point for the discussion examines the existing impediments to international business, which are caused by the differences between national legal systems ("Troubled Waters," II.A) and the resulting business need for a solution ("A Business Need for a Bridge Between Different National Legal Systems," II.B).*

As a business facilitator covering all general questions of contract law, the UNIDROIT Principles 2016 can provide that solution and reduce both risks and costs of international transactions ("The UNIDROIT Principles 2016 as a Tool Bridging Different National Legal Systems," II.C). The discussion will further include specific examples of negotiated compromises between different legal systems which have been incorporated into the UNIDROIT Principles 2016 ("The Components of the Bridge," II.D), developed by the international Working Group of the inter-governmental organization UNIDROIT and ratified by votes in the Governing Council of UNIDROIT, which represents the member states.

The Article will then include examples from the Hamburg, Germany based international law practice of the author who has used the UNIDROIT Principles regularly for more than fifteen years around the globe, without any problems, both for common law and for civil law clients, in various industries, and both at the stage of contract drafting and in arbitrations ("The Bridge is Stable," II.E).

The Article will further discuss existing freedoms in using the UNIDROIT Principles and existing limits of using the UNIDROIT Principles ("Crossing the Bridge: Freedoms and Limits in Using the UNIDROIT Principles 2016," II.F). Despite these limits, the Article will argue that the UNIDROIT Principles 2016 provide a bridge that facilitates the life of the legal profession ("Reasons for an Increased Use of the Bridge by the Legal Profession", II.G). It will finish with a conclusion (II.H).

Brödermann, Published by Wolters Kluwer, 34 ARBITR INT. 469, 469-71 (2018); Petra Butler, *Book Review: UNIDROIT Principles of International Commercial Contracts—An Article-by-Article Commentary,* 49 VICTORIA U. WELLINGTON L. REV. 409, 410 (2018); Ian Davidson, *Book Review, UNIDROIT Principles of International Commercial Contracts*, 93 ALJ 894, 967-68 (2019); François Dessemontet, *Book Review, Eckart Brödermann, Principles of International Commercial Contracts: An Article-By-Article Commentary, Alphen aan den Rijn: Kluwer Law International. 2018*, 36 J. INT'L ARB. 533, 533-37 (2019); Christiana Fountoulakis, *Brödermann Eckart J., UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary, Baden-Baden (Germany): Nomos, 2018. XCVIII, 433 pp.*, 21 EUROPEAN J.L. REFORM 427, 627-29 (2019); Lauro Gama, *Eckart J. Brödermann, UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*, REVISTA BRASILEIRA DE ARBITRAGEM 222, 222-25 (2018); Brenda Horrigan, *UNIDROIT Principles of International Commercial Contracts, An Article by Article Commentary*, 11 NYSBA N.Y. DISPUTE RESOL. LAW. 95, 95 (2018); Michael Patchett-Joyce, *UNIDROIT Principles of International Commercial Contracts*, SING. L. GAZETTE (2019), https://lawgazette.com.sg/lifestyle/book-shelf/unidroit-principles; Andrew Tetley, *UNIDROIT Principles 2016: An Article-by-Article Commentary*, ICC DISPUTE RESOL. BULL.1, 141-42 (2020).

2. Eckart Brödermann, *Managing the Future of International Contracting—A Tool for All IPBA Lawyers*, 92 INTER-PAC. BAR ASS'N J. 1, 44-49 (2018) [hereinafter *Managing the Future*]; Eckart Brödermann, *The Choice of the UNIDROIT Principles of International Commercial Contracts in a "Choice of Law" Clause*, 2 BUCERIUS L. SCH. J. 7-14 (2018) [hereinafter *Choice of the UNIDROIT Principles*]; Eckart Brödermann, *Die Zukunft der international Vertragsgestaltung, Risikomanagement durch die Wahl der UNIDROIT Principles*, 2018 IWRZ 246, 246-50 [hereinafter IWRZ 2018]; Eckart Brödermann, *UNIDROIT Grundregeln in der internationalen Vertragsgestaltung*, 2019 IWRZ 7-18 [hereinafter IWRZ 2019].

This Article will commence, however, with a wake-up-call to the readers, i.e., practitioners, academics, and students (Part I).

I. A WAKE-UP-CALL TO PRACTITIONERS, ACADEMICS AND STUDENTS

A. To Practitioners: Fear Not!

The UNIDROIT Principles of International Commercial Contracts 2016[3] are compatible with all major legal orders.[4] Based on the principle of party autonomy (Article 1.1),[5] the UNIDROIT Principles 2016 provide default rules on issues of general contract law.[6] They can be varied with very few boundaries relating to core aspects of fair dealing in international trade (Article 1.5 *in fine)*.[7] Thus, practitioners can start working with the

3. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016), https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

4. For common and civil law practitioners' perspectives demonstrating that they feel comfortable working with the UNIDROIT Principles, see Roger Barton, *The UNIDROIT Principles of International Commercial Contracts: A High-Level Analysis for the United States' Commercial Practitioner*, 2 HAMBURG L. REV. 77, 82 (2018) (for New York); Rena See & Dharshini Prasad, *The UNIDROIT Principles 2016: A Contemporary English Law Perspective*, 2 HAMBURG L. REV. 83, 105 (2018) (for England); Gerhard Wegen & Benedikt Keil, *To What Extent Do the UNIDROIT Principles Restate International Commercial Law? Principles Familiar to Civil Law & Principles Unfamiliar to Common Law—a Continental European, in Particular German Perspective*, 2 HAMBURG L. REV. 39, 60 (2018) (for Germany).

5. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.1.

6. *Id.* chs. 1-11.

7. *Id.* art 1.5; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27-28 (cmt. 2 on art. 1.5).

UNIDROIT Principles 2016 by using the contract templates they are familiar with as a starting point.[8] As will be shown in this Article, it is often cost, time, and risk saving to agree to the UNDROIT Principles instead of a "neutral" national law.[9] Not using an existing and stable bridge over troubled waters,[10] but rather using another way, requires a deliberate choice in many situations.[11] Various websites on the Internet provide access to international awards and domestic court decisions applying the UNIDROIT Principles.[12] Legal literature[13] including article-by-article commentaries[14] of the UNIDROIT Principles is also accessible. Use the tool that facilitates life in international contracting![15]

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8. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1.

9. Eckart Brödermann, *The UNIDROIT Principles as a Risk Management Tool*, *in* 2 INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, EPPUR SI MUOVE: THE AGE OF UNIFORM LAW ESSAYS IN HONOUR OF MICHAEL JOACHIM BONNELL TO CELEBRATE HIS 70TH BIRTHDAY 1282, 1295 (2016) [hereinafter *Risk Management Tool*].

10. SIMON & GARFUNKEL, BRIDGE OVER TROUBLED WATERS (Columbia Records 1970).

11. IWRZ 2019, *supra* note 2, at 13.

12. *See, e.g.*, UNILEX, http://www.unilex.info/instrument/principles (last visited Apr. 19, 2020); TRANS-LEX, https://www.trans-lex.org/ (last visited Apr. 19, 2020); *Law—Databases*, QUEEN MARY U. LONDON, https://www.library.qmul.ac.uk/subject-guides/law/databases/ (last visited Apr. 19, 2020); *CISG Database*, PACE L. SCH., http://www.cisg.law.pace.edu/ (last visited Apr. 19, 2020); ITA L., https://www.italaw.com/ (last visited May 13, 2020).

13. From the abundant literature, two publications from the chairman of the working group are particularly noteworthy: JOACHIM M. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed. 2005) [hereinafter AN INTERNATIONAL RESTATEMENT]; Michael J. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, 23 UNIF. L. REV. 1 (2018) [hereinafter Bonell, UNIF. L. REV. 2018]. A remarkable source of wisdom with many articles on the UNIDROIT Principles is INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, EPPUR SI MUOVE: THE AGE OF UNIFORM LAW ESSAYS IN HONOUR OF MICHAEL JOACHIM BONNELL TO CELEBRATE HIS 70TH BIRTHDAY, vols. 1-2 (Rome, 2016) [hereinafter FESTSCHRIFT BONELL]. See further, Faculty of Law at the Univ. of Hamburg, *Towards Use of the UNIDROIT Principles 2016 in Practice—a Bridge between Common and Civil Law (Eckart Brödermann & Marian Paschke*, ed.), 2 HAMBURG L. REV. 5, 5-120 (2018); INT'L BAR ASS'N, PERSPECTIVES IN PRACTICE OF THE UNIDROIT PRINCIPLES 2016, VIEWS OF THE IBA WORKING GROUP ON THE PRACTICE OF THE UNIDROIT PRINCIPLES 2016 (2019), https://www.ibanet.org/Publications/Perspectives-in-Practice-of-the-UNIDROIT-Principles-2016.aspx [hereinafter IBA PERSPECTIVES IN PRACTICE].

14. In addition to BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, see COMENTARIO A LOS PRINCIPIOS DE UNIDROIT PARA LOS CONTRATOS DE COMERCIO INTERNACIONAL (Morán Bovio ed., 2003) [hereinafter MORÁN BOVIO'S COMENTARIO]; COMMENTARY ON THE UNIDROIT PRINCIPLES (Stefan Vogenauer ed., 2d ed., 2015) [hereinafter VOGENAUER'S COMMENTARY 2D] following a first edition which he co-edited with Jan Kleinheisterkamp (2009) [hereinafter VOGENAUER'S COMMENTARY 1ST]; RADU BOGDAN BOBEI, CONCISE COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, at 38 (Andreea Alexe ed., 2017).

15. Ghada Qaisi Audi & Eckart Brödermann, *Deploying Robust Default Rules: International Commercial Contracts Under UNIDROIT*, ACC-DOCKET (Apr. 19, 2020), https://www.accdocket.com/articles/international-commercial-contracts-under-unidroit.cfm.

B. To Academics: Help!

The time is ripe to speak up! To prepare the students to cope with the business needs of a global world, we need to teach more than national law developed with the focus on national needs. When teaching general contract law or international transactions, it is helpful to point to the UNIDROIT Principles 2016 as an international benchmark recommended by the United Nations Commission on International Trade Law (UNCITRAL).[16]

C. To Students: Watch Out!

Law is a reflection of society (*Ubi societas ibi ius*).[17] As the upcoming generation of lawyers in international contracting, it is helpful to learn about the UNIDROIT Principles 2016 as a cutting-edge legal tool of general contract law. You will be the first U.S. generation to apply them systematically, at least as your "Plan B" when you cannot agree on the law that you have studied. Enjoy becoming part of such a development!

II. THE BRIDGE OVER TROUBLED WATERS

A. Troubled Waters

Differences between national legal systems can cause trouble when a company or entrepreneur—jointly hereinafter referred to as "merchant"—engages in international business.[18] The different national legal systems may not match with each other, or even contradict one another.[19] There may be a conflict of laws.[20]

When the contract and its stakeholders, including the holding company of any of the parties, have relations within different national

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16. *See, e.g.*, U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Its Forty-Fifth Session, U.N. GAOR, 62d Sess., U.N. Doc. A/67/17 (June 25-July 6, 2012); UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2010, Supp. No. 17 no. XIV, *Endorsement of texts of other organizations*, at 33, no. 139 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2010).

17. This sentence is attributed to Hugo Grotius (1583-1645). *See* Christian Starck, *Rechtsvergleichung im öffentlichen Recht*, 52 JZ 1021, 1025 (1997).

18. Eckart 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*, 11 UNIF. L. REV. 749, 752 *passim* (2006).

19. *See generally* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEORIDES, CONFLICT OF LAWS 144 (5th ed. 2010); AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 13; Bonell, UNIF. L. REV. 2018, *supra* note 13, at 22-23.

20. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 22-23.

legal systems, caution is required.[21] There exist entire encyclopedias on comparative law[22] that can assist in discovering the differences among national legal systems, which constitute potential pitfalls. For the purposes of this Article, it may suffice just to point out a few examples.

Let us start with the *mind-set* of arbitrators and judges who have the ultimate power of interpretation if the matter should come to a dispute.[23]

Depending on their legal education, arbitrators and judges will take different approaches to interpretation.[24] A common law trained judge is likely to start with the "plain meaning of the words," as that is presumed to best express the parties' intent.[25] She or he may be reluctant to accept circumventing evidence, such as the drafting history of the contract, as indication of the intention of the party.[26] In contrast, a civil law trained judge may be bound "to ascertain the true intention rather than adhering to the literal meaning of the declaration," in the words used in the German Civil Code.[27] This is commonly interpreted as a door-opener to consider the underlying circumstances of the case including, notably, the history of the contract (e.g., the exchange of drafts in mark-up versions and surrounding email exchanges).[28] Additional circumstances may include the interests of the parties and the purpose and structure of the contract as viewed from their respective perspectives.[29] In a famous case of the old

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21. *Risk Management Tool*, *supra* note 9, at 1283, 1286.

22. INT'L INST. OF LEGAL SCI., INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, (Victor Knapp ed., 1st ed. 1973).

23. Eckart Brödermann, *§ 6 Internationales Privatrecht*, *in* MÜNCHENER ANWALTSHANDBUCH INTERNATIONALES WIRTSCHAFTSRECHT 345, 414-15 (Burghard Pilz ed., 2017) [hereinafter *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB].

24. *Id.* at 418.

25. *See*, *e.g.*, Greenfield v. Philles Records, 98 N.Y.2d 562, 569-70 (2002).

26. *Id.*

27. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 133, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.) (interpreting declarations, which applies also to contract interpretation in the context of applying Section 157 German Civil Code); *see*, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 10, 2012, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] X ZR 37/12, 598 (599 no. 18), 2013 (Ger.); Martin Ahrens, *§ 133*, *in* BGB KOMMENTAR 144 (Hanns Prütting et al. eds., 14th ed. 2019) (cmt 1). *See, e.g.*, CIVIL CODE [C. CIV.] [CIVIL CODE] art. 1156 (1804) (Fr.) as still in force, unchanged, in Luxemburg and Belgium, "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes." C. CIV. art. 1188 (2016) (Fr.).

28. BGH Jan. 29, 2003 – VIII ZR 300/02, NJW-RR 2003, 18 NJW 926-27, 2003 (Ger.); Ahrens, *supra* note 27, at 148 (cmt. 35 on § 133).

29. Ahrens, *supra* note 27, at 148-49 (cmt. 38 on § 133).

German *Reichsgericht*,[30] the parties agreed on the sale of "Haakjöringsköd," which literally means Norwegian shark meat, while both actually meant whale meat.[31] The contract was interpreted to be intended as a contract for whale meat although the written agreement was clear otherwise.[32] The same result of interpretation is difficult to imagine under the four corners rule utilized under the common law.[33] The approach of an arbitration tribunal may thus depend on its composition and the comparative legal experience of the arbitrators.[34]

The language chosen for international contracts can cause trouble and bear risks.[35] When any of the parties involved in the negotiation and drafting of an English document is a non-native English speaker, a determination of the joint intention of the parties can become a complex issue.[36] There may be different understandings depending on the level of foreign language proficiency. In case of a bilingual document, it makes a difference whether the contract contains a clause regulating the issue of hierarchy between the language versions.[37]

Sometimes contracts drafted in English between parties in circumstances in which none of them is represented by a native English speaker contain a choice of English or New York law clause, and they are combined with a choice of London or New York as venue for dispute resolution.[38] The reasons why a merchant from a civil law jurisdiction would accept such choice may vary from personal attraction to London or New York as a city to blind assumptions that the law of a certain jurisdiction is good for use because of a long tradition in a given industry.[39]

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30. Reichsgericht [RG] [Court of last resort for Civil matters] June 8, 1920, RGZ 99 (147, 148), https://www.iurastudent.de/leadingcase/der-haakj%C3%B6ringsk%C3%B6d-fall-rgz-99-147 (Ger.).

31. *Id.*

32. *Id.*

33. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 384 (cmt. 299).

34. *Id.* at 414-15 (cmt. 299).

35. *See generally* VOLKER TRIEBEL & STEFAN VOGENAUER, ENGLISCH ALS VERTRAGSSPRACHE 116-31 (2018); *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 381-84 (cmts. 139-157).

36. Michelle J. Rozovics, *Drafting Multiple-Language Contracts*, ABA (Apr. 3, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/april_may/drafting_multiple-languagecontractswhenyouonlyspeakenglish/.

37. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 384 (cmt. 153); *see* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 4.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016) (noting linguistic discrepancies in case of equally authoritative versions of a contract).

38. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 382.

39. Over the years, the author has observed all of such scenarios in practice (e.g., for a contract on the sale of vessels, for a helicopter sale contract, etc.).

In recent years, Chinese or European parties increasingly accept Hong Kong law and Hong Kong as a venue for China-related contracts, without realizing the consequences of such a change from a civil law to a common law environment.[40] The risks for the non-native English speaker contracting in English may increase if a native speaker judge or arbitrator interprets the contract pursuant to the four corners rule.[41]

A similar risk exists if a native speaker and a non-native speaker contract with each other.[42] Words like warranty, guarantee, indemnification, or suretyship may have different meanings, especially when combined with existing pre-concepts on the rules of interpretation in different jurisdictions.[43] Without detailed analysis of the chosen law, these differences are often overlooked.[44] Potential trouble is then programmed into a subsequent dispute.[45]

It is not possible, nor necessary, to discuss in detail the risks that may arise due to different understandings of the same word originating from deviating training received.[46] Suffice it to point out, e.g., the different understandings with regard to the expression "first floor."[47] For some people, including Americans, it is the ground floor, for others, including the English or New Zealand population, or all continental Europeans, it is the floor above the ground floor.[48] If even basic words may have such a different meaning, it is easy to imagine the risks of using legal expressions in differing languages. For example, the expression "joint and several" means for lawyers from common law jurisdictions that co-creditors (i.e.,

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40. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 422 (cmt. 312).

41. *Id.* at 384 (cmt. 299); TRIEBEL & VOGENAUER, *supra* note 35, at 23-32 (with an overview of the most important sources of errors when a German native speaker uses the English language).

42. TRIEBEL & VOGENAUER, *supra* note 35, at 23-32.

43. *Id.* at 87-96.

44. *Id.* at 23-24; *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 373 (cmt. 110).

45. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 373 (cmt. 110).

46. TRIEBEL & VOGENAUER, *supra* note 35, at 26-27.

47. *First Floor*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/first%20floor (last visited Apr. 19, 2020).

48. Remarkable is the following observation of a Canadian colleague living in Australia asked how an Australian would understand the expression "first floor":

> This is actually an interesting question. Unlike here in Canada where we refer to the ground floor as the first floor (like the USA), the Australians traditionally use the English scheme (the first floor is one level above the ground) but I understand that for newer buildings in Australia they now refer to floors as "levels" and in some buildings the ground floor is designated as Level 1.

Id.

co-obligees, in the neutral words of the UNIDROIT Principles 2016)[49] will file a claim against the debtor (i.e., the obligor)[50] only jointly (joint obligation[51]). In contrast, for lawyers trained in civil law, each co-creditor (i.e., co-obligee) is free to pursue the claim against the debtor (obligor) alone (as these are separate obligations[52]) and later forward the share of the other co-creditor (i.e., co-obligee) to him or her.[53] Through our different legal training, we operate with different presumptions, even assumptions, what words mean.[54] The concrete issue over whether there is potential for different understandings can be easily settled if discussed during contract negotiation and drafting.[55] The issue of whether a "joint and several" co-creditor (i.e., co-obligee) shall be entitled to pursue the claim alone will depend upon the level of trust between the co-creditors (i.e., co-obligees) and their assessment of the risks; (1) of misappropriation of funds by a co-creditor, and (2) of insolvency of the co-creditor.[56] The parties simply need to make their choices, which is an easy issue and takes usually only a few minutes once discovered.[57] In reality, parties engaging in joint and several co-creditor-relationships will rarely realize that using the expression "joint and several" will require such a choice and may become an issue in case of dispute.[58]

Even if a lawyer representing a party is an English native speaker and knows the chosen contract law, the mere fact of contracting with a non-

49. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 1.11 4th hyphen, 11.2.1 lit. b (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

50. *Id.* art. 1.11 4th hyphen.

51. Sonja Meier, *Chapter 11: Plurality of Obligors and Obligees*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 1244 *passim*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393, 396 (cmt. 1 on art. 11.2.1).

52. Meier, *supra* note 51, at 1252 (cmt. 28 on art. 11.2.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393 (cmt. 1 on art. 11.2.1).

53. *See also* Annex 2 (in the electronic version at VI.A) (on the ambiguity of "joint and several" creditors (i.e., obligees, Art. 1.11)).

54. *See, e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393 (cmt. 1 on art. 11.2.1).

55. *Id.*

56. *Id.* at 394 (cmt. 2 on art. 11.2.1); *see also id.* Annex 2 (in the electronic version at VI.A).

57. *Id.*; Meier, *supra* note 51, at 1253-54 (cmt. 34 on art. 11.2.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393-94 (cmts. 2-3 on art. 11.2.1).

58. The different pre-conceptions of "joint and several co-obligees" was so debated within the Working Group over years that it could not agree on a default rule on this issue. *See* Meier, *supra* note 51, at 1252 (cmt. 29 on art. 11.2.1). Rather, chapter 11, section 2 offers three choices to choose from. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 361 (Introduction to Plurality of Obligors and Obligees cmt. 3).

native speaker with a differently shaped mind-set constitutes a risk.[59] The apparent advantage of the native speaker may melt away if the misunderstanding becomes obvious and leads to serious litigation or arbitration.[60]

A famous German lawyer who has lived for decades as barrister in London goes as far to say that the mere fact of concluding a contract under German law in the English language constitutes a risk.[61] Every translation constitutes an interpretation due to the different structure of the languages.[62] A translation will often cause discussion in a second round if the original text should be adapted to match the interpretation that was chosen when translating.[63]

Another example of troubled water may be due to diverging mandatory law.[64] A judge will have to apply all domestically mandatory law applicable in its court.[65] An arbitrator may apply a more restricted scope of mandatory law, i.e., only internationally mandatory law.[66]

A further example of troubled water can be found in the differences in establishing and proving foreign law.[67] A common law trained judge will consider the question of determining the contents of foreign law as a question of fact.[68] The production of evidence on foreign law by expert

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59. *See, e.g.*, Volker Triebel, *PROVIDED THAT—Gefahren und Missverständnisse eines versteckten Rechtsbegriffs*, *in* FESTSCHRIFT FÜR SIEGFRIED H. ELSING ZUM 65. GEBURTSTAG 1047, 1049-51 (Werner F. Ebke, Dirk Olzen & Otto Sandrock eds., 2015).

60. An example from the author's practice: The English expression "change of control" led to an entire arbitration because of different understandings of that expression in different cultures and in the context of different laws.

61. Triebel, *supra* note 59, at 1048; *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 383 (cmt. 149).

62. *See* TRIEBEL & VOGENAUER, *supra* note 35, at 33-52.

63. *Id.*

64. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 370, 434.

65. *See, e.g.*, Commission Regulation 593/2008 (Rome I), art. 9 para. 2, 2008 O.J. (L 177) 6, *corrected in* 2009 O.J. (L 309) 8 (EU) (noting the courts in the Member States of the European Union).

66. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 4 on art. 1.4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 24-26 (cmts. 2-5 to art. 1.4).

67. *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 99 (2014) (cmt. 3-31); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 254, 255 (cmt. 9-002) (Sir Lawrence Collins et al. eds., 14th ed. 2006); ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS 598-600 (2008) (no. 14.64); RICHARD FENTIMAN**,** FOREIGN LAW IN ENGLISH COURTS 62 (P.B. Carter, QC ed., 1998).

68. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 406 (cmt. 251); *see* BRIGGS, *supra* note 67; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 67; DICKINSON, *supra* note 67; FENTIMAN**,** *supra* note 67.

witnesses can be expensive.[69] The judge may treat briefs of the lawyers on a chosen foreign law with care.[70] A civil law trained judge will be open to the presentation of a foreign law by the parties;[71] however, pursuant to the *iura novit curia* principle,[72] he or she is also free, personally, to research a foreign statute, court decision or literature.[73] From a civil law perspective, it is submitted that a rule does not change its character depending on the qualification of the reader.[74] Arbitrators will take different approaches depending on their legal background and training.[75]

In addition to multiple further differences between civil and common law on a procedural level,[76] there exist multiple substantive law differences.[77] One typical example is the different approach to handling a battle of forms, with the *last shot*-doctrine in the USA (where the terms sent out last will prevail) on the one extreme side, and the *first shot*-doctrine in the Netherlands on the other extreme end.[78]

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69. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 406 (cmt. 251); *Eckart Brödermann*, *Zustandekommen von Rechtswahl-, Gerichtsstands- und Schiedsvereinbarungen—Rechtssoziologische Notizen*, *in* FESTSCHRIFT FÜR DIETER MARTINY ZUM 70. GEBURTSTAG 1045, 1052 (Mohr Siebeck ed., 2014) [hereinafter FESTSCHRIFT MARTINY]; Eckart Brödermann, D*ie Bedeutung des (internationalen) Gesellschaftsrechts in internationalen zivil- und handelsrechtlichen Schiedsverfahren*, *in* FESTSCHRIFT FÜR GERHARD WEGEN ZUM 65. GEBURTSTAG 591, 603 (2015).

70. BRIGGS, *supra* note 67, at 99 (cmt. 3-31).

71. For example, Section 293, sentence 1 of the German Code of Civil Procedure provides, "The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them." ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 293 (Ger.).

72. In English: "The court knows the law." *See* Christian Koller, *Chapter 2 Civil Justice in Austrian-German Tradition*, 34 IUS GENTIUM 35, 40 (2014).

73. For example, Section 293, sentence 2 of the German Code of Civil Procedure provides, "In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use." ZPO § 293 (Ger.).

74. Class Material of Professor Brödermann's Class on "International Contracts—Negotiation, Conception, Drafting, incl. Comparative Substantive Law, UNIDROIT Principles of International Commercial Contracts 2016 and Private International Law with an Eye on International Procedural law and International Arbitration," University of Hamburg, Faculty of Law, Class Materials Summer 2020, at 71 (on file with author).

75. The author has encountered an arbitrator from civil law jurisdictions who thought that the *iura novit curia* principle does not apply in international arbitration. Others would qualify this as outright wrong.

76. E.g., different approaches to the taking of evidence, towards privileges and attorney secrecy, and facilitating settlement during a court procedure or an arbitration. *See, e.g.*, *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 410 (cmt. 266) (summary).

77. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17.

78. *See* Giesela Rühl, *The Battle of the Forms: Comparative and Economic Observations*, 24 U. PA. J. INT'L ECON. L. 189, 190-91 (2003).

Limitation periods tend to be procedural questions in common law jurisdictions and a substantive matter in civil law jurisdictions.[79] Some jurisdictions may even consider them as mandatory.[80] The compromise rules in the UNIDROIT Principles on this and other issues will be discussed below at Section II.D.2. The water of comparative law with various approaches of diverging legal systems bears different shades causing potential trouble if not properly considered.

B. A Business Need for a Bridge Between Different National Legal Systems

Merchants who participate in international business need to navigate through such troubled waters.[81] They require adequate legal tools to achieve their economic goals.[82]

Merchants do *not* need hurdles to their conducting of business created by multiple laws, including the need to invest in attorney fees to determine the best choice of law under the circumstances.[83] They need the law "as facilitator—rather than impediment—to international business."[84]

In the experience of the author, merchants do not like to confront technicalities of differing laws and issues of dispute.[85] In a good contract negotiation, the important issues will be discussed in sufficient depth and addressed in the contract.[86] Ideally, there will never be a need to look again into the contract during its performance.[87] After contract conclusion, changes to the market, to the stakeholders of the contract, or unforeseen

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79. For common law jurisdictions, in USA: *see, e.g.*, DIETER MARTINY & CHRISTOPH REITMAN, INTERNATIONALES VERTRAGSRECHT DAS INTERNATIONALE PRIVATRECHT DER SCHULDVERTRÄGE 291 (2018) (cmt. 3.251); Peter Hay, *Die Qualifikation der Verjährung im US-amerikanischen Kollisionsrecht*, 1989 IPRAX 197 *passim*. For civil law jurisdictions: *cf., e.g.*, BGB § 194 (Ger.).

80. For England: *see, e.g.*, BRIGGS, *supra* note 67, at 579 (cmt. 7.211); *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 427 (cmt. 334, at 'Praxistipp').

81. *See, e.g.*, AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 17; *Risk Management Tool*, *supra* note 9, at 1284-85 (Introduction to Legal Risk Management); *id.* 1286-90 (Change of the Legal Environment for Cross-Border Contracts).

82. *See, e.g.*, AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 17*; Risk Management Tool*, *supra* note 9, at 1284-85 (Introduction to Legal Risk Management); *id.* 1286-90 (Change of the Legal Environment for Cross-Border Contracts).

83. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 368.

84. See the title of the conference, *Using Law as Facilitator—Rather than Impediment—to International Business.*

85. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 368 (cmt. 87).

86. This follows from the requirements of risk management with the care of a diligent merchant. *See, e.g.*, *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 392-93 (no. 191).

87. Except for the requirement of proper documentation. *See id.* at 78-79, 83 (no. 123).

party behavior may lead to impediments, which give reason to have the contract written out in detail.[88] Yet, depending on: (1) the approach, mentality, awareness of comparative law and legal and cultural risk as a result of the combination of stakeholders in the contract, (2) the available experience of the contracting business partners in international business, (3) their respective market power,[89] (4) the available time, budget and energy, as well as (5) multiple other circumstances,[90] the parties will often omit to regulate all issues that may come up for discussion during the life of the contract.[91]

In case of dispute, two key clauses provide the setting for any dispute resolution process.[92] These are the dispute resolution clause and the choice of law clause, including soft law.[93] Most contractual regimes permit choice of court and arbitration clauses, possibly combined with a clause on conciliation/mediation; and they permit choice of law, sometimes with restrictions to avoid the evasion of certain mandatory rules contained in the domestic law.[94]

When merchants meet contract partners from other jurisdictions, there is always a potential conflict of laws.[95] The contractual regime needs to be coherent and (usually) cannot give room for two conflicting national laws.[96] A choice must be made.[97] Merchants will often try using their home law and to impose it with market power, if any, on their contract partners.[98]

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88 *Id.*

89. *See* in detail Brödermann, *supra* note 18, at 752-54; *see also § 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 374-88.

90. These include market development, financial constraints, business and secondary goals of the acting persons, and the relative importance of the contract project for the merchants in relation to other business. *See generally § 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 374-88 (noting the impact of non-legal circumstances on contract conclusion).

91. *See* Eckart Brödermann & Philipp von Dietze, *Vertragsmanagement "Vom NDA bis zur Abwicklung des Exportgeschäfts," in* HAMBURGER HANDBUCH DES EXPORTRECHTS 60, 64-67 (cmts. 18-27) (Marian Paschke, Christian Graf & Arne Olbrisch eds., 2014).

92. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 371 (cmt. 102).

93. *Id.*

94. *See, e.g.*, *id.* at 426-27.

95. *See* Brödermann & von Dietze, *supra* note 91, at 74-76.

96. On rare occasions, several laws are combined. For example, during the days when the author was still ignorant about the existence of the UNIDROIT Principles, he settled a U.S.-Russian arbitration case in Paris. Upon insistence of the other side, English law was chosen for the settlement agreement, combined with an arbitration clause and a clause of *dépeçage,* whereby a clause on good faith and fair dealing, integrated upon the author's insistence, was submitted, for its interpretation, to German law.

97. *See* Brödermann & von Dietze, *supra* note 91, at 74-76.

98. *Id.* at 75; *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 374-76; Brödermann, *Choice of Law and Choice of UPICC Clauses in the Shadow of the Dispute Resolution Clause*, 1 HAMBURG L. REV. 21-51 (2016).

This mechanism has two obvious limits: *First,* as contract partners are becoming stronger due to business concentration effects in many industries, this approach will not always be successful; and *second,* the character of national law is not designed to regulate and serve the needs of international business.[99] For example, they may lack provisions on time-zone management[100] or foreign currency set-off.[101] Similarly, the choice of a neutral third country's law as a compromise between the parties is also full of risks.[102] For example, from a U.S. perspective, English law has a different approach to "good faith."[103] Regarding Swiss law, which is also often chosen as the law governing international business contracts, it has been observed that many questions have not yet been decided by the Supreme Court.[104]

Without tools to cope with the conflict of laws, merchants take remarkable risks by operating under unknown laws.[105] In sum: (1) there is a business need for a bridge between different national legal systems, and (2) merchants may expect the legal community to offer legal tools which are innovative and adapted to the fundamental changes in other areas of human knowledge that shape the business environment.[106]

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99. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17.

100. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.12(3) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

101. *Id.* art. 8.2.

102. *See* Anish Wadia & Magdalena Göbel, *CEAC's 10th Anniversary Arbitration Conference on China's Belt and Road Initiative, A Report on the Common and Civil Law Perspectives viz. the Interplay Between the UNIDROIT Principles and the CISG*, 2 HAMBURG L. REV. 107, 114 (2018) (summarizing an assessment on Swiss law as neutral law by Ingeborg Schwenzer); Bonell, UNIF. L. REV. 2018, *supra* note 13, at 16-17 n.2 (quoting Ingeborg Schwenzer in *Global Unification of Contract Law*, 21 UNIF. L. REV. 60, 63-64 (2016)); Brödermann, *supra* note 18, at 754.

103. For an English example: *see* James Spencer & Co Ltd v Tame Valley Padding Co Ltd [1997] EWCA Civ 2288. For the U.S. legal system: U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 2017); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

104. *See, e.g.*, Wadia & Göbel, *supra* note 102. For similar reasons, the choice of the law of Belgium is a happenstance compromise; as once proposed in the author's practice to his German client by its (future) U.S. contract partner because Belgium lies somewhere in the middle between the United States and Germany and Brussels is convenient to reach by plane. *See* Brödermann, *supra* note 18, at 754.

105. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17. As a Hongkong based in-house counsel put it once: Sometimes you have to close your eyes and prey to get the business. This applies especially to negotiation scenarios in which the contract partner comes from a culture in which change proposals may be felt as offensive, and as a disrespect of the person submitting the proposal.

106. *See id.* at 16-21, 38-41.

C. The UNIDROIT Principles 2016 as a Tool Bridging Different National Legal Systems

This is the point at which the UNIDROIT Principles 2016 come into play.[107] They provide an answer for the legal community to the business needs for global trade.[108] They have been developed under the auspices of the intergovernmental-organization "International Institute for the Unification of Private Law" ("UNIDROIT" with regard to its French designation "*Institut international pour l'UNIfication du DROIT privé*").[109]

During a time span of more than thirty-five years, the UNIDROIT Principles were first negotiated and released in 1994 and then developed further, by supplementing additional topics, to become in the end the UNIDROIT Principles 2016, which cover the full range of questions of general contract law, whereby the so-called "black-letter rules" have been supplemented by "official comments" and illustrations.[110] Organized in eleven chapters, they provide 211 articles on general contract law, bridging common and civil law legal thinking.[111]

With regard to various issues ranging from validity of the contract, performance and non-performance of the contract, third party rights and conditions, assignment of rights and limitation of periods, the UNIDROIT Principles 2016 contain a very broad scope which exceeds the scope of the issues covered by the United Nations Convention on the International Sale of Goods (CISG)[112] by far.

The specific content of the rules is the result of significant time and effort spent by the Working Group, which took particular care to use a

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107. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

108. *Id.* at xxix (Introduction to the 1994 edition: "intended to provide a system of rules especially tailored to the needs of international commercial transaction").

109. *Id.* (emphasis added) (French version).

110. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); *e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 7 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 14).

111. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, at viii (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 3-7 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmts. 8, 10 and 13).

112. United Nations Convention for the International Sale of Goods, Apr. 11, 1980 and 1489 U.N.T.S. 3 [hereinafter CISG].

neutral language, avoiding terminology "peculiar to any given legal system."[113]

The UNIDROIT Principles 2016 have been accepted by the Governing Council of UNIDROIT, which represents sixty-three member states, and were translated into sixteen languages.[114]

The Principles are not state law but "rules of law";[115] however, in practice they **reduce costs** (by avoiding research on otherwise applicable foreign law) and they **reduce risks** (of unknown pitfalls in foreign national laws designed to function in a national environment).[116]

The UNIDROIT Principles 2016 cover a broad range of purposes.[117] They thrive to provide a tool to international trade on many levels.[118] According to their preamble, the UNIDROIT Principles 2016 cover a wide range of applications, including their application as **general principles of law** or the *lex mercatoria*.[119] They may be applied if no choice was made, or to interpret or supplement uniform law instruments or domestic law.[120] They may serve as a model for national and international legislators.[121]

For example, several changes in the contract law reform of 2016 in France can be traced back to the UNIDROIT Principles.[122] UNCITRAL has circulated the UNIDROIT Principles in 2006 to all its Member States and has recognized them as **"general rules for international commercial contracts"** and "commended" their use, "as appropriate, for their intended

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113. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 6; Stefan Vogenauer, *Introduction*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 17 (referencing, in cmt. 122, OLIVER REMIEN, DIE UNIDROIT-PRINZIPIEN UND DIE GRUNDREGELN DES EUROPÄISCHEN VERTRAGSRECHTS: EIN VERGLEICHENDER BLICK IN GRUNDREGELN DES EUROPÄISCHEN VERTRAGSRECHTS 64, 74 (E. Cashin Ritaine & F. Lein, eds., 2007)); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 7 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 13).

114. I.e., fifteen languages described at BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 6 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 12), plus Vietnamese (email exchange on February 18 and May 2, 2020, with the translators Nguyen Minh Hang (2016 edition) and Net Le (1994 edition) (on file with the author)).

115. *Id.* pmbl. ¶ 1.

116. IWRZ 2019, *supra* note 2, at 12.

117. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

118. *See, e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 1-2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3); *id.* at 4-5 (cmt. 9).

119. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl. ¶ 3.

120. *Id.* pmbl. ¶¶ 4-6.

121. *Id.* pmbl. ¶ 7.

122. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 23; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* 1, at 18 (cmt. 13 on pmbl.).

purposes" in 2007.[123] The endorsement was repeated for the 2010 edition.[124] Courts and arbitration tribunals around the globe have applied or referred to the UNIDROIT Principles.[125]

The UNIDROIT Principles 2016 can be described as a "disruptive" legal technology[126] because they tear down mental walls in the heads of lawyers accustomed to operate solely within state law and not with soft law. They are essentially based on a system by which each party is responsible for its own sphere of influence,[127] unless there is *force majeure*[128] or the parties agree otherwise,[129] whereby there is an underlying duty of good faith and fair dealing of the binding nature of contracts and of trying to uphold a contract wherever it is reasonably possible.[130] For businesswomen and businessmen this is usually acceptable. The UNIDROIT Principles 2016 thus provide a valuable soft law tool bridging different national legal systems.[131]

The bridge of the UNIDROIT Principles 2016 is thus ready to be used, thanks to approximately thirty-five years of titanic effort of an inter-governmental organization as supported by many comparative law experts representing all major legal systems and all continents who worked in,

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123. U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Its Fortieth Session U.N. GAOR, 62d Sess., U.N. Doc. A/62/17 (June 25-July 12 and Dec. 10-14, 2007) (Part I); UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2010, Supp. No. 17 no. XIV, *Endorsement of texts of other organizations*, at 50-52, no. 213 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2010) ("Congratulating Unidroit on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts, Commends the use of the Unidroit Principles 2004, as appropriate, for their intended purposes.").

124. U.N. Comm'n on Int'l Trade Law, *supra* note 16; UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2010, Supp. No. 17 no. XIV, *Endorsement of texts of other organizations*, at 33, no. 139. It is reasonable to expect a further endorsement of the 2016 edition, *see* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 21 n.25.

125. *See* UNILEX ON UNIDROIT PRINCIPLES & CISG, http://www.unilex.info (last visited Apr. 19, 2019); sources cited *supra* note 12.

126. *See, e.g.*, *Managing the Future*, *supra* note 2, at 46; IWRZ 2019, *supra* note 2, at 15, 17-18 (cmt. 6 in the English summary).

127. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 183 (Introduction to Chapter 7 cmt. 2).

128. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

129. *Id.* art. 7.1.6.

130. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 3 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 7).

131. *See, e.g.*, H.D. Gabriel, *The Role of Soft Law in Institutional International Commercial Law and Why It Is a Good Idea*, *in* FESTSCHRIFT BONELL, *supra* note 13, at 273 *passim*; *id.* at 284 ("one of the most successful and ambitious recent soft law instruments").

with and for the Working Group, watched by observers from practice.[132] It is often wise to use the bridge of the UNIDROIT Principles 2016 in order to cross the troubled waters of comparative law and to avoid the leap into the dark of a foreign national law.[133] In other areas of knowledge, such as medicine, there exist well established processes and practices on how to test and approve, e.g., a new pharmaceutical entering the market.[134] For new international legal instruments there exists no such generally accepted approval process if the rules are created as soft law.[135] In the case of the UNIDROIT Principles 2016 there exist supplements that have the same effect, and which shall be repeated here as a summary: (1) *To start*, there was the long and transparent process of their creation[136] through an international Working Group working under the auspices of an inter-governmental organization; (2) *Secondly,* the results of the Working Group were subjected to a vote of the Council of UNIDROIT representing the member states; (3) *Thirdly,* the UNIDROIT Principles 1994, 2004, 2010 and 2016 have been successfully used by a number of lawyers, and by many arbitration tribunals and courts (this will be discussed later at Section II.E); (4) *Fourthly,* worldwide legal literature is full of positive reactions to the UNIDROIT Principles 1994, 2004, 2010 and even 2016 and criticism is limited to detail;[137] (5) *Fifthly,* as mentioned, UNCITRAL has twice commended their use as "general rules for international commercial

132. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, at xvii-xx, xxv-xxvi, xxx-xxxv.

133. This expression finds its basis in a famous statement of the German private international law professor Leo Raape. *See* LEO RAAPE, INTERNATIONALES PRIVATRECHT 90 (5th ed. 1961). He compared applying foreign law with a "jump into the darkness." *Id.* Raape was an open-minded professor of law and later "Rektor" at the University of Hamburg since 1924, and *nota bene*, he was voted down in 1933 with his proposal at the German conference of University "Rektors" to protest against the dismissal of Jewish colleagues. *Leo Raape*, WIKIPEDIA, https://de.wikipedia.org/
wiki/Leo_Raape (last visited Apr. 19, 2020).

134. *See, e.g.*, *USA Development & Approval Process / Drugs*, FDA, https://www.fda.gov/drugs/development-approval-process-drugs (last visited Apr. 19, 2020).

135. *See* Felix Dasser, *"Soft Law" in International Commercial Arbitration*, 402 RECUEIL DES COURS 389, 452-474 (2019) (Chapter IV, part C. "Substantive 'soft law"); *see also* Felix Dasser, *Soft Law in International Commercial Arbitration—A Critical Approach*, 24 AUSTRIA Y.B. INT'L L. 111, 111-27 (2019).

136. *See*, *e.g.*, *Preparatory Work for the 4th Edition of Principles of International Commercial Contracts*, UNIDROIT, https://www.unidroit.org/unidroit-principles-2016/preparatory-work (last visited on Apr. 19, 2020) (all materials documenting the discussion).

137. *See, e.g.*, Meier, *supra* note 51, at 1243 (Introduction to Section 11.2 of the PICC cmt. 4); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 393 (cmt. 2 on art. 11.2.1) (noting objections).

contracts" in resolutions of its General Assembly.[138] This combination of factors must suffice to make it "knowable" to practitioners that the UNIDROIT Principles 2016 provide a usable tool for international contracting.[139] Subject to applicable mandatory law,[140] they provide for general business contract law "law without walls,"[141] a universal space free from national contract law.

It is further submitted out of personal experience many years ago that, once one has undertaken the task of using the UNIDROIT Principles as a benchmark to detect possible pitfalls, one may realize that it is easier and more cost-efficient just to choose them whenever it is not possible to impose one's own national law.[142] They provide the perfect Plan B to choosing the law of one's home jurisdiction.[143]

D. The Components of the Bridge: An International Restatement plus Negotiated Compromises

The components of the bridge, i.e., the individual rules that jointly constitute the UNIDROIT Principles 2016, are easy to comprehend both by merchants and lawyers, regardless of their training.[144] They restate an international consensus and are easy to understand (hereinafter 1.), or they constitute a negotiated compromise (2.).[145] At least in cases in which civil and common law meet, the compromise in the rules of the UNIDROIT Principles 2016 will often be closer to one's own legal system than a foreign national legal system and better reflect the needs of international trade.[146] Rarely did the drafters of the UNIDROIT Principles exceed existing rules to develop an answer for an existing business need that,

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138. *See* U.N. Comm'n on Int'l Trade Law, *supra* note 123; UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2010, Supp. No. 17 no. XIV, *Endorsement of texts of other organizations*, at 33, no. 139, 50-52, no. 213 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2010).

139. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 38-39.

140. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

141. LAW WITHOUT WALLS, http://lawwithoutwalls.org (last visited Apr. 19, 2020).

142. *Managing the Future*, *supra* note 2, at 49; IWRZ 2019, *supra* note 2, at p. 17 (no. 4 in the English summary).

143. *See infra* Section II.E.

144. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 1-2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt 3) and (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 8).

145. *See infra* Section II.D.1 and II.D.2.

146. AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 24.

subsequently, has been well received in the international legal community (3.).[147]

1. A Restatement of International Consensus

Wherever the international Working Group could discover a (quasi) worldwide consensus on a contractual question, such consensus was restated in the UNIDROIT Principles 1994, 2004, 2010, and, most recently, in the UNIDROIT Principles 2016.[148] Therefore, the UNIDROIT Principles 2016 serve as a "restatement" of international commercial law.[149] In this respect, U.S. lawyers tend, in discussions, to call them "an international UCC,"[150] although the UNIDROIT Principles 2016 do provide **more than just a restatement** as their purpose includes the goal to serve as the applicable law regime (Preamble para. 2).[151] In 2017, a Brazilian court referred to the UNIDROIT Principles as the "new *lex mercatoria,"* that is, "the group of norms gathered in principles, usages and customs, model clauses, model contracts, judicial decisions and arbitral awards, conceived or derived from trade transactions amongst actors of international commerce,"[152] to justify their application.[153]

It may suffice to give the following few examples for rules in the UNIDROIT Principles 2016, which actually do have a restatement character:

Example 1: Article 1.8 states the principle of the prohibition of inconsistent behavior, which can be found in both civil law and common law systems.[154] This principle is known in civil law systems under the

147. *See infra* Section II.D.3.

148. VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 20; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 6 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3).

149. *See generally* AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 9 *passim*; *see also* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 20-24.

150. This is a helpful comparison to catch the attention of novices to the subject; but pursuant to their preamble, the UNIDROIT Principles serve more purposes. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, 2016).

151. *Id.*

152. T.J.R.S., Ap. Civ. No. 70072362940, Relator: Des Umberto Guaspari Sudbrack, 14.02.2017, 175 Diário Oficial dos Estados Rio Grande do Sul [D.O.E.R.S.] 03.04.2017, 1 (Braz.); Bonell, UNIF. L. REV. 2018, *supra* note 13, at 15, 28; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 4).

153. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 15, 28.

154. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 1 on art. 1.8).

concept of *venire contra factum proprium* or *théorie de l'apparence*; in common law systems it manifests itself as the doctrine of estoppel.[155]

Example 2: Article 2.1.1 includes the nearly worldwide consensus that the conclusion of a contract requires an offer and an acceptance[156] integrating the "neoclassical approach to contract law, maximizing the parties' freedom to negotiate until they agree to contract certain terms, . . . by expressly mentioning that one means of concluding a contract by conduct of the parties that is 'sufficient' (ie definite enough) to 'show agreement.'"[157]

Example 3: Article 7.2.2. lit. a) restates the general principle that nobody can require something that is impossible to deliver (*impossibilium nulla est obligatio).*[158]

Example 4: Article 9.3.1 on "assignments of contracts" reflects the general understanding in the commercial world around the globe that, to effectuate the assignment of a "contract" (which, as such, is not foreseen in most national laws), it is necessary, from a legal perspective, to assign the contractual claims and to transfer the contractual obligations.[159]

To the extent that the UNIDROIT Principles 2016 contain restatements of a worldwide consensus, they are compatible with the major legal systems of the world.[160]

2. A Series of Wise Compromises Bridging Legal Cultures

In cases lacking international consensus, the Working Group had to cope with different perceptions within different national systems to

155. AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 134; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 1 on art. 1.8).

156. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 2.1.1; Pilar Perales Viscasillas, *Capítulo 2: Formacion*, *in* MORÁN BOVIO'S COMENTARIO, *supra* note 14, at 109 (cmt. 1 on art. 2.1); BOBEI, *supra* note 14, at 69; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 39 (cmt. 1 on art. 2.1.1).

157. Luke Nottage, *Formation I Arts. 2.1.1-2.1.5—Offer*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 262.

158. Harriet Schelhaas, *Section 2: Right to Performance*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 891 (cmt. 18 on Article 7.2.2, with references for the laws of England, France, Germany, Italy, the Netherlands and Switzerland); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 208 (cmt. 3 on art. 7.2.2 and with additional references in footnote 17).

159. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 323-24 (cmt. 1 on art. 9.3.1).

160. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 22 ("[P]reference was given to solutions generally accepted at the international level (the 'common core' or 're-statement' approach).").

develop sound solutions that are generally acceptable to both common law and civil law lawyers.[161]

a. Different Kinds of Compromises

For some issues there was a need for a compromise on the most general level because of diverging legal perceptions.[162] In this respect, from a comparative legal and academic perspective, it is held that the compromises, which are obviously visible in the UNIDROIT Principles 2016, represent only part of their achievement.[163]

Considerable compromise is also found in their silence with regard to certain issues that play a major role in some national laws.[164] For example, from an English perspective, there is no requirement of "consideration"[165] which, in practice, is sometimes being reduced to symbolic amounts. A unified system of international contract rules does not need such outdated formal symbolism.[166] From a French perspective, the UNIDROIT Principles 2016 do not contain any need for "cause."[167] The deliberate silence of the UNIDROIT Principles on these topics also represents major achievements of international compromising at the time.[168]

Regarding other issues, the different legal systems may converge on a general principle while there exist substantial differences on the level of details, or differences with regard to the answer to sub-questions that had to be overcome.[169] In these cases, the Working Group acted with remarkable wisdom by building bridges between the different national legal systems. Each of these common or civil law "systems" includes a myriad of varieties, as every U.S. trained lawyer knows from the differences among the different state laws of the United States, which

161. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 4-5 (cmt. 8 in Introduction to the UNIDROIT Principles of International Commercial Contracts).

162. *Managing the Future*, *supra* note 2, at 47.

163. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

164. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 23.

165. *Id.* at 15, 23.

166. *Id.* at 23.

167. *See* formerly Article 1108 of the French Civil Code, prior to the reform of 2016 in which the French legislator, inspired by the UNIDROIT Principles of International Commercial Contracts 2016, abolished that requirement. C. CIV. art. 1108 (1804) (Fr.); *see* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 15, 23.

168. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 23.

169. An example are the compromises in Chapter 11 of the UNIDROIT Principles of International Commercial Contracts 2016 as discussed in Annex 1 to the electronic version of this article (at VI).

operate within a purely common law legal system (this includes the laws of all U.S. states except for Louisiana).[170] The same level of variety can be found between or among different civil law systems, notably those that are based, at least initially, on the French Civil Code of 1804[171] or on the German Civil Code of 1900.[172]

The following review does not purport to regard in depth all compromises reached over three decades of work.[173] Such a review is beyond the scope of this Article.

Rather, this Article builds hereinafter on compromises that the author has noted during the writing of his article-by-article commentary of UNIDROIT Principles.[174] Borrowing from the freedom of a bird's perspective—flying over that bridge built by the UNIDROIT Principles 2016—this Section will strive to look through general comparative legal lenses as shaped by the author's training in, and contract practice with, different civil and common laws.[175] Based on a close look at these compromises, the author will set forth that the compromises in the UNIDROIT Principles 2016 are sound, balanced, and usable, regardless of the system of law from which one looks at the principles.

The overview of compromises, below, will consider examples from the seven chapters of the UNIDROIT Principles (lit. b-e, supplemented, in the electronic version of this article, by further compromises discussed at Annex 2), before drawing a conclusion on the myriad of compromises (lit. f) and assessing their background character (lit. g).[176] Regarding the proof

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170. Daniel Berkowitz & Karen Clay, American Civil Law Origins: Implications for State Constitutions and State Courts 4 (unpublished conference paper) (Apr. 2004), http://www.pitt.edu/~dmberk/aler0415.pdf; HAY. BORCHERS & SYMEORIDES, *supra* note 19, at 4.

171. This includes, by a rule of thumb, jurisdictions that at some point in time had been ruled by Napoleon, including Louisiana.

172. Including the Greek Civil Code (ASTIKOS KODIKAS [A.K.] [CIVIL CODE] (2000) (Greece)), initially also the Chinese Contract law, which, however, changed in 1999 from the German fault-based system of liability to the division of responsibility by spheres of influence of each party under the CISG and the UNIDROIT Principles. *See* Chinese Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999) art. 107, https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf.

173. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

174. *Supra* note 1. A search of the word "compromise" in the manuscript revealed over thirty findings, all building on the in-depth research of the international team united initially by Stefan Vogenauer and Jan Kleinheisterkamp. *See* VOGENAUER'S COMMENTARY 1ST, *supra* note 14. Yet, the real figure of compromises that are contained in the UNIDROIT Principles 2016 is substantially higher, if one considers the details of national laws with regard to the 211 issues that the UNIDROIT Principles 2016 resolve by providing a compromise default rule.

175. See *supra* note **.

176. *See infra* Section II.D.2.b-g.

of the different national solutions that cause the troubled water of competing national rules, suffice it to reference, for the purposes of this overview, the sources cited in the second edition 2015 of the *Vogenauer* commentary,[177] supplemented with additional references for jurisdictions that have changed their contract law since then (France 2016,[178] China 2017[179]).

b. Chapter 1 of the UNIDROIT Principles—General Provisions: Good Faith and Fair Dealing

Within the general rules of Chapter 1 of the UNIDROIT Principles 2016, the rule set out in Article 1.7 stands for a remarkable compromise, which may not be easy to visualize at first sight and can be assessed only by comparison with the other black-letter-rules.[180]

While the principle of good faith and fair dealing has been described by *Vogenauer* as corresponding to "a global trend towards an increasing role for the standard of good faith in contract law,"[181] which can be found in civil law as well as several common law jurisdictions (including the USA[182]), and in hybrid jurisdictions (such as Israel[183] or Dubai[184]), it is not generally shared in all jurisdictions.[185] In particular, England and many Commonwealth jurisdictions do not yet recognize a general rule of an

177. *See* VOGENAUER'S COMMENTARY 2D, *supra* note 14.

178. C. CIV. (Fr.); Bonell, UNIF. L. REV. 2018, *supra* note 13, at 23.

179. General Rules of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017) Presidential Order No. 66.

180. BRÖDERMANN's UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31-32 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 4) with further references.

181 Stefan Vogenauer, *General Provisions III: Arts. 1.6-1-12—Application of the PICC*, *in* VOGENAUERS' COMMENTARY 2D, *supra* note 14, at 205 (cmt. 1 on art. 1.7).

182. U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 2017); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

183. Gabriela Shalev, *General Comments on Contracts (General Part) Law, 1973*, 9 ISR. L. REV. 274, 274 (1974); *see, e.g.*, Gabriela Shalev & Shael Herman, *A Source Study of Israel's Contract Codification*, 35 LA. L. REV. 1091, 1097 (1975) (reproduction at 1106, 1109, of Contract Law (Isr.), General Part, pertinent arts. 12, 39).

184. See CIVIL CODE [C. CIV.] [CIVIL CODE] (UAE), Art. 246 and Dubai Cassation 2009/06/14 as kindly searched and shared by Ghada Audi with reference to JAMES WHELAN, UAE CIVIL CODE AND MINISTRY OF JUSTICE COMMENTARY 153 (2011).

185. See & Prasad, *supra* note 4, at 86, 88; Vogenauer, *supra* note 181, at 206 (cmt. 1 on art. 1.7).

abstract principle of good faith.[186] Thus, there was a need for a compromise.[187] The compromise was subtle:

First, on the level of wording, the formulation of Article 1.7(1) itself is remarkably neutral.[188] By using both the words "good faith" and "fair dealing," the wording englobes both the common law's distinction between these expressions and the continental European approach to subjective and objective aspects of good faith.[189]

Secondly, and possibly more importantly, the compromise recognizes the English need for specifics.[190] English lawyers are said not to be as accustomed to codifications and they tend to prefer specific rules, as compared to abstract legal principles.[191] Projecting this preference to the issue of good faith and fair dealing, two commonwealth practitioners, *Rena See* (with a New Zealand and UK background) and *Dharshini Prasad* (with a Singapore and UK background) recently summarized the critical English law position as follows:[192] First, a general principle of good faith is contrary to the English perception of freedom of contract where each party is free to pursue its own interests while being obliged to protect itself under the *caveat emptor* principle.[193] Second, it cannot be reconciled with English common law, which is fact driven and therefore provides piecemeal solutions in response to problems.[194] Third, it is perceived as antithetical to the foundational importance of certainty in English law.[195]

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186. VOGENAUERS' COMMENTARY 2D, *supra* note 14, at 206 (cmt. 1 on art. 1.7); *see also* Klaus Peter Berger & Thomas Arntz, *Treu und Glauben als Rechtsprinzip im englischen Wirtschaftsrecht*, 180 ZVGLRWISS 115, 167-99 (2016) (arguing that a general principle of good faith and fair dealing is emerging); Klaus Peter Berger, *The Lex Mercatoria (Old and New) and the TransLex-Principles*, TRANS-LEX, no. 11.1, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8 (last visited Apr. 19, 2020).

187. *See* Secretariat of UNIDROIT, Working Grp. for the Preparation of Principles for Int'l Commercial Contracts, Summary Records of the Meeting Held in Miami from 6 to 10 January 1992—Rome, at 75, P.C.-Misc. 18 (May 1992); *id*. at 62, 66, 69, 74.

188. *Id.* at 75; *id*. at 62, 66, 69, 74; VOGENAUERS' COMMENTARY 2D, *supra* note 14, at 214 (cmt. 19 on art. 1.7).

189. Secretariat of UNIDROIT, Rep. of the Working Grp. for the Preparation of Principles for Int'l Commercial Contracts on the Rome Meeting, at 64, 115, P.C. Misc. 18, supra note 187 at 69, 74, 75 (1994).

190. See & Prasad, *supra* note 4, at 105.

191. *Id.* at 89-90 ("[I]ntroducing a standard of good faith is thought to create a level of subjectivity and uncertainty that is antithetical to the foundational importance of certainty in English law.").

192. *Id.* at 89.

193. *Id.*

194. *Id.*

195. *Id*.

From a continental European perspective, it might be observed with regard to the second concern that forty-seven years of participation of the UK in a European Union,[196] which operates by written regulations and directives,[197] might have triggered some comfort to manage the application also of abstract rules; but what are forty-seven years as compared to close to 1000 years since the emergence and development of English law, subsequent to the battle of Hastings of 1066?[198]

See/Prasad have expressed the reasons for English skepticism amongst lawyers with any common law jurisdiction background with regard to a general rule of "good faith and fair dealing"[199] in the fact that there is a foundational conceptual difference between the role of "good faith and fair dealing" and the principle of party autonomy.[200]

Recognizing the English need for concrete examples, the UNIDROIT Principles 2016 contain at least forty specific rules with practical applications of the general principle of good faith and fair dealing.[201] The concrete rules calling for reasonable behavior cover most standard situations in which a contract partner would expect good faith behavior from its counter-part, as a civil law or a U.S.-trained lawyer might be inclined to call it.[202] The description below gives four examples[203]:

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196. 1 January 1973 through BREXIT on 31 January 2020 (Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, art. 185, 2019 O.J. (C 384/01)).

197. *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47 (EU).

198. *See* George B. Adams, *Origin of the Common Law*, 23 YALE L.J. 115, 116 (1924).

199. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

200. See & Prasad, *supra* note 4, at 86.

201. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 1 on art. 1.7 (listing thirty-seven such specific rules); See & Prasad, *supra* note 4, at 92 ("no less than 37 provisions in the Principles that are direct or indirect applications of the principle of good faith"); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31-32 (cmt. 4 on art. 1.7). The counting does not purport to be complete. If one includes all the rules that contain the word "reasonable" (i.e., fifty-eight by electronic counting of the author), there may be approximately sixty rules with a relation to the good faith principle. There may be even more relevant rules. In his commentary, Vogenauer refers even to "82 references to the idea of 'reasonableness' throughout the PICC." VOGENAUERS' COMMENTARY 2D, *supra* 14, at 210 (cmt. 10 on art. 1.7).

202. See & Prasad, *supra* note 4, at 97 (arguing in a similar direction).

203. Selected from the list in UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 1 on art. 1.7; *see also* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31-32 (cmt. 4 on art. 1.7). For further examples see Annex 1 in the electronic version of this article.

(1) Article 1.8 prohibits inconsistent behavior.[204] Relying on inconsistent behavior would also contravene good faith and fair dealing.[205]
(2) As an application of the principle of prohibiting inconsistent behavior, Article 2.1.4 (2) limits the right to revoke an offer in a number of situations, where revocation would constitute inconsistent behavior.[206]
(3) Following the same scheme,[207] and thereby applying the general principle of good faith and fair dealing, Article 2.1.18 sentence 2 precludes a party from asserting a clause in a contract if it caused the other party to reasonably rely on a conduct that deviates from an agreement in writing.[208] This rule does not apply if a party who prompts and accepts deviating behavior of the other party communicates clearly, at that occasion, that the other party may not rely on this exception in the future.[209] In such case, there is no "reasonable" reliance in the sense of Article 2.1.18 sentence 2, and contradictory behavior to such communicated exceptional behavior would not intrude upon the general principles of good faith and fair dealing.[210]
(4) Article 5.1.3 states a duty of cooperation "when such co-operation may reasonably be expected" by the other party.[211] This rule not only evidences a modern concept of perceiving international contracts as a "common project,"[212] it also expresses a concrete example of the general duty of good faith and fair dealing.[213] As noted by *Bonell*, in the famous *Andersen* arbitration, the arbitrators referred to the

204. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.8.
205. *Id.* art. 1.7, cmt. 1; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 1 on art. 1.8).
206. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 2b on art. 2.1.4; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 42 (cmt. 1 on art. 2.1.4).
207. Stefan Vogenauer, *Formation IV: Arts. 2.1.17-2.1.18—Integrity of Writing*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 377 (cmt. 8 on art. 2.1.18).
208. *Id.*
209. VOGENAUERS' COMMENTARY 2D, *supra* note 14, at 378 (cmt. 9 on art. 2.1.18).
210. *Id.*
211. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 5.1.3.
212. Stefan Vogenauer, *Section 1: Content*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 617, 621 (cmt. 3 on art. 5.1.3); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 123 (cmt. 1 on art. 5.1.3).
213. Juan Luis Begines, Contenido, *in* MORÁN BOVIO'S COMENTARIO, *supra* note 14, at 259-61.

general duty of good faith and fair dealing in Article 1.7 instead of citing Article 5.1.3.[214]

The high number of specific applications of the principle of good faith and fair dealing as illustrated by these examples[215] also documents, firstly, why the general rule in Article 1.7 is one of the few underlying principles of the UNIDROIT Principles 2016.[216]

Secondly, and more important for all common law trained lawyers: Against the background of these examples, there is limited room left actually to apply the general principle set out in Article 1.7.[217] One example is the *de minimis non curat praetor rule*, according to which, for an assessment of the accuracy of any performance, there may come a point at which it would be abusive to insist on (further) correction of performance.[218] This is the case when the deviation of the delivered or executed scope of work from the agreed scope of work is minimal.[219] Another example, developed by the German author *Schlechtriem*, is the right to refuse a delivery, even without a "legitimate reason" in the sense of Article 6.1.5(1).[220] For example, if delivery is offered at 1 a.m. in the morning, no one can realistically expect, in good faith, the other party to take delivery in the middle of the night.[221] The respect for the need to sleep is a reason to deny delivery.[222]

As a matter of autonomous interpretation of the UNIDROIT Principles 2016 pursuant to Article 1.6, the specific rules take priority over

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214. Michael Joachim Bonell, *A "Global" Arbitration Decided on the Basis of the UNIDROIT Principles Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, 17 ARB. INT'L 249, 253-54 (2001) [hereinafter *A "Global" Arbitration*] (arguing that the commented award would have been better based on the more specific rule in UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 4.8 or art. 5.3 (now: art. 5.1.3), than art. 1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, 2016)).

215. Sixteen further examples are set forth in Annex 1, reproduced in the electronic version of this article.

216. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 88-172; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 30 (cmt. 7 in Introduction to the UNIDROIT Principles of International Commercial Contracts).

217. Berger & Arnzt, *supra* note 186 (cmt. 4 on Trans-Lex-Principle 1.1.1—Good faith and fair dealing in international trade).

218. VOGENAUER'S COMMENTARY 1ST, *supra* note 14, at 222-23 (cmt. 37 on art. 1.7).

219. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 4 on art. 1.7).

220. VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 222-23 (cmts. 36-37 to art. 1.7); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 4 on art. 1.7).

221. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 2 on art. 1.7).

222. *Id.*

the general rule in Article 1.7.[223] As a result, there remains limited room for the parties still to rely upon the general and underlying principle of Article 1.7.[224] In most situations a more specific rule steps in as a result of the compromises negotiated in the UNIDROIT Principles 2016 for the issue of good faith and fair dealing.[225]

As a result, an overwhelming majority of issues relating to the principle of good faith and fair dealing is encapsulated in piecemeal solutions[226] in response to demonstrated scenarios of unfairness, as discussed by the Working Group.[227] Thereby, the Working Group has come close to the approach of English law to good faith and fair dealing issues, as observed by *Bingham L.J. i*n *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd.*[228] With such reduction of the sphere of application of the general rule on good faith and fair dealing in Article 1.7 arising as a result of the inclusion of these many specific rules, the inclusion of such a general principle has become acceptable as a compromise, also for UK lawyers.[229]

Common law trained lawyers, as well as civil law trained lawyers, are free to work with the specific principles and negotiate deviations from any of the specific rules, as long as they remain within the boundaries of the underlying principle of good faith, Article 1.7 para. 2.[230] With diligent negotiation and drafting, it is possible to adapt the specific rules in the UNIDROIT Principles to special business need in a way that is consistent with the underlying principle of good faith as expressed in Article 1.7.[231] *See/Prasad* concluded that due to the limited scope for any unpredictable application of the good faith principle, the UNIDROIT Principles 2016 are consistent with English law while also offering protection to parties who are less familiar with English law default rules "to fill in gaps in a contract

223. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 1.6, 1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

224. *Id.* art. 1.7.

225. *Id.* cmt. 1. on art. 1.7.

226. *See, e.g.*, See & Prasad, *supra* note 4, at 105 (quoting observations of Bingham LJ (from 1989) in Yam Seng Pte Ltd. (a company registered in Singapore) v. Int'l Trade Corp. Ltd., [2013] EWHC 111 QB, para. 121-123, http://www.bailii.org/ew/cases/EWHC/QB/2013/111.html).

227. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, at x-xi, xvii-xx, xxv-xxvi, xxxii-xxxv, *reprinted in* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at LXII-LXIV.

228. See & Prasad, *supra* note 4, at 89 (citing Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd [1989] EWHC 1 Q.B. 433, 439 (Eng.)).

229. *Id*; *see also* note 201 for the number of the specific rules.

230. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31 (cmt. 2 on art. 1.7). These boundaries will be discussed *infra* Section II.F.1.

231. See & Prasad, *supra* note 4, at 105.

in a way the English law may not."[232] This reconciliation of different attitudes towards good faith in different legal systems constitutes a remarkable and wise achievement.

c. Chapter 3—Validity

National laws treat the legal consequences of initial impossibility differently.[233] In France and in the Romanistic tradition (including in this respect Louisiana[234]), a contract obliging someone to do something that is impossible to do is invalid.[235] In other jurisdictions, such a contract would be treated as valid.[236] Under these circumstances, it is helpful that the UNIDROIT Principles 2016 provide for a clarifying rule that avoids misunderstanding.[237] In Article 3.1.3, [238] the UNIDROIT Principles 2016 treat initial impossibility as an issue of non-performance[239] or mistake,[240] and not as matter of validity.[241]

d. Chapter 4 (Interpretation) and Chapter 5 (Content)

The interpretation of contracts goes to the heart of contract law.[242] Two aspects suggesting compromise are particularly worth noting:

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232. *Id.*

233. *See* Peter Huber, *Section 1: General Provisions*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 469 (cmts. 1-3 on art. 3.1.3); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 80-81 (cmt. 1 on art. 3.1.13).

234. LA. CIV. CODE arts. 1971, 1972 (2019).

235. C. CIV. arts. 1163(2), 1178(1) (Fr.); Lucia Alvarado Herrera, *Propuestas de Enmienda*, *in* MORÁN BOVIO'S COMENTARIO, *supra* note 14, at 178 (cmt. 1 on art. 3.3).

236. *See, e.g.*, BGB § 311a (1) (Ger.); *see also* Huber, *supra* note 233, at 469 (cmt. 3 on art. 3.1.3).

237. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 3.1.3, cmt. 1 on art. 3.1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

238. *Id.* art. 3.1.3 cmt. 1; Herrera, *supra* note 235.

239. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.2.2; Herrera, *supra* note 235, at 178 (cmt. 1 on art. 3.3); Huber, *supra* note 233, at 470 (cmts. 6-7 on art. 3.1.3).

240. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 3.2.2, cmt. 2 on art. 3.2.2. For an assessment see Peter Huber, *Art. 3.2.2 (Relevant Mistake)*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 479 (cmt. 4 on art. 3.2.2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 84-85 (cmts. 1-2 on art. 3.2.2).

241. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 80-81 (cmt. 1 on art. 3.1.3).

242. *See, e.g.*, The Square Mile P'ship Ltd v Fitzmaurice McCall Ltd, [2006] EWCA (Civ.) 1960 [5] (Eng.); Bobux Marketing Ltd. v Raynor Mktg Ltd (Babies' Leather Booties case), [2001] NZCA at [16-19], [33-34], [39-40] (N.Z.).

i. The Contents of Chapter 4, as Such

In light of the substantially different approaches to interpretation to be found in common and civil law jurisdictions, as observed above (as part of the "troubled water"),[243] it is helpful that the UNIDROIT Principles 2016 set forth rules of interpretation in Chapter 4.[244] That avoids unpleasant surprises in case of dispute.[245] The rules in Chapter 4 have been welcomed by the international community, e.g., as "general principles of law"[246] reflecting "universal hermeneutic truths."[247] They reflect a compromise between different approaches.[248] Parties acting under national laws have been reported to have integrated into their contract nonetheless the rules in Chapter 4.[249]

The starting point is Article 4.1 para. 1, pursuant to which a contract shall be interpreted according to the common intention of the parties at the time of contract conclusion.[250] Each party thereby has a chance to prove by any means[251] their joint "true" or "real" will.[252] Article 4.3 enumerates a non-exhaustive list of relevant circumstances including: (1) preliminary negotiations between the parties; (2) practices that the parties have established between themselves; (3) the conduct of the parties subsequent to the conclusion of the contract; (4) the nature and purpose of the contract; (5) the meaning commonly given to terms and expressions in the trade

243. *See supra* Section II.A.

244. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 4.1-4.8; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 109 (cmt. 1 on art. 4.1).

245. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 109 (cmt. 1 on art. 4.1).

246. Stefan Vogenauer, *Chapter 4: Interpretation*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 572 (Introduction to Chapter 4 of the PICC cmt. 7); BOBEI, *supra* note 14, at 225 (cmt. 1.1 on art. 4.1).

247. Vogenauer, *supra* note 246, at 572 (Introduction to Chapter 4 of the PICC cmt. 7); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110 (cmt. 2 on art. 4.1).

248. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110 (Cmt. 2 on art. 4.1).

249. VOGENAUER'S COMMENTARY 1ST, *supra* note 14, at 572 (Introduction to chapter 4 of the PICC no. 7 note 22 to a settlement agreement integrating arts. 4.1-4.3 and 4.5 as reported in the following Arbitral Award: Joseph Charles Lemaire v Ukraine, ICSID Case No. ARB(AF)4/98/1, ¶¶ 22-23 (Mar. 20, 2000)).

250. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 4.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 575 (cmt. 3 on art. 4.1); BOBEI, *supra* note 14, at 226 (cmt. 1.2 on art. 4.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110-11 (cmt. 3 on art. 4.1).

251. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.2.

252. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110-11 (cmt. 3 on art. 4.1).

concerned; and (6) usages.[253] If such common intention of the parties cannot be established, Article 4.1 para. 2 calls for an interpretation "according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."[254] This is an objective yet individualized and contextualized test.[255] It is submitted that, for international contracts in which minds from different cultures are meeting, which may even operate in different languages, this combination between a "subjective" and an "objective" approach appears more appropriate than merely regarding the wording as, for example, a New York judge would do.[256] The other party might perceive the judge's perception pursuant to New York law as one-sided because the non-native English speaking party might have no chance to grasp that "plain" meaning as reflected in well hidden (New York) jurisprudence.[257]

Article 4.2 paras. 1 and 2 mirror Article 4.1 paras. 1 and 2 for the interpretation of statements and other conduct.[258] Additional rules of interpretation in Articles 4.4 ("reference to a contract as a whole") and Article 4.5 ("all terms to be given effect") supplement the list of relevant circumstances in Article 4.3, which help to establish the common intention of the parties or the meaning of the contract language, statement or other conduct under the individualized and contextualized "reasonable third person" test of Article 4.1 para. 2 and of Article 4.2 para. 2.[259]

Article 4.6 adds a "*contra proferentem* rule,"[260] which shifts the risk of interpretation to the drafting side and thereby gives an incentive for careful drafting.[261] Article 4.7 raises the issue of "linguistic discrepancies," which may easily occur in international drafting.[262] It provides a "soft

253. *See id.* at 113-14 (cmts. 1-4 on art. 4.3) (noting further examples, such as (1) the ordinary meaning of the words, (2) policy arguments or (3) fairness and equity of a particular interpretation).

254. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 4.1(2).

255. VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 576 (cmt. 5 on art. 4.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 111 (cmt. 5 on art. 4.1).

256. *See, e.g.*, Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (N.Y. 2002).

257. It must be noted on a practical level that New York law, as well as any other law of a U.S. state, is not that simple to detect in many parts of the world, without access to standard U.S. research tools like LexisNexis or WestLaw, and without training in searching jurisprudence as opposed to searches in codes and commentaries.

258. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 4.1, 4.2.

259. *Id.* arts. 4.2(2), 4.3-4.5.

260. *Id.* art. 4.6; AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 156-57.

261. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 117 (cmt. 1 on art. 4.6) (with further references).

262. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 4.7; *see also* discussion of the language risks *supra* Section II.A (as part of the "troubled waters").

default rule"[263] with a preference for the version in which the contract was originally drawn up. Pursuant to Article 1.5, the parties are free to adapt that rule.[264]

Article 4.8 on "supplying an omitted term" will be discussed in more detail hereinafter.[265]

ii. Supplying an Omitted Term Versus Implied Obligations

Many international contracts contain a "severability" clause, which provides for varying legal consequences if a clause is null and void (or sometimes "impractical") or if the contract contains a loophole, where an issue that should be regulated is not clearly regulated.[266] Such a contractual clause on "severability" would take priority (Article 1.5) over the default regime in the UNIDROIT Principles 2016.[267]

Absent such a clause, Article 4.8 on "supplying an omitted term" and Articles 5.1 and 5.2 on "implied obligations" provide default rules that reveal yet another sound compromise solution.[268] The default system applies whenever none of the specific default rules in the UNIDROIT Principles 2016 applies; e.g., on issues such as on quality of performance (Article 5.1.6), price determination (Article 5.1.7), time of performance (Article 6.1.1), order of performance (Article 6.1.4), place of performance (Article 6.1.6) and currency, where not expressed (Article 6.1.10).[269]

Pursuant to Article 4.8, which is inspired by both, § 204 of the U.S. Restatement (Contracts, 2d) and the German concept of "*ergänzende Vertragsauslegung*,"[270] when contracting parties have not agreed on a term

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263. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 1 on art. 4.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 117-18 (cmt. 1 on art. 4.7).

264. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.5; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 117 (cmt. 1 on art. 4.7).

265. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 4.8.

266. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 119 (cmt. 2 on art. 4.8).

267. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.5; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27 (cmt. 1 on art. 1.5).

268. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 4.8, 5.1.1, 5.1.2; *see* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 121 (cmt. 1 on art. 5.1.1) ("cultural bridge to common law" in arts. 5.1.1-5.1.2).

269. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 2 on art. 4.8, cmt. 3 on art. 2.1.14; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 119 (cmt. 2 on art. 4.8).

270. Secretariat of UNIDROIT, Rep. of the Working Grp. for the Preparation of Int'l Commercial Contracts on the Meeting held in Rome May 27-31, 1991, at 142, P.C.-Misc. 17 (Feb. 1993); VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 611-13 (cmt. 5 on art. 4.8);

that is important to determine their rights and duties, a term appropriate to the circumstances needs to be found.[271] When determining such term, *inter alia* the intention of the parties, the nature of the contract, good, and reasonableness need to be taken into account.[272] This approach goes to the edge of contract interpretation.[273] It may appear strange for lawyers trained in jurisdictions that do not have such a rule.[274] A jurist trained in English law would feel more familiar with the concept of implied obligations[275] than to "supplying" an additional term.[276]

The UNIDROIT Principles 2016 also pick up this other approach, searching for "implied obligations," if any.[277] In the beginning of chapter 5 on "Content, Third Party Rights and Conditions," they provide in Article 5.1 the rule according to which "contractual obligations of the parties may be express or implied."[278] Articles 5.1.3 through 5.1.9 constitute examples of such implied contract provisions.[279] Article 5.1.2 enumerates the sources that may provide the foundation of implied obligations using the same criteria as Article 4.8 on supplying an omitted term (except for the criterion "intention," and by adding one other criterion: *practices*).[280]

As a result, the same topic of obligations that may exist, although they have not been explicitly stated; it is addressed from two different perspectives.[281] One of them (supplying an omitted term) is more familiar to civil law trained lawyers, and the other one (searching for implied obligations) is more familiar to common law trained lawyers educated in the UK.[282]

BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 118 (cmts. 2, 6 on art. 4.8).

271. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS, art. 4.8 (1).

272. *Id.*

273. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 118 (cmt. 1 on art. 4.8), 120 (cmt. 4 on art. 4.8).

274. *Id.* at 121 (cmt. 1 on art. 5.1.1).

275. *Id.*; VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 614 (cmt. 8 on art. 4.8 with further references).

276. VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 619 (cmt. 1 on art. 5.1.2), 615 (cmt. 13 on art. 4.8); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* 1, at 120 (cmt. 4 on art. 4.8).

277. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 5.1.1.-5.1.2.

278. *Id.* art. 5.1.1.

279. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 122 (cmt. 2 on art. 5.1.2).

280. *Id.* (cmt. 1 on art. 5.1.2).

281. VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 613 (cmt. 7 on art. 4.8), 619 (cmt. 1 on art. 5.1.2).

282. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 122 (cmt. 1 on art. 5.1.2), 123 (cmt. 1 on art. 5.1.3).

As the rule in Article 4.8 is part of Chapter 4 on "interpretation," and as it precedes Articles 5.1.1 and 5.1.2, proper application of the UNIDROIT Principles 2016 would require to first apply Article 4.8 prior to discussing any implied obligations.[283] In practice, however, the reasoning can be left open, at least in most cases, since it does not matter whether the interpretation is made pursuant to Article 5.1.2 or Article 4.8.[284] For example, in an arbitration with arbitrators from both common and civil law backgrounds, the co-existence of Articles 4.8, 5.1.1, and 5.1.2 can avoid lengthy deliberations and provide a tool for reaching a unanimous decision, while the academic discussion of its founding can be left open.[285] The underlying issue of resolving a question to which the plain language alone does not necessarily provide a clear answer is thereby solved by a sound compromise within which any lawyer can practice regardless of the background of his or her training.[286]

e. Chapter 7—Non-Performance

Chapter 7 contains a number of negotiated compromises regarding non-performance[287]:

i. Remedies in Case of Non-Performance

The overall approach to this topic is remarkable. In case of non-performance, a common law lawyer will start thinking in categories of damages while a civil law trained lawyer will first think how to enforce a right of specific performance.[288]

The UNIDROIT Principles 2016 bridge this difference by the quite ingenious approach of Articles 7.2.1-7.2.2, which provide for a middle ground.[289] To start with, they separate claims for payment from other claims due to non-performance of non-monetary obligations.[290]

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283. *Id.*at 120 (cmt. 5 on art. 4.8).

284. AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 145; *see also* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at (cmt. 7 on art. 4.8); VOGENAUER, *supra* note 207, at 619 (cmt. 1 on art. 5.1.2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 121.

285. AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 145; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 122 (cmt. 2 on art. 5.1.2).

286. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 1 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 1).

287. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, ch. 7, § 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

288. Schelhaas, *supra* note 158, at 887-88 (cmt. 1 on art. 7.2.2).

289. *Id.* at 888 (cmt. 2 on art. 7.2.2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 207 (cmt. 1 on art. 7.2.2).

290. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 7.2.1, 7.2.2.

Non-Performance of Monetary Obligations: By their nature, claims for payment of an agreed sum that are due under a contract are claims for specific performance.[291] If necessary, they can be enforced in court or in front of an arbitral tribunal.[292] For these claims for performance of monetary obligations,[293] the discussion whether "specific performance" or damages are the appropriate remedy is fruitless.

By their approach of separating claims for non-performance into claims relating to monetary obligations and claims relating to non-monetary obligations, the UNIDROIT Principles 2016 provide a means of settlement of possibly about half the claims for non-performance through its neutral language in Article 7.2.1. whereby "a party who is obliged to pay money does not do so, the other party may require payment."[294]

Non-Performance of Non-Monetary Obligations: In Article 7.2.2, the UNIDROIT Principles 2016 continue with a right to require performance also of non-monetary obligations.[295] This represents at first sight a slight inclination towards the civil law world.[296] Yet, the opening sentence is immediately counter-balanced with an opening to the common law thinking by providing for five exceptions with which a common law lawyer will feel comfortable.[297]

The first exception in lit. a) relates to the general principle that nobody can claim something that is impossible to deliver (*impossibilium nulla est obligatio)*.[298] This was already mentioned at Section II.D.1 as an example for rules that can be considered as an international restatement.[299] The second exception in lit. b) relating to unreasonably burdensome or expensive performance, which can be found also in civil law systems, e.g., in Section 275 para. 2 of the German Civil Code.[300] With this start, it becomes easy for a civil law trained lawyer also to accept the exceptions

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291. Schelhaas, *supra* note 158, at 884 (cmt. 2 on art. 7.2.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 206 (cmt. 1 on art. 7.2.2).

292. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS, arts. 1.11, 1st hyphen.

293. *Id.* art. 7.2.1

294. *Id.*

295. *Id*. art. 7.2.2.

296. Schelhaas, *supra* note 158, at 887-88 (cmt. 1-2 on art. 7.2.2); BOBEI, *supra* note 14, at 396-97.

297. Schelhaas, *supra* note 158, at 888 (cmt. 2 on art. 7.2.2).

298. *Id*. at 891, 894.

299. *See supra* Section II.D.1 (example 3, with references).

300. BGB § 275(2) (Ger.) (*wirtschaftliche Unzumutbarkeit*); *see, e.g.*, Martin Schmidt-Kessel & Malte Kramme, *Vor § 275, §§ 275-92*, in BGB KOMMENTAR, *supra* note 27, at 44 (cmt. 18 on § 275); UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.2.2 cmt. 3(b); Schelhaas, *supra* note 158, at 894-95; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 208.

in lit. c) through e) even if, in sum, the number of exceptions erode the principle rule in the beginning of Article 7.2.2.[301] The result, i.e., the cases in which specific performance is granted comes close to what a U.S. lawyer will be accustomed to.[302] The wording is so subtle that both civil and common law trained lawyers can live with it.[303] Moreover, the parties would be free to adapt Article 7.2.2 to their needs (Article 1.5).[304]

ii. Right to Terminate the Contract

In complex contracts, the parties tend to negotiate detailed clauses on termination with rules on both, the reasons for termination and different legal consequences depending such reason.[305] In many contracts, however, termination is not covered, or at least not in any detail.[306] In these situations, a background default rule is helpful.[307] In Article 7.3.1, the UNIDROIT Principles 2016 provide an internationally negotiated compromise between different legal systems with respect to fundamental non-performance.[308] According to its para. 1, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.[309] Para. 2 sets forth criteria on how to determine whether a failure to perform an obligation amounts to a fundamental non-performance.[310]

301. Schelhaas, *supra* note 158, at 888 (cmt. 2 on art. 7.2.2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY**,** *supra* note 1, 207 (cmt. 1 on art. 7.2.2).

302. Schelhaas, *supra* note 158, at 888 (cmt. 2 on art. 7.2.2).

303. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 207 (cmt. 1 on art. 7.2.2).

304. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 212 (cmt. 11 on art. 7.2.2).

305. Regular experience from practice. If the topic is negotiated in depth, the legal consequences are usually regulated differently depending on the reason of termination.

306. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 222, 230 (cmt. 1 on art. 7.3.5).

307. *See* AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 256-60; Ghada & Brödermann, *supra* note 15.

308. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 185 (cmt. 2 on art. 7.1.1).

309. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.3.1 (1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

310. *Id.*

The non-exclusive list[311] of (sometimes overlapping)[312] criteria in lit. a-e is a masterpiece of comparative research and compromise.[313] For example, as set forth by *Huber* in the Vogenauer commentary,[314] lit. a) took inspiration from the earlier international compromise set out in Article 25 CISG.[315] Both, lit. a) and lit. b) find further foundations in English contract law, in sections 236-243 Restatement (Second) of Contracts (USA) ('material breach') especially in section 241 of the Restatement (Second) of Contracts (USA) and e.g., in Spanish law.[316]

Finally, Art. 7.3.1 (3) provides in case of delay that the aggrieved party may also terminate the contract if it had previously allowed to the defaulting party an additional period of time for performance under Art. 7.1.5.[317]

iii. Effects of Termination in General

National contract laws differ on the issue as to whether a termination due to fundamental non-performance has a merely prospective (*ex nunc)* and/or a retroactive (*ex tunc)* effect.[318] Both national concepts provide for exceptions, so that, in their practical impact, they are not that different.[319] Yet again, the UNIDROIT Principles 2016 help to level the playing field of international contracting.[320]

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311. Secretariat of UNIDROIT, *supra* note 189; Peter Huber, *Section 3: Termination*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 923 (cmt. 12 on art. 7.3.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 218 (cmt. 2 on art. 7.3.1).

312. Huber, *supra* note 311, at 923 (cmt. 14 on art. 7.3.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 218 (cmt. 2 on art. 7.3.1).

313. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.3.1(2) a-e; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 218-19 (cmt. 2 on art. 7.3.1); Huber, *supra* note 311, at 921-22 (cmt. 5-6 on art. 7.3.1) (underlying policy considerations).

314. Huber, *supra* note 311, at 923 (cmt. 13 on art. 7.3.1).

315. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 219 (cmt. 4 on art. 7.3.1).

316. Tribunal Supremo (STS) Feb. 17, 2010 (Spain); Tribunal Supremo (STS) Dec. 3, 2008 (Spain), https://supremo.vlex.es/vid/-52051155?_ga=2.212792727.223815308.1574136608-875068202.1574136608); Tribunal Supremo (STS) July 9, 2007 (Spain); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-30; Huber, *supra* note 311, at 925 (cmt. 17 on art. 7.3.1).

317. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 7.3.1 (3), 7.1.5.

318. G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 382-84 (cmt. 282) (1991); Huber, *supra* note 311, at 956 (cmt. 3 on art. 7.3.1, note 148); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-30 (cmt. 1 on art. 7.3.5).

319. TREITEL, *supra* note 318, at 382-84 (cmt. 282).

320. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-30 (cmt. 1 on art. 7.3.5).

Article 7.3.5 on "Effects of termination in general" provides for a compromise.[321] Para. 1 provides for a prospective approach[322], attenuated by a right to claim accrued damages for non-performance (para. 2)[323] and a clarification regarding surviving rights (Para. 3[324]).[325] For merchants with different legal backgrounds, it thereby offers a starting point with which internationally active merchants and lawyers can well live.[326]

f. Interim Conclusion: The Power of the UNIDROIT Principles-Bridge

It is submitted that the non-exhaustive overview of compromises provided above at Section II.D.2.lit b) though e)[327] can serve as a good sample for both:

(1) the variety of topics for which different pre-concepts on contractual issues exist around the globe, where the intuitive approach of a lawyer trained in any national law may clash with the expectations of the other contracting party; and
(2) the kind of balanced and often nuanced compromises which the international legal community has reached with the UNIDROIT Principles 2016.[328]

From a practical perspective, the mere existence of this myriad of compromises is already helpful.[329] They provide a robust system of default

321. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.3.5. The article is supplemented by further rules on restitution with respect to contracts to be performed at one time in article 7.3.6 and on restitution with respect to long-term contracts in article 7.3.7, which are not discussed here.

322. *Id*. art. 7.3.5(1) ("Termination of the contract releases both parties from their obligation to effect and to receive future performance.").

323. *Id.* art. 7.3.5(2) ("Termination does not preclude a claim for damages for non-performance.").

324. *Id.* art. 7.3.5(3) ("Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.").

325. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 230 (cmts. 2-3 on art. 7.3.5).

326. Huber, *supra* note 311, at 956 (cmt. 3 on art. 7.3.5: "middle ground"); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 230 (cmt. 1 on art. 7.3.5).

327. As supplemented by sixteen further examples in Annex I, contained in the electronic edition of this article.

328. *See supra* Section II.D.2.b-e (supplemented by Annex 1 to the electronic version of this article).

329. *See, e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 1-2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3).

rules[330] and thereby a powerful tool for all merchants and lawyers. Many of the issues covered in the compromises cover contractual questions that would usually not be put on the agenda of negotiation,[331] such as imputation of payment (Article 6.1.12) or details of foreign currency set-off (Articles 8.2–8.5).[332] Nonetheless, these questions may become highly relevant during the execution phase of a contract and the different national perceptions of the subjects compromised in the UNIDROIT Principles may then clash.[333] To achieve the same level of comfort, as with the UNIDROIT Principles 2016, with a foreign national legal order to which a company might agree in the alternative to choosing the UNIDROIT Principles 2016 (e.g. Swiss or English law), the list of negotiated compromises discussed in this Article demonstrates the level of work required to research the contractual topics for which concepts differ around the globe.[334] There exists a danger that these differences will remain unnoticed, such as the different understandings of the same words[335] and the different approach to interpretation.[336] Diligent choice of a foreign (purportedly neutral) law would require a substantial amount of research for all these issues, comparing the position of the alternative national foreign law to the law of a company's home jurisdiction.[337] Diligence would be required to effectuate such a point by point analysis of the differences in order to determine: (1) where, in the contract, an adaptation is necessary, or (2) where, during the execution period of the contract, certain behavior needs to be organized (e.g., with regard to notice requirements as stipulated e.g., in Article 6.1.12 para. 2 for imputation of payment and in Article 8.3 for a foreign currency set-off).[338] In the author's experience, that simply does not happen. Rather, companies from around the globe often tend to agree blindly to the application of a foreign national

330. Email from Petra Butler to author, A Solid International Contract Regime (Sept. 18, 2018, 07:03 AM) (on file with author).

331. Multiple experiences of the author in countless cross-border negotiations over three decades.

332. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 6.1.12, 8.2-8.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

333. See, e.g., the different national concepts of imputation of payment and foreign currency set-off, discussed in the electronic version of this article at Annex 2, II.B. and C.

334. *See, e.g. supra* Section II.D.2.b-e; Annex 1 to the electronic version of this article.

335. *See supra* Section II.A.

336. *See supra* Section II.D.2.d.

337. *See, e.g.*, Reinhard Zimmerman, *in* II THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1554-55 (Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmerman & Andreas Stier eds., 2012); INT'L INST. OF LEGAL SCIENCE, *supra* note 22.

338. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 6.1.12(2), 8.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

law, sometimes based on a footprint of experiences with former contracts that were performed smoothly, without testing the chosen neutral state law.[339] There exist exceptions, but these are few as compared to the large number of cross-border contracts concluded every day around the globe.[340] Even major companies do not enjoy spending substantial resources on choosing the applicable law.[341]

The very number of 211 rules in the UNIDROIT Principles 2016 suggests that proper due diligence with regard to all the issues covered in the UNIDROIT Principles 2016 would be much too time consuming, costly, and out of proportion in relation to ordinary circumstances of contract conclusion.[342] Often, companies lack international experience and/or comparative legal training even to apprehend the risk of not agreeing to the UNIDROIT Principles 2016 as compared to a national legal order.[343] One of the biggest risks in international contracting is the undetected differences.[344] Against this background, it is submitted, it is just wise to agree on a set of rules with internationally negotiated solutions as compared to "jumping into the darkness" of an unknown foreign law.[345] Working with the UNIDROIT Principles 2016 minimizes not only the risk of such a leap into the dark but also ensures to find rules that were written for international trade.[346]

g. The Background Character of the Compromises Offered by the UNIDROIT Principles-Bridge

All compromise solutions in the UNIDROIT Principles 2016 need to be seen in the context of Article 1.5, which enables the contracting parties to exclude individual principles or to vary them, subject to very few exceptions consisting of core duties of "fair dealing" in international trade,

339. On the sociological reasons why companies do not undertake more detailed research when choosing the applicable law, see FESTSCHRIFT MARTINY, *supra* note 69, at 1061-68.

340. *See id.* at 1059-61.

341. In the last thirty-five years of practice, the author has witnessed only twice that companies were prepared to invest the necessary budget for detailed research prior to a decision on a choice of law.

342. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17.

343. FESTSCHRIFT MARTINY, *supra* note 69, at 1062 (highlighting "ignorance" as a major reason why lawyers often do not concentrate on choice of law and dispute resolution clauses).

344. *Id.*

345. RAAPE, *supra* note 133, at 90.

346. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 16-38.

Article 1.5 para. 2.[347] Contracting parties can thus use their party autonomy (Article 1.1) to customize the UNIDROIT Principles 2016 to their needs and to alter the compromises offered by the UNIDROIT Principles-Bridge as background law.[348] Thus, in general, parties are free contractually to agree on other concepts to which they are accustomed.[349] For example, a common law lawyer desirous to limit the impact of the contract history on interpretation may operate with a merger clause.[350] A German lawyer who likes the interruption of statutes of limitation by mere negotiation—a tradition in Germany—might add language to that extent.[351] The author's firm does so in all its clients contracts and fee agreements with foreign clients which are now all submitted to the UNIDROIT Principles 2016. The compromise in Chapter 10 on Limitation Periods does not contain such a rule as it exists in Germany, but party autonomy under Articles 1.1 and 1.5 provides the freedom to add a provision by which such negotiations with a contract partner about a disputed topic interrupt the statute of limitation until any of the parties refuses to continue the negotiations.[352] When acting for German (as opposed to foreign) clients, the author tends to also include such a provision because German legal departments and managers all know this rule and might forget that it does not exist when contracting under the UNIDROIT Principles.[353] For clients who do not like that rule, one would not touch the existing contractual regime in Chapter 10 and leave it as it is.[354] However, if there is no time and budget to adapt the UNIDROIT Principles, it is possible simply to trust that the UNIDROIT Principles encompass compromises that are truly neutral, developed with a mind for cross-border business.[355]

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347. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27-28 (cmts. 1-2 on art. 1.5) (with further references).

348. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27-28, 197 (cmts. 2-3 on art. 7.1.6) (highlighting the multiple contractual options under the UNIDROIT Principles).

349. *Id.*

350. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 2.1.17.

351. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 350 (cmt. 5 on art. 10.5).

352. *Id.*; *see* BGB § 203 (Ger.). Such a clause avoids the necessity to file formal judicial, arbitral, or alternative dispute proceedings to interrupt the statute of limitations. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 10.5, 10.6, 10.7.

353. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 350 (cmt. 5 on art. 10.5).

354. *Id. e contrario*.

355. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 20-21.

3. Occasional Solutions Beyond a Restatement of International Commercial Law

On rare occasions, the Working Group went beyond existing rules and integrated a negotiated principle that was felt necessary in the context of international contracting.[356] A good example are the provisions on *hardship* in Articles 6.2.1-6.2.3 UNIDROIT Principles 2016. Ever since Roman law times, the law has tackled with the tension between bindingness of contract (*pacta sunt servanda*) and fairness in light of fundamentally changed circumstances.[357] Thus, the Working Group had to agree on a compromise rule that solved this problem, which was also inspired by the practice of large international contracts with explicit rules on this subject.[358]

The section on hardship commences with a reminder of the principle of bindingness of contracts[359] in Article 6.2.1.[360] The rules on hardship provide then for a right to request renegotiations in certain exceptional situations in which the occurrence of events fundamentally alters the equilibrium of the contract.[361] Since 1994, the provisions on hardship have been well accepted and applied by many arbitral tribunals,[362] and they have been also used by multiple national courts to supplement or interpret domestic law.[363]

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356. *Id.* at 23.

357. Rudolf Meyer-Pritzl, *§§ 313-314: Störung der Geschäftsgrundlage. Kündigung von Dauerschuldverhältnissen aus wichtigem Grund*, *in* HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB, BAND II SCHULDRECHT 1710-11, at no.4 (Schmoeckel et. al. eds., 2007).

358. Harmathy Attila, *Hardship*, *in* 2 FESTSCHRIFT BONELL, *supra* note 13, at 1035, 1041-42; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 176.

359. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

360. *Id.* art. 6.2.1 ("Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.").

361. *Id.* art. 6.2.3(1). Under certain conditions specified in article 6.2.2. *Id.*

362. *See, e.g.*, at UNILEX, *supra* note 12, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc., ICC-7365/FMS (1997); and at ITA L. *supra* note 12, ICC-11051 (2001); Chevron Corp. & Texaco Petroleum Corp. v. Ecuador Ad hoc arbitration, IIC 4211, (2010).

363. *See, e.g.*, Argentinian Court of Appeal Cámara de Apelaciones en lo Civil y Comercial de La Matanza (2006); Cour de Cassation [Cass.] (Dupiré Invicta (D21) v. Gabco), No. 12-29.550 13-18.956 13-20.230, (2015); Spanish Tribunal Supremo, No. 333/2014 (2014).

They have inspired legislators, e.g., in Russia[364], the Ukraine,[365] and Lithuania[366] to integrate similar provisions into their domestic contract laws.[367] A Belgian court has used the provisions on hardship to supplement the provision in Article 79 CISG on the basis of Article 7 para. 2 CISG.[368] With regard to the principle of party autonomy parties are free to adapt the rule to their particular needs or industry standards if they for wish.[369] In some contracts, e.g., gas supply contracts, merchants will prefer to exclude the applications of the provisions of hardship and to operate instead with an industry proven Price Adaptation Clause or an Economical Clause, which has been tested in previous economic crises.[370] However, when merchants from different parts of the world meet to do business, the approach to variation of a contract in case of fundamental alteration of the equilibrium of the contract varies.[371] Operating with an international compromise solution may be the best possible option under the

364. *See* Alexei G. Doudko, *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, 5 UNIFORM L. REV. 483, 484-85 (2000); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 177 (cmt. 2 on art. 6.2.1); Ewan McKendrick, *Section 2: Hardship*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 808-09 (cmt. 3 in Introduction to Section 6.2 of the PICC).

365. CODE CIVIL [C.CIV.] [CIVIL CODE] art. 652 (2) (Ukr.).

366. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 6.204 (Lith.).

367. Pursuant to its purpose as stated in the preamble (UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016)), the UNIDROIT Principles have inspired multiple legislators also beyond the provisions on hardship, e.g., the legislators in China (Siyuan Han, *The UNIDROIT Principles and the Development of the Chinese Contract Law*, *in* 2 FESTSCHRIFT BONELL, *supra* note 13, at 1473-92) and France (Bénédicte Fauvarque-Cosson, *The UNIDROIT Principles, the World and the French Reform of Contract Law*, *in* 2 FESTSCHRIFT BONELL, *supra* note 13, at 1350, 1355-58).

368. Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, AR C.07.0289N, at IV (Belg.); McKendrick, *supra* note 364, at 809 (cmt. 5 in Introduction to Section 6.2 of the PICC). The pleadings during the Willem C. Vis Moot Court Competition 2018-2019 offered an example of vivid discussion whether such supplementation is indeed possible without specific contractual arrangements. The critical voices focused their argumentation on the interpretation of the term "impediment" contained in Article 79 CISG: Harry M. Flechtner, *Uniformity and Politics: Interpreting and Filling Gaps in the CISG*, *in* FESTSCHRIFT FÜR ULRICH MAGNUS ZUM 70. GEBURTSTAG 193, 202 (Peter Mankowski & Wolfgang Wurmnest eds., 2014); Scott D. Slater, *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to the CISG*, 12 FLA. J. INT'L L. 231, 259 (1998).

369. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, arts. 1.1, 1.5. In his practice, the author has observed, e.g., industry focussed customisations relating to the conditions of hardship.

370. Following the 2008 worldwide economic crisis, many clauses have been tested in arbitration or court. *See, e.g.*, Higher Regional Court of Hamm, Judgement of 16 December 2011 (I-19 U 154/10) (unpublished) (on file with author).

371. *See, e.g.*, McKendrick, *supra* note 364, at 808 (Introduction to Section 6.2 of the PICC cmt. 1).

circumstances.[372] In case of dispute, contracting parties will fight about the facts, e.g., if an event (like the market disruption in certain sectors as a result of the COVID-19 driven crisis) "fundamentally alters the equilibrium of the contract."[373] Depending on the size and curve of the lenses that seller and supplier are using when assessing the changes to the circumstances of the disputed contract, either side may have a different perception that requires finding a solution by negotiation, mediation, or arbitration.[374] It saves time and costs if the dispute can focus on the facts, and there is no need to also establish a foreign law in such circumstances.[375]

E. The Bridge Is Stable: Practical Experiences with the UNIDROIT Principles

The UNIDROIT Principles have been used in practice for all the purposes set forth in their preamble.[376]

They have often been used in arbitration proceedings,[377] e.g., pursuant to their preamble[378] as "general principles of law,"[379] as "*lex mercatoria*"[380] or when a contract had to be interpreted according to "International Commercial Law."[381] They have been applied when the parties had chosen their application.[382] In this respect, it is wise to agree upfront on the dispute resolution forum to determine the circumstances

372. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 16 *passim*, 22.

373. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 6.2.2.

374. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17.

375. This can be expensive. *See § 6 Internationales Privatrecht/*MÜNCHANW.HDB., *supra* note 23, at 406; FESTSCHRIFT MARTINY, *supra* note 69, at 1052; FESTSCHRIFT WEGEN, *supra* note 67, at 603.

376. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl; *see, e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-20 (cmts. 1-17 on pmbl.).

377. *See* Matthias Scherer, *Preamble II: The Use of the PICC in International Arbitration*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 110-49.

378. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶¶ 1, 3.

379. *E.g.*, at UNILEX, *supra* note 12, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc., ICC-7365/FMS (1997) ("general principles of international law"); Ad hoc arbitration, San José, 30-04-2001 ("general rules and principles regulating international contractual obligations").

380. *E.g.*, ICC-9875 (1999); *see, e.g.*, UNILEX http://www.unilex.info/principles/cases/article/102/issue/1212#issue_1212 (last visited Apr. 19, 2020) (for further awards).

381. Final Award of 24 June 2008, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration V (111/116) (unpublished) (on file with the author)

382. *See, e.g.*, UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 2; *Managing the Future*, *supra* note 2, at 48-49; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 9 (Introduction to the UNIDROIT Principles of International Commercial Law cmt. 9).

under which the UNIDROIT Principles 2016 will be applied.[383] As a rule of thumb, their application in combination with an arbitration clause gives more freedom.[384]

Most arbitration laws respect party autonomy, including the choice of rules of law such as the UNIDROIT Principles 2016.[385] A judge at a state court often has more restrictions as a result of the applicable private international law regime.[386] In particular, a judge will have to apply all domestic mandatory law while an arbitration tribunal will only apply internationally mandatory law.[387]

Sometimes parties will agree on the application of the UNIDROIT Principles only after the commencement of their arbitration proceedings, thereby changing the otherwise applicable contractual regime.[388]

In accordance with the preamble, arbitration tribunals also use the UNIDROIT Principles when a proper choice of law was missing,[389] to supplement international instruments, notably the CISG,[390] or to supplement national law.[391]

In many jurisdictions (e.g., Brazil, China, Russia), they have also been used by national courts as background law[392] to overcome deficiencies or uncertainties of national contract laws, which, unlike the UNIDROIT Principles, were not designed with a focus on cross-border business to business contracts.[393] In such jurisdictions—and in jurisdictions in which the legislator has used the UNIDROIT Principles as

383. *See, e.g.*, IWRZ 2018, *supra* note 2, at 246-47.

384. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, cmt. 4.a on pmbl.; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-14 (cmts. 3-4 on pmbl.), 24 (cmt. 2 on art. 1.4). For a U.S. judgement recognizing the application of the UNIDROIT Principles in arbitration even as general principles of law without a choice of law, see, e.g., Singh v. Carnival Corp., No. 13-20414-CIV (S.D. Fla. 2013) (refusing to accept a public policy defence against an award that applied the UNIDROIT Principles without agreement of the parties).

385. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-14 (cmts. 3 on pmbl.).

386. *Id*. at 14, 19 (cmts. 4, 15-16 on pmbl.).

387. *Id*. at 25-26 (cmts. 3-5 on art. 1.4).

388. *Id.* at 9 (Introduction to the UNIDROIT Principles of International Commercial Contracts 2016 cmt. 19); *id.* at 236-37 (cmt. 2 in Section 4: Damages, Introductory Remarks).

389. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 4.

390. *Id.* pmbl. ¶ 5; *see, e.g.*, Bonell, UNIF. L. REV. 2018, *supra* note 13, at 32-35.

391. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 6.

392. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 35-38; Ralf Michaels, *Preamble I: Purposes, Legal Nature, and Scope of the PICC for the Purpose of Interpretation and Supplementation and as a Model*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 39 (cmt. 9).

393. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 6; Bonell, UNIF. L. REV. 2018, *supra* note 13, at 16-20.

a source for its own contract law[394]—it is particularly plausible that courts rely on the UNIDROIT Principles to interpret national law.[395] For example, for China, in thirteen national court cases the judges have indicated in their comments (of their own judgements) that they relied on the UNIDROIT Principles.[396] Yet, domestic courts also use the UNIDROIT Principles to solve questions of international relevance that the domestic law did not solve.[397] The cited 2017 decisions of the Court of Appeal of Rio Grande do Sul are an example.[398] Another strong example stems from the Supreme Court of Paraguay: "We cannot fail to mention the UNIDROIT Principles (Principles on International Commercial Contracts), to which we resort as an interpretive tool to complement our internal law."[399] In Colombia, even the Constitutional Court used UNIDROIT Principles to confirm that a solution provided by domestic law was in conformity with international standards.[400] When negotiating with parties from these jurisdictions, the proposal to choose the UNIDROIT Principles tends to be well received in the experience of the author.[401]

As a lawyer in international private practice, the author is a regular witness and participant in the realization of the purpose set forth at para. 2 of the Preamble, i.e., the choice of the UNIDROIT Principles.[402] Since 2001, the UNIDROIT Principles serve as one of the best tools for international contract projects in his practice.[403] He has used them—or

394. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS pmbl., ¶ 7; Han, *supra* note 367, at 1473-92; Fauvarque-Cosson, *supra* note 367, at 1350, 1355-58.

395. *See, e.g.*, Han, *supra* note 367, at 1473, 1482-84.

396. Gary Gao & Ronnia Zheng, *UNIDROIT Principles Practice in China*, *in* IBA PERSPECTIVES IN PRACTICE, *supra* note 13, at 46-47; *see also* Han, *supra* note 367, at 1483.

397. It is beyond the scope of this Article to guide through dozens of examples that can be found at the websites listed *supra* note 12. *See generally* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 35-38.

398. *See supra* Section II.D.1; Noridane Foods S.A. v. Anexo Comercial Importação e Distribuição Ltd., No. 70072362940, Decision, Court of Appeal of Rio Grande do Sul, ¶ 8 (Feb. 14, 2017).

399. Corte Suprema de Justicia—Sala Civil y Comercial, 2018, case no. 72, María José Ramirez de Aranda y otros c/ Hernán Darío Ramírez Almada s/ pago por consignazión y otros. Translation of the original states: "Tampoco Podemos dejar de mencionar los Principios UNIDROIT (Pincipios sobre Contratos Comerciales Internacionales), a los recurrimos como auxilio interpretativo y para complementar nuestro derecho interno."

400. Constitutional Court of Columbia, No. C-1008, 2010, Enrique Javier Correa de la Hoz et al., http://www.unilex.info/principles/case/1591 (referencing art. 7.4.4 UNIDROIT Principles).

401. E.g., tested in negotiations with a Chinese party.

402. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

403. *Managing the Future*, *supra* note 2, at 48-49.

observed their use—in all nature of industries (e.g., automotive, consultancy, construction, cosmetics, gold, health, IT, life style, satellite, shipping, and textile) and for many varying purposes; including letters of intent, non-disclosure agreements, cooperation agreements, investment agreements, research and development contracts, sales contracts, transponder lease contracts, standard purchase terms and conditions, consulting agreements, and frame distribution agreements.[404] He has used them in contracts with connections to different continents (Europe, USA, Asia, Africa), usually in combination with an arbitration clause.[405] Sometimes he uses them as an alternative to national law by offering to contract partners of his German clients to either accept the choice of German law or the choice of the UNIDROIT Principles as neutral contractual regime; in such circumstances, the contract partners often choose the UNIDROIT Principles.[406] The author has used them for all magnitude of clients: large,[407] medium,[408] and small,[409] of both common and of civil law origin.[410] It is submitted that the components of the bridge, discussed in Section II.D. above, offer such a quality from a comparative legal perspective that it is possible to agree on the UNIDROIT Principles-bridge regardless of the national background of a party.[411] The author's law firm is also using the UNIDROIT Principles for its own contracts with foreign clients, *inter alia* to avoid pitfalls of the national German law on standard terms,[412] while the clients often appreciate the neutral approach.

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404. *See id.*

405. *Id.*; Eckart Brödermann, *The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice—the Experience of a German Lawyer*, NS-XVI UNIF. L. REV. 589, 594-95 (2011) [hereinafter *Experience of a German Lawyer*].

406. Author experience from practice with several dozen subcontractors; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 20 (cmt. 17 on pmbl.); *Managing the Future*, *supra* note 2, at 49.

407. E.g., for a company belonging to the German DAX group, as first noted in *Experience of a German Lawyer*, *supra* note 405, at 593.

408. E.g., for a vertically integrated textile company.

409. E.g., for a research and development center focusing on hair-related products (2018) or for satellite related contracts such as transponder leases, *see* Eckart Brödermann, *The UNIDROIT Principles 2004 as a Tool for Satellite Related Contracts and Other International Transactions*, OUTER SPACE COMMITTEE NEWSL., Aug. 2005, at 23, 24-25 (IBA Legal Practice Division).

410. *See, e.g.*, *The Future of International Contract Drafting Has Begun: An Interview of Eckart Brödermann by Marc O. Dedman and Caroline Berube*, PARADIGM, Fall 2018, at 2-8. https://www.primerus.com/files/PRI_0718_DedmanBrodermannBerube_LONG_FNL.pdf.

411. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17-20.

412. *Choice of the UNIDROIT Principles*, *supra* note 2, at 26; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 25-26 (cmt. 4 on art. 1.4).

Other examples include cooperation agreements with law firms in other jurisdictions.[413]

On occasion, the author has used the UNIDROIT Principles in order to attenuate the effect of an otherwise chosen national law.[414] By stipulating that the national law (which was unavoidable in a public tender scenario) would need to be interpreted in accordance "with due regard to international usages and, in particular, the principle of good faith,"[415] the contract provided a basis to choose the UNIDROIT Principles for multiple international sub-contracts.[416]

The multitude of practical experiences—both in the contractual stage and in arbitrations—bring the author to the conclusion that the bridge built by the UNIDROIT Principles is stable. In the case of the author, this conclusion is corroborated by two further experiences: (1) the observation of the thorough process of the making of the UNIDROIT Principles 2010 as an official observer from practice over several years; it is submitted that, by reading in the transcripts of the sessions of the Working Group, everybody has the chance to repeat this experience to some extent for oneself if so desired.[417] The entire process was transparent; (2) the two-year experience of writing an article-by-article commentary led to gain an overview of the UNIDROIT Principles 2016 and to discovery of the wisdom of many compromises that this Article meant to share.[418]

F. Crossing the Bridge: Freedoms and Limits in Using the UNIDROIT Principles 2016

This Section concentrates on the mode of crossing the bridge, i.e., the question, "How do you use the UNIDROIT Principles 2016?"[419]

When using the UNIDROIT Principles-bridge, there is adequate room for freedom of maneuver (hereinafter 1.).[420] There are some *caveats*

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413. Personal experience; whereby it is suggested that international lawyers' associations would be well advised to explicitly include a choice of the UNIDROIT Principles 2016 into their contracts to avoid the Andersen nightmare in case of dispute. *See A "Global" Arbitration*, *supra* note 214.

414. *Experience of a German Lawyer*, *supra* note 405, at 589, 593.

415. *Id.*

416. *Id.*; *see also* author experience, *supra* note 406.

417. *See Preparatory Work for the 4th Edition of Principles of International Commercial Contracts*, *supra* note 136.

418. *See generally* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1.

419. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

420. *See infra* Section II.F.1.

and limits to bear in mind (hereinafter 2.).[421] On balance, however, it will be submitted in a final assessment that the UNIDROIT Principles 2016 are so well developed by now that it is possible and convenient to choose the UNIDROIT Principles 2016 as the applicable contract regime, without also choosing a national law to supplement it, and this is best in combination with an arbitration clause (hereinafter 3.).[422]

1. Freedom of Contract

The UNIDROIT Principles 2016 are based on a number of underlying principles, among which is "freedom of contract" as set forth in Article 1.1, i.e., the first principle and starting point of the UNIDROIT Principles 2016.[423] When crossing the UNIDROIT Principles-bridge, the parties are invited to use that freedom.[424] The options are endless. For any contract project, it is wise to consider where adaptations or choices should be made to accommodate specific business needs or other wishes of the contracting parties.[425] For example, when the contract includes a situation of a possible plurality of obligees, it is strongly advisable to make a choice with regard to which of the three options offered by Section 11.2 shall apply.[426]

Whenever varying the UNIDROIT Principles 2016 pursuant to Article 1.5 and/or writing a clause that covers a specific aspect of an issue covered by the UNIDROIT Principles, it is worth specifying whether a contractual clause shall replace or supplement an existing UNIDROIT Principle.[427] In his practice over the years, this author has seen efforts in all of these directions. Party autonomy shall be respected as long as it is not excessive (Articles 1.5 and 7.1.6).[428] Within the acceptable boundaries of Article 1.5, freedom of contract comes first.[429]

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421. *See infra* Section II.F.2.

422. *See infra* Section II.F.3.

423. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.1.

424. *Id.* arts. 1.1, 1.5.

425. For example, just screening the electronic index of the author's article by article commentary (*op. cit.* note 1), the word "option" is contained eighty times in the heading, referring either to options of action or to contractual options.

426. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, § 11.2; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 5 (Introduction no. 9 cmt. 9 at (iv)), 361 (Introduction to Chap. 11 cmt. 3). For more details, see Annex 2 to the electronic version of this article, at VI.

427. For an example from practice, see BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 350 (cmt. 5 on art. 10.5).

428. *Id.* arts. 1.5, 7.1.6.

429. *Id.* art. 1.5.

Good faith skeptical parties may want to have a look at at least approximately forty concrete rules referred to in Section II.D.2. lit. b, which substantiate the general and underlying principle of good faith and fair dealing.[430] Again, they may consider alterations within the boundaries of Article 1.5 para. 2.[431] Businessmen will usually not feel offended by such mandatory principles and might consider not to conclude a contract if the other side feels offended.[432]

In yet other scenarios, where the choice of a foreign national law is unavoidable, it is possible to integrate just some principles into the contract.[433] This has been reported, e.g., for the provisions on interpretation in Chapter 4.[434]

2. Limits on the Use of the UNIDROIT Principles 2016

The choice of the UNIDROIT Principles 2016 is subject to a number of limits.[435]

First, regardless of the applicable contractual regime, most contracts and cases also have angles that are not subject to the law of contracts.[436] Private international law will usually distinguish contractual matters from other matters such as, for example, representation, company law, property, intellectual property, competition, IT or data protection.[437] For these issues, the law as determined by the applicable private international law regime will apply.[438]

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430. *See supra* Section II.D.2.b.

431. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 1.5, cmt. 2.

432. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27-28 (cmt. 2 on art. 1.5).

433. *See id.* at 20 (cmt. 17 on pmbl.) (on the use of the UNIDROIT Principles as a checklist).

434. Vogenauer, *supra* note 246, at 572 (Introduction to chapter 4 of the PICC no. 7 note 22 to a settlement agreement integrating arts. 4.1-4.3 and 4.5 as reported in the following Arbitral Award: Joseph Charles Lemaire v. Ukraine, ICSID Case No. ARB(AF) 4/98/1, ¶¶ 22-23 (Mar. 20, 2000).

435. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 8 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 17); IWRZ 2018, *supra* note 2, at 13.

436. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 8 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 17); *§ 6 Internationales Privatrecht/*MÜNCHANW.HDB., *supra* note 23, at 462-95.

437. *Id. See* generally on the issue of "classification" ("qualification") e.g., for the United States: HAY, BORCHERS & SYMEORIDES, *supra* note 19, at 3; BRIGGS, *supra* note 67 at 500 (cmt. 7.01); AUDIT & D'AVOUT, DROIT INTERNATIONAL PRIVE REGLES DE CONFLIT PRINCIPALES (2013); *see* VINCENT HEUZE & PIERRE MAYER , DROIT INTERNATIONAL PRIVE 74 (11th ed. 2014) ("C'est à propos de chaque question de droit que se pose le problème de droit international privé.").

438. This Article does not address the special topic of determining the law applicable to limitation periods (which is qualified procedural in some and material in other jurisdictions) which

Secondly, there will always be some (internationally) mandatory national laws that will require respect and their application on fundamental issues like anti-corruption, anti-money-laundering or recently emerging trade fights with, e.g., U.S. actions under Section 301 of the U.S. Trade Acts of 1974 (as updated and amended) and European blocking regulations.[439] According to Article 1.4 UNIDROIT Principles 2016, any application of mandatory rules shall not be restricted.[440]

Thirdly, there may be situations where it may be wiser to use other international instruments.[441] For example, as an international treaty, the CISG may claim priority over national law in many jurisdictions.[442] Thus, it can trump Turkish national law on the mandatory use of the Turkish language as a precondition for a valid contract.[443] In contrast, choosing the UNIDROIT Principles 2016, a soft international instrument, would not have that effect.[444] Thus, for a contract on the sale of goods with a Turkish party it may be wisest to select, as neutral contractual regime, the CISG supplemented for those issues, which are not covered by the CISG, by the UNIDROIT Principles 2016.[445]

For any given scenario it is worth considering which dispute resolution regime and (soft) law shall be chosen.[446] The relationship and comparison between the regime of the CISG and the UNIDROIT Principles 2016 is beyond the scope of this overview.[447] Suffice it to note that (1) the UNIDROIT Principles 2016 are a more recent international compromise and have a substantially broader scope of regulation than the CISG, which is limited to the sale of goods;[448] (2) many rules of the UNIDROIT Principles 2016 are based on the CISG, while others

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may usually respect the limitation regime chosen with the UNIDROIT Principles and its pertinent rules in Chapter 10.

439. Council Regulation 2271/96, 1996 O.J. (L 337) 7 (protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom).

440. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 23 (detailed overview).

441. IWRZ 2019, *supra* note 2, at 14.

442. *Id.*

443. Christian Rumpf, *Sprachenverbot oder—das türkische Gesetz Nr. 805*, 15 SCHIEDSVZ 1, 11-16 (2017); BURGHARD PILTZ, RECHTSANWALT, UN-KAUFRECHT/CISG—WAS SPRICHT DAGEGEN? 138 (2017).

444. IWRZ 2019, *supra* note 2, at 14.

445. MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS, cla. 3 a, b (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2019).

446. *§ 6 Internationales Privatrecht/*MÜNCHANW.HDB., *supra* note 23, at 395-425.

447. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 32-35.

448. *Id.* at 18-19.

deviate;[449] (3) it is possible and a standing option—and in some circumstances also state of the art practice—to choose for contracts of sales the CISG, supplemented, for those issues which are not covered by the CISG, by the UNIDROIT Principles 2016.[450] Another example of combining the UNIDROIT Principles 2016 with other international instruments is the use of FIDIC templates and to supplement such choice with an agreement on the UNIDROIT Principles 2016 as background law for those issues that are not covered by the FIDIC templates, such as, again, the example of foreign currency set-off.[451]

Fourthly, some national laws permit only the choice of a state law.[452] In such circumstances, it is nonetheless possible to incorporate the UNIDROIT Principles 2016 into the contract that will then apply to the extent that mandatory law (including any domestic mandatory law) does not intervene.[453] To avoid such limitations on the application of the UNIDROIT Principles 2016, it is best to combine a choice of the UNIDROIT Principles 2016 with a choice of arbitration rules.[454]

Finally, it needs to be borne in mind that the UNIDROIT Principles 2016 provide solutions for questions of general contract law.[455] There will often be the need to regulate specifics peculiar to a specific kind of contract.[456] For example, without some concrete adaptations, the UNIDROIT Principles 2016 are not suitable to govern a suretyship agreement if one has a specific hierarchy of liability in mind.[457] In such cases, it may be easier to resort to the desired national law of the surety.[458]

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449. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 412-13 (detailed overview).

450. *Id.* at 16-17 (cmts. 9-10 on pmbl.).

451. INT'L FED'N OF CONSULTING ENG'RS, THE FIDIC SUITE OF CONTRACTS, https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf (last visited Apr. 29, 2020).

452. *E.g.*, Commission Regulation 593/2008, art. 3(2), (Rome I), 2008 O.J. (EU). For a counter example, see recently the law of Paraguay as noted by Bonell, UNIF. L. REV. 2018, *supra* note 13, at 35.

453. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 19 (cmt. 16 on pmbl.).

454. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., cmt. 4.A (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

455. *Id.* pmbl. cmt. 1.

456. Under article 1.5, the parties can agree on all the specifics that they deem proper even these deviated from the default rules in the principles. *See*, *e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 124-25 (cmt. 6 on art. 5.1.3 for construction contracts).

457. Many laws, including German law, provide that the surety becomes only liable if the claim cannot be enforced against the main debtor. *See* BGB § 765 (Ger.); *see, e.g.*, Eckart Brödermann, *§§ 759-779*, *in* BGB KOMMENTAR, *supra* note 27, at 1582 (Vor §§ 765 ff no. 10-11). Such a concept is distinct from a joint and several liability under Art. 11.1.2 UNIDROIT Principles.

458. For Germany, *see* Brödermann, *supra* note 457.

3. Operating with the UNIDROIT Principles on a "Stand-Alone" Basis

The UNIDROIT Principles project is so well developed by now that it is possible and convenient to choose those Principles as the applicable contract regime on a stand-alone basis.[459] This is best done in combination with an arbitration clause in order: (1) to enjoy the sometimes higher degree of flexibility regarding choice of law;[460] (2) to reduce the scope of possibly intervening mandatory law;[461] and (3) to use the increased freedom to shape the dispute resolution system, e.g., by integrating rules on the taking of evidence[462] or on privilege and attorney secrecy[463] (in addition to the other advantages of arbitration such as, often, an increased level of enforceability under the New York Convention[464]). To do so fully avoids the discussion on the choice of a default national law, which can be helpful as it avoids negotiation time and costs.[465] For the very few areas for which an issue is not resolved in the UNIDROIT Principles, e.g., the determination of the interest rate for a claim for damages,[466] it will be up to the arbitration tribunal or state court to determine the applicable law and to make that determination on the appropriate legal basis.[467] It is up to the parties and their counsel to determine whether, under the circumstances of

459. In his practice, when working with the 1994 and 2004 versions, the author usually agreed on the UNIDROIT Principles supplemented by a national law. *See* MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS, cla. 1.2 a, b (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2019); *Experience of a German Lawyer*, *supra* note 405, at 594-95. However, since the release of the UNIDROIT Principles 2010, he has changed that practice and refers usually only to the UNIDROIT Principles.

460. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-14 (cmt. 3 on pmbl.), 24-26 (cmt. 2 on art. 1.4).

461. *See id.* at 24-26 (cmt. 2 on art. 1.4).

462. E.g., the IBA Rules on the Taking of Evidence (2010) or the Inquisitorial Rules on the Taking of Evidence in International Arbitration (Prague Rules, 2018).

463. Bringing a five-year process of preparation and discussion to a close, the Council of the Inter-Pacific Bar Association (IPBA) has approved on 13 October 2019 in Milan the IPBA Guidelines on Privilege and Attorney Secrecy, which have been released on 13 November 2019 in Osaka at the IPBA Arbitration Day. The IPBA Guidelines provide in ten articles an equal level playing field in international arbitration with regard to certain limits of producing information during an arbitration. IPBA, IPBA GUIDELINES ON PRIVILEGE AND ATTORNEY SECRECY (Oct. 13, 2019), https://ipba.org/media/fck/files/2020/IPBA%20Guidelines.pdf.

464. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, T.I.A.S. No. 6997, 330 U.N.T.S. 4739 (June 10, 1958).

465. Experience from practice.

466. Ewan McKendrick, *Section 4: Damages*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 14, at 1019 (cmt. 5 on art. 7.4.10); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 257-58 (cmt. 2 on art. 7.4.10).

467. *Id.*

a specific contract project, they want to take that—*de minimis*—risk.[468] To take that risk may save time, avoid discussions, contribute to the negotiation atmosphere, and enable focus on more important and relevant issues. When combined with an arbitration clause, the risk is mitigated if the parties have a say in the determination of the composition of the arbitration tribunal so that it includes arbitrators who know how to use their powers to determine otherwise applicable law, if necessary.[469] Compared to the leap in the dark of agreeing on a neutral foreign state law,[470] the risk in taking the UNIDROIT Principles on a stand-alone basis is negligible.

Choosing the UNIDROIT Principles on a stand-alone basis is often the simplest and "fast selling" solution. The robust system of default rules of the UNIDROIT Principles encompass the best choice in particular in situations with time pressure, as there is no room to concentrate on all aspects of a contractual relationship individually. With the UNIDROIT Principles 2016 such choice has become sound even for long-term contracts.[471]

When introducing the idea to choose the UNIDROIT Principles to a contract partner, it is helpful to point at the neutrality of the UNIDROIT Principles as background law, in which both sides could place their trust because of: (1) the thoroughness of the process in which it was established, and (2) the international wisdom of the compromises for which the Working Group settled, which the UNIDROIT Council has approved and which UNCITRAL has recommended to use.[472] The choice of the UNIDROIT Principles did avoid the appearance of impropriety, of desiring something one-sided with regard to choice of law. When representing the economically stronger party, such a proposal can create trust and prepare the ground to be successful in the negotiations on other,

468. As a matter of practice, the risk is limited as most general issues of contract law are covered in the UNIDROIT Principles and most specific issues should be included into the contract. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

469. On the freedom to appoint the arbitrator, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1638-64 (2d ed. 2014); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-14 (cmt. 3 on pmbl.)

470. *See* RAAPE, *supra* note 133, at 90.

471. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, Introduction at vii; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 6-7 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 12).

472. *See supra* notes 123-124; Michaels, *supra* note 392, at 81 (cmt. 120 on pmbl. I).

more important issues (such as the arbitration regime, or limitation of liability terms).[473]

It saves time to just use the UNIDROIT Principles 2016 quasi "off the shelf."[474] The parties can use the *economized* precious *negotiation time* to concentrate on the details of their relationship which are most burning on their minds.[475] At the same time, such decision minimizes risks because the UNIDROIT Principles 2016 cover many issues for which it is important just to have a solution in an international environment where different expectations otherwise may clash.[476] Most practitioners will concur that one of the highest risks in a contract, and easily a source for misunderstanding or even dispute, are the issues that one might forget to regulate.[477] Integrating the global wisdom as developed by the Working Group of UNIDROIT into a contract[478] can actually help one to sleep better.

As a European businessman once argued in a conversation with the author, in 2004: "If so many brains from around the globe have concentrated on the development of the UNIDROIT Principles over so many years, why should I spend time and money on researching national alternatives for my cross-border business?"[479]

G. Reasons for an Increased Use of the Bridge by the Legal Profession

A mixture of pragmatic arguments, wisdom, and fear will cause increasing use of the UNIDROIT Principles 2016. Every lawyer with an international practice, every company engaged in international business and those engaged in (continued) legal education can and should contribute to the increased knowledge about and use of the UNIDROIT

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473. *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 375-76.

474. On the offer of the Governing Council of UNIDROIT to the international legal and business communities, see UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, Introduction at viii.

475. This coincides with the interests of most clients who do not wish to spend time and energy on choice of law. *See* FESTSCHRIFT MARTINY, *supra* note 69, at 1061-68.

476. *See supra* Section II.A (description of "troubled waters"); UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl.

477. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 17.

478. I.e., to accept the offer of the Governing Council of UNIDROIT to the international legal and business communities at UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, Introduction at viii.

479. During a symposium in honor of Hein Kötz at Bucerius Law School (Hamburg) on 14 May 2004. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 1-2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3).

Principles, so that they will have an impact on the legal profession and on international business as a whole.

While the present status of the UNIDROIT Principles 2016 is that of a niche product for a minority of specialized lawyers,[480] this is bound to change, for three reasons:

1. Both Wisdom and Pragmatism Point Towards Using the UNIDROIT Principles

In the long run, the global wisdom that has been encapsulated in the UNIDROIT Principles by the international legal community will be attractive.[481] There exist hardheaded reasons to follow the recommendations of the United Nations Commission on International Trade Law[482] to use the general rules for international commercial contracts as contained in the UNIDROIT Principles.[483] The UNIDROIT Principles serve an existing business need for global room for action without the boundaries of national law.[484] In the near future, the UNIDROIT Principles 2016 can be very helpful, e.g., for contracts with merchants from China, in the Belt and Road Project[485] and beyond, because of the foundation of Chinese contract law on the UNIDROIT Principles 1994 (in addition to the CISG).[486] In the medium term, the UNIDROIT Principles 2016 may even change the way to do international business when parties choose them for entire blockchain projects.[487] International business can then take place with instant observation from the stakeholders of any given project in different countries, on the basis of

480. Implicitly also Bonell, UNIF. L. REV. 2018, *supra* note 13, at 39.

481. *See supra* Section II.D.

482. U.N. Comm'n on Int'l Trade Law, *supra* note 123, no. XI, at 50-52 (no. 213); U.N. Comm'n on Int'l Trade Law, *supra* note 16, Supp. No.17 no. XIV., at 33 (no. 139).

483. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. ¶ 1.

484. *See* LAW WITHOUT WALLS, *supra* note 141 ("The future of law requires a mentality of a world of law—without walls.").

485. Mo Shijian, *The UNIDROIT Principles of International Commercial Contracts in Chinese Judicial Practice*, *in* 2 FESTSCHRIFT BONELL, *supra* note 13, at 1553; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 4).

486. Han, *supra* note 367, at 1473-82.

487. Discussion at the seminar at Tulane Law School during the seminar on "Using Law as Facilitator—Rather than Impediment—to International Business," *supra* note *; *see also* Pietro Ortoloni, *The Impact of Blockchain Technologies and Smart Contracts on Dispute Resolution: Arbitration and Court Litigation at the Crossroads*, 24 UNIF. L. REV. 430, 430-48 (2019).

one neutral set of rules.[488] They could help to overcome many of the existing choice of law problems.[489]

Pragmatism also suggests to cope with an existing market need to bridge between different national legal systems and to accept the offer which the Governing Council of UNIDROIT has made to the legal and business communities.[490] As noted, this reduces costs and risks.[491] The following quote from a senior director of the European legal department of a U.S. manufacturing company towards the use of UNIDROIT Principles 2016 speaks for itself.[492] Confronted with the statement of a European businessman supporting the use of the UNIDROIT Principles, he stated[493]: "Of course, that is true. We believe that the UNIDROIT Principles are a wonderful tool. The problem is that most people do not yet know them and do not take the time to read them."[494]

Thus, both global wisdom as well as pragmatic reasons for using the UNIDROIT Principles point in the same direction to consider the UNIDROIT Principles seriously when engaging in international contracting projects.

2. Fear

The second reason for change is fear. The UNIDROIT Principles have existed since 1994![495] They have been used in practice.[496] They have been recommended by UNCITRAL.[497] They have inspired legislatures.[498] The awareness of compliance has risen in the past years.[499] This includes the obligation to manage a company, also in its international business, with the care of a prudent businessman.[500] To continue living without the UNIDROIT Principles and solely relying on national law is like using an old telephone and ignoring the existence of smart phones and the Internet.

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488. *See supra* Section II.D.2.

489. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 203.

490. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, Introduction to the 2016 edition, at viii (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

491. *See supra* Section II.C.

492. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 1-2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3).

493. *Id.*

494. *Id.*

495. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 1994 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 1994).

496. *See supra* Section II.E.

497. *See supra* notes 123-124.

498. *See, e.g.*, *supra* note 367.

499. *Risk Management Tool*, *supra* note 9, at 1286-89.

500. *Id.* at 1289.

Not to even consider them may even amount to malpractice.[501] Here is why: In 2018, at a conference of the Chinese European Arbitration Centre[502] with 130 participants from twenty-four nations, the international arbitration community discussed a German malpractice case caused by wrong choice of law.[503] In line with his regular practice (i.e., without concrete balancing of the options), a German lawyer had chosen German law, excluding the CISG.[504] Like the UNIDROIT Principles 2016,[505] the CISG does not require proof of a specific fault for a claim of non-performance.[506] The non-performance as such will usually suffice as a basis for contractual liability.[507] In contrast, German national law is based upon a system of fault.[508] The client advised by the lawyer lost its case because it could not prove fault for a defect stemming from the sphere of the seller while it would have—likely easily—won the case if its lawyer had not routinely excluded the otherwise applicable CISG.[509] This **liability insurance case** scenario for a wrong choice of law clause can be imagined also when deciding against the choice of the UNIDROIT Principles 2016 without any reflection with due regard to the circumstances of the particular case.[510] Thus, for lawyers advising on international contracts, in particular when civil and common law meet each other, it is time to change and at least to integrate the UNIDROIT Principles 2016 into the choice of law reflections.[511]

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501. The argument to also point at malpractice was first suggested in an Essay in honor of Professor Michael Joachim Bonell, the Chairman of the Working Group. *Risk Management Tool*, *supra* note 9, at 1290 ("If the UNIDROIT Principles can reduce risks, it may be negligent to ignore the possibility"). It was then developed in German in a short series of articles: IWRZ 2018, *supra* note 2, at 249; IWRZ 2019, *supra* note 2, at 13-15, 17 (no. 5 in the English summary).

502. I.e., an international arbitration centre with a focus on China-related matters in Hamburg, Germany, integrating, at the level of the Appointing Authority always a European and a Chinese expert and a third expert from other parts of the world. *See Chinese European Arbitration Centre*, CEAC, https://www.ceac-arbitration.com/ (last visited Apr. 19, 2020).

503. The author has heard from three independent sources that the case was settled by an insurance payment. *See* IWRZ 2018, *supra* note 2, at 249; IWRZ 2019, *supra* note 2, at 14.

504. *CISG*, *supra* note 112, art. 6.

505. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 7.1.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); *see, e.g.*, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 183 (Chapter 7—Introduction, cmt. 2).

506. *CISG*, *supra* note 112, art. 35, 45, 61.

507. *Id.*

508. BGB §§ 276-278, 280 (Ger.).

509. IWRZ 2018, *supra* note 2, at 249.

510. *Id.*

511. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, pmbl., ¶ 1, cmt. 4a to pmbl. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016); *see also supra* Section II.E. (on choice of the UNIDROIT Principles in combination with and arbitration clause); Section II.F.2 (on choice of the UNIDROIT Principles in combination with a choice of court

The clients of lawyers, i.e., the merchants, need lawyers who know how to use the bridge of the UNIDROIT Principles 2016[512] to remain compliant with their obligations under corporate law and their employment contracts.[513] To cope with the risks of international trade and the diversity of national laws properly, they will need to instruct lawyers managing such transactions in an adequate manner including considering modern tools like the UNIDROIT Principles 2016.[514] It is thus not sufficient just to hire a lawyer.[515] It is necessary to inquire if he or she has the necessary knowledge.[516] There is no imperative to use them, but the UNIDROIT Principles 2016 need to be considered when it comes to international contracting.[517] Times have changed.[518]

3. Education

The third and last reason why the UNIDROIT Principles 2016 are bound to have a bright future is legal education of the next generation. At Harvard Law School, as per the fall of 2018, the UNIDROIT Principles 2016 were part of the "1L"-Reading Assignments on contracts.[519] Other law schools are doing the same or will follow or are teaching the UNIDROIT Principles in other classes.[520] For example, the UNIDROIT Principles 2016 are quite often being taught in China,[521] and also in other jurisdictions such as Germany.[522] Yet, distinct from the approach at Harvard University, they are usually not yet part of the normal, mandatory reading material. The goal is that every law student studying contracts knows that the UNIDROIT Principles 2016 exist and are a tool to consider

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clause); *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23*,* at 411, 424-25. *See generally Choice of the UNIDROIT Principles*, *supra* note 2, at 79-86; IWRZ 2018, *supra* note 2, at 249*; Managing the Future, supra* note 2, at 48.

512. *See* SIMON & GARFUNKEL, *supra* note 10.

513. *See* Wadia & Göbel, *supra* note 102, at 116-17 (failure to consider the UNIDROIT Principles as a breach of a fiduciary duty).

514. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016.

515. IWRZ 2019, *supra* note 2, at 13-15.

516. *Id.*

517. *Risk Management Tool*, *supra* note 9, at 1301 ("As a result, knowledge of the UNIDROIT Principles is no longer a matter of choice but a necessity, as they have become a notable risk management tool for cross-border contracts.").

518. *Id.* at 1285-93.

519. Noticed by the author on Harvard campus in October 2018, Harvard Law School contracts syllabus.

520. AN INTERNATIONAL RESTATEMENT, *supra* note 13, at 267.

521. Most Chinese students whom the author has been meeting during his teaching have reported that they have heard of the UNIDROIT Principles or taken classes where they have been mentioned.

522. E.g., at the universities of Hamburg, Heidelberg, Würzburg (knowledge of the author).

in case of cross-border contracting.[523] The more students study them in more detail and learn about the important nuances of their interrelation with private international law, comparative law, and international arbitration, the better are the chances for the use of the global wisdom in the UNIDROIT Principles in the future. The worldwide Willem C. Vis Moot Court competition in international arbitration has been integrating the UNIDROIT Principles as a background law in their CISG-oriented cases for several years.[524] With regard to practicing lawyers, the UNIDROIT Principles will have to be discussed more around the globe at conferences, seminars, and in continued legal education.[525]

H. Conclusion

Given the fact that the UNIDROIT Principles have existed since 1994, i.e., over twenty-five years, and that they provide real advantages when merchants face the troubled waters of comparative and international law, it is time to concentrate on them.[526] Even for a conservative society like the legal community as a whole, building on over 2000 years of legal development, twenty-five years are long enough to expect awareness and studying.[527]

Further, the global legal community as a whole should be able to learn.[528] When the CISG came into force in 1988,[529] the international legal community did not yet exist in this vivid interactive form with thousands of players around the globe, connected via the Internet and other tools of modern communication. The present shape of the international legal

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523. *Experience of a German Lawyer*, *supra* note 405, at 611-12.

524. *See* ANNUAL WILLEM C. VIS INT'L COM. ARB. MOOT, https://vismoot.pace.edu/ (last visited Apr. 19, 2020).

525. For example, the International Bar Association (IBA) has started to concentrate on the UNIDROIT Principles. *See* IBA PERSPECTIVES IN PRACTICE, *supra* note 13. The Union Internationale des Avocats (UIA) is presently working towards an official endorsement of the UNIDROIT Principles (email of the President of the UIA, Jerome Roth, to the author dated 9 April 2020 (on file with the author)).

526. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

527. *See* IWRZ 2019, *supra* note 2, at 16-18 (no. 8 in the English summary: "There is no excuse not to deal with the UNIDROIT Principles and not to include them in the drafting of international contracts. They are easy to understand.").

528. *See*, *e.g.*, J.P. Flaum & Becky Winkler, *Improve Your Ability to Learn*, HARV. BUS. REV., June 8, 2015. https://hbr.org/2015/06/improve-your-ability-to-learn.

529. The United States was among the first contracting parties in 1988: *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, UNCITRAL, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited Apr. 19, 2020).

society has only emerged during the past approximately thirty years, around the millennium turning point.[530] Thus, the mistakes made by the legal community in ignoring the CISG for many years need not to be repeated.[531] Furthermore, the choice of the UNIDROIT Principles 2016 had also the advantage of covering most relevant contractual topics by default rules.[532] In this respect, times have changed since the first release of the UNIDROIT Principles in 1994.[533] At that time, they covered a substantially more narrow range of issues.[534] Only now, since the 2010 and the 2016 editions, can one dare without risk to agree solely on the choice of the UNIDROIT Principles, without agreeing in addition to a specific supplemental national law.[535]

The UNIDROIT Principles 2016 provide a disruptive legal technology tearing down mental walls in the heads of lawyers addicted to national state law, but: (1) they function, as evidenced by the reports of the author about their use in practice in Section II.E of this Article; and (2) they reduce risks and costs.[536] They cover all important subjects of general contract law with a focus on international business-to-business contracts and their specific problems, such as, as mentioned, foreign currency set-off.[537] Thus, it is not state of the art, and may sometimes even amount to malpractice, to neglect to consider their use when working on an international legal project.[538] As they are "on the market" since 1994 (in their first edition), enough time for testing has passed.[539] The UNCITRAL has twice commended their use in resolutions.[540] Ignorance of the UNIDROIT Principles is no longer an option.[541]

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530. *Risk Management Tool*, *supra* note 9, at 1285-93.

531. John E. Murray, Jr., *The Neglect of CISG A Workable Solution*, 17 J.L. & COM. 365, 365-79 (1988).

532. *See* UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, chs. 5, 6 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2016).

533. *Risk Management Tool*, *supra* note 9, at 1301.

534. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, Table of correspondence of the articles of the 1994, 2004, 2010 and 2016 editions of the UNIDROIT Principles, at xxxvii-xliii.

535. *See supra* Section II.E.

536. *See supra* Section II.C.

537. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 2016, art. 8.2.

538. *See supra* Section II.G.2.

539. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS 1994 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 1994).

540. *Supra* notes 123, 124, and 138.

541. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13 at 38-39 (complaining about the "inherent conservatism, coupled with a good deal of provincialism, of the legal profession" as the reason for the ignorance of the UNIDROIT Principles in practice).

Time has come to accept that the choice of the UNIDROIT Principles 2016 is wiser than not to do business, to choose a not sufficiently researched foreign law or to insist in an international context on a local U.S. law.[542] It is time that the various local legal communities wake up and use the UNIDROIT Principles 2016. The risk is limited, especially because the UNIDROIT Principles 2016, like U.S. law, are based on the general principle of good faith and fair dealing and at least approximately forty more specialized rules on good faith issues,[543] which render the concept sufficiently certain even from an English or Commonwealth legal perspective.[544] As recently observed by a New York practitioner in a high-level analysis from the perspective of a United States' commercial practitioner, "UNIDROIT and the US Common Law are more often than not in harmony with one another."[545]

It lies within the human nature that each of us is inclined to think that the solutions of contract law found in the contract law that we have studied is the best solution.[546] We are accustomed to that law and we may feel secure in using it. Yet, the moment we act internationally, we are bound to discover that our own solution is not always acceptable; or it may cause substantial costs to impose and enforce it.[547] In these situations, rather than turning towards an unknown foreign law, developed by a national legislature with a national focus and other interest, it is better to rely on the bridge of the UNIDROIT Principles 2016, developed with an international focus with negotiated compromises including the perspective of the home law to which one is accustomed.[548] In the case of Louisiana, the state of jurisdiction over Tulane University, the UNIDROIT Principles 2016 are compatible with both the Civil Code of Louisiana and the common law of its neighboring jurisdictions.[549] Details may be researched and detected in future seminars at Tulane Law School. Joint classes of both civil and

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542. In an example from practice in March 2019, the Dutch side of a contract about the procurement of services of a New York chartered accountant did propose the choice of the UNIDROIT Principles. The local New York lawyer of the chartered accountant insisted on New York law. The Dutch side communicated that it would then not conclude the contract because that would increase transaction costs unreasonably. In his despair, the chartered accountant, desirous to sell its services in a valuation matter, "googled" the UNIDROIT Principles and thereby found the author who then encouraged to actually consent to the choice of the UNIDROIT Principles.

543. *See* discussion *supra* Section II.D.2.b (with example (1) through (4)).

544. See & Prasad, *supra* note 4, at 105.

545. Barton, *supra* note 4, at 82.

546. *See* Bonell, UNIF. L. REV. 2018, *supra* note 13, at 38-39.

547. On the impact of economic power on choice of law, see *§ 6 Internationales Privatrecht*/MÜNCHANW.HDB., *supra* note 23, at 374-88.

548. Bonell, UNIF. L. REV. 2018, *supra* note 13, at 40-41.

549. *See supra* Section II.D.2.

common law students at Tulane comparing the respective studied laws with the UNIDROIT Principles 2016 will help to reveal further details. With this Article, a starting point (or rather a reminder[550]) is meant to be set.

550. *See* Michael J. Bonell, *Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles*, 3 TUL. J. INT'L & COMP. L. 73, 73-91 (1994).