

STUDIES

COMPETING METHODS AND NORMS IN THE
REGULATION OF INTERNATIONAL SALES

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Abstract: The study explores the unification of private international law and substantive contract law in the field of international sales law. It starts by asking whether the instruments of uniform substantive contract law can fully replace the rules of private international law, as well as if different periods be distinguished: can it be said that, at first, private international law played the decisive role in the settlement of international commercial disputes, followed by the law of traders, the *Lex Mercatoria*, and then by uniform norms of substantive law? Or is the relationship more sophisticated, because different gates open between the instruments of substantive law and conflict of laws? Can private international law eventually play a role in determining the application of substantive law conventions or in filling gaps in the uniform law? In the second part of the paper, several examples demonstrate that the unification of substantive law and private international law does not exclude or make each other superfluous; they live in a multifaceted relationship, besides competing as part of their long-lasting coexistence.

Keywords: contract law, *Lex Mercatoria*, non-state laws, conflict of laws, unification of laws

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Introduction

This study takes a concise look at the issues related to legal diversity and possible responses to them in the field of contract law, focusing on closely related topics. It compares private international law and its unification,¹ the coordinated attempts to create a uniform substantive contract law, not only screening international conventions but also non-state norms,² *rules of law*. The goal is to determine the relationship or the interface between the above-mentioned two areas of law, all the while seeking the answer to whether classical private international law,³ the critics of which claim that its serious

¹ Because private international law is originally part of national legal systems, it is itself the embodiment of legal pluralism with its diverse solutions. It is true that, during the last century, conflict of laws has also been significantly affected by the European and international unification process.

² It should be noted that the category of non-state laws extends beyond the world of norms in international trade, encompassing various religious rules, such as *Sharia* law. M PETSCHKE, ‘The Application of Transnational Law (*Lex Mercatoria*) by domestic courts’ *Journal of Private International Law*, 10 (2014) 3, 489-515, 493.

³ J LOOKOFKY – K HERTZ, ‘EU-PIL: European Union Private International Law in Contract and Tort’ (JurisNet, LLC 2009) 109. Also, quoting F K JUENGER by S C SYMEONIDES, ‘Contracts

weakness is that it requires the application of the *domestic* law of a state to the settlement of international facts and transactions, will really be replaced or rendered superfluous by the unification of substantive contract law. If so, we would conclude that a uniform law, which is inherently tailored to international commercial relations, would be much more suitable.⁴

I. Fundamental questions

There are several interrelated questions revolving around the issue of unification. Will the era of the unification of private international law be replaced by the unification of substantive law,⁵ and, if so, is this process, or paradigm shift, if you like, unstoppable?⁶

Do the different solutions offered to deal with and resolve the differences between legal systems exclude or at least render each other

subject to non-state norms' *The American Journal of Comparative Law*, 54 (2006) 209-232, 224.

⁴ F K JUENGER, 'The Problem with Private International Law' In J BASEDOW *et. al.* (eds), *Private Law in International Arena - Liber Amicorum Kurt Siehr* (T.M.C. Asser Press 2000) 289-309, 290-291, 304-305, 308-309.

⁵ I THOMA, 'Relations between Conflict of Laws Rules and Uniform Law' *RHDI*, 53 (2000) 169-188, 188.

⁶ B ZELLER, 'The Development of Uniform Laws - A Historical Perspective' *Pace International Law Review*, 14 (2002) 1, 163-177.

superfluous⁷; are they in fact antitheses,⁸ rivals⁹ or alternatives,¹⁰ or is there a more complex relationship,¹¹ and if so, what elements and forms of coexistence and interaction are present? Are there cases where they are directly conditional on each other? Can private international law play a role in determining the application of substantive law conventions or in filling gaps in the uniform law?¹² What questions of private international law might arise as a result of international conventions seeking universal application? How do changes in substantive law affect private international law? Are there

⁷ 'The unification of substantive law of course obviates the need for choice of law rules.' JUENGER *supra* no 4, 306.

⁸ 'Private International Law is in a sense the antithesis of universal unification of law. Its *raison d'être* is the existence in different countries, and sometimes within the same country, of different systems of law.' W E BECKETT, 'The question of classification ("Qualification") in Private International Law' *Brit. Y.B. Int'l L.*, 15 (1934) 3, 46-81, 46. Similarly, DÖLLE on the advantages of substantive unification: '...to save the difficult search for the applicable law'. H DÖLLE, 'Einheitliches Kaufgesetz und Internationales Privatrecht' *Rabel's Journal*, 32 (1968) 3, 438-449, 439; P HAY, 'Unification of Law in the United States. Treaties and Judicially Declared Federal Common Law' in J N Hazard – J WAGNER, WENCESLAS (eds), *Legal Thought in the United States of America under Contemporary Pressures* (Emile Bruylant 1970) 261-293, 261; K ZWEIGERT – U DROBNIG, 'Uniform Sales Law and Private International Law' *Rabel's Journal*, 29 (1965) 146-165, with further references 150-151.

⁹ Gy EÖRSI, 'The Hague Conventions of 1964 and the International Sale of Goods' *Acta Juridica*, 11 (1969) 3-4, 321-354.

¹⁰ M J BONELL, 'The law governing international commercial contracts and the actual role of the UNIDROIT Principles' *L. Rev.*, 23 (2018) 15-41, 15. (However, the study does not mention at the unification of private international law and its impact all.)

¹¹ LOOKOFSKY-HERTZ, *supra* no 3, 68.

¹² P WINSHIP, 'Private International Law and the U.N. Sales Convention' *Cornell. International Law Journal*, 21 (1988) 3, 491, 533.

any wormholes,¹³ gateways or shortcuts between international conventions, through which we can suddenly fall from the world of uniform substantive law into another universe, the world of conflict of laws, or vice versa? Which is easier to achieve: unification of substantive contract law or unification of private international law?¹⁴ To what extent have lasting, widely accepted rules been crystallised over the decades of unification? Can different periods be distinguished; can it be said that private international law played the decisive role in the settlement of international commercial disputes, followed by the law of traders, the *Lex Mercatoria*¹⁵, and then by substantive law unification? Or have conventions on substantive law become more inclusive as regards the role of conflict of laws?¹⁶ How are the processes under study evolving in the European Union, where the coexistence, 'conversation', interaction, and unification of national laws in the internal market and the European legal

¹³ *Wormhole, Einstein-Rosen bridge*, in astronomy, a theoretical connection in space-time between distant parts of a universe or between two universes. 'Such a tunnel would provide a shortcut between its end points. In analogy, consider an ant walking across a flat sheet of paper from point A to point B. If the paper is curved through the third dimension so that A and B overlap, the ant can step directly from one point to the other, thus avoiding a long trek' Britannica.com (visited 13.09.2023.).

¹⁴ E M KIENINGER, 'Codification Idea and European Private Law' *Jurisprudence*, (2012) 4, 406-431., especially 429-430.

¹⁵ The *Lex Mercatoria*, or 'merchants' law', was originally a set of rules and principles developed by medieval merchants to regulate their transactions. The new *Lex Mercatoria*, which has been gradually adopted over the last fifty years, includes usages of trade, but also a number of other international norms that are regularly respected by international trading operators. See G CUNIBERTI, 'Three Theories of Lex Mercatoria' *Columbia Journal of Transnational Law*, 52 (2014) 1, 369-434, esp. 369 and 371. Similarly, R MICHAELS, 'The True Lex Mercatoria: Law beyond the State' *Indiana Journal of Modern Legal Studies*, 14 (2007) 2, 447-467.

¹⁶ F FERRARI, 'New Paradigm for International Substantive Law Conventions' *Uniform Law Review*, (2019) 467-483.

space have been given a new interpretative and institutional framework?¹⁷ Is there a recipe for successful legal unification? And what is the relationship between the sources of private international law and substantive law unification in general; so, if an international sale is subject to both a conflict of laws and a substantive convention, which one takes precedence or to what extent can they complement each other?¹⁸ In the first part of the paper I will elaborate on the questions outlined here and to set out their background, and in the second part I will answer them.

In making this comparison, it should be borne in mind that we are comparing norms of a different nature.¹⁹ Private international law is concerned with the designation of the applicable law and is therefore more procedural and administrative in nature, while substantive contract law regulates the rights and obligations of the parties.²⁰ Private international law pursues specific objectives, as indicated by the terms *private international law justice and justice conflictuelle*. These include a sufficiently close connection between the applicable law and the legal relationship, the requirement of *le principe de proximité*²¹ and the foreseeability of the applicable law, the protection of the stability of legal relationships²² and the

¹⁷ A VON BOGDANDY, 'The Transformation of European Law: The Reformed Concept and its Quest for Comparison' Max Planck Institute for Comparative Public Law & International Law (MPIL) *Research Paper*, No. 2016-14., 25 5-7, 10-14. Moreover, arguing for a new European Union *Ius Commune*, Juenger, *supra* no 4, 308.

¹⁸ WINSHIP, *supra* no 12, 491.

¹⁹ THOMA, *supra* no 5, 169.

²⁰ LOOKOFSKY-HERTZ, *supra* no 3, 2.

²¹ Paul Lagarde's expression is *quoted* by H MEIDANIS, 'Justice and underlying 'values', aims and principles in EU private international law' in I KUNDA (ed.), *Essays in Honour of Spyridon Vrellis*. (Nomikē Vivliothēkē 2014) 579-592, 584-585.

²² M BOGDAN, 'On the so-called deficit of social values in private international law' in I KUNDA (ed.), *Essays in Honour of Spyridon Vrellis*. (Nomikē Vivliothēkē 2014) 31-38, 33-35.

pursuit of international harmony in decision-making. However, in many cases, both conflict of laws and substantive laws are necessary for the assessment of an international sales transaction, and in fact they are stages or phases of the application of the law that fit together. The hypothesis of the conflict of laws rule, as is well known, is based on concepts of substantive law. As such, we are looking at different but interconnected worlds, even more so because the objectives of substantive law, such as the protection of the weaker party, the consumer, are slowly permeating private international law, especially since the second half of the 20th century.²³

Hence, the study primarily approaches the unification of substantive contract law from the perspective of the law applicable to international sales, but with the knowledge that this unification process may also have an impact on the development of national contract laws governing domestic transactions, and in some cases, such as the EU directives on consumer contracts, this is the main objective. Understandably, particular emphasis is placed on the examination of *party autonomy*, namely the emergence of contractual freedom²⁴ and its limits in the world of private international law, and its relationship with the various documents of harmonisation of substantive contract law.

Of course, a distinction must be made between harmonisation of laws on the one hand, and legal unification on the other: the former aims to approximate existing rules, typically those of the state, while the latter aims to establish a single set of rules. The rich toolbox of legal unification and

²³ BOGDAN, *ibid* 35.

²⁴ Juenger, *supra* no 4, 306.

approximation²⁵ and the phenomena and limitations of the processes are highlighted in the analysis. Where appropriate, attention should be paid to the specific legal sources, institutional background, and underlying policy choices of a legal harmonisation of contract law within a federation or integration.²⁶

This study is concerned with the unification or approximation of law through codification (for example, international conventions or various instruments of international organisations), but does not examine their broader forms, such as the imitation or rational herding of lawmaking between states, the effect of regulatory competition, or the migration and transfer of lawmaking as a specific craft, or the internationalisation of the legal profession, the unification that follows the practice of transnational law firms.²⁷ It is also legitimate to suggest that the results or even the limits of legal unification are ultimately reflected in the drift of judicial practice; however, the structure and skeleton of judgments and case law is still provided by legislation, in this case by the norms of uniform law.

The questions and answers that arise concern the legal basis and means of unification and, where appropriate, harmonisation, both in substantive contract law and in the conflict of laws rules applicable to contracts. They cannot, however, provide an exhaustive analysis of the content of the various instruments; it would be difficult to do so in a single paper, since most of the sources of law discussed could be the subject of a separate commentary, or such a commentary already exists. Instead, it is

²⁵ F GOMEZ, 'Some Law and Economics of Harmonizing European Private Law' in A S HARTKAMP – M W HESSELINK – E HONDIUS – Ch MAK – E DU PERRON (eds) *Towards a European Civil Code* (4th rev ed, Kluwer 2010) 401-426., especially 404-406.

²⁶ GOMEZ, *ibid* 410-412.

²⁷ *Ibid* 406-410.

always an attempt to explore and describe the interface between instruments of different natures. What are the links between conflict of laws and regional and international instruments on substantive law unification? Is it sufficient to describe the relationship by stating the general principle that uniform substantive law takes precedence²⁸ over uniform conflict of laws as the ideal solution?²⁹ To what extent does uniform contract law rely on classical PIL norms in its own application or, for example, in filling legal gaps? Can the references of PIL rules lead directly or indirectly to the invocation of uniform substantive law (international conventions)? Is there even a need for a uniform substantive law if choice of law and well-functioning objective connecting rules can deal with the challenges arising from the diversity of legal systems? Or can it be assumed that the option of choice of law, for example in mass consumer transactions, is not the most appropriate solution and requires specific rules?³⁰ Furthermore, how does private international law respond to the creation of a uniform contract law, the different *principles of contract law*? Of these non-state norms, *soft law* instruments, those adopted by an international organisation such as UNCITRAL, UNIDROIT or

²⁸ K H NADELMANN, 'The Uniform Law on International Sale of Goods: A Conflict of Laws Imbroglío' *The Yale Law Journal*, 74 (1965) 3, 449-464, 450.

²⁹ ZWEIGERT-DROBNIG, *supra* no 8, 160; H EIDENMÜLLER – N JANSEN – E M KIENINGER – G WAGNER – R ZIMMERMANN, 'The Proposal for a Regulation on a Common European Sales Law' *The Edinburgh Law Review*, 16 (2012) 3, 301-357, in particular 318, with further references. Thoma *supra* no 5, 171 'Does the scope of application of a convention set aside *in globo* the application of the rules of private international law?' and 173 'If a uniform substantive law settles an issue, then there is no place for the application of the uniform conflict rules.'

³⁰ GOMEZ, *supra* no 25, 413, with references to other sources. S C SYMEONIDES, 'Party Autonomy and the Lex Limitativa' in I KUNDA (ed.), *Essays in Honour of Professor Spyridon Vrellis* (Nomikē Vivliothēkē 2014) 909-924, 924.

the EU are the most likely to come into focus, following the institutionalisation of law-making³¹ in this area too.

To reiterate the questions to be answered: do conflict of laws and substantive law sources ‘talk’ to each other? How efficient and effective are the two unification processes, conflict of laws and substantive law, separately and when their effects are summed up? To what extent are there still white spots in the unification process?

The wider context is even richer. Indeed, the birth and applicability of non-state norms already lead us to the *Lex Mercatoria*; in other words, the usages, principles, and practices that have been shaping international trade since the Middle Ages, with all its diversity, sometimes amorphous nature, and sometimes in conjunction with the state and non-state instruments of international legal unification. Moreover, different periods and interpretations of the *Lex Mercatoria* can be distinguished, as emerges from the debate between its supporters and opponents. Particularly divisive are the extent to which the *Lex Mercatoria* is independent of state law, the relationship between state and non-state norms, and whether state regulation or traders' law provides greater efficiency.³²

Furthermore, the question of applicable law cannot be hermetically separated from the role of international civil procedural law. Indeed, the parties' autonomy, choice of law and contractual freedom may depend to a

³¹ B FAUVARQUE-COSSON, ‘New Principles in the Legal World: The Hague Principles on the Choice of law in International Commercial Contracts’ in L GULLIFER – S VOGENAUER (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart 2014) 455-466, 461.

³² MICHAELS, supra no 15, 447-450, 452-454, 461-464 and 466. See also CUNIBERTI, supra no 15, 369-434, and A MAURER - G P CALLIES, ‘Lex Mercatoria’ in J BASEDOW – G RÜHL – F Ferrari - A, P DE MIGUEL (eds): *Encyclopedia of Private International Law, Vol 1-4*. (Elgar 2017) 1119-1129.

considerable extent on the forum in which the dispute is brought and on whether the dispute is to be decided by an ordinary court or by arbitration. It is on this complex world of globalisation and regional integration and cooperation that globalisation and regional integration and cooperation will settle in the late 20th and early 21st century, themselves having a multi-directional impact on trade relations and legislation, and also posing a new challenge, questioning whether the state, the 'national' level of regulation, is always the most appropriate in the complex world of international transactions.³³ Globalisation and the single market of the European Union increase the chances of individuals coming into contact with the legal systems and fora of other states.³⁴

³³ J H DALHUISEN, 'Globalization and the Transnationalization of Commercial and Financial Law' *Rutgers University Law Review*, 67 (2015) 1., 1–41, on the process of globalization 1-4, on the risks of subordinate legislation to national interests in the era of transnational transactions, 13-14; MICHAELS, *supra* no 15, 464-465; I SCHWENZER, 'Global Unification of Contract Law' *Uniform Law Review*, 21 (2016) 60-74. However, on the legal diversity that remains despite globalisation, on the variations in *economic constitutions*, see G TEUBNER, 'Transnational Economic Constitutionalism in the Varieties of Capitalism' *The Italian Law Journal*, 1 (2015) 2, 219-248, especially 238 (The extent of the negative impact of the Covid19 epidemic on international production chains and trade, on the functioning of multinational corporations and thus on globalisation cannot yet be assessed, but it seems so that no dramatic collapse has occurred.)

³⁴ J BASEDOW, 'Theory of Choice of Law or Party Autonomy as the Basis of Private International Law' *Rabel's Journal*, 75 (2011) 32-59, 55.

II. The interplay between PIL and substantive law

Returning to the questions posed in the first part, the following answers emerge: the unification of substantive law and private international law do not exclude or make each other superfluous; they have a complex relationship and coexist. For example, the application of the Vienna Sales Convention (CISG)³⁵ as a uniform substantive law instrument, precedes the Rome I Regulation³⁶ in the context of transactions involving places of business in the States party to the Convention, if the CISG is not excluded by the seller and the buyer.³⁷ However, there are occasions when the application of a uniform substantive law instrument is achieved, as an auxiliary solution, precisely by means of private international law, as may also be the case with the Vienna Sales Convention.³⁸ Here, therefore, the objective connecting norms of private international law lead indirectly to the application of an international convention. In the case of the ULIS,³⁹ the predecessor of CISG, a solution was also offered whereby the acceding States could make a reservation that they would only apply this uniform substantive law

³⁵ The United Nations Convention on Contracts for the International Sale of Goods (11 April 1980), (United Nations Convention on Contracts for the International Sale of Goods, (CISG).

³⁶ Regulation (EC) No 593/2008 on the law applicable to contractual obligations.

³⁷ F FERRARI (ed.), *'Rome I Regulation. Pocket Commentary'* (Sellier 2015) 134-135.

³⁸ Article 1(b) of the CISG provides for the application of the Convention indirectly, i.e. even if the rules of private international law led to the application of the law of a Contracting State. I SCHWENZER, U G SCHROETER (eds) *'Schlechtriem & Schwenzler, Commentary on the UN Convention on the International Sale of Goods (CISG)'* (Fifth ed, OUP 2022) 39-43. ed. D MARTINY (ed), *'Reithmann/Martiny, Internationales Vertragsrecht'* (Ninth ed, Otto Schmidt 2022) 1837-1838.

³⁹ Convention relating to a Uniform Law on the International Sale of Goods (ULIS) (1964).

convention if a private international convention provided for it.⁴⁰ It is also possible that the contracting parties can choose the law of a State that has acceded to a substantive convention, thus also giving effect to the uniform substantive law. In some cases, the parties may even directly choose an international convention as the '*rules of law*' governing their transaction.⁴¹

Theoretically, a complete, comprehensive, seamless, universally applied codification of substantive law, if it existed, could replace private international law, eliminating conflicts of different legal systems, but this is not feasible. Therefore, substantive unification does not necessarily and not always eliminate private international law issues; as such, they remain or are revived in a different guise and context. However, the (full) unification of private international law does not, by its very nature, render substantive unification superfluous, since it does not eliminate the diversity of substantive rules, but merely makes the choice of applicable law more predictable and helps to promote harmony in international decision-making. It is also true that the applicable law may be determined via several private international law conventions.⁴²

⁴⁰ Article IV of ULIS, apparently in the light of the 1955 Hague Convention on the Law applicable to International Sales, empowered Contracting States which had previously ratified or acceded to one or more conventions on conflict of laws in international sales to decide to apply ULIS only if one of those private international law conventions itself provided for the application of the uniform law.

⁴¹ UNCITRAL, '*UNCITRAL, HCC and Unidroit Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sale*' (United Nations Commission on International Trade Law, Hague Conference on Private International Law 2021) 11.

⁴² For example, if a Dutch seller delivers a product to a Greenlandic buyer and the dispute is decided by a Danish court, then - CISG excluded - it is not the Rome I Regulation, or even its predecessor, the Rome Convention on the law applicable to contractual obligations (1980), that

Sometimes the conventions themselves, which are intended to unify substantive contract law, contain references to private international law⁴³ or rules of a private international law nature⁴⁴ or regulatory loopholes that lead to the application of the law of a State instead of a uniform rule. These can rightly be described as ‘wormholes’ in these international conventions, through which we suddenly find ourselves plunged from the uniform substantive law system into another universe, that of conflict of laws. The infiltration of rules of private international law into the uniform substantive law is inevitable if the latter does not provide a complete and exhaustive regulation of the area in question.⁴⁵ In several EU substantive law sources, conflict of laws rules appear in the context of consumer protection.⁴⁶ As such, as it seems, it is not possible to expel conflict of laws from the world of uniform substantive law. However, the passage is not one-way: it happens that

applies to the dispute, but the 1955 Hague Convention of which Denmark is a member. This is explained by the fact that, although the Danish fora continue to apply the Rome Convention, an earlier version of the uniform EU private international law, instead of the Rome I Regulation, Article 21 of the Rome Convention provides that the Rome Convention does not affect the application of other international conventions to which the Contracting State is or becomes a party.

⁴³ See Article 7(2) of the CISG.

⁴⁴ See Art. 28 of the CISG, providing a role to the *lex fori*. I SCHWENZER (ed.) Schlechtriem & Schwenger, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed. OUP 2016) 492. In detail: M KIRALY, ‘Specific Performance – and the International Unification of Sales Law’ *Acta Universitatis Carolinae*, Vol 69 No 2 (2023) 127-137, DOI: <https://doi.org/10.14712/23366478.2023.19>.

⁴⁵ A good example of this is the lack of regulation of the institution of interest on late payments, with regard to the rate of interest and the question of compound interest.

⁴⁶ One source of conflict of laws in EU legislation aimed at harmonising substantive law is Council Directive 93/13/EEC on unfair terms in consumer contracts, Art. 6(2). The current consolidated version of the Directive was published on 28.05.2002.

substantive law rules, in the form of imperative norms, enter the field of application of private international law,⁴⁷ as if through a wormhole, eclipsing the application of the rules otherwise designated by conflict of laws.

Over time, conventions on substantive law have become more permissive as to the role of conflict of laws, as can be seen by comparing the provisions of the 1964 Hague Conventions (ULIS, ULFIS⁴⁸), which sought to exclude private international law from their scope, with those of the 1980 Vienna Sales Convention. This generosity is justified by the fact that the multiplicity of legal loopholes in the substantive conventions, the existence of reservations, the limits on the subject matter and territorial scope, the issues deliberately not regulated, or the provisions of exclusion of the application uniform law instruments make it essential for the contracting parties to involve private international law in the determination of the applicable substantive law in areas which are not unified or where the application of uniform law is impeded.⁴⁹

However, the complex relationship shows that substantive law can also impose limits on the choice of law provided by conflict of laws, as the *Amazon EU Sàrl* judgment showed.⁵⁰ Nevertheless, it also happens that a

⁴⁷ See Article 9(2) of the Rome I Regulation.

⁴⁸ Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, (ULFIS) (1964).

⁴⁹ This is why UNCITRAL's summary of the importance of the CISG is somewhat overly optimistic 'The CISG applies only to international transactions and avoids the recourse to rules of private international law for those contracts falling under its scope of application.' https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg, (visited 12.09.2023.).

⁵⁰ The European Court of Justice ruled in the C-191/15 *Amazon EU Sàrl* case, that a condition in the general conditions of sale of a seller or service provider, which is not specifically negotiated, that the contract is governed by the law of the Member State where the seller or

conflict of laws convention limits the application of the principle of closest connection, precisely in the light of substantive unification.⁵¹

A common feature in both areas is the growing role of party autonomy. In the area of private international law, the choice of law is ensured by increasingly detailed rules,⁵² while in the area of substantive law we see the emergence of optional, *opt-in* sources of law on the one hand,⁵³ and the authorisation of the parties to exclude the application uniform law on the other.⁵⁴

In some cases, private international law instruments also consider the results of substantive unification. A good example of this is the 1986 Hague Convention on the Law applicable to International Sales of Goods, which explicitly stated that it did not prejudice the application of the Vienna Sales Convention.⁵⁵ Or the Hague Principles,⁵⁶ which also support the application of the UNIDROIT Principles⁵⁷ by ensuring the choice of non-state norms as "*rules of law*".⁵⁸ On the other hand, Article 7 of the Vienna Sales Convention

service provider is established, is unfair *if* it misleads the consumer. That is to say, by giving the impression that the law of that Member State alone is applicable to the contract, without informing the consumer that he is protected, within the meaning of Article 6(2) of Regulation No 593/2008, by the implied rules of the law applicable in the absence of that contractual term, which must be examined by the national court in the light of all the relevant circumstances.

⁵¹ See the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. (1986 Hague Convention) Art. 8 (5), referring to the CISG.

⁵² Rome I Regulation Art. 3 on freedom of choice.

⁵³ For example, the UNIDROIT Principles on International Commercial Contracts.

⁵⁴ CISG Art. 6.

⁵⁵ 1986 Hague Convention, (not in force) Art. 23.

⁵⁶ Principles on Choice of Law in International Commercial Contracts (2015).

⁵⁷ Most recent edition: *UNIDROIT Principles of International Commercial Contracts 2016*. (UNIDROIT 2016) (Hereinafter referred to as UPICC 2016)

⁵⁸ Hague Principles Art. 3.

on interpretation has had a demonstrable impact on the wording of the rules on the interpretation of conflict of laws conventions.⁵⁹ It is also precisely the case-law based on substantive unification that offers guidance for the interpretation of European conflict of laws on important issues such as the concept of sale.⁶⁰ The relationship between the Rome I Regulation and the CESL draft⁶¹ is a particular derailment of the relationship between EU private international law and substantive law, since the latter – ‘by creating within

⁵⁹ See Article 16 of the 1986 Hague Convention, Article 18 of the Rome Convention and Article 4 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) (1994), all of which refer to the international character and the need to promote uniform application.

⁶⁰ The concept of a contract of sale, in accordance with recital 17 of the Rome I Regulation, must be interpreted in accordance with Article 5 of the Brussels I Regulation (Regulation (EC) No 44/2001), while the case law and literature on the subject is based to a significant extent on the Vienna Sales Convention (CISG), describing the concept of sale as the sale of goods for money. The Brussels I Regulation has been replaced by the Brussels Ia Regulation, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶¹ CESL, Common European Sales Law, Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, COM(2011)0635 final. The Draft was preceded by major academic research resulted the so called Draft Common Frame of Reference (DCFR): von Ch BAR – E CLIVE – H SCHULTE-NÖLKE, (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline ed, Sellier 2009). The Study Group on European Civil Code and the Research Group on EC Private Law, which drafted the DCFR, published the full results of its work in von Ch BAR – E CLIVE (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Full edition. Volumes I-VI. Sellier, 2009) On the detailed evaluation of CESL see R Schulze, ed., *Common European Sales Law (CESL) – Commentary* (C.H. Beck, Hart, Nomos, 2012). A critical assessment provided by H EIDENMÜLLER – N JANSEN – E M KIENINGER – G WAGNER – R ZIMMERMANN, ‘The Proposal for a Regulation on a Common European Sales Law’ supra no 29.

each Member State's national law a second contract law regime for contracts within its scope' – would bypass the Rome I Regulation, despite the fact that it clearly foresaw the possible unification of European contract law and was permissive towards this possibility.⁶²

The question arises as to whether the unification of substantive contract law or rather of the relevant private international law is easier to achieve. The example of the European Union suggests that the unification of conflict of laws is more rapidly achievable than the creation of a uniform substantive law, as illustrated by the failure to create a Common European Sales Law. At the international level, the emergence of *soft law* instruments such as the UNIDROIT Principles or the Principles of European Contract Law (PECL)⁶³ is , meaning that there is a shift towards the creation of contractual principles⁶⁴ but, at world level, even the unification of private international law is progressing very slowly. This can be illustrated by the failure of the 1986 Hague Convention to enter into force, or by the fact that the Hague Conference on Private International Law has also developed non-binding Principles rather than a classical convention on the choice of law in international commercial contracts. For this reason, it cannot be said that different eras can be separated; in other words, that private international law first played the decisive role in the settlement of international commercial disputes, then *Lex Mercatoria* and then substantive law unification took over

⁶² Preamble paragraph 14 of the Rome I Regulation compared to COM(2011)635 final, Preamble paragraph (9). P MANKOWSKI, 'Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht' *RIW*, (2012) 3, 97-105.

⁶³ O LANDO – H. BEALE (eds), '*Principles of European Contract Law. Parts I and II.*' (Kluwer 2000). O LANDO – E CLIVE – A PRÜM – R ZIMMERMAN (eds), "*Principles of European Contract Law. Part III.*" (Kluwer 2003).

⁶⁴ FAUVARQUE-COSSON, *supra* no 31, 457.

the decisive role.⁶⁵ (It should be noted that there are states, such as India, Iran and many African countries, which do not participate in either conflict of laws or substantive law unification, for cultural or ideological, political reasons.) However, it is possible to distinguish between periods in the methodology of private international law conventions: first, strict, objective principles of connection; *hard and fast rules* prevailed, then the principle of the closest connection also appeared with greater or lesser intensity, and today the two approaches are more in balance.

If there is a paradigm-shift in legal unification, it can best be illustrated by the emergence of the European Union as a 'heavyweight' player, which has to some extent eclipsed the role of the Hague Conference on Private International Law or UNIDROIT in the fields under consideration. This is illustrated, for example, by the spill-over effect of the Rome Convention⁶⁶, followed by the Rome I Regulation, on legal science in other continents and even on the legislative efforts to unify the law.

To sum up, neither the unification of substantive law nor the unification of private international law is an unstoppable process, even in the European Union. The territorial scope, subject matter, and scope of application of the conventions and other sources of law adopted remain limited. Nevertheless, it is reasonable to point out that the scope of most conflict of laws instruments is broader and their universal application⁶⁷ is

⁶⁵ ZELLER, *supra* no 6.

⁶⁶ Rome Convention on the law applicable to contractual obligations (1980). The Rome Convention had an impact on the Inter-American Convention on the Law Applicable to International Contracts (1994).

⁶⁷ It is important for the comparison of private international law and substantive law unification that the scope of the 1955 Hague Convention or the Rome I Regulation is wider than the scope of the CISG. For example, the two conflict-of-law conventions do not exclude

more acceptable for the states than that of conventions seeking to unify substantive contract law.⁶⁸ For example, the Rome Convention or the Rome I Regulation, at the level of designation of the applicable law, covers the invalidity of a contract, a legal problem which is, however, expressly outside the scope of ULIS or the CISG.⁶⁹ The simple fact that regulations have been adopted in the European Union for creating the common PIL, while the approximation of substantive contract law has been done through directives, can be an indication of the greater codification potential of private international law.

The organic development of international instruments and their drafts is also remarkable, particularly in the unification of the substantive law of international sales. There have been changes, but they have always been based on earlier ideas or conventions. The drafts and knowledge of codification and comparative law have survived the world wars, the fall of empires and political earthquakes in the hidden shelves of libraries, in university departments or in

the question of invalidity from their scope unlike the CISG. Thus, if the question of the invalidity of a sales contract arises between the contracting parties of the EU Member States which are party to the CISG, either the law designated by the 1955 Hague Convention or the law designated by the Rome I Regulation will govern the question.

⁶⁸ The universal application of private international law conventions can also be well defended in the interests of creating international harmony in the decision-making, which is a central goal of PIL. J BASEDOW, 'Private International Law (PIL)' in *Max Planck Encyclopedia of European Private Law* (2012), Online ed. [https://max-eup2012.mpipriv.de/index.php/Private_International_Law_\(PIL\)](https://max-eup2012.mpipriv.de/index.php/Private_International_Law_(PIL)) (Visited 14.09.2023). Moreover, the conflict of laws rules, by their abstract nature, link the applicable law, for example, to the habitual residence of the seller, and the consequences of this solution are only made clear in the concrete fact situation, by the actual designation of the applicable law, as opposed to the directly perceptible effect of substantive conventions on the obligations of seller and buyer.

⁶⁹ ULIS Art. 8, CISG Art. 4 (a).

emigration. The UNIDROIT drafts⁷⁰ of the first half of the 20th century matured into the norms of the 1964 Hague Conventions (ULIS, ULFIS), which were taken over by the Vienna Sales Convention. This, in turn, was transmitted through the provisions of the PECL and the UNIDROIT Principles and appeared directly or indirectly in national codifications.

If we look at the way in which the processes of legal unification under study are evolving in the European Union, where the coexistence, interaction, and unification of national laws have been given a new interpretative and institutional framework with the emergence of the *European legal space*, we can see the dominant role of the internal market. Behind the efforts and results of legal unification, there is a clear desire for *a level playing field* around conflict of laws and substantive contract law, as required by the single market. The European Union's legislative machinery, with its effective institutional and organisational backing, is certainly a strong promoter of successful legal unification. However, even this institutional background is not an absolute guarantee, as the fate of the CESL shows. It is important that economic operators and *stakeholders*, be they traders or consumers, see the potential benefits of unification, and that Member States do not consider abandoning their own rules and trusting in the benefits of regional or global regulation as a sensitive sovereignty issue. This requirement would seem to be better met by private international law than by substantive contract law, which directly regulates social relationships. However, it is true that, at the

⁷⁰ International Institute for the Unification of Private Law (UNIDROIT), '*Draft of an International Law of the Sales of Goods*' (La Libreria Dello Stato 1935), also '*Projet D'Une Loi Uniforme sur la Vente Internationale Des Objets Mobiliers Corporels*' and '*Draft Uniform Law on International Sales of Goods (Corporeal Movables)*' in *L'Unification du Droit = Unification of Law. A general survey of work for the unification of private law (Drafts and Conventions)*. (UNIDROIT 1948).

international level, the unification of private international law has not been any more successful than the unification of substantive law.

In general, it seems as if the strength of the efforts to unify the law in the area under study is dwindling. A possible amendment of the Vienna Sales Convention was rejected in short order,⁷¹ and more comprehensive regulation was only achieved through non-state norms, *soft law* sources. The low tide is indicated by the fact that the Hague Conference on Private International Law also formulated Principles instead of a classical convention, adopting the model of a gentle unification of substantive contract law.⁷² The emergence of non-state law, the '*rules of law*', since they are not directly backed by state enforcement and thus do not lead to territorial conflicts between legal systems, has long remained under the radar of legal literature. However, if they are linked to the choice of arbitration forum, they can still provide the substantive legal framework for enforceable awards.⁷³ Furthermore, their importance in influencing state codification or contributing to cross-border academic discourse is indisputable.

⁷¹ In 2012, the Swiss government submitted a proposal to UNCITRAL for the elaboration of a convention on a more comprehensive regime of international contract law, Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, 45th Session, New York, 25 June-6 July 2012. The Swiss proposal was introduced to the Governing Council of UNIDROIT too.

⁷² S C SYMEONIDES, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' *The American Journal of Comparative Law*, 61 (2013) 4, 873-899, 874.

⁷³ States also assist in the enforcement of arbitral awards based on non-state rules by applying the 1958 New York Convention.

A separate question is to what extent have lasting, widely accepted rules been crystallised over the decades of unification of substantive law. The acceptance of the Vienna Sales Convention points in the direction of success. However, there is still no consensus, no standard solution on important issues such as the conditions for specific performance, the role of commercial usages or the rate of interest for late payment. Where appropriate, *soft law* sources, non-binding contractual principles, also reflect a different approach. There is even a lack of a common definition of the concept of contract or sale, both in uniform private international law and in substantive law. The situation is further complicated by the fact that, at least at world level, there is no single forum system that could continue, through its jurisprudence, the unification process begun by conventions and *soft law* instruments through legislation.

Private international law rules on contracts (apart from Denmark) have been unified in the European Union, but Brexit has left the United Kingdom out of this unity. The harmony offered by the unified private international law in the designation of governing law can be broken by the application of the public policy clause and the overriding mandatory rules, albeit only in exceptional cases.⁷⁴ At a global level, there is no widely accepted PIL instrument for contracts. There is no global consensus on the protection of consumers and on its methods, on the permissibility of choice of law or on the enforcement of imperative rules. Although the unification of conflict of laws, at least at the European level, has been more successful in addressing consumer protection issues than substantive instruments, which at the beginning have been silent on consumer transactions and then excluded this sensitive area from their scope⁷⁵ or have been deadlocked on consumer

⁷⁴ Rome I Regulation Art. 9.

⁷⁵ Although the UNIDROIT Principles do not explicitly exclude consumer transactions from their scope of application, they do, by virtue of their title, apply only to commercial contracts.

protection issues.⁷⁶ However, the various traditions and the differences in the deep structure of substantive law, for example with regard to the transfer of property, may limit and hinder even the unification of private international law.⁷⁷

Finally, we must not forget the importance of commercial usages, which are themselves a kind of organically evolving uniform law under the umbrella of the *Lex Mercatoria*, but which may also lead to a departure from the codified uniform law, at least to the extent permitted by the international conventions concerned or the law of the forum.⁷⁸ A highly complex phenomenon is at stake, with state and non-state, substantive and conflict of

⁷⁶ During the codification of the CESL, very detailed tables were produced to demonstrate that the Common European Sales Law is even more beneficial for consumers than the protection offered by national laws, and the Commission has even funded a specific academic study on this issue. A specific legal instrument, the so-called standard *information notice*, has been developed to provide consumers with the right information when they decide to use the CESL. Despite this, consumer organisations were not convinced of the need to create an optional European contract law. However, what was too little for consumer organisations proved to be too much for business, certainly not independently of the cost of the proposed solutions to protect consumers. J BASEDOW, 'An Optional Instrument and the Disincentives to Opt In' *Contratto e impresa / Europa*, 17 (2012) 1, 37-47, especially 41-42.

⁷⁷ 1955 Hague Convention on the Law applicable to International Sales Art. 5 which excludes the transfer of ownership from the scope of the Convention.

⁷⁸ R GOODE, 'Usage and its Reception in Transnational Commercial Law' *International & Comparative Law Quarterly* (1997) 46(1) 1-36. On the classification and hierarchy of different sources see: L MISTELIS, 'Is Harmonisation a Necessary Evil? – The Future of Harmonisation and New Sources of International Trade Law' in I FLETCHER, L MISTELIS, M CREMONA (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 3-27. On unification and usages: M KIRALY, 'The Unification of Contract Law and Commercial Usages' in *Transnational Commercial Law Review (TCLR)*, No 2 (2022), <https://www.qmul.ac.uk/unidroit-itcl/tclr/tclr-issue-2/>, DOI: 10.26494/tclr220225.

laws rules, the practice of ordinary courts and arbitral tribunals, conventions on substantive law and private international law, EU regulations and customs, all interlocking and interpenetrating regulatory fields that define the interpretative framework of international sales.

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