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

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1. ECKART BRÖDERMANN, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, AN ARTICLE BY ARTICLE COMMENTARY, (Nomos and Wolters Kluwer 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, by Eckart J. Brödermann, Published by Wolters Kluwer,* 34 Arbitr Int. 469–471 (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 967-968 (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); LAURO GAMA, *Eckart J. Brödermann, UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*, REVISTA BRASILEIRA DE ARBITRAGEM 222, 222-225 (2018); BRENDA HORRIGAN, *UNIDROIT Principles of International Commercial Contracts, An Article by Article Commentary*, 11 NYSBA NEW YORK DISPUTE RESOLUTION LAWYER 95, 95 (2018); MICHAEL PATCHETT-JOYCE, *UNIDROIT Principles of International Commercial Contracts*, SINGAPORE LAW GAZETTE (2019), https://lawgazette.com.sg/lifestyle/book-shelf/unidroit-principles; ROLF A. SCHÜTZE, *Eckart J. Brödermann, UNIDROIT Principles of*

referred to as "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 US 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 15 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 which 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.**).*

International Commercial Contracts, Baden Baden, Nomos, IWRZ 95-96 (2018). For an introductory you-tube video *see* www.youtube.com/watch?v=jX0utyTCC5Q&t=2s.

2. Parallel publications of the author relate to the perspective of (1) the **Asian** market: ECKART BRÖDERMANN, *Managing the Future of International Contracting—A Tool for All IPBA Lawyers*, 92 INTER-PACFIC BAR ASSOCIATION JOURNAL 1, 44-49 (2018) [hereinafter MANAGING THE FUTURE]; and (2) the **German** market: ECKART BRÖDERMANN, *The Choice of the UNIDROIT Principles of International Commercial Contracts in a "choice of law" clause*, 2 BUCERIUS LAW SCHOOL JOURNAL 7-14 (2018) [hereinafter Choice of the UNIDROIT Principles]; ECKART BRÖDERMANN, Die Zukunft der international Vertragsgestaltung, Risikomanagement durch die Wahl der UNIDROIT Principles, IWRZ 246, 246-250 (2018) [hereinafter IWRZ 2018]; ECKART BRÖDERMANN, *UNIDROIT Grundregeln in der internationalen Vertragsgestaltung*, IWRZ 7-18 (2019) [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

3. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT International Institute 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 INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

6. *Id.* chapters 1 through chapter 11.

aspects of fair dealing in international trade (Article 1.5 *in fine)*.[7] Thus, practitioners can start working with the UNIDROIT Principles 2016 by using the contract templates they are familiar with as a starting point. 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.[8] Not using an existing and stable bridge over troubled waters,[9] but rather using another way, requires a deliberate choice in many situations.[10] Various websites on the internet provide access to international awards and domestic court decisions applying the UNIDROIT Principles.[11] Legal literature[12] including article-by-article commentaries[13] of

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

8. ECKART BRÖDERMANN, *The UNIDROIT Principles as a Risk Management Tool in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW ESSAYS IN HONOUR OF MICHAEL JOACHIM BONNELL TO CELEBRATE HIS 70TH BIRTHDAY (UNIDROIT International Institute for the Unification of private Law, ed.), 1282, 1295 (vol. 2 2016) (hereinafter RISK MANAGEMENT TOOL).

9 SIMON AND GARFUNKEL, *Bridge Over Troubled Waters*, (Columbia Records 1970).

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

11 *See* e.g. UNILEX (http://www.unilex.info/instrument/principles); Translex (https://www.trans-lex.org/); Queen Mary Arbitration Data Base (https://www.library.qmul.ac.uk/subject-guides/law/databases/); Pace Law Database (http://www.cisg.law.pace.edu/); ITA Law (https://www.italaw.com/).

12. 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, (3rd ed.2005) (hereinafter "AN INTERNATIONAL RESTATEMENT") and 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 International Institute for the Unification of Private Law UNIDROIT (ed.), EPPUR SI MUOVE: THE AGE OF UNIFORM LAW ESSAYS IN HONOUR OF MICHAEL JOACHIM BONNELL TO CELEBRATE HIS 70TH BIRTHDAY, 2 VOL. (2016) (hereinafter FESTSCHRIFT BONELL). *See* further FACULTY OF LAW AT THE UNIVERSITY OF HAMBURG, TOWARDS USE OF THE UNIDROIT PRINCIPLES 2016 IN PRACTICE - A BRIDGE BETWEEN COMMON AND CIVIL LAW (ECKART BRÖDERMANN & MARIAN PASCHKE, ed.), Hamburg Law Review 2018 vol. 2 (hereinafter HmbgLawR 2018); INTERNATIONAL BAR ASSOCIATION, Perspectives in Practice of the UNIDROIT Principles 2016, Views of the IBA Working Group on the practice of the UNIDROIT Principles 2016 (2019), available at https://www.ibanet.org/Publications/Perspectives-in-Practice-of-the-UNIDROIT-Principles-2016.aspx (visited on 19 January 2020) (hereinafter IBA PERSPECTIVES IN PRACTICE).

13. In addition to the author's UNIDROIT Principles' Commentary of 2018, *supra* note 1, *see* MORÁN BOVIO, ed., COMENTARIO A LOS PRINCIPIOS DE UNIDROIT PARA LOS CONTRATOS DE COMERCIO INTERNACIONAL 289 (2003) (MORÁN BOVIO'S COMENTARIO); STEFAN VOGENAUER (ed.), COMMENTARY ON THE UNIDROIT PRINCIPLES (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, 38 (Andreea Alexe ed., 2017).

the UNIDROIT Principles is also accessible. Use the tool which facilitates life in international contracting![14]

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").[15]

C. To Students: Watch Out!

Law is a reflection of society (*Ubi societas ibi ius*).[16] As 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 US generation to apply them systematically, at least as your "Plan B" when you cannot agree on the law, which 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.[17]

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[14] GHADA QAISI AUDI & ECKART BRÖDERMANN, Deploying Robust Default Rules: International Commercial Contracts Under UNIDROIT, ACC-Docket 25 March 2019, at https://www.accdocket.com/articles/international-commercial-contracts-under-unidroit.cfm.

[15] *See i.a.* Report of the United Nations Commission on International Trade Law on the Work of its Forty-fifth Session (25 June – 6 July 2012), Official Records of the General Assembly, Sixty-second Session, A/67/17, Supplement No. 17 no. XIV "Endorsement of texts of other organizations" under "A. UNIDROIT Principles of International Commercial Contracts 2010", p. 33 at no. 139.

16. This sentence is attributed to Hugo Grotius (1583-1645), *see* CHRISTIAN STARCK, JZ 1997, at 1021, 1025.

17. 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 et seq. (2006).

The different national legal systems may not match with each other, or even contradict one another.[18] There may be a conflict of laws.[19]

When the contract and its stakeholders, including the holding company of any of the parties, have relations within different national legal systems, caution is required.[20] There exist entire encyclopedias on comparative law[21] 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.[22]

Depending on their legal education, arbitrators and judges will take different approaches to interpretation.[23] 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.[24] 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.[25] 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.[26] This is commonly interpreted as a door-opener to consider

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18. See generally PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEORIDES, Conflict of Laws 5th ed. 2010) at 144; AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 13; BONELL, UNIF. L. REV. 2018, *supra* note 12, at 22-23.

19. BONELL, UNIF. L. REV. 2018, *supra* note 12, at 22-23.

20. RISK MANAGEMENT TOOL, *supra* note 8, at 1283*, 1286.*

21. INTERNATIONAL INSTITUTION OF LEGAL SCIENCE, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*, (Victor Knapp ed., 1st ed. 1973).*

22. ECKART BRÖDERMANN, *§ 6 Internationales Privatrecht in*: Münchener Anwaltshandbuch Internationales Wirtschaftsrecht (ed. Burghard Pilz) 345, 414-415 (2017) [hereinafter § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB.].

23. *Id.* at 418.

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

25. *Id.*

26. See BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 133, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.), on the interpretation of 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, 2013 (Ger.) at 598, 599 (no. 18); MARTIN AHRENS, § 133, in BGB Kommentar (Hanns Prütting et al. eds.), 14th ed. 2019, at 144 (cmt no. 1). *See* in the same sense e.g. CIVIL CODE [C. CIV.][CIVIL CODE] art. 1156 (Fr., 1804)., as still in force, unchanged, in Luxemburg and Belgium (*"On doit dans les conventions rechercher*

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).[27] Additional circumstances may include the interests of the parties and the purpose and structure of the contract as viewed from their respective perspectives.[28] In a famous case of the old German *Reichsgericht*,[29] the parties agreed on the sale of "Haakjöringsköd," which literally means Norwegian shark meat, while both actually meant whale meat.[30] The contract was interpreted to be intended as a contract for whale meat although the written agreement was clear otherwise.[31] The same result of interpretation is difficult to imagine under the four corners rule utilized under the common law.[32] The approach of an arbitration tribunal may thus depend on its composition and the comparative legal experience of the arbitrators.[33]

The language chosen for international contracts can cause trouble and bear risks.[34] 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.[35] There may be different understandings depending on the level of foreign language proficiency. In case of a bilingual document, it makes a difference

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quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.") and CIVIL CODE [C. CIV.][CIVIL CODE] art. 1188 (Fr., 2016).

27. Bundesgerichtshof [BGH] [Federal Court of Justice] 2003, vol. 29, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 926-27, 2003 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] 2003, vol. 29, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 926-27, 2003 (Ger.); AHRENS, *supra* note 26, at 148 (cmt. 35 on § 133).

28. AHRENS, *supra* note 26, at 148-149 (cmt. 38 on § 133).

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

30. *Id.*

31. *Id.*

32. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 384 (cmt. 299)

33. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 414-415 (cmt. 284)

34. *See* generally VOLKER TRIEBEL & STEFAN VOGENAUER, ENGLISCH ALS VERTRAGSSPRACHE 116-131 (2018); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 381-384 (cmt. 139-157).

35. MICHELLE J. ROZOVICS, *Drafting Multiple-Language Contracts*, A.B.A. (Apr. 3, 2009), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/april_may/drafting_multiple-languagecontractswhenyouonlyspeakenglish/.

whether the contract contains a clause regulating the issue of hierarchy between the language versions.[36]

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.[37] 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.[38] 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.[39] 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.[40]

A similar risk exists if a native speaker and a non-native speaker contract with each other.[41] 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.[42] Without detailed analysis of the chosen law, these differences are often

36. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 384 (cmt. 153); *see* on linguistic discrepancies in case of equally authoritative versions of a contract UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 4.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

37. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 382.

38. 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.).

39. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 422 (cmt. 312).

40. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 384 (cmt. 299); TRIEBEL & VOGENAUER, *supra* note 34, at 23-32 (With an overview of the most important sources of errors when a German native speaker uses the English language).

41. TRIEBEL & VOGENAUER, *supra* note 34, at 23-32.

42. *Id.* at 87-96.

overlooked.[43] Potential trouble is then programmed into a subsequent dispute.[44]

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.[45] Suffice it to point out, e.g., the different understandings with regard to the expression "first floor."[46] 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.[47] 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. *co-obligees,* in the neutral words of the UNIDROIT Principles 2016)[48] will file a claim against the debtor (i.e. the obligor)[49] only jointly (joint obligation[50]). 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[51]) and later forward the share of the other co-creditor (i.e. co-obligee) to him

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43. *Id.* at 23-24; § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 373 (cmt. 110).

44. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 373 (cmt. 110).

45. TRIEBEL & VOGENAUER, *supra* note 34, at 26-27.

46. *First Floor*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/first%20floor.

47. 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.*

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

49 *Id.* at art. 1.11 4th hyphen.

50. SONJA MEIER, *Chapter 11: Plurality of Obligors and Obligees*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 1244 *et seq.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393 (cmt. 1 on art. 11.2.1).

51. MEIER, *supra* note 50, 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).

or her.[52] Through our different legal training, we operate with different presumptions, even assumptions, what words mean.[53] The concrete issue over whether there is potential for different understandings can be easily settled if discussed during contract negotiation and drafting.[54] 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.[55] The parties simply need to make their choices, which is an easy issue and takes usually only a few minutes once discovered.[56] 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.[57]

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-native speaker with a differently shaped mind-set constitutes a risk.[58] The apparent advantage of the native speaker may melt away if the misunderstanding becomes obvious and leads to serious litigation or arbitration.[59]

A famous German lawyer who has lived for decades as barrister in London goes as far to say that the mere fact of

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52. *See infra* at **II.D.2. lit. j** on the ambiguity of "joint and several" creditors (i.e. obligees, Art. 1.11).

53. For another example *see* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393 (cmt. 1 on art. 11.2.1).

54. *Id.*

55. *Id.* at 394 (cmt. 2 on art. 11.2.1); *see* also Annex 2 in the electronic version of this article, at VI.A.

56. *Id.*; MEIER, *supra* note 50, at 1253-54 (cmt. 34 on 11.2.1 we will need you to find this); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393-394 (cmts. 2-3 on art. 11.2.1).

57. 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 50, 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).

58. For en example *see* VOLKER TRIEBEL, *PROVIDED THAT- Gefahren und Missverständnisse eines versteckten Rechtsbegriffs*, Festschrift für Siegfried H. Elsing zum 65. Geburtstag, 2015 in WERNER F. EBKE/DIRK OLZEN/OTTO SANDROCK, p. 1047, 1048 at II.

59. 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.

concluding a contract under German law in the English language constitutes a risk.[60] Every translation constitutes an interpretation due to the different structure of the languages.[61] A translation will often cause discussion in a second round if the original text should be adapted to match the interpretation which was chosen when translating.

Another example of troubled water may be due to diverging mandatory law.[62] A judge will have to apply all domestically mandatory law applicable in its court.[63] An arbitrator may apply a more restricted scope of mandatory law, i.e. only internationally mandatory law.[64]

A further example of troubled water can be found in the differences in establishing and proving foreign law.[65] A common law trained judge will consider the question of determining the contents of foreign law as a question of fact.[66] The production of evidence on foreign law by expert witnesses can be expensive.[67] The judge may treat briefs of the lawyers on a chosen foreign law with care.[68] A civil law trained judge will be open to the presentation of a foreign law by the parties;[69] however, pursuant to

60. TRIEBEL, *supra* note 58 at 1048; § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 383 (cmt. 149).

61. *See* TRIEBEL & VOGENAUER, *supra* note 34 at 33-52.

62. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 370, 434.

63. *See e.g.* for the courts in the member states of the European Union: Commission Regulation 593/2008 (Rome I), art. 9 para. 2, O.J. (European Union, 2008), L 177 p. 6, corrected in O.J. (European Union, 2009) L 309 p. 8.

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

65. *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS (2014), at 99 (cmt. 3-31; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS at 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 (2008) at 598-600 (no. 14.64); Richard Fentiman**,** FOREIGN LAW IN ENGLISH COURTS 62 (P.B. Carter, QC ed., 1998).

66. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 406 (cmt. 251); *see* also all sources in the previous note.

67. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* 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).

68. BRIGGS, *supra* note 65at 99 (cmt. 3-31).

69. For example, Section 293 sentence 1 of the German Code of Civil Procedure provides:

the *iura novit curia* principle,[70] he or she is also free, personally, to research a foreign statute, court decision or literature.[71] From a civil law perspective, it is submitted that a rule does not change its character depending on the nationality of the reader. Arbitrators will take different approaches depending on their legal background and training.[72]

In addition to multiple further differences between civil and common law on a procedural level[73], there exist multiple substantive law differences.[74] 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.[75]

Limitation periods tend to be procedural questions in common law jurisdictions and a substantive matter in civil law jurisdictions.[76] Some jurisdictions may even consider them as mandatory.[77] The compromise rules in the UNIDROIT Principles on this and other issues will be discussed below at **II.D.2.** The water of comparative law with various approaches of diverging

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"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.).

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

71. 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.* ZIVILPROZESSORDNUNG [ZPO] CODE OF CIVIL PROCEDURE §293 (Ger.).

72. 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.

73 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. the summary at § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at p. 410 (cmt. 266).

74. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 17.

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

76. For common law jurisdictions e.g in USA *See* DIETER MARTINY & CHRISTOPH REITMAN, INTERNATIONALES VERTRAGSRECHT DAS INTERNATIONALE PRIVATRECHT DER SCHULDVERTRÄGE (2018) p. 291 (cmt. 3.251); PETER HAY, *Die Qualifikation der Verjährung im US-amerikanischen Kollisionsrecht*, (1989) IPRAX 197 *et seq.*; for civil law jurisdictions cf. § 194 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE].

77. *See e.g.* for England BRIGGS, *supra* note 65 at ##, (cmt. 7.211); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at p. 427 (cmt. 334, at 'Praxistipp').

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.[78] They require adequate legal tools to achieve their economic goals.

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.[79] They need the law "as facilitator—rather than impediment—to international business."[80]

In the experience of the author, merchants do not like to confront technicalities of differing laws and issues of dispute.[81] In a good contract negotiation, the important issues will be discussed in sufficient depth and addressed in the contract.[82] Ideally, there will never be a need to look again into the contract during its performance.[83] After contract conclusion changes to the market, to the stakeholders of the contract or unforeseen party behavior may lead to impediments, which give reason to have the contract written out in detail. 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,[84] (4) the available time, budget and energy, as well as (5) multiple other

78. See e.g. BONELL, *supra* note 12 at 17; RISK MANAGEMENT TOOL, *supra* note 8, at 1284-1285 (Introduction to Legal Risk Management) and at 1286-1290 (Change of the Legal Environment for Cross-Border Contracts).

79. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 368.

80. *See* the title of the conference, *supra* at footnote *.

81. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 368 (cmt. 87).

82. **[Tulane editors: You have an idea? – I would not footnote for this self-evident statement from my class; but I would like to avoid renumbering of footnotes].**

83. *Except for the requirement of proper documentation, see Id. at 78-79, 83 (at no. 123).*

84. *See* in detail BRÖDERMANN, *supra* note 17, at 752-754; *see* also § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 374-388.

circumstances,[85] the parties will often omit to regulate all issues that may come up for discussion during the life of the contract.[86]

In case of dispute, two key clauses provide the setting for any dispute resolution process.[87] These are the dispute resolution clause and the choice of law clause, including soft law.[88] 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.[89]

When merchants meet contract partners from other jurisdictions, there is always a potential conflict of laws.[90] The contractual regime needs to be coherent and (usually) cannot give room for two conflicting national laws.[91] A choice must be made.[92] Merchants will often try using their home law and to impose it with market power, if any, on their contract partners.[93] 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.[94] For example, they may lack provisions on time-zone management[95] or foreign

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[85] 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 22, at 374-388 on the impact of non-legal circumstances on contract conclusion.

86. *See* ECKART BRÖDERMANN & PHILIPP VON DIETZE, Vertragsmanagement "Vom NDA bis zur Abwicklung des Exportgeschäfts" in Hamburger Handbuch des Exportrechts (Marian Paschke/ Christian Graf/ Arne Olbrisch, eds.), at 64 (cmt. 18).

87. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22 at 371 (cmt. 102).

88. *Id.*

89. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22 at 395 (cmt. 205).

90. See BRÖDERMANN & VON DIETZE, *supra* note 86, at 74-76.

91. 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 US-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.

92. See BRÖDERMANN & VON DIETZE, *supra* note 82, at 75-76.

93. *Id.* at 75; § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 374-376; BRÖDERMANN, Hamburg Law Review 2016, *supra* note 98, 21-51.

94. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 17.

95. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.12(3) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

currency set-off.[96] Similarly, the choice of a neutral third country's law as a compromise between the parties is also full of risks.[97] For example, from a US perspective, English law has a different approach to "good faith".[98] 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.[99]

Without tools to cope with the conflict of laws, merchants take remarkable risks by operating under unknown laws.[100] 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.[101]

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.[102] They provide an answer for the legal community to the business needs for global trade.[103] They have been

96. *Id*. at art. 8.2.

97. 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*, in: HmbgLawR 2018, *supra* note 12, at 107, 114 (summarising an assessment on Swiss law as neutral law by INGEBORG SCHWENZER); BONELL, Unif. L. Rev. 2018, *supra* note 12, at 16-17 (quoting Schwenzer in Global Unification of Contract Law, Unif. L. Rev. 2016, p. 60, 63-64); BRÖDERMANN, *supra* note 17, at 754.

98. *See* (as an English example) James Spencer & Co Ltd v Tame Valley Padding Co Ltd [1997] EWCA Civ 2288 *versus* Uniform Commercial Code, § 1-304 and American Law Institute, Restatement (Second) of Contracts (1981), § 205 (for the US legal system).

99. 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) US 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 17, at 754.

100. BONELL, Unif. L. Rev. 2018, *supra* note 12, 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.

101. See BONELL, Unif. L. Rev. 2018, *supra* note 12 at 16-21, 38-41,

102. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

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'**UNI**fication du **DROIT** privé"* (emphasis added).[104]

During a time span of more than 35 years the UNIDROIT Principles were first negotiated and then released in 1994 and 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.[105] Organized in 11 chapters, they provide 211 rules on general contract law, bridging common and civil law legal thinking.[106]

With regard to various issues ranging from validity of the contract, third party rights and conditions, performance and non-performance of the contract, 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)[107] 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 neutral language, avoiding terminology "peculiar to any given legal system."[108].

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104. *Id.* (French version).

105 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); and *e.g.* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13 (cmt. 2 on pmbl.).

106. *Id.*

107. United Nations Convention for the International Sale of Goods, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

108. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 6.; STEFAN VOGENAUER, Introduction, in VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 17 with reference in cmt. 122 to OLIVER REMIEN, *Die UNIDROIT-Prinzipien und die Grundregeln des Europäischen Vertragsrechts: Ein vergleichender Blick in* GRUNDREGELN DES EUROPÄISCHEN VERTRAGSRECHTS 64, 74 (E. Cashin Ritaine and 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).

The UNIDROIT Principles 2016 have been accepted by the Governing Council of UNIDROIT, which represents 63 member states and were translated into 16 languages.[109]

The Principles are not state law but "rules of law"[110]; 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).[111]

The UNIDROIT Principles 2016 cover a broad range of purposes.[112] They thrive to provide a tool to international trade on many levels.[113] According to the preamble, the UNIDROIT Principles 2016 cover a wide range of applications, including their application as **general principles of law** or the *lex mercatoria*.[114] They may be applied if no choice was made, or to interpret or supplement uniform law instruments or domestic law.[115] They may serve as a model for national and international legislators.[116]

For example, several changes in the contract law reform of 2016 in France can be traced back to the UNIDROIT Principles.[117] 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 purposes" in 2007.[118] The endorsement was repeated for the 2010

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109. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). *See* also https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (listing official languages).

110 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

112. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, pmbl (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

114 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, pmbl para. 3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

115 *Id.* at pmbl para. 4, 5 and 6.

116 *Id.* at pmbl para. 7.

117. BONELL, Unif. L. Rev. 2018, *supra* note 12 at 23; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, *supra* note 1, at 18 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 13 on pmbl.).

118. Report of the United Nations Commission on International Trade Law on the Work of its Fortieth Session (25 June - 12 July and 10 – 14 December 2007), Official Records of the General

edition.[119] Courts and arbitration tribunals around the globe have applied or referred to the UNIDROIT Principles.[120]

The UNIDROIT Principles 2016 can be described as a "disruptive" legal technology[121] 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,[122] unless there is *force majeure*[123] or the parties agree otherwise[124] 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.[125] For businesswomen and businessmen this is usually acceptable. The UNIDROIT Principles 2016 thus provide a valuable soft law tool bridging different national legal systems.

The bridge of the UNIDROIT Principles 2016 is thus ready to be used, thanks to approximately thirty 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, with and for the Working Group, watched by observers from practice.[126] It is often wise to use the

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Assembly, Sixty-second Session, A/62/17 (Part I), no. XI (at "Endorsement of texts of other organizations: UNIDROIT Principles of International Commercial Contracts 2004," p. 50-52 at no. 213: "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.").

[119] Report of the United Nations Commission on International Trade Law on the Work of its Forty-fifth session (25 June - 6 July 2012), Official Records of the General Assembly, Sixty-seventh Session, Supplement No.17 no. XIV. "Endorsement of texts of other organizations", under "A. UNIDROIT Principles of International Commercial Contracts 2010", at 33 (at no. 139). It is reasonable to expect a further endorsement of the 2016 edition, *see* BONELL, Unif. L. Rev. 2018, *supra* note 12 at 21 (note 25).

120. *See* UNILEX ON UNIDROIT PRINCIPLES & CISG, http://www.unilex.info (last visited Apr. 14, 2019) as well the other websites cited *supra* note 12.

121. 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).

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

123. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

124. *Id.* at art. 7.1.6.

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

126. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016), at p. xvii-xx, xxv-xxvi, xxx-xxxv.

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.[127] In other areas of knowledge, such as medicine, there exist well established processes and practices on how to test and approve e.g. new pharmaceutical entering the market.[128] For new international legal instruments there exists no such generally accepted approval process if the rules are created as soft law.[129] In the case of the UNIDROIT Principles 2016 there exist supplements which 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[130] 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 part **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;[131] (5) *Fifthly,* as mentioned**,** UNCITRAL has twice commended their use as "general rules for international commercial contracts" in resolutions of its General Assembly.[132] This combination of factors must suffice to make it

127. This expression finds its basis in a famous statement of a German private international law professor Leo Raape, see LEO RAAPE Internationales Privatrecht, 5th ed., (1961), at 90. 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 (https://de.wikipedia.org/wiki/Leo_Raape).

128. *See* e.g. for the USA Development & Approval Process / Drugs *https://www.fda.gov/drugs/development-approval-process-drugs*.

129. *See* on the creation of soft law FELIX DASSER, "Soft Law" in international commercial arbitration, Recueil des Cours 2018, at 21 *et seq.*, Chapter IV, part C. "Substantive 'soft law'", (2019, in production, article on file with the author), *see* also FELIX DASSER, Soft Law in International Commercial Arbitration – A Critical Approach, Austria Yearbook International Law 2019, 111-127 .

130. *See*, *e.g.* PREPARATORY WORK FOR THE 4TH EDITION OF PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**,** *https://www.unidroit.org/unidroit-principles-2016/preparatory-work* for all materials documenting the discussion.

131. *See* e.g. MEIER, *supra* note 50, at 1243 (Introduction to Section 11.2 of the PICC cmt. 4); objected in BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note, 1 at 393 (cmt. 2 on art. 11.2.1).

132. *See supra* notes 118 and 119.

"knowable" to practitioners that the UNIDROIT Principles 2016 provide a usable tool for international contracting.[133] Subject to applicable mandatory law[134], they provide for general business contract law "law without walls,"[135] 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.[136] They provide the perfect Plan B to choosing the law of one's home jurisdiction.[137]

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

The components of the bridge, i.e. the individual rules which jointly constitute the UNIDROIT Principles 2016, are easy to comprehend both by merchants and lawyers, regardless of their training.[138] They restate an international consensus and are easy to understand (hereinafter **1.**), or they constitute a negotiated compromise (**2.**).[139]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.[140] Rarely did the drafters of the UNIDROIT Principles exceed existing rules to develop an answer for an existing business need which, by now, has been well received in the international legal community (**3.**).[141]

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133. *See* BONELL, Unif. L. Rev. 2018, *supra* note 12, at 38-39.

134 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

135. LAW WITHOUT WALLS, *http://lawwithoutwalls.org* (last visited Oct. 19, 2019).

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

137. *See infra* **II.E.** ("The Bridge is Stable").

138. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 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).

139. *See infra* ***II.D.2*** below.

140. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 24.

141. *See infra* **II.D.3**.

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.[142] Therefore, the UNIDROIT Principles 2016 serve as a "restatement" of international commercial law.[143] In this respect, US lawyers tend, in discussions, to call them "an international UCC,"[144] 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).[145] 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,"*[146] to justify their application.[147]

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.[148] This principle is known in civil law systems under the concept of *venire contra factum*

142. VOGENAUER, *supra* note 107, at 20; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 3 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 3).

143. *See* generally AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 9 *et seq*.; *see* also BONELL, Unif. L. Rev. 2018, *supra* note 12, at 20-24.

144 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 INTERNATIONAL COMMERCIAL CONTRACTS 2016 pmbl. (UNIDROIT International Institute for the Unification of Private Law, 2016).

145. *Id.*

146. *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), http://www.unilex.info/case.cfm?pid=2&do=case&id=2035&step=FullText; BONELL, Unif. L. Rev. 2018, *supra* note 12 at 15, 28*;* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at p. 2 (Introduction to the UNIDROIT Principles of International Commercial Contracts, cmt. 4).

147. *See* BONELL, Unif. L. Rev. 2018, *supra* note 12, at 15, 28.

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

proprium or *théorie de l'apparence;* in common law systems it manifests itself as the doctrine of estoppel.[149]

Example 2: Article 2.1.1 includes the nearly worldwide consensus that the conclusion of a contract requires an offer and an acceptance[150] 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.*"[151]

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).*[152]

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.[153]

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.[154]

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

149. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 134; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 1 on art. 1.8).

150. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.1.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); PILAR PERALES VISCASILLAS, *Capítulo 2: Formacion* in MORÁN BOVIO'S COMENTARIO, *supra* note 13, at 109 (cmt. 1 on art. 2.1),; BOBEI, *supra* note 13, at 69; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, p. 39 (cmt. 1 on art. 2.1.1).

151. LUKE NOTTAGE, *Formation I Arts. 2.1.1-2.1.5 - Offer in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 262.

152. HARRIET SCHELHAAS, *Section 2: Right to Performancce*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, 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).

153. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 323-324 (cmt. 1 on art. 9.3.1).

154. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 22: "preference was given to solutions generally accepted at the international level (the 'common core' or 're-statement' approach)".

national systems to develop sound solutions which are generally acceptable to both common law and civil law lawyers.[155]

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.[156] 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.[157]

Considerable compromise is also found in their silence with regard to certain issues that play a major role in some national laws.[158] For example, from an English perspective, there is no requirement of "consideration"[159] which, in practice, is sometimes being reduced to symbolic amounts. A unified system of international contract rules does not need such outdated formal symbolism.[160] From a French perspective, the UNIDROIT Principles 2016 do not contain any need for "cause."[161] The deliberate silence of the UNIDROIT Principles on these topics also represents major achievements of international compromising at the time.[162]

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.[163] In these cases, the Working Group acted with remarkable wisdom by building bridges between the different national legal systems. Each of

155. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, p. 4 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 8).

156. MANAGING THE FUTURE, *supra* note 2, at 47.

157. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016)

158. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 23.

159. *Id.* at 15, 23.

160. *Id.* at 23.

161. 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 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016) abolished that requirement; see BONELL, Unif. L. Rev. 2018, *supra* note 12 at 15, 23.

162. BONELL, Unif. L. Rev. 2018, *supra* note 12 at 23.

163. An example are the compromises in Chapter 11 of the UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016) as discussed in Annex 1 to the electronic version of this article (at VI).

these, common or civil law, "systems" include a myriad of varieties, as every US trained lawyer knows from the differences among the different state laws of the US, which operate within a purely common law legal system (this includes the laws of all US states except for Louisiana).[164] The same level of variety can be found between or among different civil law systems, notably those which are based, at least initially, on the French Civil Code of 1804[165] or on the German Civil Code of 1900.[166]

The following review does not purport to regard in depth all compromises reached during the almost three decades of work.[167] Such a review is beyond the scope of this article.

Rather, this article builds hereinafter on compromises which the author has noted during the writing of his article-by-article commentary of UNIDROIT Principles.[168] 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.[169] 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.

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164. DANIEL BERKOWITZ & KAREN CLAY, *American Civil Law Origins: Implications for State Constitutions and State Courts*, AM. LAW AND ECON. ASS'N MEETINGS 1, 4 (2004); HAY ET AL., *supra* note 18, at 4.

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

166. 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 Art. 107 of the Chinese Contract Law, adopted on 15.3.1999 by the Second Session of the Ninth National People's Congress, available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf (visited on 12 April 2019).

167. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

168. *Supra n*ote 1. A search of the word "compromise" in the manuscript revealed over 30 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 13. Yet, the real figure of compromises which are contained in the UNIDROIT Principles 2016 is substantially higher, if one considers the details of national laws with regard to the 211 issues which the UNIDROIT Principles 2016 resolve by providing a compromise default rule.

169. See *supra* note (**).

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. k**) and assessing their background character (**lit. l**).[170] Regarding the proof of the different national solutions which cause the troubled water of competing national rules, suffice it to reference, for the purposes of this overview, the sources cited in the 2d edition 2015 of the *Vogenauer* commentary,[171] supplemented with additional references for jurisdictions which have changed their contract law since then (France 2016,[172] China 2017[173]).

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.[174]

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"[175] which can be found in civil law as well as several common law jurisdictions (including the USA[176]), and in hybrid

170. *See infra* **lit. b through g**.

171. *See* VOGENAUER'S COMMENTARY 2D, *supra* note 13.

172. *CODE CIVIL* [C. CIV] [CIVIL CODE] (Fr.); BONELL, Unif. L. Rev. 2018, *supra* note 12, at 23.

173. General Rules of the People's Republic of China (promulgated by NPC, March 15, 2017, effective October 1, 2017) Presidential Order No. 66.

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

175. VOGENAUER, General Provisions III: Arts. 1.6-1-12 – Application of the PICC in VOGENAUERS' COMMENTARY, *supra* note 13, at 205 (cmt. 1 on art. 1.7).

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

jurisdictions (such as Israel[177] or Dubai[178]), it is not generally shared in all jurisdictions.[179] In particular, England and many Commonwealth jurisdictions do not yet recognize a general rule of an abstract principle of good faith.[180] Thus, there was a need for a compromise.[181] The compromise was subtle:

First, on the level of wording, the formulation of Article 1.7(1) itself is remarkably neutral.[182] 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.[183]

Secondly, and possibly more importantly, the compromise recognizes the English need for specifics.[184] English lawyers are said not to be as accustomed to codifications and they tend to prefer specific rules, as compared to abstract legal principles.[185] 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 *Darshimi Prasad* (with a Singapore and UK background) recently summarized the critical

177. GABRIEAL 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) with reproduction at pp. 1106, 1109, of Contract Law (Isr.), General Part, pertinent arts. 12, 39.

178. See CIVIL CODE [C. CIV.] [CIVIL CODE] (UAE) as kindly searched and shared by *Ghada Audi* with reference to JAMES WHELAN, UAE CIVIL CODE AND MINISTRY OF JUSTICE COMMENTARY, 153 (2011).

179. See & PRASAD, *supra* note 4, at 86, 88; VOGENAUER , *supra* note 175, at 206 (cmt. 1 on art. 1.7).

180. VOGENAUER , *supra* note 175, at 206 (cmt. 1 on art. 1.7); *see also* KLAUS PETER BERGER & THOMAS ARNTZ, Treu und Glauben als Rechtsprinzip im englischen Wirtschaftsrecht, ZVglRWiss 115 (2016)), 167-199 (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 https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8, at no. 11.1.

181. *See* (1992) P.C. – Misc. 18, Working Group for the preparation of Principles for International Commercial Contracts. Summary records of the meeting held in Miami from 6 to 10 January 1992 (prepared by the Secretariat of UNIDROIT) – Rome, May 1992, at 75 as well as *id*. at 62, 66, 69 and 74

182. P.C. Misc. 18, *supra* 168 at 75 as well as *id*. at 62, 66, 69 and 74; VOGENAUER, *supra* note 175, at 214 (cmt. 19 on art. 1.7).

183. P.C. Misc. 19, *supra* 168 at 64.

184. SEE & PRASAD, *supra* note 4, at 105.

185. *Id.* at 89-90 ("introducing 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.")

English law position as follows:[186] 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.[187] Second, it cannot be reconciled with English common law, which is fact driven and therefore provides piecemeal solutions in response to problems.[188] Third, it is perceived as antithetical to the foundational importance of certainty in English law.[189]

From a continental European perspective, it might be observed with regard to the second concern that 47 years of participation of the UK in a European Union,[190] which operates by written regulations and directives,[191] might have triggered some comfort to manage the application also of abstract rules; but what are 47 years as compared to close to 1,000 years since the emergence and development of English law, subsequent to the battle of Hastings of 1066?[192]

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"[193] 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.[194]

Recognizing the English need for concrete examples, the UNIDROIT Principles 2016 contain at least 40 specific rules with practical applications of the general principle of good faith and fair dealing.[195] The concrete rules calling for reasonable behavior

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186. *Id.* at 89.

187 *Id.*

188 *Id.*

189. *Id.*

190. 1 January 1973 (*see* EUROPEAN UNION, EU MEMBER COUNTRIES IN BRIEF - UNITED KINGDOM (2019), https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en.) 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, OJ 2019/C 384/01), art. 185.

191. *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).

192. *See* GEORGE B. ADAMS, *Origin of the Common Law*, 23 YALE L.J. 115, 116 (1924).

193 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

194. SEE & PRASAD, *supra* note 4 at 86.

195. *See* the examples given by the UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.7 (cmt. 1) (UNIDROIT INT'L INST. FOR THE UNIFICATION

cover most standard situations in which a contract partner would expect good faith behavior from its counter-part, as a civil law or a US trained lawyer might be inclined to call it.[196] The description below gives four examples[197]:

(1) **Article 1.8** prohibits inconsistent behavior.[198] Relying on inconsistent behavior would also contravene good faith and fair dealing.[199]

(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.[200]

(3) Following the same scheme,[201] 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 causes the other party to reasonably rely on a conduct that deviates from an agreement in writing.[202] 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.[203] In such case, there is no 'reasonable' reliance in the sense of Article 2.1.18 sentence 2, and

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OF PRIV. L. 2016) which lists 37 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 which contain the word "reasonable" (i.e. 58 by electronic counting of the author), there may be approximately 60 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", VOGENAUER, *supra* note 175, at 210 (cmt. 10 on art. 1.7).

196. SEE & PRASAD, *supra* note 4, at 97 (arguing in a similar direction).

197. Selected from the list in UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 Art. 1.7 (cmt. 1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). *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.

198 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.8 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

199. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.7 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 32 (cmt. 1 on art. 1.8).

200. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.4 (cmt. 2b) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 42 (cmt. 1 on art. 2.1.4).

201. VOGENAUER, Formation IV: Arts. 2.1.17-2.1.18 – *Integrity of Writing* in VOGENAUER'S COMMENTARY 2D, *supra* note 13 at 377 (cmt. 8 on art. 2.1.18).

202. *Id.*

203. VOGENAUER, *supra* note 203 at 378 (cmt. 9 on art. 2.1.18).

contradictory behavior to such communicated exceptional behavior would not intrude upon the general principles of good faith and fair dealing.[204]

(4) **Article 5.1.3** states a duty of cooperation "*when such cooperation may reasonably be expected"* by the other party.[205] This rule not only evidences a modern concept of perceiving international contracts as a "common project,"[206] it also expresses a concrete example of the general duty of good faith and fair dealing.[207] As noted by *Bonell*, in the famous *Andersen* arbitration, the arbitrators referred to the general duty of good faith and fair dealing in Article 1.7 instead of citing Article 5.1.3.[208]

The high number of specific applications of the principle of good faith and fair dealing as illustrated by these examples[209] also documents, firstly, why the general rule in Article 1.7 is one of the few underlying principles of the UNIDROIT Principles 2016.[210]

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.[211] 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.[212] This is the case when the deviation of the delivered or executed scope of work

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204. *Id.*

205. VOGENAUER, Section 1: *Content* in VOGENAUER'S COMMENTARY 2D, *supra* note 13. at art. 5.1.3.

206. *Id.* at 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).

207. JUAN LUIS BEGINES, in MORÁN BOVIO'S COMENTARIO, *supra* note 13, at 259-261.

208. 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, 253-254 (2001) (hereinafter A "GLOBAL" ARBITRATION) arguing that the commented award would have been better based on the more specific rule in UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 4.8 or Art. 5.3 (now: Art. 5.1.3) than art. 1.7 (UNIDROIT International Institute for the Unification of Private Law, 2016).

209 16 further examples are set forth in Annex 1, reproduced in the electronic version of this article.

210. BONELL, *supra* note 12, at 88-172; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, p. 3 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 7).

211. BERGER&ARNZT, *supra* note 180 (cmt. 4 on Trans-Lex-Principle 1.1.1 – Good faith and fair dealing in international trade).

212. VOGENAUER, *supra* note 175, at 222-223 (cmt. 37 on Article 1.7).

from the agreed scope of work is minimal.[213] 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).[214] 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.[215] The respect for the need to sleep is a reason to deny delivery.[216]

As a matter of autonomous interpretation of the UNIDROIT Principles 2016 pursuant to Article 1.6, the specific rules take priority over the general rule in Article 1.7. [217] As a result, there remains limited room for the parties still to rely upon the general and underlying principle of Article 1.7.[218] In most situations a more specific rule steps as a result of the compromises negotiated in the UNIDROIT Principles 2016 for the issue of good faith and fair dealing. [219]

As a result, an overwhelming majority of issues relating to the principle of good faith and fair dealing is encapsulated in **piecemeal solutions**[220] in response to demonstrated scenarios of unfairness, as discussed by the Working Group.[221] 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.*[222] With such reduction of the sphere of application of the general rule

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

214. VOGENAUER, *supra* note 175, at 222-223 (cmts. 36-37 to art. 1.7); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 32 (cmt. 4 on art. 1.7).

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

216. *Id.*

217. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 1.6, 1.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

218. *Id.,* art. 1.7.

219 *Id.,* cmt. 1. on art. 1.7.

220 *See e.g.* the quote of observations of Bingham LJ (from 1989) in 2013 in *Yam Seng Pte Limited (A company registered in Singapore) v. International Trade Corporation Limited*, [2013] EWHC 111 QB, para. 121-123 (online available at http://www.bailii.org/ew/cases/EWHC/QB/2013/111.html, visited on 3 February 2020); as cited by SEE & PRASAD, *supra* note 4, at 105.

221. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, at x-xi, xvii-xx, xxv-xxvi, xxxii-xxxv (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); reprinted at BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at LXII-LXIV.

222. *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] EWHC 1 Q.B. 433, 439 (Eng.), as referenced by SEE & PRASAD, *supra* note 4, at 89.

on good faith and fair dealing in Article 1.7 arising as a result of the inclusion of these many (forty) specific rules, the inclusion of such a general principle has become acceptable as a compromise, also for UK lawyers.[223]

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.[224] 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.[225] *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 in a way the English law may not."[226] 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.[227] In France and in the Romanistic tradition (including in this respect Louisiana[228]), a contract obliging someone to do something which is impossible to do is invalid.[229] In other jurisdictions, such a contract would be treated as valid.[230] Under these circumstances, it is helpful that the

223. SEE & PRASAD, *supra* note 4, at 105.

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

225. SEE & PRASAD, *supra* note 4, at 105.

226. *Id.*

227. *See* PETER HUBER, *Section 1: General Provisions*, in VOGENAUER'S COMMENTARY 2D, *supra* note 13, 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).

228. LA. CIV. CODE art. 1971, 1972 (2019).

229. CODE CIVIL [C. CIV] [CIVIL CODE] arts. 1163(2), 1178(1) (Fr.); Lucia Alvarado Herrera, PROPUESTAS DE ENMIENDA in MORÁN BOVIO'S COMENTARIO, *supra* note 13, at 178 (cmt. 1 on art. 3.3).

230. See e.g. for Germany BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 311a (1) (Ger.); for further examples see HUBER, *supra* note 227, at 469 (cmt. 3 on art. 3.1.3).

UNIDROIT Principles 2016 provide for a clarifying rule that avoids misunderstanding.[231] In Article 3.1.3, [232] the UNIDROIT Principles 2016 treat initial impossibility as an issue of non-performance[233] or mistake,[234] and not as matter of validity.[235]

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

The interpretation of contracts goes to the heart of contract law.[236] Two aspects suggesting compromise are particularly worth noting:

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"),[237] it is helpful that the UNIDROIT Principles 2016 set forth rules of interpretation in Chapter 4.[238] That avoids unpleasant surprises in case of dispute.[239] The rules in Chapter 4 have been welcomed by the international community, e.g. as "*general principles of law"*[240]

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231. See UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 3.1.3 and cmt. 1 on art. 3.1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

232. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 3.1.3 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); HERRERA, *supra* note 218.

233. *See id.* at art. 7.2.2; HERRERA, *supra* note 218, at 178 (cmt. 1 on art. 3.3); HUBER, *supra* note 227, at 470 (cmts. 6-7 on art. 3.1.3).

234. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 3.2.2 and cmt. 2 on art. 3.2.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); for an assessment see HUBER, Art. 3.2.2 (Relevant Mistake), in VOGENAUER'S COMMENTARY 2D, *supra* note 13, 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).

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

236. *See* for example Lady Justice Arden in Court of Appeal (Civil Division), No. A3/2006/0290, The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd, (2006); and Court of Appeal Wellington, New Zealand, Bobux Marketing Ltd. V. Raynor Marketing Ltd (Babies' leather booties case), (2001). Available at: http://cisgw3.law.pace.edu/cases/011003n6.html.

237. *See supra* II.A.

238. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 1-4.8 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 109 (cmt. 1 on art. 4.1).

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

240. VOGENAUER, Chapter 4: *Interpretation* in VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 572 (Introduction to Chapter 4 of the PICC cmt. 7); BOBEI, *supra* note 13, at 225 (cmt. 1.1 on art. 4.1).

reflecting "*universal hermeneutic truths."*[241] They reflect a compromise between different approaches.[242] Parties acting under national laws have been reported to have integrated into their contract nonetheless the rules in Chapter 4.[243]

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.[244] Each party thereby has a chance to prove by any means[245] their joint "true" or "real" will.[246] Article 4.3 enumerates a non-exhaustive list of relevant circumstances including: (1) preliminary negotiations between the parties; (2) practices which 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 concerned; and (6) usages.[247] 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."*[248] This is an objective yet individualized and contextualized test.[249] It is submitted that, for international contracts in which minds from different cultures are meeting, which may even operate in different languages, this

241. VOGENAUER, *supra* note 240 at 572 (Introduction to Chapter 4 of the PICC cmt. 7); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, p. 110 (cmt. 2 on art. 4.1).

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

243. VOGENAUER, *supra* note 240, 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 Arbitral Award 20 March 2000 (*Joseph Charles Lemaire v Ukraine)*, ICSID case no. ARB(AF) 4./98/1/(2000), para, 22-23).

244. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (Working Grp. for the Preparation of the UNIDROIT Principles 2016) ; VOGENAUER, *supra* note 240 at 575 (cmt. 3 on art. 4.1); BOBEI, *supra* note 13, at 226 (cmt. 1.2 on art. 4.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110-111 (cmt. 3 on art. 4.1).

245. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

246. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 110-111 (cmt. 3 on art. 4.1).

247. *See id.* at 113-114 (cmts. 1-4 on art. 4.3) with further examples such as (1) the ordinary meaning of the words, (2) policy arguments or (3) fairness and equity of a particular interpretation.

248. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 4.1(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

249. VOGENAUER, *supra* note 240, at 576 (cmt. 5 on art. 4.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 111 (cmt. 5 on art. 4.1).

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.[250] 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.[251]

Article 4.2 paras. 1 and 2 mirror Article 4.1 paras. 1 and 2 for the interpretation of statements and other conduct.[252] 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.[253]

Article 4.6 adds a "*contra proferentem* rule"[254] which shifts the risk of interpretation to the drafting side and thereby gives an incentive for careful drafting.[255] Article 4.7 raises the issue of "linguistic discrepancies" which may easily occur in international drafting.[256] It provides a "soft default rule"[257] with a preference for the version in which the contract was originally

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

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

252. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 4.1, 4.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

254. *Id.* at art. 4.6; AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 156-157.

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

256. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 4.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). *See* also the discussion of the language risks above at II.A. (as part of the "troubled waters").

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

drawn up. Pursuant to Article 1.5, the parties are free to adapt that rule.[258]

Article 4.8 on "supplying an omitted term" will be discussed in more detail hereinafter.[259]

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.[260] Such a contractual clause on "severability" would take priority (Article 1.5) over the default regime in the UNIDROIT Principles 2016.[261]

Absent such a clause, Article 4.8 on "s*upplying an omitted term"* and Articles 5.1 and 5.2 on "*implied obligations"* provide default rules which reveal yet another sound compromise solution.[262] 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).[263]

Pursuant to Article 4.8, which is inspired by both, § 204 of the US Restatement (Contracts, 2d) and the German concept of

258. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); and BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 117 (cmt. 1 on art. 4.7).

259. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 4.8 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

261. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 27 (cmt. 1 on art. 1.5).

262. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 4.8, 5.1.1 and 5.1.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); *see* on the "cultural bridge to common law" in articles 5.1.1-5.1.2 BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 121 (cmt. 1 on art. 5.1.1).

263. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, cmt. 2 on art. 4.8 and cmt. 3 on art. 2.1.14 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 119 (cmt. 2 on art. 4.8).

"*ergänzende Vertragsauslegung"*[264], when contracting parties have not agreed on a term which is important to determine their rights and duties, a term appropriate to the circumstances needs to be found.[265] 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.[266] This approach goes to the edge of contract interpretation.[267] It may appear strange for lawyers trained in jurisdictions which do not have such a rule.[268] A jurist trained in English law would feel more familiar with the concept of implied obligations[269] than to "supplying" an additional term.[270]

The UNIDROIT Principles 2016 also pick up this other approach, searching for "i*mplied obligations,"* if any.[271] 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."*[272] Articles 5.1.3 through 5.1.9 constitute examples of such implied contract provisions.[273] Article 5.1.2 enumerates the sources which 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)*.[274]

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264. Secretariat of UNIDROIT, Rep. of the Working Grp. for the Preparation of Int'l Com. Cont. on the Meeting held in Rome May 27-31, 1991 P.C.—Misc. 17, at 142, (Feb. 1993) [hereinafter Secretariat of UNIDROIT]; VOGENAUER, *supra* note 240, at 611-613 (cmt. 5 on art. 4.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 118 (cmts. 2, 6 on art. 4.8).

265. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 4.8 (1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

266. *Id.*

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

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

269. *Id.* and VOGENAUER, *supra* note 240, at 614 (cmt. 8 on art. 4.8 with further references).

270. VOGENAUER, *supra* note 207, at 619 (cmt. 1 on art. 5.1.2) and VOGENAUER, *supra* note 240, at 615 (cmt. 7 on art. 4.8); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 120 (cmt. 4 on art. 4.8).

271. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 5.1.1.-5.1.2. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

272. *Id.* at art. 5.1.1.

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

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

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.[275] 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.[276]

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.[277] 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.[278] 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.[279] 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.[280]

e. Chapter 7—Non-Performance

Chapter 7 contains a number of negotiated compromises regarding non-performance[281]:

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275. VOGENAUER, *supra* note 240 at (cmt. 7 on art. 4.8) and VOGENAUER, *supra* note 207 at 619 (cmt. 1 on art. 5.1.2).

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

277. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 120 (cmt. 5 on art. 4.8).

278. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 145; see also VOGENAUER, *supra* note 240 at (cmt. 7 on art. 4.8) and VOGENAUER, *supra* note 207 at 619 (cmt. 1 on art. 5.1.2).; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 121.

279. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 145; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 122 (cmt. 2 on art. 5.1.2).

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

281. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Ch. 7 § 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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.[282]

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.[283] To start with, they separate claims for payment from other claims due to non-performance of non-monetary obligations.[284]

Non-Performance of Monetary Obligations: By their nature, claims for payment of an agreed sum which are due under a contract are claims for specific performance.[285] If necessary, they can be enforced in court or in front of an arbitral tribunal.[286] For these claims for performance of monetary obligations, [287] 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 ".[288]

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.[289] This represents at first sight a slight inclination towards the civil

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282. SCHELHAAS,, *supra* note 152, at 887-888 (cmt. 1 on art. 7.2.2).

283. *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).

284. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS arts. 7.2.1 and 7.2.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

285. SCHELHAAS, *supra* note 152, 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).

286. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS arts. 1.11 1st hyphen (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

287. *Id.* at art. 7.2.1

288. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.2.1. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

289. *Id.* at 7.2.2.

law world.[290] 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.[291]

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)*. This was already mentioned at **II.D.1.** as an example for rules that can be considered as an international restatement.[292] 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.[293] With this start, it becomes easy for a civil law trained lawyer also to accept the exceptions 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.[294] The result, i.e. the cases in which specific performance is granted comes close to what a US lawyer will be accustomed to.[295] The wording is so subtle that both civil and common law trained lawyers can live with it.[296] Moreover, the parties would be free to adapt Article 7.2.2 to their needs (Article 1.5).[297]

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

290. SCHELHAAS, *supra* note 152, at 887-888 (cmt. 1-2 on art. 7.2.2); BOBEI, *supra* note 13, at 396-97.

291. SCHELHAAS, *supra* note 152, at 888 (cmt. 2 on art. 7.2.2).

292. *Supra* at **II.D.1** (example 3) with references.

293. BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 275 (2) (*wirtschaftliche Unzumutbarkeit*), translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.). *See e.g.* MARTIN SCHMIDT-KESSEL & MALTE KRAMME, *Vor § 275, §§ 275-292*, in BGB Kommentar (Hanns Prütting et al. eds.), 14th ed. 2019 at 44 (cmt. 18 on § 275); UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 7.2.2 cmt. 3(b) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); SCHELHAAS, *supra* note 152, at 894-95; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 208.

294. SCHELHAAS, *supra* note 152 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).

295. SCHELHAAS, *supra* note 152 at 888 (cmt. 2 on art. 7.2.2).

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

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

reason.[298] In many contracts, however, termination is not covered, or at least not in any detail.[299] In these situations, a background default rule is helpful.[300] In Article 7.3.1, the UNIDROIT Principles 2016 provide an internationally negotiated compromise between different legal systems with respect to fundamental non-performance.[301] 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.[302] Para. 2 sets forth criteria on how to determine whether a failure to perform an obligation amounts to a fundamental non-performance.

The non-exclusive list[303] of (sometimes overlapping)[304] criteria in lit. a-e is a masterpiece of comparative research and compromise.[305] For example, as set forth by *Huber* in the Vogenauer commentary,[306] lit. a) took inspiration from the earlier international compromise set out in Article 25 CISG.[307] Both, lit. a) and lit. b) find further foundations in English contract law, in §§ 236-243 Restatement (Second) of Contracts (USA) ('material

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

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

300. *See* generally AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 256-260; GHADA & BRÖDERMANN*, supra* note 14.

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

302 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 7.3.1 (1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

303. Int'l Inst. for the Unification of Private Law, Rep. of the Working Grp. for the Preparation of Principles for Int'l Com. Cont. on the Rome Meeting., PC- Misc. 19 (1994); PETER HUBER, *Section 3: Termination*, in VOGENAUER'S COMMENTARY 2D, *supra* note 13, 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).

304. HUBER, *supra* note 303, 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).

305. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.3.1(2) a-e (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 218-219 (cmt. 2 on art. 7.3.1); HUBER, *supra* note 303, at 921-922 (cmt. 5-6 on art. 7.3.1) on underlying policy considerations.

306. HUBER, *supra* note 303, at 923 (cmt. 13 on art. 7.3.1).

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

breach') especially in § 241 of the Restatement (Second) of Contracts (USA) and e.g. in Spanish law.[308]

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.[309]

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.[310] Both national concepts provide for exceptions, so that, in their practical impact, they are not that different.[311] Yet again, they help to level the playing field of international contracting.[312]

Article 7.3.5 on "Effects of termination in general" provides for a compromise.[313] Para. 1 provides for a prospective approach[314], attenuated by a right to claim accrued damages for non-performance (para. 2)[315] and a clarification regarding surviving rights (Para. 3[316]).[317] For merchants with different legal

308. Tribunal Supremo (STS) Feb. 17, 2010, (Spain); Tribunal Supremo (STS) December 3, 2008, (Spain) https://supremo.vlex.es/vid/-52051155?_ga=2.212792727.223815308.1574136608-875068202.1574136608; Tribunal Supremo (STS) July 9, 2007, (Spain); BRÖDERMAN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-230; HUBER, *supra* note 303, at 925 (cmt. 17 on art. 7.3.1).

309. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 7.3.1 (3), 7.1.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

310. TREITEL, Remedies for Breach of Contract (1991) pp. 382-384 at 382-84 (cmt. 282); HUBER, *supra* note 303, at 956 (cmt. 3 on art. 7.3.1, note 148); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-230 (cmt. 1 on art. 7.3.5).

311. TREITEL, *supra* note 310, at 382-84 (cmt. 282).

312. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 229-230 (cmt. 1 on art. 7.3.5).

313. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 7.3.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). 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.

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

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

316 *Id.* at 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.".*

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

backgrounds, it thereby offers a starting point with which internationally active merchants and lawyers can well live.[318]

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

It is submitted that the non-exhaustive overview of compromises provided above at II.D.2.lit b) though e)[319] 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.[320]

From a practical perspective, the mere existence of this myriad of compromises is already helpful.[321] They provide a robust system of default rules[322] and thereby a powerful tool for all merchants and lawyers. Many of the issues covered in the compromises cover contractual questions which would usually not be put on the agenda of negotiation,[323] such as imputation of payment (Article 6.1.12) or details of foreign currency set-off (Articles 8.2–8.5).[324] 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.[325] To achieve the same

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318. HUBER, *supra* note 303, 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).

319 As supplemented by further 16 examples in Annex I, contained in the electronic edition of this article.

320. *See supra* **II.D.2.lit b) through e)**, as supplemented by Annex 1 to the electronic version of this article.

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

322. Email from Petra Butler to author (Sept. 18, 2018, 07:03) (on file with author).

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

324. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 6.1.12, 8.2-8.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

325. *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.

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.[326] There exists a danger that these differences will remain unnoticed, such as the different understandings of the same words[327] and the different approach to interpretation.[328] 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.[329] 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).[330] 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 law, sometimes based on a footprint of experiences with former contracts that were performed smoothly, without testing the chosen neutral state law.[331] There exist exceptions, but these are few as compared to the large number of cross-border contracts concluded every day around the globe.[332] Even major companies do not enjoy spending substantial resources on choosing the applicable law.[333]

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326. See e.g. above **II.D.2 lit. b-e)** and Annex 1 to the electronic version of this article.

327. *See supra* **II.A.**

328. *See supra* **II.D.2. lit. d.**

329. *See e.g.* REINHARD ZIMMERMAN**,** THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, Volume II 1554-55 (Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmerman, Andreas Stier eds., 2012); INTERNATIONAL INSTITUTION OF LEGAL SCIENCE, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 21.

330. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 6.1.12(2), 8.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

331. On the sociological reasons why companies do not undertake more detailed research when choosing the applicable law, *see* FESTSCHRIFT MARTINY, *supra* note 67, at 1061-1068

332. *See* FESTSCHRIFT MARTINY, *supra* note 67, at 1059-1061.

333. In the last 35 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.

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.[334] 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.[335] One of the biggest risks in international contracting is the undetected differences.[336] 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.[337] Working with the UNIDROIT Principles 2016 minimizes not only the risk of such a leap into the dark, but also ensures to find rules which were written for international trade.[338]

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, Article 1.5 para. 2.[339] 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.[340] Thus, in general, parties are free contractually to agree on other concepts to which they are accustomed.[341] For example, a common law lawyer desirous to

334. BONELL, UNIF. L. REV. 2018, *supra* note 12, at 17.

335. FESTSCHRIFT MARTINY, *supra* note 67, at 1062 (high lightening "ignorance" as a major reason why lawyers often do not concentrate on choice of law and dispute resolution clauses).

336. *Id.*

337. RAAPE, *supra* note 126, at 90.

338. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 16-38.

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

340. *Id.* and at 197 (cmts. 2-3 on art. 7.1.6) as an example for the multiple contractual options under the UNIDROIT Principles.

341. *Id.*

limit the impact of the contract history on interpretation may operate with a merger clause.[342] A German lawyer who likes the interruption of statutes of limitation by mere negotiation—a tradition in Germany—might add language to that extent.[343] 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.[344] 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.[345] 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.[346] 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 which are truly neutral, developed with a mind for cross-border business.[347]

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 which was felt

342. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.17 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

344. *Id.*, see BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 203, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (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 INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 10.5, 10.6 and 10.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

346. *Id. e contrario*.

347. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 20-21.

necessary in the context of international contracting.[348] 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.[349] Thus, the Working Group had to agree on a compromise rule which solved this problem, which was also inspired by the practice of large international contracts with explicit rules on this subject.[350]

The section on hardship commences with a reminder of the principle of bindingness of contracts[351] in Article 6.2.1.[352] The rules on hardship provide then for a right to request renegotiations.[353] Since 1994, the provisions on hardship have been well accepted and applied by many arbitral tribunals[354] and they have been also used by multiple national courts to supplement or interpret domestic law.[355]

348. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 23.

349. 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).

350. HARMATHY ATTILA, *Hardship* in FESTSCHRIFT BONELL*, supra* note 12, vol. 2 at 1035, 1041-1042; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 176.

351 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

352. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6.2.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). It provides: *"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."*

353 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6. 2.3(1)) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016)*,* under certain conditions specified in Article 6.2.2, *id.*

354 *See* e.g. ICC Award 7365/FMS (1997); ICC Award No. 11051 (2001); *Ad hoc* arbitration, The Hague (Chevron Corporation & Texaco Petroleum Corporation v. Ecuador, No.: IIC 4211 (2010), 2010.

355 *See* e.g. Argentinian Court of Appeal *Cámara de Apelaciones en lo Civil y Comercial de La Matanza* (2006); French *Cour de Cassation* (*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[356], the Ukraine[357] and Lithuania[358] to integrate similar provisions into their domestic contract laws.[359] 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.[360] 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.[361] 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.[362] 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

356. *See* ALEXEI G. DOUDKO, *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, 5 UNIFORM L. REV. 483, 484-485 (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 2[D], *supra* note 13, at 808-809 (cmt. 3 in Introduction to Section 6.2 of the PICC).

357 Art. 652 (2) of the Ukrainian Civil Code.

358 Article 6.204 of the Civil Code of Lithuania, Available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

359 Pursuant to its purpose as stated in the preamble (UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS pmbl. para. 7 (UNIDROIT International Institute for the Unification of Private Law)), 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* FESTSCHRIFT BONELL, *supra* note 12, vol. 2, at 1473-92) and France (BÉNÉDICTE FAUVARQUE-COSSON, The UNIDROIT Principles, the World and the French Reform of Contract Law, in FESTSCHRIFT BONELL, *supra* note 12, vol. 2, 1350, 1355-1358).

360. Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, AR C.07.0289N, at IV (Belg.); MCKENDRICK, *supra* note 356, 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 focussed their argumentation on the interpretation of the term "impediment" contained in Article 79 CISG**:** *Flechtner,* Uniformity and Politics: Interpreting and filling gaps in the CISG, in: Festschrift für Ulrich Magnus zum 70. Geburtstag, edited by Peter Mankowski and Wolfgang Wurmnest, p. 193, 202 (2014); *Slater*, Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to the CISG, (1998) 12 Florida Journal of International Law 231, 259.

361. (UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS arts. 1.1, 1.5 (UNIDROIT International Institute for the Unification of Private Law). In his practice, the author has observed *e.g.* industry focussed customisations relating to the conditions of hardship.

362. 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 the editor).

contract varies.[363] Operating with an international compromise solution may be the best possible option under the circumstances.[364] In case of dispute, contracting parties will fight about the facts, e.g. if an event "fundamentally alters the equilibrium of the contract."[365] Depending on the size and curve of the lenses which seller and supplier are using when assessing the changes to the circumstances of the disputed contract, either side may have a different perception which requires finding a solution by negotiation, mediation or arbitration.[366] 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.[367]

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.[368]

They have often been used in arbitration proceedings,[369] e.g. pursuant to their preamble[370] as "general principles of law",[371] as "*lex mercatoria*"[372] or when a contract had to be interpreted according to "International Commercial Law".[373] They have been

363. See e.g. MCKENDRICK, *supra* note 344, at 808 (Introduction to Section 6.2 of the PICC cmt. 1).

364. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 16 *et seq.* and 22.

365. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6.2.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

366. BONELL, Unif. L. Rev. 2018, *supra* note 12, at 17.

367. This can be expensive, *see* § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 406; FESTSCHRIFT MARTINY, *supra* note 67, at 1052; FESTSCHRIFT WEGEN, *supra* note 67 , at 603.

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

369. *See* MATTHIAS SCHERER, *Preamble II: the use of the PICC in International Arbitration, in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 110-149.

370 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 1, 3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

371 *E.g.* ICC Award 7365/FMS, (1997) ("general principles of international law"); *Ad hoc* arbitration, San José, 30-04-2001 ("general rules and principles regulating international contractual obligations").

372 *E.g.* ICC Award No. 9875 (1999). For further awards see e.g. at UNILEX http://www.unilex.info/principles/cases/article/102/issue/1212#issue_1212.

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

applied when the parties had chosen their application.[374] In this respect, it is wise to agree upfront on the dispute resolution forum to determine the circumstances under which the UNIDROIT Principles 2016 will be applied.[375] As a rule of thumb, their application in combination with an arbitration clause gives more freedom.[376]

Most arbitration laws respect party autonomy, including the choice of rules of law such as the UNIDROIT Principles 2016.[377] A judge at a state court often has more restrictions as a result of the applicable private international law regime.[378] In particular, a judge will have to apply all domestic mandatory law while an arbitration tribunal will only apply internationally mandatory law.[379]

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.[380]

In accordance with the preamble, arbitration tribunals also use the UNIDROIT Principles when a proper choice of law was

374. See e.g. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); MANAGING THE FUTURE, *supra* note 2, at 48-49; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 9 (Cmt. 9 in Introduction to the UNIDROIT Principles of International Commercial Law).

375. *See e.g.* IWRZ 2018, *supra* note 2, at 246-247.

376. See UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 cmt. 4.a on pmbl. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); 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 US judgement recognizing the application of the UNIDROIT Principles in arbitration even as general principles of law without a choice of law, see e.g. United States District Court, S.D. Florida, No. 13-20414-CIV, 2013, *Singh v. Carnival Corporation* (refusing to accept a public policy defence against an award which applied the UNIDROIT Principles without agreement of the parties).

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

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

379. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 25-26 (cmts. 3-5 on art. 1.4).

380. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, at 9 (cmt. 19 in Introduction to the UNIDROIT Principles of International Commercial Contracts 2016) and 236-237 (cmt. 2 in Section 4: Damages, Introductory Remarks).

missing[381], to supplement international instruments, notably the CISG,[382] or to supplement national law.[383]

In many jurisdictions (e.g. China, Russia, Brazil), they have also been used by national courts as background law[384] 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.[385] In such jurisdictions - and in jurisdictions in which the legislator has used the UNIDROIT Principles as a source for its own contract law[386] -, it is particularly plausible that courts rely on the UNIDROIT Principles to interpret national law.[387] For example, for China, in 13 national court cases the judges have indicated in their comments (of their own judgements) that they relied the UNIDROIT Principles.[388] Yet, domestic courts also use the UNIDROIT Principles to solve questions of international relevance which the domestic law did not solve.[389] The cited 2017 decisions of the Court of Appeal of Rio Grande do Sul are an example.[390] 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

381. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

382. Id. para. 5. *See e.g.* BONELL, Unif. L. Rev. 2018, *supra* note 12, at 32-35.

383. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. PARA. 6 (WORKING GRP. FOR THE PREPARATION OF THE UNIDROIT PRINCIPLES 2016).

384. BONELL, Unif. L. Rev. 2018, *supra* note 12, 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 2[D], *supra* note 13, at 39 (cmt. 9).

385. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 6 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BONELL, Unif. L. Rev. 2018, *supra* note 12, at 16-20.

386 *See supra* note 359.

387. See e.g. for CHINA SIYUAN HAN, *supra* note 359, at 1473, 1482-84.

388. GARY GAO & RONNIA ZHENG, *UNIDROIT Principles Practice in China*, in IBA PERSPECTIVES IN PRACTICE, *supra* note 12, at ##. See also again Siyuan Han, *supra* note 359, at 1483.

389. It is beyond the scope of this article to guide through dozens of examples which can be found at the websites listed at note 11. See generally BONELL, Unif. L. Rev. 2018, *supra* note 12, at 35-38.

390. *See infra* at **II.D.1** and Decision, Court of Appeal of Rio Grande do Sul, ¶ 8 (Feb. 14, 2017), *supra* note 132.

law."[391] In Colombia, even the Constitutional Court used UNIDROIT Principles to confirm that a solution provided by domestic law was in conformity with international standards.[392] 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.[393]

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.[394] Since 2001, the UNIDROIT Principles serve as one of the best tools for international contract projects in his practice.[395] He has used them—or 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.[396] He has used them in contracts with connections to different continents (Europe, USA, Asia, Africa), usually in combination with an arbitration clause.[397] 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

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[391] 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 which 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.*"

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

[393] E.g. tested in negotiations with a Chinese party.

394. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. para. 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

395. MANAGING THE FUTURE, *supra* note 2, at 48-49.

396. See *id*.

397. *Id.*; ECKART BRÖDERMANN, The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer, Uniform Law Review 2011 (hereinafter EXPERIENCE OF A GERMAN LAWYER), at 594-595.

the UNIDROIT Principles.[398] The author has used them for all magnitude of clients: large,[399] medium[400] and small,[401] of both common and of civil law origin.[402] It is submitted that the components of the bridge, discussed as 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.[403] 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,[404] while the clients often appreciate the neutral approach. Other examples include cooperation agreements with law firms in other jurisdictions.[405]

On occasion, the author has used the UNIDROIT Principles in order to attenuate the effect of an otherwise chosen national law.[406] 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',[407] the contract provided a basis to choose the UNIDROIT Principles for multiple international sub-contracts.[408]

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398. Experience from practice with several dozen subcontractors in a large construction project where the main contract had been submitted to a foreign law to be interpreted "with due regard to international usages", BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 20 (cmt. 17 on pmbl.); MANAGING THE FUTURE, *supra* note 2, at 49.

399. *Id.* for a company belonging to the German DAX group, as first noted in EXPERIENCE OF A GERMAN LAWYER, *supra* note 397, at 593.

400. E.g. for a vertically integrated textile company.

401. E.g. for a research and development center focusing on hair related products (2018).

402. *See e.g.* Interview with ECKART BRÖDERMANN, "The Future of International Contract Drafting Has Begun", in International Society of Primerus Law Firms (Fall, 2018). (available online at https://www.primerus.com/files/PRI_0718_DedmanBrodermannBerube_LONG_FNL.pdf, visited on 19 January 2020).

403. *See* BONELL, Unif. L. Rev. 2018, *supra* note 21, at 17-20.

404. 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).

405. Personal experience; whereby it is suggested that international lawyers' association 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 210.

406 EXPERIENCE OF A GERMAN LAWYER, *supra* note 397, at 589, 593.

407. *Id.*

408. *Id.*

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.[409] 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 which this article meant to share.[410]

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 to use the UNIDROIT Principles 2016."[411]

When using the UNIDROIT Principles-bridge, there is adequate room for freedom of maneuver (hereinafter **1.**).[412] There are some *caveats* and limits to bear in mind (hereinafter **2.**).[413] 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.**).[414]

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409. *See*, PREPARATORY WORK FOR THE 4TH EDITION OF PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**,** *supra* note 130.

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

411. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT International Institute for the Unification of Private Law, 2016).

412. *See infra*, **II.F.1**.

413. *See infra*, **II.F.2**.

414. *See infra*, **II.F.3**.

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.[415] When crossing the UNIDROIT Principles-bridge, the parties are invited to use that freedom.[416] 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.[417] 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.[418]

Whenever varying the UNIDROIT Principles 2016 pursuant to Article 1.5 and/or writing a clause which 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.[419] 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).[420] Within the acceptable boundaries of Article 1.5, freedom of contract comes first.[421]

Good faith skeptical parties may want to have a look at the at least approximately 40 concrete rules referred to in part **II.D.2. lit. b** which substantiate the general and underlying principle of good faith and fair dealing.[422] Again, they may consider alterations

415. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

416. *Id.*, arts. 1.1 and 1.5.

417. For example, just screening the electronic index of the author's article by article commentary (*op. cit.* note 1), the word "option" is contained 80 times in the heading, referring either to options of action or to contractual options.

418. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Section 11.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 5 (Introduction no. 9 cmt. 9 at (iv)) and at 361 (Introduction to Chapter 11 cmt. 3). For more details, *see* Annex to the electronic version of this article, at VI.

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

420. *Id.* at arts. 1.5, 7.1.6.

421. *Id.*

422. *See* above at II.D.2. lit. a

within the boundaries of Article 1.5 para. 2.[423] Businessmen will usually not feel offended by such mandatory principles and might consider not to conclude a contract if the other side feels offended.[424]

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.[425] This has been reported e.g. for the provisions on interpretation in Chapter 4.[426]

2. Limits on the Use of the UNIDROIT Principles 2016

The choice of the UNIDROIT Principles 2016 is subject to a number of limits.[427]

First, regardless of the applicable contractual regime, most contracts and cases also have angles that are not subject to the law of contracts.[428] 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.[429] For these issues, the law as determined by the applicable private international law regime will apply.[430]

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423. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.5 cmt. 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

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

425. See on the *use of the UNIDROIT Principles as a checklist,* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 20 (cmt. 17 on pmbl.).

426. VOGENAUER, *supra* note 240, 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 Arbitral Award 20 March 2000 (*Joseph Charles Lemaire v Ukraine)*, ICSID case no. ARB(AF) 4./98/1/(2000), para, 22-23)

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

428. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, p. 8 (in Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 17); in depth § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 462-495.

429. Id. See generally on the issue of "classification" ("qualification") e.g. for the USA: HAY ET AL., *supra* note 18, at 3; BRIGGS, *supra* note 65 at ##; AUDIT & D'AVOUT, DROIT INTERNATIONAL PRIVE REGLES DE CONFLIT PRINCIPALES, (2013); MAYER & HEUZE**,** 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."*).

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

Secondly, there will always be some (internationally) mandatory national laws which will require respect and their application on fundamental issues like anti-corruption, anti-money-laundering or recently emerging trade fights with e.g. US actions under Section 301 of the US Trade Acts of 1974 (as updated and amended) and European blocking regulations.[431] According to Article 1.4 UNIDROIT Principles 2016, any application of mandatory rules shall not be restricted.

Thirdly, there may be situations where it may be wiser to use other international instruments.[432] For example, as an international treaty, the CISG may claim priority over national law in many jurisdictions.[433] Thus, it can trump Turkish national law on the mandatory use of the Turkish language as a precondition for a valid contract.[434] In contrast, choosing the UNIDROIT Principles 2016, a soft international instrument, would not have that effect.[435] Thus, for a contract of sale 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.[436]

For any given scenario it is worth considering which dispute resolution regime and (soft) law shall be chosen.[437] The relationship and comparison between the regime of the CISG and the UNIDROIT Principles 2016 is beyond the scope of this overview.[438] 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;[439] (2) many rules of the UNIDROIT

431. 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.

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

433. *Id.*

434. CHRISTIAN RUMPF, Sprachenverbot oder Sprachengebot – das türkische Gesetz Nr. 805, 15 SCHIEDSVZ 1, 11-16 (2017); BURGHARD PILTZ, RECHTSANWALT, UN-Kaufrecht/CISG—Was spricht dagegen?, 138 (2017).

435. RUMPF, *supra* note 436; IWRZ 2019, *supra* note 2, at 14.

436. MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, clauses 3 a, b (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2019).

437. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 395-425.

438. BONELL, Unif. L. Rev. 2018, *supra* note 12 at 32-35.

439. *Id.* at 18-19.

Principles 2016 are based on the CISG, while others deviate;[440] (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.[441] 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 which are not covered by the FIDIC templates, such as, again, the example of foreign currency set-off.[442]

Fourthly, some national laws permit only the choice of a state law.[443] In such circumstances, it is nonetheless possible to incorporate the UNIDROIT Principles 2016 into the contract which will then apply to the extent that mandatory law (including any domestic mandatory law) does not intervene.[444] 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.[445]

Finally, it needs to be borne in mind that the UNIDROIT Principles 2016 provide solutions for questions of general contract law.[446] There will often be the need to regulate specifics peculiar to a specific kind of contract.[447] For example, without some concrete adaptations, the UNIDROIT Principles 2016 are not suitable to govern a suretyship agreement if one has a specific

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440. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 412-413 (detailed overview).

441. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 16-17 (cmts. 9-10 on pmbl.).

442. THE FIDIC SUITE OF CONTRACTS (INT'L FED'N OF CONSULTING ENG'RS).

443. *E.g.* Art. 3 (2) Commission Regulation 593/2008 (Rome I), O.J. (European Union, 2008). For a counter example *see* recently the law of Paraguay as noted by BONELL, Unif. L. Rev. 2018, *supra* note 12 at 35.

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

445. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. cmt. 4.A (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

446. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, pmbl. cmt. 1 (UNIDROIT, INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

447. Under article 1.5, the parties can agree on all the specifics which they deem proper even these deviated from the default rules in the principles. *See*, for example, BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 124-125 (cmt. 6 on Art. 5.1.3) for construction contracts.

hierarchy of liability in mind.[448] In such cases, it may be easier to resort to the desired national law of the surety.[449]

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.[450] 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;[451] (2) to reduce the scope of possibly intervening mandatory law;[452] and (3) to use the increased freedom to shape the dispute resolution system, e.g. by integrating rules on the taking of evidence[453] or on privilege and attorney secrecy[454] (in addition to the other advantages of arbitration such as, often, an increased level of enforceability under the New York Convention[455]). To do so fully avoids the discussion on the choice of a default national law, which can be helpful as it avoids

448. Many laws, including German law, provide that the surety becomes only liable if the claim cannot be enforced against the main debtor. See BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 765, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0765 (Ger.) and e.g. BRÖDERMANN, §§ 759-779, in BGB Kommentar (Hanns Prütting et al., eds.), 14.. ed. 2019, *supra* note 24, at Vor §§ 765 ff mo. 10-11. Such concept is distinct from a joint and several liability under Art. 11.1.2 UNIDROIT Principles.

449. *Id.* for German law.

450. 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 INTERNATIONAL COMMERCIAL CONTRACTS, clauses 1.2 a, b (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2019), EXPERIENCE OF A GERMAN LAWYER, *supra* note 397, at 594-595. However, since the release of the UNIDROIT Principles 2010, he has changed that practice and refers usually only to the UNIDROIT Principles.

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

452 See BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 24-26 (cmt. 2 on art. 1.4).

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

454. Bringing a five year process of preparation and discussion to a close, of 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 (on file with the author, about to be published).

455. New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, U.N.T.S. ##

negotiation time and costs.[456] 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,[457] 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.[458] It is up to the parties and their counsel to determine whether, under the circumstances of a specific contract project, they want to take that - *de minimis* - risk.[459] To take that risk may save time, avoid discussions, contributes to the negotiation atmosphere and enables to 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.[460] Compared to the leap in the dark of agreeing on a neutral foreign state law, [461] 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.[462]

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456. Experience from practice.

457. EWAN MCKENDRICK, *Section 4: Damages*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 1019 (cmt. 5 on art. 7.4.10); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 257-258 (cmt. 2 on art. 7.4.10).

458. *Id.*

459. 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 INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

460. On the freedom to appoint the arbitrator *see* GARY BORN, International Commercial Arbitration, 2nd ed. (2014), ##; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 13-14 (cmt. 3 on pmbl.)

461. *See* again RAAPE, *supra* note 126, at 90.

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

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.[463] 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, more important issues (such as the arbitration regime, or limitation of liability terms).[464]

It saves time to just use the UNIDROIT Principles 2016 quasi "off the shelf."[465] The parties can use the **economized** precious **negotiation time** to concentrate on the details of their relationship which are most burning on their minds.[466] 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.[467] Most practitioners will concur that one of highest risks in a contract, and easily a source for misunderstanding or even dispute, are the issues which one might forget to regulate.[468] Integrating the global wisdom as developed by the Working Group of UNIDROIT into a contract[469] can actually help one to sleep better.

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463. *See supra* notes 118 and 119; MICHAELS, *supra* note 384, at 81 (cmt. 120 on Preamble I).

464. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 375-376.

465. On the offer of the Governing Council of UNIDROIT to the international legal and business communities see UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Introduction at viii (WORKING GRP. FOR THE PREPARATION OF THE UNIDROIT PRINCIPLES 2016) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

466. 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 67, at 1061-1068.

467. See the description of "troubled waters" *infra* at **II.A**. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 pmbl. ((UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

468. *See* BONELL, Unif. L. Rev. 2018, *supra* note 12, at 17.

as a Tool for Satellite Related Contracts and Other International Transactions, in Outer Space Committee Newsletter August 2005, at 5 (IBA Legal Practice Division).

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?"*[470]

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 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,[471] 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 which has been encapsulated in the UNIDROIT Principles by the international legal community will be attractive.[472] There exist hardheaded reasons to follow the recommendations of the United Nations Commission on International Trade Law[473] to use the general rules

469. *I.e.* to accept the offer of the Governing Council of UNIDROIT to the international legal and business communities at UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Introduction at viii (WORKING GRP. FOR THE PREPARATION OF THE UNIDROIT PRINCIPLES 2016) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

470. 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).

471. Implicitly also BONELL, Unif. L. Rev. 2018, *supra* note 12, at 39.

472. *See supra,* **II.D.**

473 Report of the United Nations Commission on International Trade Law on the Work of its Fortieth Session (25 June - 12 July and 10 – 14 December 2007), Official Records of the General Assembly, Sixty-second Session, A/62/17 (Part I), no. XI p. 50-52 at no. 213; Report of the United

for international commercial contracts as contained in the UNIDROIT Principles.[474] The UNIDROIT Principles serve an existing business need for global room for action without the boundaries of national law.[475] 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[476] and beyond, because of the foundation of Chinese contract law on the UNIDROIT Principles 1994 (in addition to the CISG).[477] 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.[478] International business can then take place with instant observation from the stakeholders of any given project in different countries, on the basis of one neutral set of rules.[479] They could help to overcome many of the existing choice of law problems.[480]

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.[481] This reduces costs and risks. [482] The following quote from a senior director of the European legal department of a US manufacturing company towards the use of UNIDROIT Principles 2016 speaks for itself.

Nations Commission on International Trade Law on the Work of its Forty-fifth session (25 June - 6 July 2012), Official Records of the General Assembly, Sixty-seventh Session, Supplement No.17 no. XIV. at 33 (at no. 139).

474 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 pmbl. para. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

475. *See* LAW WITHOUT WALLS, *http://lawwithoutwalls.org* (last visited Oct. 19, 2019) which stipulates at its website: "The future of law requires a mentality of a world of law—without walls."

476. MO SHIJIAN, *The UNIDROIT Principles of International Commercial Contracts in Chinese Judicial Practice*, *in* FESTSCHRIFT BONELL, *supra* note 12, vol. 2, at 1553; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 p. 2 (Introduction to the UNIDROIT Principles of International Commercial Contracts cmt. 4).

477. SIYUAN HAN, *supra* note 359, at 1473, 1474-1482.

478. 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 - 48 (2019).

479. *Infra,* **II.D.2.**

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

481 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Introduction to the 2016 edition, at viii (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

482 *See supra,* **II.C.**

Confronted with the statement of a European businessman supporting the use of the UNIDROIT Principles, he stated: [483]

"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." [484]

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 exist since 1994![485] They have been used in practice.[486] They have been recommended by UNCITRAL.[487] They have inspired legislatures.[488] The awareness of compliance has risen in the past years.[489] This includes the obligation to manage a company, also in its international business, with the care of a prudent businessman.[490] 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.

Not to even consider them may even amount to malpractice.[491] Here is why: In 2018, at a conference of the Chinese European Arbitration Centre[492] with 130 participants from

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

[484] *Id.*

485. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 1994 (WORKING GRP. FOR THE PREPARATION OF THE UNIDROIT PRINCIPLES 1994).

486. *Supra*, **II.E.**

487. *See supra* notes 118-119.

488. *See e.g. supra* note 359.

489. RISK MANAGEMENT TOOL, *supra* note 8, at 1286-1289.

490. *Id*. at 1289.

491. 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, 8 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 and IWRZ 2019, *supra* note 2, at 13-15 and 17 (no. 5 in the English summary).

492. *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

24 nations, the international arbitration community discussed a German malpractice case caused by wrong choice of law.[493] In line with his regular practice (i.e. without concrete balancing of the options), a German lawyer had chosen German law, excluding the CISG.[494] Like the UNIDROIT Principles 2016[495], the CISG does not require proof of a specific fault for a claim of non-performance.[496] The non-performance as such will usually suffice as a basis for contractual liability.[497] In contrast, German national law is based upon a system of fault.[498] 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.[499] 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.[500] 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.[501]

The clients of lawyers, i.e. the merchants, need lawyers who know how to use the bridge of the UNIDROIT Principles

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Chinese expert and a third expert from other parts of the world, *see* https://www.ceac-arbitration.com/ (visited on 29.01.2019).

493. 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 and IWRZ 2019, *supra* note 2, at 14.

494. Under CISG, *supra* note 106, art. 6.

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

496. CISG, *supra* note 102 at arts. 35, 45, 61.

497. *Id.*

498. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] §§ 276-278, 280 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

499 IWRZ 2018, *supra* note 2, at 249 note 34.

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

501. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 pmbl. para. 1 and cmt. 4a to pmbl.(UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). *See* also (i) *supra,* **II.E.** on choice of the UNIDROIT Principles in combination with and arbitration clause and **II.F.2** on choice of the UNIDROIT Principles in combination with a choice of court clause; (ii) § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 411, 424-425; and 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.

2016[502] **to remain compliant** with their obligations under corporate law and their employment contracts.[503] 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.[504] It is thus not sufficient just to hire a lawyer.[505] It is necessary to inquire if he or she has the necessary knowledge.[506] There is no imperative to use them, but the UNIDROIT Principles 2016 need to be considered when it comes to international contracting.[507] Times have changed.[508]

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.[509] Other law schools are doing the same or will follow or are teaching the UNIDROIT Principles in other classes.[510] For example, the UNIDROIT Principles 2016 are quite often being taught in China,[511] and also in other jurisdictions such as Germany.[512] Yet, distinctly from the approach at Harvard University, they are usually not yet part of the normal, mandatory reading material. The goal is to succeed that every law student studying contracts knows that the UNIDROIT Principles 2016

502. SIMON & GARFUNKEL, *see supra* note 8.

503 *See* ANISH WADIA & MAGDALENA GÖBEL, *supra* note 97, at 116-117 (*Failure to consider the UNIDROIT Principles as a breach of a fiduciary duty*).

504. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016)

505. IWRZ 2019, *supra* note 2, at ##.

506. *Id.*

507. RISK MANAGEMENT TOOL, *supra* note 8, 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.")*.

508 RISK MANAGEMENT TOOL, *supra* note 8, at 1285-1293.

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

510. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 267.

511. 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.

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

exist and are a tool to consider in case of cross border contracting.[513] 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.[514] 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.[515]

H. CONCLUSION

Given the fact that the UNIDROIT Principles have existed since 1994, i.e. over 25 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.[516] Even for a conservative society like the legal community as a whole, building on over 2000 years of legal development, 25 years are long enough to expect awareness and studying.[517]

Further, the global legal community as a whole should be able to learn.[518] When the CISG came into force in 1988[519], 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

513. EXPERIENCE OF A GERMAN LAWYER, *supra* note 397, at 611-612.

514. *See* Willem C.,Vis International Commercial Arbitration Mootwww.vismoot.pace.edu (visited on 29 January 2019).

515. For example, the *International Bar Association* (IBA) has started to concentrate on the UNIDROIT Principles, *see* Perspectives in Practice, *supra* note 12. The *Inter-Pacific Bar Association* (IPBA) is presently working towards an official endorsement of the UNIDROIT Principles.

516. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

517. *See* IWRZ 2019, *supra* note 2, at 16-17 and 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."*).

518. *See*, J. P. FLAUM & BECKY WINKLER, Improve Your Ability to Learn, HARVARD BUS. REV. (June 8, 2015).

519. USA was among the first contracting parties in 1988: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

society has only emerged during the past approximately thirty years, around the millennium turning point.[520] Thus, the mistakes made by the legal community in ignoring the CISG for many years need not to be repeated.[521] Furthermore, the choice of the UNIDROIT Principles 2016 had also the advantage to cover most relevant contractual topics by default rules.[522] In this respect, times have changed since the first release of the UNIDROIT Principles in 1994.[523] At that time, they covered a substantially more narrow range of issues.[524] Only now, since the 2010 and the 2016 releases, 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.[525]

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 part **II.E.** of this article; and (2) they reduce risks and costs.[526] 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.[527] 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.[528] As they are "on the market" since 1994 (in their first release), enough time for testing has passed.[529] The UNCITRAL has twice commended their use in

520. RISK MANAGEMENT TOOL, *supra* note 8, at 1285-1293.

521. JOHN E. MURRAY, JR., The Neglect of CISG A Workable Solution, 17 J. OF LAW AND COM. 365, 365-379 (1988).

522. *See* in particular UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, ch. 5, 6 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

523. RISK MANAGEMENT TOOL, *supra* note 8, at 1301.

524. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, TABLE OF CORRESPONDENCE OF THE ARTICLES OF THE 1994, 2004, 2010 AND 2016 EDITIONS OF THE UNIDROIT PRINCIPLES, AT XXXVII-XLIII (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

525. *See supra*, **II.F.2.** (text at notes 836-840).

526. *See SUPRA,* **II.C.** and note 186.

527. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 8.2 (UNIDROIT International Institute for the Unification of Private Law, 2016).

528. *See supra*, **II.G.2.b**.

529. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT International Institute for the Unification of Private Law, 1994).

resolutions.[530] Ignorance of the UNIDROIT Principles is no longer an option.[531]

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 US law.[532] 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 US 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[533] which render the concept sufficiently certain even from an English or Commonwealth legal perspective.[534] 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."*[535]

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 which we have studied is the best solution.[536] 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.[537] 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

530. *Supra* note 128.

531. *See* BONELL, Unif. L. Rev. 2018, *supra* note 12 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.

532. 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.

533. *See* the observation in note 193.

534. SEE & PRASAD, *supra* note 4, at 105.

535. BARTON, *supra* note 4, at 82.

536. *See* BONELL, Unif. L. Rev. 2018, *supra* note 12, at 38-39.

537. On the impact of economic power on choice of law see § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 374-388.

with an international focus with negotiated compromises including the perspective of the home law to which one is accustomed.[538] 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.[539] Details may be researched and detected in future seminars at Tulane law school. Joint classes of both civil and 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[540]) is meant to be set.

538. BONELL, Unif. L. Rev. 2018, *supra* note 12 at 40-41.

539. *See supra*, **II.D.2.**

540. *See* MICHAEL J. BONELL, *Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles*, TUL. J. OF INT'L & COMP. L., at 73-91 (1994).

ANNEX 1: Further Examples of Detailed Rules Expressing the General Principle of Good Faith

In **part II.D.2.a.**, the Article has set forth four examples of detailed rules in the UNIDROIT Principles 2016[541] which are acceptable even to an English common law perspective opposing a general principle of good faith.[542] Hereinafter, this Annex will provide 15 further examples which express the general principle of good faith.

(1) **Article 2.1.15 (2)** prohibits a party from breaking off negotiations in bad faith, whereby bad faith is defined pursuant to the subsequent rule in para. (3) as when a party enters into negotiations or continues negotiations when intending not to reach an agreement with the other party.[543] Prohibiting such actions in bad faith promotes the general principle of the requirement to act in good faith.[544] Like all other default rules of the UNIDROIT Principles 2016, the black-letter rule in Article 2.1.15 (2) needs to be read in the context of the freedom of contract principle in Articles 1.1 and 1.5.[545] For example, a seller is free to communicate that it organizes a sale as an auction with parallel negotiations.[546] In such situations, a prospective seller may negotiate with the second highest bidder to organize a fall back position while indeed intending and hoping that, in the end, it can conclude with the highest bidder. In such a scenario, there would be no negotiation in bad faith.

(2) **Article 2.1.16** provides for a duty by a party not improperly to disclose, for its own purposes, information received as

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541 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 1.8, 2.1.4. (2), 2.1.18 sentence 2, 5.1.3. (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

542 *Supra* **II.D.2.a.**

543. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15(2) and (3), *see* also art. 2.1.15 cmt. 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

544. *Id.* at art. 2.1.15 cmt. 2; BONELL, *supra* note 12, at 136-137; ISABEL ZULOAGA RIOS, Formation III: Arts 2.1.5-2.1.16 – *Negotiations*, *supra* note 12, at 353 (cmt. 21 on art. 2.1.15); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 56 (art. 2.1.15 cmt. 2).

545 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 1.1, 1.5 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

546. This is regular practice in the business of mergers and acquisition; experience of the author.

confidential.[547] Again, this is a specific application of the general principle to act and deal in good faith.[548]

(3) As a further expression of the principle of good faith and fair dealing, **Article 2.1.20 para. 1** prohibits reliance on surprising general terms and conditions which the other party could not reasonably have expected.[549]

(4) Pursuant to **Article 3.2.7**, it is possible to avoid a contract or an individual term in it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage.[550]

(5) The same observation applies to the avoidance of a contract concluded as a result of unjustified threats under **Article 3.2.6**.[551]

(6) In the context of interpretation, both **Article 4.8** on supplying an omitted term and . . .

(7) . . . **Article 5.1.2** on implied obligations, explicitly mention the general principle of good faith and fair dealing as a factor to take into account.[552]

(8) As an expression of good faith,[553] and in line with many civil and common law jurisdictions[554] **Article 5.3.3** prohibits the

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547. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.16 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

548. VISCASILLAS, *supra* note 149, at 152 (cmt. 1 to Art. 2.16); ZULOAGA RIOS, *supra* note 544, 351-352 (cmt. 18 to art. 2.1.15); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 58 (cmt. 1 on Art. 2.1.16).

549. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.7 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31 (cmt. 4 on Art. 1.7) and 64 (cmt. 1 on art. 2.1.20).

550. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.7 cmt. 1 and art. 3.2.7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); *see* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 91 (cmt. 1 on Art. 3.2.7).

551. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 3.2.6 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 89 (cmt. 1 on art. 3.2.6).

552. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 4.8 lit. c, 5.1.2 lit. c (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

553. *Id.* art. 5.3.3 cmt. c; SOLÈNE ROWAN, *Article 5.3.3 in* VOGENAUER'S COMMENTARY 2D at 701-702; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 145-46 (cmt. 1-2 on art. 5.3.3).

554. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 145 (cmt. 1 to art. 5.3.3 referencing to the detailed remarks of ROWAN, *supra* note 553, at 700-701); BOBEI, *supra* note 13, at 292.

interference with agreed conditions.[555] The "duty of good faith and fair dealing" is mentioned explicitly both with regard to the prohibition to interfere with the occurrence of a condition (para. 1) and with regard to any attempt of a party to rely on the non-occurrence or fulfillment of a condition (para. 2).[556] The rules in Article 5.3.3 may be regarded as a specific application of the rule on the duty of cooperation in Article 5.1.3 which, as discussed already above, is itself an expression of the principle of good faith and fair dealing.[557]

(9) **Article 5.3.4** imposes upon the parties a duty to preserve rights pending the fulfillment of a condition.[558] Similar to its sibling rule in Article 5.3.3 seeking to avoid interference with conditions[559], this rule can also be qualified both as an expression of the general duty to cooperate in Article 5.1.3 and the general duty of good faith and fair dealing.[560]

(10) Unless otherwise agreed in the contract,[561] **Article 6.1.3 para. 1** sets boundaries on partial performance with regard to a balancing of legitimate interests of the parties.[562] The "obligee" who is entitled to performance[563] may reject an offer of the obligor to perform "in part" at the time the performance is due[564] if it has a "*legitimate interest"* in so doing.[565]

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555. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 5.3.3 cmt. c (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

556. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 145-146 with further references (cmt. 2 on art. 5.3.3).

557. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 5.1.3 cmt. 1; BRÖDERMANN UNIDROIT Principles' Commentary, *supra* note 1, at 123 (cmt. 1 on art. 5.1.3).

558. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 5.1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

559. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 5.3.3 (UNIDROIT International Institute for the Unification of Private Law, 2016).

560. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 31 (cmt. 4 to art. 1.7).

561. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 1.1, 1.3, 1.5 as well as arts. 2.1.19-2.1.22 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

562. *Id.* at cmt. 3; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 153 (cmt. 1 on art. 6.1.3).

563. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.11, 4th hyphen (UNIDROIT International Institute for the Unification of Private Law, 2016).

564. *Id.* art. 6.1.1.

565. *Id.* art. 6.1.3. para. 1 (*in fine*).

(11) Subject to contract, **Article 6.1.5 para. 1** sets a similar boundary on rejecting earlier performance.[566] Such a rejection also requires a "legitimate interest" as a concrete application of the general principle of good faith and fair dealing in Article 1.7.[567]

(12) The rule in **Article 7.1.2** prevents a party "to rely on the non-performance of the other 'party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk."[568] It thereby calls for consistent behavior.[569] Avoiding inconsistent behavior (*venire contra factum proprium)*, it constitutes an application of the rule in Article 1.8[570] and is thereby, again, a concrete application of the general principle of good faith and fair dealing in Article 1.7.[571]

(13) The right to withhold performance in case of simultaneous performance, under **Article 7.1.3**,[572] provides guidelines on how to cope with certain withholding situations.[573] According to the Official Comments, withholding performance is only admissible "where in normal circumstances this is consonant with good faith and fair dealing.[574] Thus, withholding performance may be excessive in some circumstances, e.g. in case of non-fundamental non-performance or partial performance.[575]

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566. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 6.1.5(1) (UNIDROIT International Institute for the Unification of Private Law, 2016).

567. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 157 (cmt. 1 to art. 6.1.5).

568. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.1.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

569. *See id.* at art. 1.8.

570 *Id.*

571. SCHELHAAS, § 7.1.1-7.1.6 in VOGENAUER'S COMMENTARY, *supra* note 13, at 833 (cmt. 2 on art. 7.1.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 186 (art. 7.1.2 cmt. 1).

572. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.1.3 (UNIDROIT International Institute for the Unification of Private Law, 2016).

573. SCHELHAAS, *supra* note 570, at 842 (cmt. 25 on art. 7.1.3); BOBEI, *supra* note 13, at 369-370; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 189-190 (art. 7.1.3 cmt. 2).

574. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, cmt. on art. 7.1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

575. SCHELHAAS, *supra* note 570, at 843 (cmt. 27 on art. 7.1.3); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 189 (cmt. 2 on art. 7.1.3).

(14) As a further application of the general principle of good faith and fair dealing in Article 1.7,[576] **Article 7.4.8 para. 1** provides a shield for the obligor[577] (i.e. "*the party who is to perform an obligation"* according to the definition in Article 1.11 4th hyphen) if the aggrieved party fails to take reasonable steps to mitigate the harm (whereby para. 2 provides for a balance by entitling the aggrieved party "*to recover any expenses reasonably incurred in attempting to reduce the harm"*).[578]

(15) In order to rely on *force majeure,* **Article 7.1.7 para. 1** requires as "a matter of good faith and fair dealing"[579] that (1) the obligee "*could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract"* and (2) it could not have "*avoided or overcome it or its consequences."*[580]

(16) **Article 7.4.13 para. 2** provides for the possibility to reduce a "grossly excessive" agreed sum for non-performance (in relation to the harm resulting from the non-performance) to a "reasonable amount." [581]

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576. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.7 and art. 1.7 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 252 (cmt. 3 on art. 7.4.8).

577. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.4.8 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

578. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.4.8(2), cmt. 2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); MCKENDRICK, *supra* note 457, at 1010 (cmt. 7 on art. 7.4.8), at 1010; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 253 (cmt. 5 on art. 7.4.8).

579. BONELL, *supra* note 12, at 147-148; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 202-203.

580. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 7.1.7(1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); PASCAL PICHONNAZ, *Article 7.1.7* in VOGENAUER'S COMMENTARY 2D, *supra* note 13 at 864, 876-877 (cmts. 5-7); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 202 (cmt. 3 on art. 7.1.7).

581. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.7 cmt. 1 and art. 7.4.13(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BONELL, supra note 540, at 83 (1994); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 31-32 (cmt. 4 on art. 1.7) and at 262-263 (cmts. 3-6 on art. 7.4.13).

ANNEX 2: Components of the Bridge – Examples for Compromises from Chapters 2, 6, 8 to 11

In **part II.D.2.**, the article has given examples from chapters 1, 3 to 5 and 7 of the UNIDROIT Principles 2016[582] for compromises made by the Working Group in the course of negotiating and agreeing on the UNIDROIT Principles.[583] This annex provides further examples from the remaining chapters.

I. CHAPTER 2—FORMATION AND AUTHORITY OF AGENTS

Within Chapter 2 on Formation and Authority of Agents several compromises on specific topics are noteworthy (hereinafter **A.** through **F.**).

A. Revocation of Offer

Pursuant to Article 2.1.4 (1), "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance."[584] Article 2.1.4 (2), discussed above in the context of good faith and fair dealing,[585] provides for two limits to this rule: "[A]n offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."[586] This balance between (1) the freedom to revoke an offer and (2) limits to such freedom by prohibiting inconsistent behavior correlates quasi verbatim with Article 16 CISG.[587] The principle has been described as a "similar

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582 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 ch. 1, 3-5, 7 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

583 *Id.*

584. *Id.* art. 2.1.4(1).

585. *Id.* at art. 1.7. *See supra* **II.D.2.b)**.

586. *Id.* art. 2.1.4(2).

587. Art. 16 CISG states: *"(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."* The only difference is the gender neutrality of the word "it" in para. (1) to describe the acting offeree, where the CISG used the word "he".

compromise solution"[588] to some other laws, notably the US law.[589] It appears to be a fair compromise both between offeror and offeree and between different possibilities as to where to draw the line between the conflicting interests.[590]

B. Negotiations in Bad Faith

Article 2.1.15 (2), noted already in the general context of good faith and fair dealing,[591] is itself part of a compromise on the tricky issue of pre-contractual liability.[592] Distinct from the general principle of pre-contractual liability in some civil law jurisdictions, notably such as Germany,[593] many common law jurisdictions, such as England or New York, do not have a general concept of pre-contractual liability.[594] In practice, this different pre-concept can cause considerable trouble at the level of initiating contract negotiations.[595] Over the years, the author has witnessed several cases, sometimes even major legal battles, about the applicability of (1) New York or English law to avoid pre-contractual liability or (2) German law in order to rely on rules protecting against unfair behavior during the pre-contractual

588. NOTTAGE, *supra* note 151, at 277 (cmt. 3 on art. 2.1.4), who describes the compromise at 276 (cmt. 2 on art. 2.1.4) as *"somewhat awkward compromise";* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 42 (cmt. 1 on art. 2.1.4). The challenges in building this compromise (or bridge) are summarized in the official comments: UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, cmt. before cmt. 1 on art. 2.1.4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

589. U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 2002; RESTATEMENT (SECOND) OF CONTRACTS §42 (AM. LAW INST. 1981).

590. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 cmt. before cmt. 1 on art. 2.1.4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

591. ZULOAGA RIOS, *supra* note 544, at 352 (cmt. 18 on art. 2.1.15). *See* above ANNEX 1 (Further Examples of Detailed Rules Expressing the General Principle of Good Faith), first example.

592. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 55-56 (cmt. 1 on art. 2.1.15).

593. The tradition of *culpa in contrahendo,* codified in 2001 in BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 311 (2) (Ger.).

594. ZULOAGA RIOS, *supra* note 544, at 346 (cmt. 4 to art. 2.1.15); WEGEN & KEIL, *supra* note 4, at 44; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 55-56 (cmt. 1 to art. 2.1.15); with reference to Allan E. Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUMBIA LAW REV. 217, 221 (1987).

595. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 92; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY**,** *supra* note 2,at 55-56 (cmt. 1 on art. 2.1.15).

phase.[596] These legal battles were caused by the lack of knowledge by the acting parties of this difference and of the different mind-set of common and civil law on this issue, when they commenced negotiations.[597] The UNIDROIT Principles 2016 provide a compromise solution.[598]

As a balance to liability for bad faith pursuant to Article 2.1.15 (2)-(3), Article 2.1.15 (1) underlines the right not to agree[599] (pursuant to the principle of party autonomy in Article 1.1).[600] It provides: "*A party is free to negotiate and is not liable for failure to reach an agreement."* [601] At the same time, through the restriction of the pre-contractual liability under Article 2.1.15 (2)-(3) for bad faith, it does not go so far as some civil law systems, like Germany, where even negligent behavior could lead to pre-contractual liability.[602] Article 2.1.15 thus constitutes a balanced and nuanced compromise between the common and the civil law approaches to pre-contractual liability.[603]

The wisdom of such compromise may be demonstrated by two examples.[604]

(1) *First, an example from a Seller's Perspective:* A German (putative) seller once sought advice over Christmas.[605] The English owned and managed Luxemburg company interested

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596. *See e.g.* WEGEN & KEIL, *supra* note 4, at 44; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 55-56 (cmt. 1 to art. 2.1.15); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 92 (cmt. 375).

597. *See e.g.* WEGEN & KEIL, *supra* note 4, at 44; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 55-56 (cmt. 1 to art. 2.1.15); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 92 (cmt. 375).

598. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.15 and cmts. 1-4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY**,** *supra* note 1, at 55-56 (cmt. 1 on art. 2.1.15); WEGEN & KEIL, *supra* note 4, at 44.

599. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); ZULOAGA RIOS, *supra* note 544, at 350 (cmts. 13-15 on art. 2.1.15).

600. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

601. *Id.* art. 2.1.15(1).

602. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] at 1673, 1675 (1991 (Ger.)).

603. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 55-56 (cmt. 1 on art. 2.1.15).

604 For practical options by combining the regime in art. 2.1.15 UNIDROIT Principles with a limitation of liability clause *see* ZULOAGA RIOS, *supra* note 544, at 363 (cmt. 47 on art. 2.1.15).

605. Experience from practice; summarized previously as a case study in § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 438 (no. 375).

in buying six cargo vessels suddenly refused to sign the fully negotiated contract, including a heavily negotiated agreement on price, after several months of on and off negotiations.[606] While the main contract for the sale of six cargo vessels was to be concluded pursuant to German law with a choice of jurisdiction clause providing for the competence of German courts, by way of compromise, the Letter of Intent was drafted with a choice of English law providing for the competence of English courts in London.[607] The (putative) seller incurred substantial costs for experts and lawyers.[608] When the (putative) buyer walked away, without any special reason other than having changed its mind, there was no chance to rely on German law for pre-contractual liability to recover these costs.[609] The German client's naiveté to accept English law for the Letter of Intent without knowing or researching English law was remarkable.[610] Solely trusting in the long tradition of English law in shipping was not good enough to present a case.[611] It was wrong to assume that English law on pre-contractual liability will be fair by the same standards understood by German merchants accustomed to a different risk allocation in case of negotiations as compared to English law which values party autonomy so much that it excludes any liability prior to contract conclusion.[612] Had the parties agreed, for both contracts, on the UNIDROIT Principles 2016, their expectations would have been better managed.[613] Depending on the facts, the parties would probably have ended up discussing whether there was a case of 'justified reliance' amounting to bad faith behavior on the part of the potential buyer, in the sense of Article 2.1.15 (2);[614] or if walking away from the deal' was still protected by party

606. *Id.*
607. *Id.*
608. *Id.*
609. *Id.*
610. *Id.*
611. *Id.*
612. *See e.g.* WEGEN & KEIL, *supra* note 4, at 44; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 55-56 (cmt. 1 to art. 2.1.15); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 92 (cmt. 375 with further references).
613. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). For a critical perception ZULOAGA RIOS, *supra* note 544, at 346 (cmt. 5 on art. 2.1.15).
614. *See* VISCASILLAS, *supra* note 149, at 150-152(cmt. 2.a, 2.b to Art. 2.15); ZULOAGA RIOS, *supra* note 544, at 358-359 (cmts. 33-37 on art. 2.1.15); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 57 (cmt. 2 on art. 2.1.15).

autonomy, Articles 2.1.15 (1), 1.1.[615] In the alternative, it is submitted that weighing Article 2.1.15 para. 3 with regard to the principle of party autonomy within the limits of Article 1.5 para. 2,[616] the potential buyer could have communicated that it had not yet made up its mind and that any further discussions with the potential seller takes place solely at the latter's own risk.[617] The specific rule in Article 2.1.15 para. 3 could have triggered a communication that would not result in superfluous costs and a legal fight because of different pre-concepts.[618]

(2) *A second example relates to a Buyer's perspective:* In merger and acquisition situations, the author has witnessed, several times over the years, that sellers would negotiate with one buyer and continue that process at full speed, while clandestinely also starting negotiations with a competing buyer with whom the contract would then be concluded at a higher price.[619] The continuation of the negotiation with the first buyer may be manifestly in bad faith.[620] If the seller, for example, does not disclose the second negotiation line to keep the first buyer interested, the seller needs the first potential buyer as a fall-back position if the second potential buyer does not agree to the higher price.[621] In such circumstances, it appears to be only fair and economically acceptable, from the seller's perspective, that the seller bears the cost of the negotiations which it continued in bad faith with the first (potential) buyer, Article 2.1.15 (3).[622] As an alternative, as discussed above,[623] the Seller would have been free to disclose the competition mode and avoid bad faith in the sense

615. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 arts. 1.1 and 2.1.15 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

616 *Id.* art. 1.5 cmt. 2.

617. See BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 56 (cmt. 1 on art. 2.1.15).

618. *Id.*.

619. Experience from practice; WEGEN & KEIL, *supra* note 215, 44.

620. *Id.* Details to be considered include e.g. if and to what extent there were agreements or expectations of exclusivity.

621. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 56 (cmt. 1 on art. 2.1.15).

622. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15 cmt. 2, illus. 3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016). In one instance, the author's law firm represented the first potential buyer in such a scenario. When learning about the bad surprise that the target was sold, it sent a copy of the invoice for legal services for the first potential buyer directly to the seller. It was paid promptly.

623. *See* above (1), the first example in this part I.B. of Annex 1.

of Article 2.1.15 (2) as a default rule.[624] However, such disclosure might have caused the first potential buyer to lose interest in the transaction.[625]

C. *Writings in Confirmation*

From the perspective of many common law lawyers, any alteration of a contract by silence is strange.[626] In contrast, in some European legal systems, including German law, it is common practice to confirm the cornerstones of agreements in writing after a discussion and oral agreement among merchants.[627] Silence upon receipt of such a commercial confirmation letter can serve as evidence for the contract formation.[628] Pursuant to the middle ground envisaged in Article 2.1.12[629], if (1) a writing is sent within a reasonable time after the conclusion of the contract and (2) purports to be a confirmation of the contract, then, as a legal consequence, (3) its additional or different terms become part of the contract, *unless* (a) they substantially modify the contract or (b) the recipient, without undue delay, protests to the deviation.[630] In practice, this rule is very practical in cases of long distance contracting.[631] For example, merchants may meet, with or without lawyers, in one continent at the place of business of the other party and send the summary by email upon arrival.[632] During the long distance travel home, the merchant or his lawyer summarizes the

624. *Id.*; *see* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

625. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 56 (cmt. 1 on art. 2.1.15; this is why some parties include possible costs for 'reliance' interests in their calculations).

626. ROSS G ANDERSON, *Articles 2.1.6-2.1.14 - Acceptance, in* VOGENAUER'S COMMENTARY 2[D], p. 322 (cmt. 2 on art. 2.1.12); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY; *supra* note 1, at 51 (cmt. 3 on art. 2.1.12); WEGEN & KEIL, *supra* note 4, 43.

627. ANDERSON, *supra* note 626, p. 322 (cmt. 2 on art. 2.1.12); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY; *supra* note 1, at 51 (cmt. 3 on art. 2.1.12); WEGEN & KEIL, *supra* note 4, 43.

628. ANDERSON, *supra* note 626, p. 323 (cmt. 4 on art. 2.1.12); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 51 (cmt. 3 on art. 2.1.12); WEGEN & KEIL, *supra* note 4, 43.

630. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.1.12 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

631. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 49 (cmt. 1 on art. 2.1.12).

632. *Id.*

results of the negotiation.[633] As wording in writing of an oral agreement often constitutes an interpretation of the concluded agreement, the compromise rule in Article 2.1.12[634] facilitates business without harming the interest of the other party. The other party is protected against the conclusion of an unwarranted agreement not only by a chance to object to the change but also, as a matter of the rule in Article 2.1.12, if the change is material.[635] From a common law perspective, which does not have a general rule on writings in confirmation, this principle is acceptable because it only comes into play after oral contract conclusion, i.e. mutual exchange of the intention to be bound, Article 2.1.1.[636]

D. Merger Clauses

In the common law world, it is standard[637] to provide for an "Entire Agreement" clause by which all earlier statements made with regard to the contract are "merged" into the contract.[638] From a civil law perspective, this approach is strange because the history of a contract negotiation is perceived as a very important tool for interpretation; and there may be additional points explicitly agreed but just not properly documented in the contract.[639] To a legal mind not trained in the common law practice of "entire agreement clauses," such a clause gives rise to the question as to what extent previous versions of the contract can be used to interpret the final wording.[640]

In this context Article 2.1.17 clarifies with a compromise solution: (1) Prior statements or agreements, stipulated before contract conclusion, cannot quash or supplement the contract a

633. *Id.*

634. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, ART. 2.1.12 (UNIDROIT International Institute for the Unification of Private Law, 2016).

635. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 50 (cmt. 1 on Art. 2.1.12).

636. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 39.

637. VISCASILLAS, *supra* note 149, at 154 (cmt. 1 on Art. 2.17); *see* the summary of the reasons for such clauses from an English law perspective by VOGENAUER, , *supra* note 203, at 372 (cmt. 3 on art. 2.1.17); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 59 (cmt. 1 on art. 2.1.17).

638. VOGENAUER, *supra* note 203, at 371 (cmt. 1 on art. 2.1.17).

639. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 59 (cmt. 1 on art. 2.1.17).

640. *Id.*

contract that includes a merger clause.[641] (2) Nonetheless such statements may be consulted to interpret the writing which is particularly helpful when contracting in an international context where misunderstand often commence with a mere languag problem.[642]

According to the freedom of contract principle in article 1.5,[643] the parties are free to expressly prohibit a contract variation through prior external statements or agreements, thereby applying the parol evidence rule.[644] This freedom to modify also the default rule on merger clauses in Article 2.1.17 needs also to be considered when evaluating the wise compromise reached in the UNIDROIT Principles 2016 on merger clauses.[645] However, it is submitted that it avoids cultural clashes to accept the compromise found in article 2.1.17.

E. Contracting Under Standard Terms

With respect to the law of standard terms, two compromises are particularly noteworthy:

Incorporation: The General Rule: Under the regime of the UNIDROIT Principles 2016, the general rules on contract formation in Articles 2.1.1 *et seq*.[646] apply also to the agreement on standard terms.[647] The 'user of standard terms' can only rely on such terms if it has received an acceptance declaration (Articles 2.1.1, 2.1.6) from 'the other (adhering) party' to an offer which includes the standard terms.[648] This has been described as a

641. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 2.1.15 sentence 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

642. *See supra* **II.A.** and VOGENAUER, *supra* note 240, at 597-598 (cmt. 29 on art. 4.3 and note 187).

643. *Id.* at art. 1.5.

644. SEE & PRASAD, *supra* note 4, at 105.

645. *See* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 59 (cmt. 2 on art. 2.1.17); SEE & PRASAD, *supra* note 4, at 104-105.

646. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS arts. 2.1.1 – 2.1.17 (UNIDROIT International Institute for the Unification of Private Law, 2016).

647. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 154-155; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 62 (cmt. 3 to art. 2.1.19).

648. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

straightforward requirement[649] and as a compromise between different concepts of incorporation[650].

Battle of Forms: Often, the reaction to an offer contains a general acceptance in combination with some modifications.[651] Sometimes the core points are accepted subject to agreement on different standard terms.[652] Such battles of forms scenario constitute a regular phenomenon in cross-border business, just as they do in national business.[653] With Article 2.1.22, the UNIDROIT Principles 2016 provide a special rule on "modified acceptance" as compared to the general rule on "modified acceptance" in Article 2.1.11.[654] The approach chosen by the UNIDROIT Principles 2016 offers a compromise solution compared to differing national solutions.[655]

Domestic legal regimes have disparate answers to battles of forms, reaching from the Dutch *first shot*-doctrine[656]to the US '*last-shot'*-doctrine[657] and the '*total knock out'* (where none of the standard terms apply).[658] Article 2.1.22 prescribes a middle ground solution, possibly inspired by German law.[659] Favoring contract

649. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 62 (cmt. 3 to art. 2.1.19).

650. *Id.* citing BONELL, AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 154-155 (less strict than German law but more restrictive than Italian and Dutch law).

651. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 2.1.11(1), 2.1.22 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016) which pre-suppose that fact pattern.

652. Example from practice.

653. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.1.22 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

654. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 2.1.22, 2.1.11 and 2.1.22 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); TJAKIE NAUDÉ, *Formation V: Arts. 2.1.19 – 2.1.22 – Standard Terms* in VOGENAUER'S COMMENTARY 2[D], *supra* note 13, at 408-409 (cmt. 2 on art. 2.1.22); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 65 (cmt. 1 on art. 2.1.22).

655. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 65 (cmt. 1 on art. 2.1.22) with reference, *inter alia*, to NAUDÉ, *supra* note 654, at 408-409 (cmt. 2 on art. 2.1.22).

656. NAUDÉ, *supra* note 654, at 411-412 (cmt. 11 on art. 2.1.22); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 65 (cmt. 1 on art. 2.1.22).

657. *See e.g.* VISCASILLAS, *supra* note 149, at 161 (cmt. 2.a, 2.b to Art. 2.15); NAUDÉ, *supra* note 654, at 408-409 (cmt. 2 on art. 2.1.22); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 65 (cmt. 1 on art. 2.1.22).

658. NAUDÉ, *supra* note 654, at 408 (cmt. 1 on art. 2.1.22 while the relevant explanation is given in footnote 169); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 65 (cmt. 1 on art. 2.1.22).

659. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1604, 1606 (at B.2.b „*Konsensualtheorie*") (1991 (Ger.)).

conclusion,[660] the common substance of the competing standard terms prevails if any such common substance can be determined after due interpretation.[661] In international business, with multiple impediments to transportation (on occasion even with impediments of electronic mails), it is wise not to rely on an element of time, such as the first or the last shot rule.

F. Agency

For Chapter 2 Section 2 on Agency, three compromise solutions between civil and common law concepts[662]—all to be interpreted autonomously[663]—are noteworthy.

Authority of Agents: The concept itself is broad.[664] As recently noted elsewhere,[665] it includes, i*nter alia*, agents acting in their own name ('commission agency')[666] and massagers as well as authorized recipients of messages.[667] For their task, they are also endowed with "authority . . . to affect the legal relations of another person" (para. 1)."[668]

Agency Undisclosed: Article 2.2.4 addresses the opposite scenario from Article 2.2.3 ("*no knowledge"* of the third party about the agency, "*no 'ought to have known'"*).[669] It "supposes that the agent respects its scope of authority (otherwise Article 2.2.6 applies)."[670] The rule has been described to provide "an

660. AN INTERNATIONAL RESTATEMENT, *supra* note 12, at 102 et seq., 110.

661. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.1.22 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

662. THOMAS KREBS, *Section 2: Authority of Agents*, in VOGENAUER'S COMMENTARY 2[D], *supra* note 13, at 416 AND 419 (cmts. 1 and 12 on art. 2.2.1); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 67 (cmt. 2 on art. 2.2.1).

663. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.6(1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 67 (cmt. 2 on art. 2.2.1).

664. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 67 (cmt. 2 on art. 2.2.1).

665. *Id.*

666. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.2.3(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

667. KREBS, *supra* note 662, at 416 (Cmt. 11 on art. 2.2.1).

668. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.2.1(1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

669. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.2.4 cmt. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 69 (cmt. 1 on art. 2.2.4).

670. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 69 (cmt. 1 on art. 2.2.4).

international bridge between common law (with a larger 'doctrine of the undisclosed principle') and other (civil law) solutions (like 'indirect agency')."[671]

Liability of Agent Acting Without or Exceeding Its Authority[672]: Article 2.2.6 again offers a compromise solution between different approaches; it corresponds with Article 16 of the Geneva Convention on Agency in the International Sale of Goods.[673] Para. 1 provides for a regime of strict liability of the agent,[674] which corresponds with the approach in some jurisdictions, including the US approach,[675] but not in other jurisdictions such as France or Italy.[676] He or she owes full compensation (Article 7.4.1) to the third party, but only in damages.[677] This is distinctly different from, e.g. German law, which gives the third party an alternative choice to require performance from the false agent under Section 179(1) German Civil Code.[678]

II. CHAPTER 6—PERFORMANCE

The rules on performance in Chapter 6 also contain a number of compromises worth noting[679]:

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671. *Id.* with a reference to KREBS, *supra* note 662, at 431-432 (cmts. 1-2 on art. 2.2.4) for an explanation why the common law doctrine was ruled out for international cases. *See* also KREBS, *supra* note 662, at 434 (cmt. 15 on art. 2.2.4: concerns expressed from the US reporter for Restatement 3d Agency (USA) led to the addition of art. 2.2.4(2)).

672. The following paragraph is based on BRÖDERMANN, UNIDROIT Principles Commentary, *supra* note 1, at 72-73 (cmts. 1-2 on art. 2.2.6).

673. Convention on Agency in the International Sale of Goods (Geneva, 1983), available at https://www.unidroit.org/ol-agency/ol-agency-en.

674. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 2.2.6(1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 72 (cmt. 1 on art. 2.2.6).

675. § 6.10 Restatement 3d Agency (USA).

676. KREBS, *supra* note 662, at 443 (cmt. 1 on art. 2.2.6 note 121).

677. *Id.* 443 (cmt. 1 on art. 2.2.6); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 72 (cmt. 1 on art. 2.2.6).

678. BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 179(1), translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.).

679. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Ch. 6 § 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

A. Currency of Payment

While a lawyer would expect that a contract expresses the currency of payment, it does happen in practice that the parties forget to mention it or confuse currencies, such as "dollar," without actually specifying the currency or its country.[680] The default rules in Article 6.1.9 and 6.1.10 reflect again an international compromise.[681] Firstly, as noted elsewhere,[682] they were inspired by Art. 75 (3) of the UN Convention on International Bills of Exchange and International Promissory Notes,[683] by Art. 1 of the Annex to the Council of Europe's European Convention on Foreign Money Liabilities,[684] by the drafts of the Principles of European Contract Law (PECL),[685] and by various national laws.[686] Thereby they draw on an international consensus reached earlier.[687] Secondly, Article 6.1.9 develops that compromise further, again in a very sound way.[688] The opening door, in para. 1 sentence 1, to the currency of the place of payment (available for payment under the UNIDROIT Principles 2016 although the monetary obligation is expressed in a different currency) is restricted[689] by para. 1 sentence 2 if that currency is not freely convertible, or if the parties expressly agree to exclude that option by providing that payment should be made only in the currency in which the monetary obligation is expressed.[690]

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680. *Id.* at art. 4.3 cmt. 2, illus. 2.

681. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 164-66; UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 6.1.9, 6.1.10 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

682. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 164 (cmt. 1 on art. 6.1.9).

683. United Nations Convention on International Bills of Exchange and International Promissory Notes, art. 75 (Dec. 9, 1988) https://www.uncitral.org/pdf/english/texts/payments/billsnotes/X_12_e.pdf.

684. European Convention on Foreign Money Liabilities, art. 1 (Dec. 11, 1967) CETS 060.

685. MARCEL FONTAINE & JERZY RAJSKI, Int'l Inst. for the Unification of Priv. Law, Study L—Doc. 34, at 3, (1985).

686. YESIM ATAMER, *Performance in General*, in VOGENAUER'S COMMENTARY 2[D], *supra* note 13, at 769 (cmt. 3 on art. 6.1.9) .

687. *Id.*; *see* also *e.g.* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 164 (cmt. 1 on art. 6.1.9).

688. ATAMER, *supra* note 686, at 769 (cmt. 3 on art. 6.1.9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 164-165 (cmts. 1-2 on art. 6.1.9).

689. ATAMER, *supra* note 686, at 769 (cmt. 3 on art. 6.1.9).

690. ATAMER, *supra* note 686, at 769-770 (cmts. 3-7 on art. 6.1.9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1 at 165 (cmt. 2 on art. 6.1.9 at (i)(a)).

B. Imputation of Payments

In business relations, debtors (i.e. "obligors" in the neutral language of the UNIDROIT Principles 2016[691]) sometimes owe payment on several grounds.[692] In the most straightforward situation, they may owe payment of a sum of money agreed in the contract, plus interest and costs.[693] The parties stipulate in their contracts usually not explicitly about the allocation of payments.[694] Rather, they rely—deliberately or by happenstance—on default rules which differ around the globe.[695] Some legal systems require a notice from the debtor (i.e. the "obligee"[696]) to the creditor ("obligor").[697] The Civil Code of Louisiana may serve as an example.[698] Others, including the German Civil Code, operate with objective criteria.[699] The UNIDROIT Principles 2016 provide a compromise.[700]

The compromise reached by Article 6.1.12 helps to manage expectations with which everybody negotiating an international contract can well live.[701] It provides for a "*three-layered order of decision"*[702] providing, firstly, in para. 1 sentence 1, a limited right to the debtor (i.e. "obligor") to "specify at the time of payment the debt to which it intends the payment to be applied."[703] However, para. 1 sentence 2 limits the power of

691. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.11 hyphen 4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

692. *Id.* cmt. on art. 6.1.12; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 168 (cmt. 1 on art. 6.1.12).

693. ATAMER, *supra* note 686, at 782 (cmt. 7 on art. 6.1.12; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 169 (cmt. 1 on art. 6.1.12 at (ii)).

694. In practice, the parties concentrate on such clauses only under special circumstances, e.g. when negotiating a settlement agreement over a dispute.

695. *See* the multiple references to varying national laws by ATAMER, *supra* note 686, at 781-783 (cmts. 4-11 on art. 6.1.12).

696. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 1.11 hyphen 4 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

697. *Id. ("obligor");* ATAMER, *supra* note 686, at 782 note 349.

698. LA. CIV. CODE art 1864 (2019).

699. *See* e.g. § 366 BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 133, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.).

700. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6.1.12 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 168 (cmt. 1 in art. 6.1.12).

701. *See id.*

702. *Id.* at cmt. 2 on art. 6.1.12; ATAMER, *supra* note 686, at 780 (cmt. 1 on art. 6.1.12).

703. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6.1.12(1) sentence 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

specification of the debtor (i.e. the "obligor").[704] Firstly, without the consent of the creditor (i.e. the "obligee")—which can be granted pursuant to the freedom to derogate from the black-letter-rules under Article 1.5—"*the payment discharges first any expenses, then interest due and finally the principal."*[705] Absent such a determination by the debtor/obligor pursuant to para.1, Article 6.1.12 grants, secondly, in para. 2 to the creditor/obligee a *"subsidiary right to impute the payment within a 'reasonable time' after receipt of payment."*[706] Again, the default rule contains a limit to balance between the interests of the parties.[707] The obligee may only impute the uncommented payment of the obligor to obligations which are "due and undisputed."[708] If none of the parties made a determination on the imputation of payment, Article 6.1.12 provides, thirdly, in para. 3 for a balanced objective system of default rules which has regard, in that order, to the following criteria: (1) maturity, (2) security, (3) cumbersomeness, (4) age and (5) pro rata imputation.[709]

Article 6.1.12 thereby provides a valuable balance between the diverging interests of the parties with possibly different expectations on a point for which parties, at least in the author's experience, never take time to negotiate.[710]

III. CHAPTER 8—SET-OFF

The chapter addressing set-off aligns different concepts in a neutral compromise.[711]

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704. *Id.* at art. 6.1.12(1) sentence 2.

705. *Id.*.

706. *Id.* at art. 6.1.12(2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 169 (cmt. 3 on art. 6.1.12).

707. *Id.*.

708. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 6.1.12(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 169 (cmt. 3 on art. 6.1.12).

709. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 art. 6.1.12(3) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); *Id.* at art. 6.1.12; AGUSTIN MADRID PARRA, *Article 6.1.3 in* MORÁN BOVIO'S COMENTARIO, *supra* note 13, at 306; ATAMER, *supra* note 686, at 784-85 (cmts. 14-20); BOBEI, *supra* note 13 at 302; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 169-170 (cmt. 4 on art. 6.1.12).

710. With the exception of settlement agreements, see BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 168 (cmt. 1 on art. 6.1.12).

711. BOBEI, *supra* note 13, at 489 (cmt. 1.1 on art. 8.1).

It is perceived as a general principle of law[712] allowing to discharge an obligation (payment function)[713] and to organize private enforcement.[714] This same need exits also for international contracts just as for national contracts.[715] However, the details vary considerably around the globe.[716] This includes, for example, the distinction between an *ex-nunc* or an *ex-tunc* effect of set-off and variations like 'automatic' set-off (as found in some civil law jurisdictions)[717] or set-off by declaration[718], judicial intervention[719] or various common law schemes ('procedural' nature of set-off as a principle;[720] 'transaction set-off'[721] and 'equitable set-off')."[722] Due to time pressure and other priorities, set-off becomes rarely an issue in international contract negotiations despite the existing need to address both the different legal regimes and the divergent private international law on determining the applicable law to set-

712. PASCAL PICHONNAZ, *Set-Off in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 1037 (cmt. 9 in Introduction to Chapter 8 of the PICC); KLAUS PETER BERGER, *Set-Off*, in SPECIAL SUPPLEMENT 2005: UNIDROIT PRINCIPLES: NEW DEVELOPMENTS AND APPLICATIONS 23-25 (2005).

713. PICHONNAZ, *supra* note 712, at 1036 (Introduction to Chapter 8 of the PICC cmt. 6).

714. *Id.* at 1035 (Introduction to Chapter 8 of the PICC cmt. 2).

715 BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 265 (cmt. 1 on art. 8.1.).

716. For a detailed comparative overview *see* M. FONTAINE, Working Grp. for the Preparation of Int'l Com. Cont., Study L—Doc. 61 (1999); C. Jauffret-Spinosi, Working Grp. for the Preparation of Int'l Com. Cont., Study L—Doc. 62, at 1, (2000); Secretariat of UNIDROIT, Working Grp. for the Preparation of Int'l Com. Cont. (3rd), Study L—Doc. 27, at 3, (2001); PASCAL PICHONNAZ & LOUISE GULLIFER, SET-OFF IN ARBITRATION AND COMMERCIAL TRANSACTIONS, 116-121 (2014); ECKART BRÖDERMANN & GERHARD WEGEN, *Art. 17 IPR-Anh 1/ROM I in* BGB Kommentar (Hanns Prütting et al. eds.), 14th ed. 2019, at 3196 (cmt. no. 5).

717. *E.g.* in France and Italy, *see* BRÖDERMANN & WEGEN, *supra* note 716, at 3196 (cmt. 5 in art. 17); ZIMMERMANN**,** *supra* note 329.

718. *E.g.* in Austria, Greece, Germany, Netherlands, Portugal, Sweden, Switzerland; *Id.* at 1061 (cmt. 5 on art. 8.3); ZIMMERMANN, *supra* note 329, at 1554-1555.

719. *See* PICHONNAZ, *supra* note 712, at 1061(cmt. 3 on art. 8.3 and note 175 referring to a dispute about the classification of set-off in France).

720. PICHONNAZ, *supra* note 712, at 1061 (Cmts. 3, 5 on art. 8.3 with further references in note 178); § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22*,* at 467 (cmt. 486).

721. PICHONNAZ, *supra* note 712, at 1062 (cmt. 8 on art. 8.1); PICHONNAZ & GULLIFER, *supra* note 740, at ¶5.19-5.49.

722. *See e.g.* BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 265 (cmt. 1 on art. 8.1.); PICHONNAZ, *supra* note 712, at 1043 (cmt. 8 on art. 8.1 no. 12 with further references in note 68 for Australia); PICHONNAZ & GULLIFER, *supra* note 740, at ¶523 *et seq.* (classifying equitable set-off as a subcategory of transaction set-off).

off.[723] As a result, there exists a real risk that lawyers act on the basis of national assumptions with regard to set-off which, in the concrete international context, simply do not apply.[724] Working instead with the regime of the UNIDROIT Principles avoids this risk because, as noted elsewhere[725], the scheme of set-off rules in Arts. 8.1-8.5 provides a useful and genuine[726] neutral compromise with 'no direct influence from a specific legal system'[727] which is readily integrated into the contractual relationship.[728]

Thus, when agreeing on the UNIDROIT Principles 2016, or whenever Chapter 8 is incorporated into a contract, the parties know, without detailed research of a foreign national regime, the conditions under which they can generate the applicability of a straightforward transnational set-off system.[729] It includes the need for notice (Article 8.3)[730] and avoids automatic set-off or judicial intervention as required in some jurisdictions.[731] From a practical perspective, the rule on foreign currency set-off in Article 8.2 is particularly noteworthy, as many national laws, such as German law (but unlike others, e.g. the Austrian, Italian and French legal

723. *See e.g.* on different legal set-off regimes BRÖDERMANN & WEGEN, *supra* note 716, at 3196 (cmt. no. 5 on art. 17 ROM I); and as an example for statutory private international law Commission Regulation 593/2008, art. 17, 2008 O.J. (L 177) at 15 (European Union).

724. PICHONNAZ, *supra* note 712, at 1037 (Introduction to Chapter 8 of the PICC cmt. 8).

725. PICHONNAZ, *supra* note 712, at 1038 (Introduction to Chapter 8 of the PICC cmt. 9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 266 (cmt. 2 on art. 8.1.); for a comparative analysis on set-off see generally *see generally* PICHONNAZ & GULLIFER, *supra* note 740; REINHARD ZIMMERMANN**,** COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 21 (2002).

726. PICHONNAZ, *supra* note 712, at 1038 (Introduction to Chapter 8 of the PICC cmt. 9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 266 (cmt. 2 on art. 8.1.).

727. PICHONNAZ, *supra* note 712, at 1038 (Introduction to Chapter 8 of the PICC cmt. 9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 266 (cmt. 2 on art. 8.1.).

728. PICHONNAZ, *supra* note 712, at 1038 (Introduction to Chapter 8 of the PICC cmt. 9); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 266 (cmt. 2 on art. 8.1.),

729. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 266 (cmt. 2 on art. 8.1).

730. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 8.3 (UNIDROIT International Institute for the Unification of Private Law, 2016).

731. *E.g.* for automatic set-off in France and Italy, *see* BRÖDERMANN & WEGEN, *supra* note 716, at 3196 (cmt. 5 in art. 17); ZIMMERMANN**,** *supra* note 319; for judicial intervention *see* PICHONNAZ, *supra* note 712, at 1061(cmt. 3 on art. 8.3 and note 175 referring to a dispute about the classification of set-off in France).

systems[732]) would not even permit foreign currency set-off.[733] Technically, the rule in Article 8.2 elevates obligations of payment in different currencies to obligations "of the same kind" in the sense of Article 8.1 para. 1.[734] It provides a tool to *quasi* pay a debt by set-off.[735] This covers a business need in international trade and corresponds with an international trend.[736]

IV. CHAPTER 9—ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

The rules in chapter 9 have been described as a neutral and practical compromise between different national laws from various perspectives.[737] It unites the opposing economic interests of the market on the one hand, seeking flexible solutions, and of the debtor on the other hand, who typically longs for a stable relationships (with no assignments). This effective compromise is organized in the three sections of chapter 9, whereby each section dedicates 7 to 15 articles offering rules for recurring situations concerning the assignments of rights, transfer of obligations and 'assignment' of contracts.[738]

From the various provisions setting forth the international compromise in Chapter 9, two examples shall be highlighted:[739]

A. Article 9.1.14—Rights Related to the Right Assigned

According to Article 9.1.14, the assignment of a right transfers to the assignee (i.e. the recipient of the right[740]) both "*all*

732. PICHONNAZ, *supra* note 712, at 1054 (cmt. 1 on art. 8.2); BOBEI, *supra* note 13, at 495 (note 993 to cmt. 1.1 on art. 8.3).

733. PICHONNAZ, *supra* note 712, at 1054 (cmt. 1 on art. 8.2); BOBEI, *supra* note 13, at 495 (note 993 to cmt. 1.1 on art. 8.3).

734. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, ART. 8.1 CMT. 1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); PICHONNAZ, *supra* note 712, at 1054-1055 (cmt. 1 on art. 8.2).

735. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, cmt. 1 on art. 8.2 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

736. PICHONNAZ, *supra* note 712, at 1060 (cmt. 3 on art. 8.2); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 273 (cmt. 1 on art. 8.2).

737. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 283 (cmt. 1 in Introduction to Chapter 9 – Assignment of Rights, Transfer of Obligations, Assignment of Contracts).

738 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, ch. 9 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

739. *Id.* at arts. 9.1.14 and 9.2.6.

740. *Id.* at arts. 9.1.1.

the assignor's rights to payment or other performance under the contract" and "*all rights securing performance of the right assigned."*[741]

This clarifying language is helpful because: (1) contracting parties may forget to agree on detailed clauses regarding the consequences of an assignment, (2) national rules differ and, without diligent research of an agreed foreign law, parties may easily have different understandings as to which related rights to the assigned rights will be transferred. For example, a US lawyer contracting under German law for one of its subsidiaries in Europe would not expect that automatic transfer of rights would be limited to those rights which are 'ancillary' to the transferred right[742] (e.g. rights under a suretyship commitment made under a legal system in which, as in Germany or France, the obligation of the surety is dependent upon the existence of the secured right).[743] A common law practitioner is not trained in such a distinction between 'ancillary' and other rights.[744] If a common law lawyer and a civil law lawyer negotiate and forget to address the issue specifically, misunderstandings are bound to occur.[745]

B. Article 9.2.6—Third Party Performance

According to Paragraph 1 of Article 9.2.6 the obligor may contract with another person that this person will perform the obligation instead of the obligee's consent,

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741. *Id.* at art. 9.1.14.

742. BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], (Ger.) §401, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.):

> Passing of accessory rights and preferential rights. (1) With the assigned claim the mortgages, ship mortgages or security rights attaching to them as well as the rights under a suretyship created for them pass to the new obligee. (2) A preferential right linked to the claim to provide for the case of execution of judgment or insolvency proceedings may also be asserted by the new obligee.

743. BRÖDERMANN, *§§ 759-779*, *in* BGB Kommentar (Hanns Prütting et al., eds.), 14th ed. 2019, at 1582 (cmt. 10 Vor § 765 for Germany) and at 1589 (cmt. 68 for Austria, Belgium, Finland, France, Italy, Luxembourg, Netherlands, Portugal, Spain and Hungary and cmt. 70 on different concepts in England); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 309 (cmt. 3 on art. 9.1.14).

744. In common law systems, a suretyship may be 'jointly' liable with the obligor under the main obligation, *see e.g.* for England SJ WHITTACKER, in CHITTY/BEARS, Chitty on Contracts, 32d ed. (2015), at cmts. 44-66; BRÖDERMANN, §§ 759-779, in PWW, *supra* note 38, at 1589 (cmt. 70 Vor § 765).

745. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 309 (cmt. 3 on art. 9.1.14).

unless the obligation is of an essentially personal character.[746] Under paragraph 2 the obligee retains its claim against the obligor.[747]

As a matter of principle, subcontracting is allowed, with the exception of obligations of an essentially personal character.[748] This approach is consistent with the compromise approach taken by the UNIDROIT Principles 2016 with respect to the exceptions to specific performance in Article 7.2.2 discussed *supra.*[749] However, the obligee retains its claim against the obligor.[750]

As with most rules, this provision needs to be read together with Article 1.5 and 1.4.[751] Both the contract and mandatory law (e.g. procurement law) may provide restrictions on subcontracting.[752]

V. CHAPTER 10—LIMITATION PERIODS

The issue of limitation periods (also referred to as 'prescription'[753]) is a vexed one in international contracting. For some lawyers, e.g. from the USA, this tends to be a matter of procedure, for others from civil law jurisdictions, this is a matter of the substantive law of contracts.[754] In the education on private international law this is a classic and basic point.[755] However, not

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[746] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 9.2.6 (1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016)

747. *Id.* art. 9.2.6 (2).

748. FRANCESCA MAZZA, *Chapter 9: Assigment of rights, transfer of obligations, assignment of contracts*, in VOGENAUER'S COMMENTARY 2[D], *supra* note 13, at 1138 (cmts. 1-2 on art. 9.2.6).

749. *See infra* **II.D.2. d (i)**.

750. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 9.2.6(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

751. *Id.* at arts. 1.4, 1.5.

752. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 319-320 (cmt. 4 on art. 9.2.6).

753. *See e.g.* CODE CIVIL [C. CIV] [CIVIL CODE] art. 2219 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 194 *et seq.*, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.); TÜRK BORÇLAR KANUNU [CODE OF OBLIGATIONS] art. 146 (Turk.); MICHAEL JOACHIM BONELL, *Chapter 31: Limitation Periods in* TOWARDS A EUROPEAN CIVIL CODE 719 (2011); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 335 (cmt. 1 on art. 10.1).

754. § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 391 (cmt. 184); *see* already E.G.L., *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 492-98 (1919).

755. *See e.g.* § 6 INTERNATIONALES PRIVATRECHT/MÜNCHANW.HDB., *supra* note 22, at 391 (cmt. 184).

all lawyers who get engaged in international contracting studied the subject in law school.[756] It is extremely helpful that the UNIDROIT Principles 2016 have picked up the subject of limitation periods.[757] It opens the eyes that, in fact and in law, there exist different approaches to this subject.[758] At the same time, they document a modern type of approach to the topic.[759]

A. Scope of the Chapter

As noted elsewhere, [760] Chapter 10 contains an international compromise for limitation periods in 11 articles. On the one hand, as emphasized by the Arabic representative in the Working Group,[761] under Islamic law the mere passage of time does not imply any loss of rights. On the other hand, in Scotland the passage of time can lead to a 'strong' effect extinguishing an obligation.[762] Against this background, chapter 10 lets passage of time only have an attenuated ('weak')[763] impact. Its core concept reflects existing international instruments, i.e. European law[764] and the UN Limitation Convention.[765] As noted by *Wintgen*, the

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756. Only recently in 2018, it took a major effort of joint lobbying of German professors and state bars with the ministers of justice of the 16 German states to actually keep the subject in the curriculum for the study of law in Germany. The author was involved as a member of the Private International Law Committee of the German Federal Bar.

757. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Ch. 10 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

758. *Id.*; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 335-336 (cmts. 1, 3 on art. 10.1); WINTGEN, Chapter 10: *Limitation Periods*, *in* VOGENAUER'S COMMENTARY 2D, *supra* note 13, at 1155 (Introduction to Chapter 10 of the PICC cmts. 1-2).

759. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 335-336 (cmts. 1, 3 on art. 10.1); WINTGEN, *supra* note 758, at 1155 (Introduction to Chapter 10 of the PICC cmts. 1-2).

760. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 335 (cmt. 1 on art. 10.1).

761. Secretariat of UNIDROIT, Working Grp. for the Preparation of Int'l Com. Cont., P.C.—Misc. 21, at 49 (1999); WINTGEN, *supra* note 758, at 1187 (cmt. 1 note 147 to art. 10.9).

762. PRESCRIPTION AND LIMITATION ACT (Scotland) 6-8A, (1984); WINTGEN, *supra* note 758, at 1187 (cmts. 1 note 148 to art. 10.9).

763. ZIMMERMANN, *supra* note 725, at 72-75.

764. EU: Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for detective products Official Journal [1985] L 210 p. 29, Art. 11; Council of Europe: Convention on civil liability for damage from resulting activities dangerous to the environment (Lugano, 21 June 1993), European Treaty Series No. 150, Art. 17.

765. United Nations Convention on the Limitation Period in the International Sale of Goods, (June 14, 1974), *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/limit_conv_e_ebook.pdf*. *See* Secretariat of UNIDROIT, Working Grp.

compromise in Chapter 10 of the the UNIDROIT Principels[766] is based on a substantive approach as found in civil law countries[767] and not on a mere procedural approach as found in English law.[768]

The general limitation period, as agreed by incorporation of the UNIDRIT Principles into a contract, is three years "beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised," Article 10.2 para. 1.[769] Moreover, pursuant to Article 10.2 para. 2. "the maximum limitation period is ten years beginning on the day after the day the right can be exercised."[770]

Regarding the details of the limitation regime, three points are highlighted hereinafter for the purpose of this overview (hereinafter **B.-D.**).

B. Modification of Limitation Periods by the Parties

Article 10.3 contains restrictions of the general freedom of the parties under article 1.5 to modify limitation periods by agreement.[771] While para. 1 iterates the freedom to modify the limitation periods in conformity with article 1.5 UNIDROIT Principles, para. 2 sets limits. A party may not shorten the general limitation period to less than one year or shorten the maximum limitation period to less than four years; [772] it may not extend the maximum limitation period to more than fifteen years."[773]

For most (i.e. close to all) cases, the UNIDROIT Principles 2016 thereby provide for a comfort zone between one year and fifteen years, subject to mandatory law (Article 1.4).[774] The restrictions in Article 10 para. 2 are part of the small mandatory

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for the Preparation of Int'l Com. Cont., P.C.—Misc. 21, at 48 (1999); *see* also PROFESSOR P. SCHLECHTRIEM, Working Grp. for the Preparation of Int'l Com. Cont., Study L—Doc. 58, at 1, (1999); WINTGEN, *supra* note 758, at 1155 (cmt. 1 in Introduction to chapter 10 of the UNIDROIT Principles art. 10.9) and *e.g.* at 1167 (cmt. 11 on art. 10.3).

766. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, chapter 10 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

767 *See e.g.* for Germany BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 199, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0406 (Ger.).

768. WINTGEN, *supra* note 758, at 1187 (cmt. 1 and note 152 to art. 10.9).

769. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 10.2(1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

770. *Id.* at art. 10.2(2).

771. *Id.* at arts. 1.5, 10.3.

772. *Id.* at art. 10.3(2) lit. a, b.

773. *Id.* at art. 10.3(2) lit. c.

774. *Id.* at art. 1.4.

core in Article 1.5.[775] In extreme scenarios (like some M&A scenarios where there might sometimes – under extreme circumstances - exist good faith reasons to agree on a shorter limitation period), it has been argued that, if necessary, the parties might consider to operate with a *dépeçage* and submit the limitation period to a national law.[776]

C. *Suspension in Case of Force Majeure, Death, or Incapacity*

Force majeure is a difficult subject of comparative law: While part of the world is critical with regard to this concept[777] and, for others, it is a part of their legal DNA, it was important to address the impact of *force majeure,* as defined in (compromise) Article 7.1.7, on the statute of limitation.[778] Pursuant to Article 10.8, a *force majeure* event can suspend the general limitation period (Articles 10.2 para. 1, 10.3 para. 2 lit. a), but not the maximum limitation period (Article 10.2(2)).[779] This compromise between the interest of the obligee and the obligor has drawn on the general rule in Article 21 UN Limitation Convention,[780] the preparatory work to the Principles of European Contract Law (PECL),[781] and various civil law legislations.[782]

775. *Id.* at art. 1.5 ("except as otherwise provided in the principles").

776. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 344-46 (cmts. 9-10 on art. 10.3).

777. *See* WINTGEN, *supra* note 758, at 1183 (cmt. 1 to art. 10.8) at 1183 (*see* however also note 132 hinting at recommendations of the Law Commission to recognize some events which the UNIDROIT Principles would subsume under *force majeure)*.

778. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 7.1.7, 10.8 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

779. See WINTGEN, *supra* note 758, at 1182 (cmt. 1 to art. 10.8); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 354-355 (cmt. 1 on art. 10.8).

780. United Nations Convention on the Limitation Period in the International Sale of Goods, (June 14, 1974), *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/limit_conv_e_ebook.pdf*); Secretariat of UNIDROIT, Working Grp. For the Preparation of Int'l Com. Cont., Study L—Misc. 22, 35 (2000); SCHLECHTRIEM, *Working Group for the Preparation of Principles of International Commercial Contracts*, UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIVATE L., 1, 14 (2001); WINTGEN, *supra* note 758, at 1182 (cmt. 1 to art. 10.8).

781. SCHLECHTRIEM, *supra* note 789; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 354 (cmt. 1 on art. 10.8).

782. WINTGEN, *supra* note 758, at 1182 (cmt. 1 on art. 10.8), *supra* note 211.

D. Effects of Expiration of Limitation Period

Regulating the effects of expiration of a limitation period, Article 10.9 reflects the compromise *('weak substantive')*[783] approach in Chapter 10[784]. Pursuant to its paragraph 1 the expiration of the limitation period does not extinguish the right.[785] According to its paragraph 2, the obligor must assert the expiration of the limitation period in order to bring it to effect.[786] In accordance with its paragraph 3 even though the expiry of the limitation period for a right has been asserted this right may still be relied on as a defence.[787]

The rule is supplemented by a right to set-off under Article 10.10 and a restriction of the right to restitution pursuant to Article 10.11.[788]

VI. CHAPTER 11—PLURALITY OF OBLIGORS AND OF OBLIGEES

The issue of plurality of obligors and of obligees is both complex and common.[789]

A. Limits of the Language

To build a bridge between civil and common law is subject to real limits of the English language, because the same words may mean different things to different parties, depending on their background.[790] For the same kind of compromise on 'joint and several obligations' (i.e. a plurality of obligors), two different expressions exist. Section 11.1 uses in (Art. 11.1(a)) the words 'joint and several obligations' which are familiar to common law

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783. ZIMMERMANN, *supra* note 725, at 72-75; BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 357 (cmt. 1 on art. 10.9) with further reference.

784 *See supra* in this Chapter (Annex 2, part V.A.).

785 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 10.9 (1) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

786 *Id.* at art. 10.9 (2).

787. *Id.* at art. 10.9 (3).

788. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 357 (cmt. 1 on art. 10.9).

789. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Ch. 11 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

790. STEFAN VOGENAUER, *The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects*, 19 UNIF. L. REV., 481, 481, 501 (2014); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 361-362 (cmt. 5 in Introduction to Chapter 11 – Plurality of Obligors and Obligees).

trained lawyers.[791] In contrast, the PECL and the (EU) Draft Common Frame of Reference[792] use the notion of 'solidarity' which means to describe the same compromise. This language will be familiar to civil law trained lawyers: As noted by *Meier*, it refers to the old Roman expression 'in solidum', the French word *solidarité*, the Italian expression *in solido*, and the Spanish word *solidaridad*.[793] Thus, the words used in the UNIDROIT Principles resemble common law words. However, the UNIDROIT Principles must be interpreted autonomously.[794] The similarity has not been chosen to express any priority to any national common law.[795]

Under common law the presumption is that the obligors have joint obligations towards the obligees, while under civil law the presumption is that the obligations are separate.[796] Thus, from a common law perspective, the co-obligees would need to pursue their claim jointly while, from a civil law perspective, each co-obligee is free to bring separately a claim and, if it is successful, it would then have to transfer any excess received (as compared to its share) to the other obligees.[797]

Thus, when parties from civil and common law negotiate, the opposite presumptions under civil law and common law (and ensuing different mind-sets taking different concepts for granted) constitutes a risk. Against this background, it is helpful that article 11.2.1 UNIDROIT Principles 2016 offers three choices of agreeing, in case of a plurality of obligees, on either separate claims, or joint and several claims as regulated by the UNIDROIT

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791. MARCEL FONTAINE, Working Grp. for the Preparation of Int'l Com. Cont. (3rd), Study L—Doc. 102, at 6, (2007); MEIER, *supra* note 50, at 1198 (cmt. 10 on art. 11.1.1). This choice of expression is also consistent with the language in Arts. 9.2.5(3) and 9.3.5(3).

792. *See* Principles, Definitions and Modern Rules of European Private Law: Draft Common Frame of Reference (DCFR), http://www.ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf; Fontaine, *supra* note 166, at 549, 551.

793. MEIER, *supra* note 50, at 1198 (cmt. 10 on art. 11.1.1)..

794. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 1.6 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); VOGENAUER, *supra* note 810, at 505; MEIER, *supra* note 50, at 1198 (cmt. 10 on art. 11.1.1).

795 BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 362 (Chapter 11 – Plurality of Obligors and of Obligees, Introduction no. 5).

796. *Supra* in the main article at II.A.

797. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 11.2.4(2) (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

Principles, or on joint claims.[798] From a practical perspective, that choice is easy to take and avoids leaving the characterisation of an obligation, which is due to several obliges, to subsequent interpretation of the language in the contract creating the obligation.[799] By offering three alternatives to choose from,[800] the UNIDROIT Principles contribute to avoiding a possible cultural clash and misunderstanding.[801]

B. Detailed Compromises

The subject is sufficiently complex to require detailed study, in any case, and even more so if a merchant or its lawyer decides to leap into the dark of a foreign law which may be different than, or even opposite to, one's own expectations fused by national legal training.[802] The neutral language of the UNIDROIT Principles 2016 provides again a nuanced compromise for the plurality of obligors (Section 11.1) and at least a clear choice, like a menu, for the plurality of obligees (Section 11.2).[803]

For the purposes of this overview, just one sample of the compromises reached shall be given.[804] It stems from section 11.1[805] and relates to the situation in which an obligee has not received full performance from its obligors.[806] In that case, article 11.1.11 para. 2 privileges the obligee over the co-obligor who has

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798 *Id.* at art. 11.2.1.

799. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, arts. 4.1, 4.3 *et seq.* (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

800. *Id.* at art. 11.2.1. and cmt. 4 on art. 11.2.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); MEIER, *supra* note 50, at 1243 (Introduction to Section 11.2 of the PICC cmt. 4) and at 1252 (cmt. 27 on art. 11.2.1).

801 *See* the practitioner's perspective at BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 5 (Introduction to the UNIDROIT Principles of International Commercial Contracts at cmt. 9).

802. *See supra* A. (in this Annex II, at VI.A.).

803. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 11.1, in particular art. 11.1.2 and 11.2 and cmt. 4 on art. 11.2.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016); BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 393 (cmt. 2 on art. 11.2.1).

804. BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 387 (cmt. 8 on art. 11.1.11).

805 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, section 11.1 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016)

806 See UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, art. 11.1.3 (UNIDROIT INT'L INST. FOR THE UNIFICATION OF PRIV. L. 2016).

paid more than his part[807] and is therefore entitled to make a contributory claim against its co-obligors under article 11.1.10[808]. It grants priority to the obligee who has not yet been fully paid over the claim of the co-obligor claim contribution from its co-obligors.[809] However, similar to Art. 10:106(2) PECL and in several civil law countries,[810] the priority is limited to the extent that such priority is necessary to enforce the remaining claim.[811]

[807] *Id.* at art. 11.1.11 para. 2.
[808] *Id.* at art. 11.1.10.
[809] *Id.* at art. 11.1.11 para. 2.
[810] BRÖDERMANN'S UNIDROIT PRINCIPLES' COMMENTARY, *supra* note 1, at 387 (cmt. 8 on art. 11.1.11 with further references).

811. MEIER, *supra* note 50, at 1232-1233 (cmt. 13 on 11.1.11), with references to different national legal systems which do not accept precedence of the obligee (e.g. Italy, Netherlands, *id.* footnote 127), or which do not allow subrogation in case of partial payment (England, *id.* footnote 128).