The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer

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I. – INTRODUCTION

Globalisation and worldwide trade between market participants from over 200 nations and legal orders have caused international trade and investment to become highly complex. This includes the law as a service discipline to such trade and transactions. No single legal mind can now master all necessary aspects. For example, within the European Union no brain is able even to read the law in all applicable European languages which, for the purposes of interpretation, have equal meaning and importance.[1] The lawyer, acting like a scout in a jungle and maze of information, needs to compare the different laws that might be applicable and to choose the one best suited to the circumstances of the case. Often, the parties wish to compromise on a neutral law. It is in this context that the UNIDROIT Principles of International

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1 See Art. 55 Consolidated version of the Treaty of the European Union; E. BRÖDERMANN, 1. Teil, "Grundlagen des Internationalen Privatrechts", in: E. Brödermann / J. Rosengarten (Eds.), *Internationales Privat- und Verfahrensrecht (IPR/IZVR)* (on European and German private international law and international procedural law), 5th ed. (2010), No. 52.

Commercial Contracts (hereinafter: the "UNIDROIT Principles" or "UP") come in helpful as a neutral set of rules.

II. – THE USE OF THE UNIDROIT PRINCIPLES IN PRIVATE PRACTICE

In view of the structural similarities between the UNIDROIT Principles and many national laws around the globe (1), the UNIDROIT Principles are often a useful tool in contract negotiations (2). While the Principles can be used most conveniently in connection with an arbitration clause, they can be also used in combination with a jurisdiction clause providing for the jurisdiction of a national court (3).

1. Structural similarities between the UNIDROIT Principles and many national laws around the globe

By their nature, the UNIDROIT Principles are similar to most national laws. The reasons for these similarities are simple. First, the UNIDROIT Principles are the result of intensive comparative legal research and debate.[2] Second, the UNIDROIT Principles have influenced many legislators over the years including, for example, the Chinese legislator[3] and (with respect to some fundamental changes of the German contract law in 2002) the German legislator.[4]

This structural similarity becomes evident whenever a practitioner examines it: all lawyers will find many familiar concepts when they study the UNIDROIT Principles. For example, the author first came across the UNIDROIT Principles in the course of an international arbitration in Lausanne, Switzerland, in the context of a dispute about a satellite lease contract. A professor who had served as an observer and expert in the development of the UNIDROIT Principles headed this Swiss arbitration proceeding which touched

2 See, e.g., M.J BONELL, An International Restatement of Contract Law, 3rd ed. (2005), 26 et seq.; S VOGENAUER, "Introduction", in: S Vogenauer / J Kleinheisterkamp (Eds.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford (2009), marginal 21.

3 M.J. BONELL, "UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law *Unif. L. Rev.* / *Rev. dr. unif.* (2004), 1, at 8; Y ZHANG / D HUANG, "The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: a Brief Comparison", *Unif. L. Rev.* / *Rev. dr. unif.* (2000), 429, at 430; E BRÖDERMANN, "Die erweiterten UNIDROIT Principles 2004", *Recht der Internationalen Wirtschaft (RIW)* (2004), 721, at 722.

4 In the reasoning for section 275 of the German Civil Code ("BGB"), the legislative documents for the 2002 German civil law reform refer to the UNIDROIT Principles as a comparative legal reference, see BRÖDERMANN in: Brödermann / Rosengarten, *supra* note 1, marginal 311.

half a dozen jurisdictions. There was a debate about the interpretation of an unworkable choice-of-law clause.[5] The opponents argued for the application of different legal orders (English or Swiss law). From the circumstances of the case, it was clear that the parties had intended to agree on a neutral legal order. In the pre-hearing conference, the tribunal suggested that the parties choose, *post contractum*, the UNIDROIT Principles in view of the joint intent of the parties to rely on a neutral law. The parties had two weeks to make this major decision in a multi-million dollar case. It was then that the author, assisted by a team of lawyers from three nations, came to the conclusion that it would make no difference whether, in the end, the tribunal applied the UNIDROIT Principles or English law with respect to the issues addressed in the arbitration. Indeed, when working through the examples given in the Official Comments to the UNIDROIT Principles, it was discovered that some of these corresponded to famous English precedents.[6] The case itself was based on a contractual damages claim. In this respect all possibly applicable laws contained restrictions, no law allowing unlimited claims. While French law requires that the damage must be "*foreseeable*",[7] German law tests if there is an "*adequate*" nexus of causality between the breach of contract and the damage,[8] while English law requires that the damage be "*not too remote*" from the event.[9] At the same time, the opponent's team went through a

5 Such mistakes happen occasionally when parties conclude contracts under time pressure and/or without diligent legal advice. For example, in one case the parties had chosen "European law" as neutral law, not realising that, so far, there is no European contract law. The European Union is working on it, see *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses*, COM (2010) 348, 1 July 2010.

6 This is a normal occurrence because, during the working sessions of the Working Group preparing the UNIDROIT Principles, numerous cases are discussed to choose examples which document the functioning of the Principles. These examples often correspond to similar examples from various jurisdictions.

7 Art. 1150 French Civil Code: "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévu ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée".

8 Ch. GRÜNEBERG, in: Palandt, *BGB*, 70th ed., Beck, Munich (2011), Vorb. v. 249 BGB, No. 24 *et seq*.

9 H. MCGREGOR, *Damages*, 18th ed., Sweet & Maxwell, London (2009), 6-157, referring to the leading case *Hadley v. Baxendale* (1854) 9 Ex., 341 at 355: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

similar process. In the end, the parties agreed to apply the UNIDROIT Principles to the contract by agreement after the beginning of the arbitration proceeding because the UNIDROIT Principles contain, in Art. 7.4.4, a similar limitation to a claim for damages.[10]

2. A useful tool in contract negotiations

In view of the structural similarities between the UNIDROIT Principles and most national laws, the UNIDROIT Principles are often helpful in overcoming legal barriers in contract negotiations. They are truly neutral and give no advantage to either party. Their choice avoids the – often costly – research of a State law which could be chosen as a neutral law. The choice of the UNIDROIT Principles is more reasoned than the choice of a neutral State law chosen by happenstance [11] because such choice of random national law always carries the risk of unexpected consequences. Furthermore, in the majority of cases the parties will find rules of conduct as well as terms in the UNIDROIT Principles with which they are familiar from their national laws.[12] In addition, the UNIDROIT Principles are a simple and ready-to-use tool which makes it easy to draft contracts efficiently.[13]

Sometimes, the parties agree on the UNIDROIT Principles in their entirety and choose them, to the extent possible, in lieu of national law.[14] In this case the UNIDROIT Principles become, *de facto*, the *lex contractus* for all issues covered by the Principles (see *infra* at 3). In addition, any mandatory law applicable under the circumstances and the law applicable to other issues not covered by the Principles, such as company law, would apply.[15]

10 This anecdote was previously reported in German in *RIW* (2004), *supra* note 3, 723 *et seq*.

11 See, *e.g.*, the example of the choice of Belgian law in a German-American contract because Belgium is located between Germany and the United States, first mentioned in E. BRÖDERMANN, "The Growing Importance of the UNIDROIT Principles – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal", *Unif. L. Rev. / Rev. dr. unif.* (2006), 749, at 754.

12 BRÖDERMANN, *RIW* 2004, *supra* note 3, 723.

13 BRÖDERMANN, *supra* note 11, 754 *et seq*.

14 See, *e.g.*, G. BORN, *International Commercial Arbitration* (2009), Vol. II, 2243.

15 In this context, the following *phenomenon* is to be noted: To the extent that the UNIDROIT Principles increasingly cover issues such as "agency" which, from a private international law perspective, are not classified as "contract", a "choice of UNIDROIT Principles" clause becomes a chameleon providing an answer to several questions of private international law.

In some cases, the UNIDROIT Principles serve as a checklist and as a basis for a number of clauses. In particular in cases where several languages were needed during the negotiations, it is helpful to rely on appropriate UNIDROIT Principles, which are available in several languages. For example, in 2011, the author used the UNIDROIT Principles during the negotiation of a complex State (construction) contract where the choice of the national law of the Contracting State was unavoidable. In order to somewhat neutralise the effect of the choice of the national law of the Contracting State, it was agreed that (i) an international ICC arbitration tribunal should be competent in case of a dispute, and (ii) the chosen national law "*would be applied with due respect to international practice and, in particular, the principle of good faith*." Further, it was possible to integrate into the contract a number of clauses (e.g., on force majeure or hardship) which were inspired by the UNIDROIT Principles.

3. Combining the UNIDROIT Principles with an arbitration clause or a jurisdiction clause

The UNIDROIT Principles can be used both in connection with an arbitration clause and with a clause providing for the jurisdiction of a national court.

(a) Combination with an arbitration clause providing for institutional arbitration

The choice of the UNIDROIT Principles in the context of a combination with an *institutional* arbitration clause is easy, because international arbitration bodies will accept such a choice. Many rules of arbitration do not refer to "national law" but to "rules of law". Such provisions can be found in, for example, the rules of arbitration used by the International Chamber of Commerce [16] and by the London Court of International Arbitration.[17] By applying the chosen UNIDROIT Principles, the arbitration tribunal applies not only the chosen rules of the arbitration institution but also gives effect to the contractual parties'

16 Art. 17 of the *ICC Rules of Arbitration* determines in para. 1: "The parties shall be free to agree upon the *rules of law* to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the *rules of law* which it determines to be appropriate."

17 Art. 14.2. of the *LCIA Rules* determines: "Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or *rules of law as* the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration."

will, derived from the respective agreement and independent of national law. Further, there is no risk that the application of the chosen UNIDROIT Principles prevents the recognition and execution of an award because, at least under the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*,[18] the decision on the applicable substantive law cannot be a ground for the refusal of an enforcement of an award.[19]

In his practice, the author quite often combines a "choice of UNIDROIT Principles" clause with the appropriate clause providing for institutional arbitration. A few examples:

- *Combination with the German DIS:* In 2004, negotiations in Paris for a French off-shore venture were based on the choice of the "UNIDROIT Principles (2004) supplemented by the law governing at the place of the seat of the Arbitration Tribunal," while the contract provided for "arbitration ... according to the Rules of the German Institution of Arbitration (DIS) in Hamburg, Germany."
- *Combination with the Hong Kong HKIAC:* A contract concluded in September 2004 between a Hong Kong-based company and two Korean parties with respect to a product in the jewellery trade combined the UNIDROIT Principles with an arbitration clause providing for arbitration administered by the Hong Kong International Arbitration Centre. Since the contract conferred some third party rights – an issue which, at the time, was not covered by the UNIDROIT Principles [20] – and as there was simply no time or occasion to research the position of Hong Kong law on third party rights, the parties reached the following compromise including a conditional choice of supplementary law:

> "The agreements contained in this document shall be governed by the Principles of International Commercial Contracts as compiled

18 Done at New York, 10 June 1958, 330 *United Nations Treaty Series,* 38.

19 The reference in Art. V(1) lit.(a) of the New York Convention to the validity of the agreement under the law chosen by the parties or, failing such indication, under the law of the country where the award was made, refers solely to the arbitration agreement as defined in Article II(1) of the New York Convention. See, e.g., C.B. LAMM / J.K. SHARPE, "Inoperative Arbitration Agreements under the New York Convention", in: E. Gaillard / D. Di Pietro (Eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice*, Cameron May, London (2008), 297, at 302.

20 Third party rights are treated in Chapter 5, Section 2 of the 2004 version of the UNIDROIT Principles which were formally endorsed by UNCITRAL as a recommendable working tool for contract negotiations in 2007.

> by UNIDROIT (Rome) … (see <www.unilex.info>). They are hereby incorporated into the entire contract. Should it become necessary to rely in addition on a national law, this will be the law of Hong Kong.
>
> However, if the law of Hong Kong should consider the third party rights granted in the agreements as null or void (*e.g.,* for lack of due consideration), all clauses relating to third party rights shall *not* be governed by Hong Kong law but instead by German law which recognizes such third party rights."

In another contract negotiation, in Asia in 2005, between a Korean and a Philippine company regarding the creation of a joint venture in Hong Kong with respect to a newly developed product in the health industry, the parties, searching for a neutral compromise, agreed on the UNIDROIT Principles in combination with an a-typical arbitration clause providing, in essence, for arbitration under the UNCITRAL Arbitration Rules administered, with respect to certain issues, by the Hong Kong International Arbitration Centre (HKIAC).

(b) Combination with a jurisdiction clause

In some jurisdictions, the private international law at the place of the court, applicable in case of a dispute before that court, permits only the choice of a "national" law. This is the case in respect of all national courts located in the European Union since the entry into force, on 17 December 2009,[21] of the Rome Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 (hereinafter: the "Rome I Regulation").[22] Article 3, paragraph 1 of the Rome I Regulation (which regulates "Freedom of Choice") requires *in principle*, in view of the history of this rule, the choice of a national law. Indeed, the initial proposal explicitly to permit the choice of "principles and rules of the substantive law recognized internationally or in the Community" as applicable law [23] was refuted in view of fierce national protests.[24] However, Recital 13 of this regulation recognises the *contractual*

21 Art. 29 Rome I Regulation (EC) No 593/2008.

22 Official Journal of the European Union, L 177, 4 July 2008, 6 et seq.

23 Art. 3 para. 2 of the European Commission's "Proposal on Conflicts of Laws regarding Contractual Obligations (Rome I)" of 15 December 2005, COM (2005) 650; see BRÖDERMANN, *supra* note 11, 760 *et seq.*

24 See, *e.g.*, regarding the protest of Germany and the United Kingdom, D. MARTINY, "Neue Impulse im Europäischen Internationalen Vertragsrecht", *Zeitschrift für Europäisches Privatrecht* (2006), 60, at 68. See also S. LEIBLE / M. LEHMANN, Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"), *Recht der Internationalen*

freedom to incorporate also the UNIDROIT Principles. It reads: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." As a result, even in the case of the application of the Rome I Regulation by a court of one of the member States of the European Union, the court must respect the parties' choice to integrate the UNIDROIT Principles. Internationally, the incorporation of the UNIDROIT Principles by reference is recognised.[25]

In these circumstances, the reference to the UNIDROIT Principles in a "choice-of-law clause" must be interpreted in the light of the interpretation rules of the applicable national law as determined by application of the Rome I Regulation with due regard to Recital 13 of the Rome I Regulation. This amounts to a *voie indirecte* towards the UNIDROIT Principles. Strictly speaking, in the categories of private international law, the "choice of UNIDROIT Principles" clause is no "choice-of-law clause" in the sense of Article 3 of the Rome I Regulation because it does not call for the application of a national law. Therefore, the applicable national law will have to be determined by application of Article 4 of the Rome I Regulation governing the "applicable law in the absence of choice". Nonetheless, the "choice of UNIDROIT Principles" clause will reach its goal. Most European laws, if not all of them, contain the principle that the construction and interpretation of a commercial contract must have due regard to the true intent of the parties.[26] Thus, even a technically incorrect "choice-of-law" clause referring to the UNIDROIT Principles must be read as an expression of the intent of the parties to apply the UNIDROIT Principles [27] to the extent that such application does not violate the otherwise applicable national law. The applicable national law therefore steps in only if the respective UNIDROIT Principle, chosen by incorporation, violates mandatory national law, which is just about unthinkable because Article 1.4 of the UNIDROIT Principles explicitly provides: "Nothing in these

Wirtschaft (RIW) (2008), 528, at 533: the time was apparently not yet "*ripe*" for such an extension of the principle of party autonomy.

25 See, *e.g.*, O. LANDO / P.A. NIELSEN, "The Rome I Regulation", *Common Market Law Review (CML Rev.)* 45 (2008), 1687, at 1698; Th. PFEIFFER, "Neues Internationales Vertragrecht. Zur Rom I-Verordnung", *Europäische Zeitschrift für Wirtschaftsrecht* (2008), 622, at 624 (implicitly); MARTINY, *Internationales Vertragsrecht*, 7th ed. (2010), marginal 101, at (p.) 102; LEIBLE / LEHMANN, *supra* note 24, 533.

26 See, *e.g.*, Art. 1156 of the French *Code Civil*, § 133 of the German *Bürgerliches Gesetzbuch (BGB)*; also Ch. VON BAR / R. ZIMMERMANN, *Grundregeln des Europäischen Vertragsrechts*, 1st ed. (2002), 345, with further examples.

27 In this sense, for Germany, BRÖDERMANN, in: Brödermann / Rosengarten, *supra* note 1, marginal 400 (referring to §§ 133, 157 BGB).

Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." In any negotiation, diligent working methods in any event require parties and their lawyers to anticipate possibly applicable internationally mandatory rules.[28]

As a result, while the choice of the UNIDROIT Principles should technically not be inserted in a "choice-of-[national]-law" clause, in light of Recital 13 of the Rome I Regulation such a clause needs to be construed as an incorporation of the UNIDROIT Principles into the contract by reference. The heading of such clause as "choice-of-law" clause technically incorrect, since the UNIDROIT Principles are no law in the traditional sense of the Rome I Regulation, but the clause suits its purpose. The otherwise applicable law, a national law which the parties *may* have meant to avoid,[29] steps in to the extent that it is mandatory or that it covers issues not covered in the UNIDROIT Principles. To sum up: despite the retrograde wording of Article 3 of the Rome I Regulation, nothing prevents the parties from incorporating the UNIDROIT Principles into European commercial contracts.[30]

(c) Combination with an arbitration clause providing for ad hoc *arbitration*

In the case of an *ad hoc* arbitration, the arbitration tribunal, when analysing the "choice of UNIDROIT Principles"-clause, will often refer to the private international law which is applicable at the place of the seat of the arbitration.[31]

In that case, the choice of UNIDROIT Principles is possible, at least, under the same conditions under which it is possible also to combine the UNIDROIT

28 J. KLEINHEISTERKAMP, in: S. Vogenauer / J. Kleinheisterkamp (Eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, OUP, Oxford (2009), Art. 1.4, marginal n° 7.

29 If the parties were aware of Art. 1.4 of the UNIDROIT Principles, they may not even have intended to avoid that law.

30 One distinction remains, as clearly evidenced by the new wording of Comments Nos. 3 and 4 to Art. 1.4 UP: The mere incorporation of the UNIDROIT Principles into a contract which is governed by State law requires to apply also domestically mandatory law and not only internationally mandatory law (see also the discussion *infra* at II(3)(c) and II(4)).

31 See, *e.g.*, for Germany: R. ZÖLLER / R. GEIMER, *Zivilprozessordnung*, 27th ed. (2005), § 1025 ZPO, marginal 10; D. MARTINY, Vorb. zu Artikel 1 Grundlagen, Rom I-VO, EG-Vertragsrechts-Übereinkommen, Internationale Zuständigkeit, Schiedsgerichtsbarkeit, in: *Münchener Kommentar*; *Bürgerliches Gesetzbuch, Internationales Privatrecht*, vol. 10, 5th ed. (BGB, 5th ed. 2010), marginal 98.

Principles with a choice of jurisdiction clause.[32] In such circumstances, the parties can count on the traditionally open mind of the arbitrators to implement the intention of the parties.

To cite a practical example: a contract regarding the cooperation between two law firms from Canada and Germany (which is still in force without a dispute) selects the UNIDROIT Principles as the legal ground, in that case embedded into national law: "This Cooperation Agreement is governed by the UNIDROIT Principles of International Commercial Contracts (version 2004, see <www.unidroit.org>). Should in addition the application of a national law become necessary, such law shall be the German law."[33] The arbitration scheme of the contract is an *ad hoc* arbitration in Switzerland (outside the European Union) under which the arbitrator is to be appointed by the Chairman of the Swiss Arbitration Association, ASA.

In a contract concluded in 2011 between a British and a German party in the logistics sector, the parties combined an *ad hoc* arbitration clause with the choice of the UNIDROIT Principles in order to overcome the divergence between English law and the continental German legal system.[34]

With respect to arbitrations where the seat of the tribunal is within the European Union, the restriction of Article 3, paragraph 1 of the Rome I Regulation to the choice of a national (State) law (discussed *supra* at (b)) could cause a problem to the direct application of the UNIDROIT Principles because, *if* this restriction applies, it has priority over national arbitration law as a matter of European law.[35] This overriding effect of the Rome I Regulation was recently argued by Peter Mankowski in a German law review article.[36] The possible impact of the argument is serious, because many member EU States have meanwhile based their national arbitration law on Article 28 of the

32 *See supra* II(3)(b).

33 It would be better to refer to <www.unilex.info>.

34 This example was mentioned by a member of a large international law firm during the 2011 "China Arbitration Day" jointly hosted in Hamburg on 20 May 2011 by the Chinese European Arbitration Centre (see *infra* III.1) and the Chinese International Economic and Trade Arbitration Commission.

35 Within the European Union, any EU regulation has "general application". It is binding in its entirety and directly applicable in all Member States (Art. 288 para. 2, *Treaty on the Functioning of the European Union*). It therefore has priority over national law.

36 P. MANKOWSKI, "Rom I-VO und Schiedsverfahren", *Recht der Internationalen Wirtschaft (RIW)* (2011), 30-44.

UNCITRAL Model Law on International Commercial Arbitration.[37] This permits the choice of "*rules applicable to the substance of dispute(s)*" which, similarly, includes the freedom to choose the UNIDROIT Principles. In all these EU member States, the Rome I Regulation is directly applicable and has priority over national arbitration law, *if* it applies. This, however, is not the case.

The answer to the questions of applicability of the Rome I Regulation depends on the construction of the wording of the exemption in Article 1, paragraph 2(e) of the Rome I Regulation.[38] Construed strictly, close to the *wording* ("arbitration agreements"), this exemption applies only to the arbitration agreement itself and not to a choice-of-law clause (or a "choice-of rules-of-law" clause) made jointly with an arbitration agreement. Therefore, the restrictive wording of Article 3, paragraph 1 of the Rome I Regulation would apply also to a choice-of-UNIDROIT Principles clause which is combined with an *ad hoc* arbitration clause. This argument in favour of the application of the Rome I Regulation to a choice-of-UNIDROIT Principles clause in a contract providing for *ad hoc* arbitration needs to be overcome in order to pave the way for a *voie directe* to the application of the UNIDROIT Principles (as opposed to the *voie indirecte* to the UNIDROIT Principles which is open even in case of a narrow construction of that exemption [39]).

The *history* of the Rome I Regulation indicates that the European Union did not intend to resolve issues of arbitration at all by way of the Rome I Regulation.[40] Further, and most importantly, an interpretation of the

37 Austria, Bulgaria, Cyprus, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovenia, Spain, United Kingdom (based on <www.uncitral.org>, visited on 12 April 2010). A special case is Denmark because it is not Member State in the sense of the Rome I Regulation according to its Art. 1 para. 4.

38 MANKOWSKI, *supra* note 36, 30-31 at II, starts his analysis from the same departure point.

39 *See supra* at II(3)(b) for choice of UNIDROIT Principles clauses made jointly with a choice of jurisdiction clause.

40 MARTINY, *supra* note 31, Vorb. zu Artikel 1 Grundlagen, marginal 100 (with further references and an explanation for the initial confusion caused by official comments on the predecessor convention of the Rome I Regulation); K. KLINGEL, *Die Principles of European Law on Personal Security als neutrales Recht für internationale Bürgschaftsverträge*, Mohr Siebeck, Tübingen (2009), 31-33 (with a detailed reasoning, based on the history of the Rome I Regulation, that the Member States of the European Union did not at all intend to resolve the choice-of-law clauses for contracts with an arbitration clause); E. BRÖDERMANN / G. WEGEN, in: H. Prütting / G. Wegen / G. Weinreich, *BGB-Kommentar*, 6th ed. (2011), Article 1 Rom I, marginal 20; G. WEGEN, "Die objektive Anknüpfung von Verträgen in deutschen internationalen Schiedsverfahren nach Inkrafttreten der Rom I-Verordnung", in: J.F. Baur / O. Sandrock / B. Scholtka / A. Shapira (Eds.), *Festschrift für Gunther Kühne zum 70. Geburtstag* ("FS Kühne"),

exemption in light of the *purpose and goal* of the Rome I Regulation ("*effet utile*" interpretation) supports the broad interpretation of the exemption for arbitration agreements in Article 1, paragraph 2(e) of the Rome I Regulation. Beyond its wording, the exemption also applies to a choice-of-law clause which is combined with an arbitration clause (such broad interpretation of the exemption results in a narrow construction of the scope of application of the Rome I Regulation itself as not being applicable in the context of a choice-of-UNIDROIT Principles clause which is combined with an *ad hoc* arbitration clause); such "*effet utile*" interpretation is one of the most important tools for interpretation existing in European Union law.[41] This purposive or goal-oriented argument leads to a clear distinction between choice of law in the context of arbitration, on the one hand, and choice of law in the context of litigation – which is the sole focus of the Rome I Regulation as part of a European scheme to enhance the proper functioning of the internal market by means of free movement of judgments –, on the other hand.[42] Thus, the Rome I Regulation does *not* require a broad area of application including its application to international arbitration (by a narrow interpretation of the exemption clause contained in Article 1, paragraph 2(e) of the Rome I Regulation which refers only to the arbitration agreement itself and not to a choice-of-law clause made jointly with an arbitration agreement).

To the contrary, a narrow interpretation of the exemption for arbitration agreements in Article 1, paragraph 2(e) of the Rome I Regulation (and thereby a broad scope of applicability of the Rome I Regulation including its application to international arbitration) would result in a distinction affecting the world of arbitration that was not intended in light of Member States' aim to stay away from arbitration. The exemption for arbitration clauses in Article 1, paragraph 2(e) Rome I Regulation does not distinguish whether the arbitration clause refers to an arbitration institution (which in turn permits the

933, at 942; with a similar result (but more cautious); Th. PFEIFFER, "Neues Internationales Vertragrecht. Zur Rom I-Verordnung", *Europäische Zeitschrift für Wirtschaftsrecht*, (2008), 622, 623, at III.3.a ("no strict applicability" / "*keine stricte Bindung*" of arbitration within the European Union to the Rome I Regulation in light of the exception for "arbitration agreements"; see para. 2 of the cited section in connection with its para. 1); see, in contrast, the reasoning to the contrary by P. MANKOWSKI, *supra* note 36, at 31 *et seq.*, 44, who wants to apply the Rome I Regulation also for the choice of law in arbitrations.

41 See, e.g., ECJ C-213/89 (19 June 1990) – *Factortame*, 1990 European Court Reports I, (p.) 2433, marginals 18 to 21.

42 Recitals 1-7, in particular Recital 6, of the Rome I Regulation. The same conclusion was drawn earlier by WEGEN, FS Kühne, *supra* note 40, 943 ("*effet utile*" argument).

choice of rules of law such as the UNIDROIT Principles [43]) or whether it provides for *ad hoc* arbitration and, in that context, also for the applicability of the UNIDROIT Principles. Nothing in the history of the Rome I Regulation suggests that the European Union intended to distinguish between *ad hoc* arbitration and institutional arbitration where the exemption of the "arbitration agreement" in Article 1, paragraph 2(e) of the Rome I Regulation clearly includes the choice-of-law regime of the institution chosen by the arbitration agreement. A broad construction of this exemption avoids such a distinction between institutional and *ad hoc* arbitration without impairing the realisation of the core purpose – the *effet utile* – of the regulation to contribute to the development of the European market by facilitating the free movement of State judgments. Therefore, the Rome I Regulation does not require its application as a matter of European law.[44]

This result is in line with the history of arbitration law. The Member States of the European Union themselves apply no specific restriction on private international arbitration law, nor has there ever been such a restriction. Many States have used their freedom of legislation explicitly to permit the choice of "rules of law" (as opposed to "law"), which include the UNIDROIT Principles.[45] Among the first examples is Article 1496 of the French *Nouveau Code des Procédures Civiles*.[46] Later, many EU States based their national arbitration law on Article 28 of the UNCITRAL Model Law.[47]

The broad interpretation of the exemption in Article 1, paragraph 2(e) of the Rome I Regulation and thereby the restrictive interpretation of the scope of applicability of the Rome I Regulation set forth above thus opens the *voie directe* to the UNIDROIT Principles also within the European Union, when the choice of the UNIDROIT Principles is combined with an *ad hoc* arbitration clause. It also treats arbitration clauses providing for *ad hoc* arbitration (combined with a "choice-of-UNIDROIT Principles" clause) on a par with an

43 See *supra* II(3)(a). As noted also by MANKOWSKI, *supra* note 36, 40 (*sub* b), any provision in the rules of arbitration institutions permitting such must be considered as "*clauses borne by the parties' intentions*" and not as "law" in its strict sense.

44 Art. 288 para. 2 Treaty on the Functioning of the European Union. See *supra* note 35.

45 See, *e.g.*, B. FRIEDRICH in: K. Böckstiegel / S. Kröll / P. Nacimiento (Eds.), *Arbitration in Germany*, Wolters Kluwer (2007), § 1051 German Code of Civil procedure, marginal 19, (p.) 352 (on the German law implementing Art. 28 of the *UNCITRAL Model Law on International Commercial Arbitration*).

46 "L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; […]."

47 See *supra* text at note 37.

arbitration clause providing for institutional arbitration (combined with such a "choice-of-UNIDROIT Principles" clause). An institutional arbitration clause clearly contains an "arbitration agreement" in the sense of Article 1, paragraph 2(e) of the Rome I Regulation which is exempted from the scope of application of the Rome I Regulation. The institutional rules referred to by such an arbitration agreement usually contain an open-minded rule suggesting respect of a choice of rules of law such as the UNIDROIT Principles.[48] Therefore, opening up the *voie directe* to the UNIDROIT Principles within the European Union also in cases of a combination of a "choice-of-UNIDROIT Principles clause" with an *ad hoc* arbitration clause, as argued here, leads to consistency in the area of arbitration.

To sum up, the broad and purpose-based interpretation of the exemption for arbitration agreements in Article 1, paragraph 2(e) of the Rome I Regulation (and, thereby, the restriction of the scope of applicability of the Rome I Regulation) suffices to secure the main goal of the Rome I Regulation, *i.e.*, the free movement of judgments,[49] and it avoids distinctions between different kinds of arbitration that were not intended. Therefore, as a matter of European law,[50] the Rome I Regulation does *not* require its application to choice-of-UNIDROIT Principles clauses that have been combined with an *ad hoc* arbitration clause. In such circumstances, the Rome I Regulation is not applicable.

In light of the functioning *voie indirecte* to the UNIDROIT Principles described *supra* at II.3(b) in the context of choice-of-jurisdiction clauses, the discussion about the (broad) interpretation of the exemption for arbitration agreements in Article 1, paragraph 2(e) of the Rome I Regulation (and, thereby, the restriction of the Regulation's scope of applicability) is likely in most cases to be more academic than practical [51] and as such may never reach the European Court of Justice, which has the power to interpret the Rome I Regulation.[52] An arbitrator in an arbitration taking place within the European Union who applies the UNIDROIT Principles chosen by the parties

48 See *supra* (II)(3)(a).

49 See *supra* note 42.

50 See supra note 36.

51 On this issue, MANKOWSKI (who opposes the *voie directe,* see *supra* note 36) appears to concur, see *RIW* (2011), 44 (at XVI(4), with further references) as read in connection with idem, (p.) 42 (before 6.)

52 Art. 267 Treaty on the Functioning of the European Union (although only certain State courts as opposed to arbitration tribunals have the competence to bring this question to the European Court of Justice).

respects the parties' choice. This is his duty, justified (i) either directly, as argued here, on the basis of the "choice-of-UNIDROIT Principles" clause being recognised under the special arbitration law permitting such choice of rules of law (*voie directe*), or (ii) indirectly in light of the interpretation of such clause as an admissible incorporation of the UNIDROIT Principles "by reference" in the sense of Recital 13 of the Rome I Regulation, which all national laws within the European Union are bound to accept in order to honour the parties' true intention to apply the UNIDROIT Principles (*voie indirecte*).[53] Those who favour a broad interpretation of the exemption for "arbitration agreements" in Article 1, paragraph 2(e) of the Rome I Regulation, as argued here, will rely on the *voie directe* because, absent the applicability of the Rome I Regulation, there is room for the application of the special (often UNCITRAL Model-based) national regime for choice of law in arbitration, which permits the choice of rules of law such as the UNIDROIT Principles. Those who tend towards a restrictive interpretation of this exemption to the scope of application of the Rome I Regulation will have to follow the *voie indirecte*. There remains little room for a practical disparity between the different lines of argument.

One case where the distinction between the *voie directe* and the *voie indirecte* may matter in the circumstances of a particular case concerns the scope of mandatory laws to be considered in view of their binding nature and in light of Article 1.4 of the UNIDROIT Principles. The 2010 version of Comments Nos. 3 and 4 to Article 1.4 (*Mandatory rules*) of the UNIDROIT Principles 2010 underline that an arbitration tribunal is bound to apply "domestically mandatory" rules in addition to "internationally mandatory" rules only in the context of the incorporation of the Principles as terms of contract (*voie indirecte*). In the context of a choice of the UNIDROIT Principles as the law governing the contract (*voie directe*), the Comments (2010) now explicitly underline that this reference "no longer encounter[s] the limit of the ordinary mandatory rules of any domestic law."[54] Instead, the determination of the applicable mandatory law is to be made with due regard to the "*circumstances of the case*", which hints to internationally binding mandatory law[55] of those

53 The *voie indirecte* would be the same as discussed *supra* at II(3)(b) in the context of choice of jurisdiction clauses which have been combined with a "Choice of UNIDROIT Principles" clause.

54 Comment No. 4 to Art. 1.4, sentence 1.

55 See also, by way of an example, the definition of international mandatory law as accepted in all European Member States which is contained in Art. 9 of Rome Regulation (EC) No. 593/2008 ("Rome I Regulation") which does, however, not apply in these circumstances in view of the focus of the Rome I Regulation on litigation (as discussed in the text).

jurisdictions that are particularly concerned (including, *e.g.*, the law of the States where enforcement is likely to be sought).[56] Therefore, the distinction between the *voie indirecte* and the *voie directe* may matter in practice in cases in which a possibly applicable domestic international law leads to a result different from the application of the UNIDROIT Principles. In such cases, the *effet utile* interpretation set forth above, which opens up the *voie directe*, should have priority over the strict application of the wording of the exemption in Article 1, paragraph 2(e) of the Rome I Regulation. To sum up: also in the context of *ad hoc* arbitrations in a Member State of the European Union, the retrograde wording of Article 3 of the Rome I Regulation does not prevent the incorporation of the UNIDROIT Principles into European commercial contracts.

4. Coping with the limits of mandatory law (Article 1.4 of the UNIDROIT Principles)

The application of the UNIDROIT Principles is always subject to the application of mandatory law (Article 1.4 UPICC). As discussed above,[57] the Official Comments (2010) draw a distinction between the application of domestically and internationally binding mandatory law in light of the basis of application of the UNIDROIT Principles. This distinction can be used in practice whenever the "Choice-of-UNIDROIT Principles" clause is combined with an arbitration clause (and, in particular, with a clause providing for institutional arbitration [58]).

To cite a current example: in the course of preparing a standard form for international construction subcontracts to be concluded in various countries around the globe in the context of a major construction project, it was deemed helpful under the circumstances to combine the choice of UNIDROIT Principles with the choice of a national law applicable in matters not covered by the UNIDROIT Principles. In light of the provision on interpretation in Article 1.6(2) UP, the following wording was chosen:

> "This Agreement (including all rights and duties out of and/or in connection with the conclusion of this Agreement) shall be governed and construed in accordance with the UNIDROIT Principles of International Commercial Contracts (2010), see <www.unilex.info>, supplemented for issues outside the scope of the UNIDROIT Principles by the laws of Germany."

56 Comment 4 to Art. 1.4 UNIDROIT Principles 2010 (sentences 1 and 4).

57 (II)(3)(c), last paragraph.

58 The combination with an institutional arbitration clause avoids most easily the debate between the *voie directe* and the *voie indirecte* as laid out *supra* at (II)(3)(c).

The reference to "issues outside the scope of the UNIDROIT Principles" leaves room for the settlement of issues within the scope of the UNIDROIT Principles in accordance with their underlying principles as provided for in Article 1.6(2) UPICC. In light of the 2010 version of the Official Comments to Article 1.4 UPICC which underline, as mentioned above, that a choice of UNIDROIT Principles no longer encounters the limit of the ordinary mandatory rules of any domestic law,[59] the wording chosen in the clause cited above avoids discussions about the application of domestic mandatory law with respect to issues within the scope of the chosen UNIDROIT Principles. The supplementary national German law is chosen only for issues *outside* the scope of the UNIDROIT Principles. It may not intervene with respect to issues *within* their scope unless it is internationally binding mandatory law. Only in that case may it be applied to the circumstances of the case.[60] As issues with respect to the interpretation of the international standard form are *within* the scope of the UNIDROIT Principles, they will be solved in the same way according to Articles 2.1.19 – 2.1.22 UPICC for all contracts concluded on the basis of that standard form. In contrast, with respect to business contracts ("B2B"), the chosen supplementary national German law does not step in with its rules on standard forms because the German national law on standard forms is domestically, not internationally binding mandatory law.[61]

III. – UNIDROIT PRINCIPLES AND CHOICE OF LAW IN THE CHINESE EUROPEAN ARBITRATION CENTRE

In 2008, the UNIDROIT Principles were used for the realisation of a major international arbitration project which is operated out of Hamburg (Germany).

1. Introduction to the Chinese European Arbitration Centre

Jointly with the Hamburg Chamber of Commerce and law firms from around the globe, in July 2008 the Hamburg Bar Organisation established the non-

59 Comment 4 to Art. 1.4 UNIDROIT Principles 2010 (sentence 1).

60 *Idem*.

61 K.P. BERGER, in: Prütting / Wegen / Weinreich, *supra* note 40, Vor §§ 305 ff, marginal 6; St. ROLOFF, in: Erman (Ed.), *BGB*, 12th ed. (2008), § 305, marginal 57 (sentence 1); implicitly also the following authors: Ch. Grüneberg, in: PALANDT, *BGB*, *supra* note 8 § 305, marginal 58; D. MARTINY, *Münchener Kommentar, BGB*, *supra* note 31, VO (EG) 593/2008 Art. 9 Eingriffsnormen, marginal 89 (sentence 3); W. HAU, in: M. Wolf / W.F. Lindacher / Th. Pfeiffer (Eds.), *AGB-Recht Kommentar* (Commentary on the German law on general terms and conditions), 5th ed. (2009), Internationaler Geschäftsverhehr, marginal 59.

profit organisation *Chinese European Legal Association* ("CELA")[62] as a vehicle for the establishment, in September 2008, of the international arbitration centre known as the *Chinese European Arbitration Centre* ("CEAC")[63] which focuses on China-related arbitrations.[64] Patron of the project was the Hamburg Minister of Justice. As of 15 June 2011, CELA had over 200 members from 29 nations.

CEAC focuses on worldwide arbitration matters which have a direct or indirect tie to China.[65] A core feature of CEAC is the concept of neutrality. This includes, most importantly, a *division of power* between China, Europe and other parts of the world, including, for example, a former president of the All China Lawyers Association of China, Gao Zongze, as President of the Advisory Board of CELA, and a former president of the *Chartered Institute of Arbitrators* in the United Kingdom, Hew Dundas, as President of the Advisory Board of CEAC. The boards of both CEAC and its shareholder CELA are international, not German. Each chamber of the appointing authority is composed of one expert from Europe, one from China and one from other parts of the world (in CELA/CEAC parlance, the word "world" refers to the world outside China and Europe). The members of the first chamber come from Italy, USA/Indonesia and China, those of the second chamber from the Netherlands, Lebanon and China.[66]

CEAC is the result of an international dialogue of an interested community from around the globe between 2007 and 2008, following a number of preliminary discussions in smaller circles between 2004 and 2007. In the end, about 470 "Supporters" of the concept from 47 nations were included, many of them actively, into the discussions about the feasibility and creation of the (Hamburg) CEAC Arbitration Rules.[67] These rules are based on the neutral UNCITRAL rules and in 2010, were adapted to comply with the 2010 revision of the UNCITRAL rules. The CEAC arbitration clause contains a basic clause supplemented by several options which relate to a number of practical

62 See <www.cela-hamburgcom>.

63 See <www.ceac-arbitration.com>.

64 This includes, e.g. (as recently reported by a CELA member), a contract of sale with respect to a 35% share in a Chinese company which was recently concluded between two European parties (in that case: German parties).

65 See Article D of the Preamble of the CEAC Arbitration Rules.

66 See <www.ceac-arbitration.com>: at "*CEAC People*" select "*4. Appointing Authority*".

67 See the 2010 version of the Rules (<http://ceac-arbitration.com/fileadmin/CEAC/English/Articles_Rules/CEAC_Core_Rules_21_09_10_Final__edited_19_10_2010_.pdf>.

arbitration issues for which the parties may wish to find a negotiated solution. The options serve as a reminder, in particular to parties lacking specialised arbitration law advice:[68]

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in Hamburg (Germany) in accordance with the CEAC Hamburg Arbitration Rules.
>
> (a) The number of arbitrators shall be ___ ((i) one or (ii) three or unless the amount in dispute is less than € _____ [*e.g.,* € 100.000] in which case the matter shall be decided by a sole arbitrator);
>
> (b) Regardless of the seat of arbitration, the arbitral tribunal is free to hold hearings in _____ (town and country);
>
> (c) The language(s) to be used in the arbitral proceedings shall be _____;
>
> (d) Documents also may be submitted in _____ (language).
>
> (e) The arbitration shall be confidential.
>
> (f) The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court.
>
> (g) The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract.

2. The Importance of the UNIDROIT Principles for CEAC – the Principles as part of an international arbitration scheme

In addition to its search for neutrality, the (Hamburg) CEAC Arbitration Rules follow a *pragmatic* approach in an effort to serve the international, China-oriented business community. It is in this context that the UNIDROIT Principles step into the picture. Despite the dogmatic difference between the law of international arbitration and the choice of the applicable substantive law to a contract, it is a matter of reality that the choice of law and the dispute resolution clause are often negotiated jointly. Therefore, the (Hamburg) CEAC Arbitration Rules offer, in addition to an arbitration clause,[69] a *choice-of-law clause* to remind the parties of the importance of agreeing on the applicable substantive law to their contract. In this clause, the rules offer a choice

68 E. BRÖDERMANN / Ch. HEEG-STELLDINGER, "The Chinese European Arbitration Centre", in: *Respondek & Fan, Asia Arbitration Guide*, 2nd ed. (2011), 37, at 38, No. 4.2.

69 Cited *supra* at (III)(1).

between national law, international law (limited to contracts of sale) and the UNIDROIT Principles. The clause reads:[70]

> The Arbitration Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. The parties may wish to consider the use of this model clause with the following option by marking one of the following boxes:
>
> The contract shall be governed by
>
> (a) the law of the jurisdiction of _____ [country to be supplemented], or
>
> (b) the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law, or
>
> (c) the UNIDROIT Principles of International Commercial Contracts supplemented by the otherwise applicable law.
>
> In the absence of any such agreement, the arbitration tribunal shall apply the rules of law which it determines to be appropriate.

According to (a) above, the parties are thus free to choose in the traditional way by designating any given *national law* which often is either not neutral or expensive to identify.[71]

For *contracts of sale*, the CEAC choice-of-law clause in sub-clause (b) further offers the option of choosing the 1980 *United Nations Convention on Contracts for the International Sale of Goods (CISG)*, but "without regard to any national reservation" in order to avoid outdated national reservations like the Chinese reservation under Article 96, relating to Article 11 CISG according to which an amendment to the contract needs to be in writing.[72] (This requirement excludes, for example, a written telefax confirmation to an agreement made by telephone and is therefore more demanding than the Chinese contract law of 1999.[73]) For those "matters which are not governed by the CISG" – the CISG includes matters which become part of the CISG by virtue of an interpretation according to Article 7 CISG – the clause further

70 Article 35(1) of the "Consolidated Version" of the CEAC Hamburg Arbitration Rules or Article III(2) of the CEAC "Core Rules".

71 See BRÖDERMANN, *supra* note 12, 754.

72 During the China Arbitration Day (see *supra* note 34), a judge of the Supreme People's Court of China indicated that, in her personal opinion, this reservation still stands. An arbitration in which the author was a co-arbitrator came to the same conclusion in 2008 as a matter of Public International Law.

73 Art. 77 Contract Law of the People's Republic of China (see <www.chinaiprlaw.com/english/laws/laws2-5.htm>).

refers, in a second step, to the "UNIDROIT Principles of International Commercial Contracts", and in a third step, for the rare case where neither the CISG nor the UNIDROIT Principles cover an issue, the CEAC choice-of-law clause refers to "the otherwise applicable national law". However, sub-clause (b) above is just an option. There is nothing to prevent the parties also with respect to contracts of sale from choosing the UNIDROIT Principles directly.

At the time of the creation of the CISG, the compromise between the CISG and the UNIDROIT Principles contained in sub-clause (b) of the CEAC choice-of-law clause was the result of a careful balance duly discussed with representatives of the legal department of UNCITRAL and the chairman of the Working Group for the preparation of the UNIDROIT Principles of International Commercial Contracts 2010.

3. Combining the CEAC Arbitration Rules and the UNIDROIT Principles

In practice, parties sometimes choose the "*full package*" and combine the choice of an institutional CEAC arbitration with the choice of the UNIDROIT Principles. For example, during the research for this article, the author received information about three purchase contracts (of which two drafted in English and one in Mandarin), concluded since October 2010 by a Chinese buyer from Zhejiang province, with sellers from Benin (Africa) and the Caribbean island of Anguilla, regarding Nigerian and Philippine ore, respectively. The choice-of-law clause refers to "the UNIDROIT Principles of International Commercial Contracts (<www.unilex.info>), supplemented by the otherwise applicable national law." With respect to dispute resolution, the contracts combine an ICC ADR mediation clause with a CEAC arbitration clause, the place for both the mediation and the arbitration being Hamburg (Germany). For disputes with a threshold value below 250,000 USD, the contracts provide for arbitration by a single arbitrator; for disputes with a higher threshold value a panel of three arbitrators is to decide. According to the information received, the African and Philippine contract partners preferred this compromise solution on a neutral set of rules and a neutral arbitration institution as compared to the choice of national Chinese law and the jurisdiction of a national Chinese arbitration institution. In both situations, the European city of Hamburg was perceived as a neutral place for dispute resolution.[74] This is particularly noteworthy for Chinese-African contracts because of the substantial involvement of Chinese business interests in Africa.

74 According to Petra Sandvoss, Deputy Director of the Hamburg Chamber of Commerce and Head of the Arbitration and Mediation Division, Hamburg is the home of some 20 arbitration

In another case concerning the cooperation between a law firm in China and a law firm in Germany, the parties also referred to the combination CEAC/UNIDROIT Principles. The choice-of-law clause refers to the UNIDROIT Principles and the dispute resolution clause combines a mediation clause with a CEAC arbitration clause as last resort.

4. Evaluation: a "win/win symbiosis"

CEAC is a young arbitration centre. While it is receiving international attention at international meetings and conferences [75] (including those of its youth organisation, Young CEAC [76]) as well as in legal writings [77] and teaching,[78] it will be several *years* before a sufficiently large number of companies have used CEAC clauses in their China-related contracts that cause problems justifying the cost and pain of an arbitration procedure. Already at this stage, any bargaining by the parties about the inclusion of a CEAC clause involves a

courts and thereby the largest arbitration "centre" in Germany (address given on 20 May 2011 during China Arbitration Day, see *supra* note 36). See also ROSENGARTEN, *supra* note 1, marginal 740.

75 *E.g.*, on 28 May 2008, the CEAC concept was introduced by the author of this article to the Working Group on the UNIDROIT Principles of International Commercial Contracts. CEAC events have taken place ever since, *e.g.* in Beijing, Buenos Aires, Dubai, Frankfurt, Hamburg, Hong Kong, Jinan, London, Madeira, Madrid, Manchester, Shanghai, Singapore, Tianjin, Tsingtao, New York, Sao Paulo, Vancouver, Zurich. In Buenos Aires, an Argentine chapter has emerged.

76 Young CEAC is active in Europe and China. It has organised events in Beijing, Hamburg, Frankfurt, Shanghai and Vienna.

77 See, *e.g.*, J. JANSEN / Ch. HEEG-STELLDINGER, "Chinese European Arbitration Center", in: P. Gola / C. Götz Staehelin / K. Graf, *Institutional Arbitration – Tasks and Powers of different Arbitration Institutions*, Sellier / Schulthess (2009), 81 *et seq*; Y. DONG / E. BRÖDERMANN, 汉堡中欧仲裁中心及其仲裁规则的国际比较研究 (on: the Chinese European Arbitration Centre (CEAC) in Hamburg and CEAC Arbitration Rules in International Comparison), in: 仲裁与法律 (*Arbitration and Law*, the CIETAC journal) Vol. 116, Beijing (2010), 104-130; P. SANDVOSS, "Schiedsgerichtsbarkeit in West-Europa" (Arbitration in West Europe), in: M. Paschke / Ch. Graf / A. Olbrich (Hrsg.), *Hamburger Handbuch des Exportrechts* (Hamburg Handbook of export law), Verlag Carl H. Dieckmann, Hamburg (2009), 1591 ff., 1598; F.-B. WEIGAND**,** "Arbitrating China-related disputes", *Yearbook on International Arbitration*, Vol. I, Vienna (2010), 115-142; BRÖDERMANN / HEEG-STELLDINGER, *supra* note 68, 37 *et seq.*; J.-M. BENEYTO / E. BRÖDERMANN / B.F. MEYER / H. ZHAO, "Neue Wege in der Schiedsgerichtsbarkeit: Das Chinese European Arbitration Centre "CEAC" für China-Verträge" (On new ways in arbitration: The Chinese European Arbitration Centre "CEAC" for China-contracts), *Recht der internationalen Wirtschaft* (2011), 12 *et seq.*

78 CEAC and CELA support, for example, the China EU School of Law, the yearly Vis Moot Court Competition in Vienna and (as of 2012) Hong Kong as well as the Düsseldorf Arbitration School.

discussion on whether or not also to incorporate the UNIDROIT Principles into the contract, as was the case in the example given above under heading (III)3. Therefore, the integration of the UNIDROIT Principles into the CEAC (Hamburg) Arbitration Rules can be considered a "win/win symbiosis".

IV. – THE USE OF THE UNIDROIT PRINCIPLES FOR TEACHING PURPOSES

Because the UNIDROIT Principles provide a common ground between different national legal orders, they provide a good reference point (*tertium comparationis*) for dialogue between lawyers from different jurisdictions. The study of the UNIDROIT Principles opens the mind to comparative legal thinking. It trains structural thinking because, as a product of comparative research, the UNIDROIT Principles draw apparent structural similarities between the different legal orders of the world. From the national legal perspective of *any* lawyer from *any* jurisdiction in the world, a comparison between the UNIDROIT Principles and the lawyer's own national law will evidence to what extent that national law of contracts meets international standards and to what extent the UNIDROIT Principles are comparable to that national legal order.

Hence the UNIDROIT Principles provide good academic teaching material and are well-suited to in-house training as a "teaching attorney". Over the past several years, the author has often assigned, both at university level and for in-house training purposes,

- to one lawyer (or team) the task of a general introduction to UNIDROIT and its achievements in comparative law and
- to another lawyer (or team) the task of comparing the UNIDROIT Principles with the student's or lawyer's own legal order.

Ideally, the task is assigned to lawyers (interns) or students who have been trained in different jurisdictions. The subject is so multi-facetted that it can be used over and again with a different emphasis or focus. Experience and the reflections of students show that, each time, a fascinating dialogue emerges.

It is important that we, the legal community of international practitioners, teach the UNIDROIT Principles to make them known and thereby prepare the ground for their application. It is in this spirit that the UNIDROIT Principles need also to be part of as many legal writings as possible around the globe.[79]

79 A comprehensive compilation of literature can be obtained under <www.unilex.info>; M.J. BONELL, *The UNIDROIT Principles in Practice*, 2nd Ed. (2006), 17 *et seq.*;

Last but not least, the UNIDROIT Principles also provide a good subject for exams, because the comparison with the UNIDROIT Principles shows if the student has understood his or her own law.

V. – CLOSING REMARK

Knowing the UNIDROIT Principles is like speaking an additional language when it comes to cross-cultural legal communication. Over the years, the UNIDROIT Principles have become a practical reality and a part of the international law practice in the author's firm which comes into contact with foreign legal orders on a daily basis. Thus, the UNIDROIT Principles have also become part of the daily international life of a number of the author's firm's clients. The UNIDROIT Principles are never the only tool to cope with or to shape a contractual bargaining situation. For example, often, it is possible to implement a specific national legal order of choice in any given circumstances. Yet, the UNIDROIT Principles often serve as a tool to bridge cultural differences. They can be used in their entirety, with specific amendments, or partly, for certain clauses. It is a matter of proficiency to know about them. Ignorance is no longer an option.

In the context of China-related contracts, the UNIDROIT Principles have become particularly attractive in combination with the rules of the worldwide Chinese European Arbitration Centre in Hamburg which, on an optional basis, has embodied the Principles in its rules.

In view of the above, it is important also to make reference to the UNIDROIT Principles in as many legal writings as possible in order to spread the knowledge about this worldwide useful tool for international contract negotiations.

and also, *e.g.*, BRÖDERMANN / WEGEN, in: Prütting / Wegen / Weinreich, *supra* note 40), Art. 3 Rom I, marginal . 4 (on the technique of choosing the UNIDROIT Principles despite the restriction, in that article, to State law); BRÖDERMANN, in: Brödermann / Rosengarten, *supra* note 1), marginals 310 *et seq.*; 400; 788 *et seq.*