

Building Competence in Commercial Law in the Member States

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STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the European Parliament's Committee on Legal Affairs (JURI Committee), sheds light on cross-border commercial contracts and their operation in theory and practice. It describes the legal framework in which commercial contracts operate and analyses current commercial practice as regards choice of law and choice of forum. It concludes that the laws and the courts of some states are more popular than others and suggests to adopt a bundle of measures that will improve the settlement of international disputes in the EU. Among others, the study suggests to introduce an expedited procedure for cross-border commercial cases and to establish specialized courts or chambers for cross-border commercial matters in each Member State. In addition, the study suggests to establish a European Commercial Court.

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LIST OF ABBREVIATIONS

- ALI** American Law Institute
- BIBC** Brussels International Business Court
- CEPEJ** European Commission for the Efficiency of Justice
- CESL** Common European Sales Law
- CJEU** Court of Justice of the European Union
- ELI** European Law Institute
- EU** European Union
- HKCIAC** Hong Kong International Arbitration Centre
- ICA** ICC International Court of Arbitration
- ICC** International Commercial Chamber
- No** number
- OJ** Official Journal
- para** Paragraph
- PECL** Principles of European Contract Law
- PETL** Principles of European Tort Law
- SIAC** Singapore International Arbitration Centre
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- UCC** Uniform Commercial Code
- UK** United Kingdom
- UNIDROIT** International Institute for the Unification of Private Law

EXECUTIVE SUMMARY

Cross border commercial contracts are subject to a patchwork of legal rules and regulations. To overcome or at least mitigate the resulting uncertainty, commercial parties, internationally and within in the EU, frequently choose the applicable law and the competent court. When they do, English and Swiss law as well as English and Swiss courts turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States. The European Parliament has, therefore, called for a debate about how commercial law competence in the EU can be increased. Commissioned by the Committee on Legal Affairs of the European Parliament, the following study seeks to contribute to this debate by taking a closer look at **cross-border commercial contracts and their operation in theory and practice**. It describes the applicable legal framework and analyses commercial practice as regards choice of law and choice of forum clauses. In addition, it discusses some of the implications that follow from the uneven distribution of commercial law competence across the EU. Finally, it makes a number of suggestions designed to make the settlement of international commercial disputes in the EU more attractive. In the following I will briefly summarize the study's most important findings (infra 1.) and recommendations (infra 2.) before providing a brief outlook (infra 3.).

1. Findings

1.1. Cross-border commercial contracts operate in a complex legal environment (infra 2.1.). They are subject to a **patchwork of national, European and international rules** depending on whether aspects of substantive law (infra 2.1.1.), choice of law (infra 2.1.2.) or dispute settlement (infra 2.1.3.) are at issue. To overcome the **legal uncertainty** that may result from this patchwork of legal rules and regulations, commercial parties, internationally and within the EU, very often choose the applicable law and the competent court with the help of **choice of law and choice of forum clauses** (infra 2.2.). When they do, **English and Swiss law** as well as **English and Swiss courts** turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States (infra 2.2.1. and 2.2.2.). In the UK, for example, the London Commercial Court has developed into an internationally renowned forum that attracts litigants not only from the EU, but from all over the world. Courts in other Member States, in contrast, are not as popular.

1.2. The fact that some laws and some courts are more popular than others indicates that **commercial law competence** is unevenly distributed across countries and notably across the EU. This finding is not per se problematic. Problems, however, may occur when not all commercial parties can actually choose the law or the courts that are commonly perceived to be the best. Many parties, for example, are not able to bring their disputes before English courts because the costs of litigating in England are notoriously high. They will depend on good alternatives in their home country or in the home country of their contracting partner. However, when looking at the **civil justice systems of the Member States** it becomes clear that not all of them live up to the expectations of commercial parties (infra 3.1.).

1.3. The **prospect of Brexit** adds to the problem: since the UK will most likely lose its access to the European Judicial Area, English court proceedings will no longer benefit from the many European Regulations that ease judicial cooperation in civil matters. Most importantly, English judgments will no longer be directly enforced in accordance with the

Brussels Ia Regulation. Even commercial parties who were thus far happy to settle their dispute in the UK might, therefore, reconsider their decision and look for alternatives in the remaining Member States (infra 3.2).

2. Recommendations

In light of the above findings, the European legislature should adopt a bundle of measures to make the settlement of cross-border commercial disputes in the EU more attractive (infra 4.). These measures should relate to choice of law on the one hand and dispute resolution on the other.

2.1. As regards choice of law, the European legislature should reform Article 3 Rome I Regulation and Article 14 Rome II Regulation (infra 4.2.1. and 4.2.2.). In particular, it should allow commercial parties to choose a **non-state law** such as the UNIDROIT Principles on International Commercial Contracts or the Principles of European Contract Law (infra 4.2.1.2.). In addition, the restrictions to be found in Article 3(2) and (3) Rome I Regulation as well as Article 14(2) and (3) Rome II Regulation should be removed to allow commercial parties the choice of a **foreign or a third-state law in purely domestic and European cases** without the mandatory provisions of domestic or European law claiming application (infra 4.2.1.3.). Together, these changes will increase commercial parties' freedom to choose the applicable law and make the choice of a Member State court more attractive.

2.2. As regards dispute resolution, the European legislature should seek to improve the settlement of cross-border disputes at the level of the Member States (infra 4.3.) and at the level of the EU (infra 4.4.).

2.2.1. At the Member State level, the European legislature should introduce an **expedited procedure for cross-border commercial cases** similar to the one already existing for cross-border small claims (infra 4.3.1.). This procedure would ensure that in each Member State a quick and efficient procedure is available to settle international disputes. And it could ensure that commercial contracts can be enforced within a reasonable time. However, for various reasons, a European expedited procedure would not be a magic bullet. First, speed is not everything. Outcome also matters. A European expedited procedure would, therefore, only help to reach better results in rather straightforward cases while it would be of a little help in more complex cases. Second, the best procedure does not help if the court and the judges do not have the competence, the expertise and the experience to deal with cross-border commercial cases. In fact, the London Commercial Court is not only popular because its procedure is perceived to be quick and efficient, but also because its judges are highly respected and regarded as commercial law experts.

2.2.2. The introduction of an expedited European procedure for cross-border commercial cases can, therefore, only be a first step to improve the overall commercial law competence in the EU. It should be accompanied by a bundle of further measures. This bundle should first and foremost envision the establishment of **specialized courts or chambers for cross-border commercial cases** in the Member States (infra 4.3.2.). These courts or chambers would be competent to hear cross-border commercial cases and could quickly build competence and expertise because they would be more often charged with the same type of cases. As regards procedure the specialized commercial courts or chambers should apply the expedited European procedure. To account for the special needs of foreign litigants they should offer to conduct proceedings in English.

2.2.3. Further measures to be adopted should relate to 1) **better training of judges and lawyers** in European private international law and international civil procedure (infra 4.3.3.1.), 2) **better access to European and foreign law** through the establishment of a centralized database as well as the introduction of a preliminary reference procedure between Member States (infra 4.3.3.2.) and 3) **better legal education** that increases the overall knowledge of European private international law and international civil procedure across the EU (infra 4.3.3.3.).

2.2.4. At the level of the EU, the European legislature should seek to establish a **European Commercial Court** (infra 4.4.). This Court would complement the courts of the Member States and offer commercial litigants an additional, an **international forum for settling cross-border disputes**. It would come with number of advantages. First, a European Commercial Court could be equipped with experienced commercial law judges from all Member State. Those would ensure that the Court has the necessary legal expertise and experience. Second, as a Court with judges from different legal and cultural backgrounds a European Commercial Court would be a truly international court. It could credibly – and probably better than any national court – signal that it is neutral and impartial. Third and finally, a European Commercial Court could also – and, again, probably better than any national court – take part in the global competition for international commercial disputes that has gained momentum over recent years and triggered the establishment of international commercial courts around the world. It could make the EU a globally attractive place for settling international disputes which, in turn, would benefit European companies both in their dealings with other European companies and in their dealings with parties from third states.

3. Outlook

The suggested bundle of measures will, if implemented, fundamentally change – and improve – the dispute resolution landscape in the EU. It will ensure that commercial parties have access to **high-quality courts and procedures in all Member States** irrespective of their size and their resources. As a consequence, they will be able to trust that they can enforce their claims across borders no matter where their contracting partner comes from and no matter whether they have agreed on a choice of forum. In addition, the EU as such will develop into an **attractive place for the settlement of cross-border commercial disputes**. It will be able to compete with some of the leading dispute settlement centres of the world which, in turn, should enhance the EU's attractiveness as a place for doing business.

1. INTRODUCTION

1.1. Starting point

The modern legal world is characterized by the **parallel existence of multiple, differently calibrated legal systems**. Usually, this multiplicity of laws does not matter very much. Even today, most transactions are purely national and therefore have connections to one legal system only. However, for the increasing number of cross-border transactions the multiplicity of laws creates uncertainties: it may be unclear which law applies. It may be unclear where claims can be brought. And it may be unclear whether a foreign judgment can be enforced.

To overcome these uncertainties, commercial parties very often resort to **choice of law and choice of forum clauses**: with the help of a choice of law clause they choose the substantive law that applies to their relationship. With the help of a choice of forum clause they decide which courts will be competent to hear a case should a dispute arise. Both the freedom to choose the applicable law and the freedom to choose the competent forum enjoy near to universal recognition. And both have long been an integral part of European law: the parties' freedom to choose the competent forum was introduced as early as 1968 with the adoption of the Brussels Convention.¹ And the parties' freedom to choose the applicable law followed suit in 1980 with the adoption of the Rome Convention.² Today, parties may choose both the applicable law and the competent forum in accordance with a number of European Regulations.³

The fact that choice of law and choice of forum clauses are popular and broadly recognized, triggers the question of how commercial parties exercise their freedom of choice. Are there laws and courts that are more popular than others? I am not giving away a secret if I say that the answer to this question is yes: according to a number of empirical studies, the **laws and the courts of England and Switzerland** are more often chosen than the laws and the courts of other countries, notably other Member States. Clearly, commercial law competence as it is perceived by commercial parties is unevenly distributed across countries and within the EU.

The following study takes this finding as an occasion to take a closer look at cross-border commercial relationships and their operation in theory and practice. It describes the applicable legal framework and analyses commercial practice as regards choice of law and choice of forum clauses. In addition, it discusses some of the implications that follow from the uneven distribution of commercial law competence across the EU. Finally, it submits a number of suggestions that will make the settlement of international commercial disputes in the EU more attractive.

¹ Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968, OJ EC 1972, L 299/32, consolidated version OJ EC 1998, C 27/1.

² Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, OJ EC 1980, L 266/1, consolidated version OJ EC 1998, C 27/34.

³ See for an overview Heinz-Peter Mansel, Party Autonomy, Legal Doctrine on Choice of Law, and the General Section of the European Conflict of Laws, in Stefan Leible (ed), *General Principles of European Private International Law* (2016) 131, at 141 ff.; Giesela Rühl, The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy, *J. Priv. Int'l L.* 10 (2014) 335, at 338 ff.

1.2. Scope

The study focuses on **commercial law**. Unfortunately, however, there is no agreement as to what commercial law is and what it actually covers.⁴ The notion varies from state to state. For the purpose of this study, I will not go into the details of this debate, but will apply a broad notion of commercial law that covers all **relationships between commercial parties**, i.e. b2b-relationships. However, for reasons of time and space, the focal point of the study will be **commercial contracts**, i.e. b2b-contracts.

Furthermore, the following three caveats apply: first, the study assumes that commercial parties have equal bargaining power. As a consequence, none of the parties involved is considered to be weaker and in need of protection. Second, as far as the study deals with dispute resolution, it focuses on litigation and, hence, dispute resolution with the help of state courts. In contrast, it does not elaborate on alternative dispute resolution mechanisms, notably international commercial arbitration. Third, the study focuses on the EU and analyses the legal situation as far as it matters for **commercial parties from the Member States**. The legal situation that prevails in other parts of the world will, therefore, be ignored.

1.3. Organization

The study is organized in four parts: the first part analyses the current **legal landscape** in which cross-border commercial contracts operate (infra 2.1.). It sheds light on existing instruments relating to substantive commercial law (infra 2.1.1.) as well as instruments that regulate choice of law and dispute resolution (infra 2.1.2. and 2.1.3.). The second part explores current **commercial practices** as regards choice of law and choice of forum clauses (infra 2.2.). It analyses which laws and which courts are most frequently chosen by commercial parties including the reasons for parties' choices (infra 2.2.1. and 2.2.2.). The third part discusses some **implications** that follow from the current legal landscape and current legal practice (infra 3.1.) including the implications of Brexit (infra 3.2.). The fourth part submits a number of **recommendations** that will improve the framework for the settlement of international disputes both at the level of the Member States and at the level of the EU (infra 4.).

⁴ See for a terminological overview Klaus Hopt, Commercial Law, in Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds), Max Planck Encyclopedia of European Private Law, Volume 1 (2012) 252, at 252; Matthias Lehmann, Braucht Europa ein Handelsgesetzbuch? ZHR 181 (2017) 9, at 28 ff.

2. STOCKTAKING

KEY FINDINGS

- Cross-border commercial contracts are subject to a **patchwork of national, European and international provisions** depending on whether aspects of substantive law, choice of law or dispute settlement are at issue (infra 2.1.). Aspects of substantive commercial law are for the most part governed by national law (infra 2.1.1.). Aspects of choice of law and dispute resolution most fall into the scope of European regulations (infra 2.1.2. and 2.1.3.). Other instruments, notably international conventions and soft law instruments may gain importance depending on the case.
- As a result of the patchwork of applicable rules and regulations, international commercial parties potentially face substantial **legal uncertainty** when trading across borders (infra 2.2.). To overcome this uncertainty, they commonly choose the applicable law and the competent court with the help of choice of law and choice of forum clauses (infra 2.2.1. and 2.2.2.).
- When they do, **English and Swiss law** as well as **English and Swiss** courts turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States (infra 2.2.1. and 2.2.2.). This holds true even if the parties are not located in any of these countries.
- Unfortunately, the reasons for parties' choices are not always clear. However, as regards the applicable law, empirical studies suggest that qualitative factors, notably the **quality of the contract law** as such, are driving forces (infra 2.2.1.2.). As regards the competent forum, the popularity of English and Swiss courts mainly seems to be grounded in the perceived higher **quality of courts and judges** (infra 2.2.2.2.).

2.1. Current legal landscape

International commercial contracts operate in a complex legal environment. They are subject to a patchwork of national, European and international law instruments depending on whether aspects of substantive law, choice of law or dispute settlement are at issue. In the following, I will first provide an overview of the sources of substantive commercial law (infra 2.1.1.). Then I will shed light on the sources of choice of law (infra 2.1.2.) before turning to dispute resolution (infra 2.1.3.).

2.1.1. Substantive commercial law

Substantive commercial law is for the most part governed by national law. This holds particularly true as far as commercial contracts are concerned. However, in view of a number of issues, European instruments (infra 2.1.1.1.) and international conventions (infra 2.1.1.2.) come into the picture. In addition, soft law instruments influence how commercial transactions are conducted in practice (infra 2.1.2.3.).

2.1.1.1. European instruments

European instruments in the field of **commercial law** are numerous.⁵ They usually come in the form of directives and have, over the past decades, led to a certain degree of harmonization. This holds true, for example, for the law of commercial registers,⁶ the law of commercial agents,⁷ the law of annual statements,⁸ and the law of regional branches.⁹ In addition, a large number of European instruments have harmonized – and at times unified – aspects of company law, banking law, capital market law, employment law, insolvency law as well as insurance law.¹⁰

However, when it comes to **commercial contracts** as such, the European legislature has remained remarkably inactive. To be sure, there are some directives that deal with contractual aspects of commercial contracts such as the consequences of late payment¹¹ and the commercial seller's right of redress in case of non-conformity of the goods.¹² All in all, however, the European legislature has not managed to provide for a comprehensive, unified set of rules for commercial contracts. In fact, attempts to adopt a uniform framework for commercial sales contracts failed in 2014 when the **Proposal for a Common European Sales Law (CESL)**¹³ was rejected by the Member States and then withdrawn.¹⁴ Of course, this does not rule out that commercial contracts or least some commercial contracts will be subject to unification in the future. Insurance contracts, for example, have long been on the agenda of the European Commission. However, the final report of an Expert Group, set up

⁵ See for an overview Association Henri Capitant, *La construction européenne en droit des affaires: Acquis et perspectives* (2016); Hopt, *supra* note 4, at 254 f.; Lehmann, *supra* note 4, at 42 ff.; Matthias Lehmann, Jessica Schmidt & Reiner Schulze, *Das Projekt eines Europäischen Wirtschaftsgesetzbuches*, ZRP 2017, 225, 226.

⁶ First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ EC 1968, L 65/8; Directive 2003/58 of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ 2003 EU, L 221/13.

⁷ First Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ EC 1986, L 382/17.

⁸ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ EU 2013, L 182/19.

⁹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ EU 2017, L 169/46.

¹⁰ See for a detailed account Association Henri Capitant, *supra* note 5.

¹¹ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ EU 2011, L 48/1. See for details Florian Faust, *Late payment*, in Max Planck Encyclopedia of European Private Law, Volume 1 (2012) 451, at 453.

¹² Article 4 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ EU 1999, L 171/12.

¹³ See for an overview Matteo Fornasier, *Common European Sales Law (CESL)*, in Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 1 (2017) 278 ff.

¹⁴ Technically, the Common European Sales Law (CESL) would not have been a uniform sales law, but a second regime complementing the contract laws of the Member States. Functionally, however, the Common European Sales would have provided for a uniform set of rules for cross-border sales contracts. See for a detailed discussion of the CESL's nature Giesela Rühl, *The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?* Maastricht J. Eur. & Comp. L. 19 (2012) 148 ff.

by the European Commission in 2013,¹⁵ has not yet triggered any legislative reaction.¹⁶ The same holds true for a recent proposal to adopt a **European Business Code**¹⁷ advocated by a French-German initiative.¹⁸

2.1.1.2. International conventions

The landscape looks slightly better when turning to international law. Here, a large number of conventions deal with substantive commercial law, notably commercial contracts. The best known and probably the most successful¹⁹ international convention is, of course, the **United Nations Convention on the International Sale of Goods (CISG)**.²⁰ Prepared by the United Nations Commission on International Trade Law (UNCITRAL),²¹ the CISG deals with cross-border sales contracts as well as associated contracts and regulates, among others, the conclusion of contracts as well as the rights and obligations of the parties.

The CISG, however, is not the only international instrument that regulates commercial contracts. As regards obligations resulting from negotiable instruments, for example, the Geneva Conventions relating to Cheques, Bills of Exchange and Promissory Notes play an important role in practice.²² In addition, the many conventions prepared by the **International Institute for the Unification of Private Law (UNIDROIT)** must be mentioned.²³ They cover a broad range of issues relevant for commercial contracts and establish, among others, uniform rules relating to international sales,²⁴ international

¹⁵ Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law, OJ 2013 C 16/6.

¹⁶ Final Report of the Commission Expert Group on Insurance Contract Law, 24 January 2014, at 6, available at http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/contract/files/expert_groups/insurance/final_report_en.pdf.

¹⁷ For a more detailed account of the French-German initiative see Association Henri Capitant, supra note 5; Matthias Lehmann, Das Europäische Wirtschaftsgesetzbuch – Eine Projektskizze, GPR 2017, 262 ff.; Lehmann, Schmidt & Schulze, supra note 5, at 227 ff. See more generally on the idea of a European Business Code Lehmann, supra note 4, at 18 ff.

¹⁸ Note, however, that the European Commission in its recent White Paper of 1 March 2017 on the Future of Europe COM(2017) 2025, at 21 mentions the project as an example for one of five scenarios for Europe by 2025.

¹⁹ The CISG has 85 contracting states including the majority of EU Member States. Exceptions relate to Ireland, Malta, Portugal and the UK. See for details the status table provided by UNCITRAL at <http://www.uncitral.org>.

²⁰ Franco Ferrari, CISG, in Encyclopedia of Private International Law, supra note 13, Volume 1 (2017) 337 ff.

²¹ Franco Ferrari, UNCITRAL, in Encyclopedia of Private International Law, supra note 13, Volume 2 (2017) 1758 ff.

²² Convention of 19 March 1931 Providing a Uniform Law for Cheques; Convention of 19 March 1931 on the Stamp Laws in connection with Cheques; Convention of 7 June 1930 Providing a Uniform Law for Bills of Exchange and Promissory Notes; Convention of 7 June 1930 on the Stamp Laws in Connection with Bills of Exchange and Promissory Notes. See for an overview Daniel Ansoff, Negotiable Instruments (Cheques & Bills of Exchange), in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 2, 1193 ff.

²³ See for details the list of instruments provided by UNIDROIT at <http://www.unidroit.org>. Note, however, that not all conventions adopted by UNIDROIT have actually entered into force. For details see the status information provided by UNIDROIT at <http://www.unidroit.org>.

²⁴ Convention of 1 July 1964 relating to a Uniform Law for the International Sale of Goods; Convention of 1 July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. See for details Ulrich Magnus, Sale of Goods, International (Uniform Law), in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 2, 1507 ff.

factoring,²⁵ and international financial leasing.²⁶ Finally, in the field of transport law, a number of international organizations, notably the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the Organization for International Carriage by Rail (OTIF) as well as non-governmental organizations such as the Comité Maritime International (CMI) and the International Air Transport Association (IATA) have adopted a number of conventions²⁷ that deal with contractual issues relating to the carriage of goods, passengers and luggage by rail,²⁸ by road,²⁹ by inland waterways,³⁰ by air,³¹ and by sea.³²

Taken together all these international conventions regulate a large number of issues that matter for commercial contracts. However, they do not amount to a comprehensive legal framework. Just like European law, international law, rather provides for a patchwork of rules and regulations. This holds also true because the contracting states vary from convention to convention.

2.1.1.3. Other instruments

In addition to European instruments and international conventions **soft law instruments** drafted by non-state actors such as academic groups, industrial organizations, international institutions or committees contain provisions of substantive commercial law. These provisions, of course, are not legal sources in the strict sense because they are not promulgated or adopted by a national or supranational legislature. However, they influence

²⁵ UNIDROIT Convention of 28 May 1988 on International Factoring, available at <<http://www.unidroit.org>>. See for details Franco Ferrari, Factoring (uniform law), in Encyclopedia of Private International Law, supra note 13, Volume 1, 731 ff.; Franco Ferrari, Factoring, in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 1, 667 ff.

²⁶ UNIDROIT Convention of 28 May 1988 on International Financial Leasing. See for details Franco Ferrari, Financial leasing (uniform law), in Encyclopedia of Private International Law, supra note 13, Volume 1, 747 ff.; Franco Ferrari, Leasing, Ulrich Magnus, Sale of Goods, International (Uniform Law), in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 2, 1045 ff.

²⁷ See for an overview Jürgen Basedow, Carriage, Contract of, in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 1, 152 ff.; Duygu Damar, Transport law (uniform law), in Encyclopedia of Private International Law, supra note 13, Volume 2, 1726 ff.

²⁸ Convention of 19 May 1980 Concerning International Carriage by Rail (as amended). See for an overview Monica Brignardello, Carriage of goods by road, rail and inland waterways, in Encyclopedia of Private International Law, supra note 13, Volume 1, 255 ff.

²⁹ Convention of 19 March 1956 on the Contract for the International Carriage of Goods by Road. See for details Brignardello, supra note 27, 255 ff.

³⁰ Convention of of 22 June 2001 on the Contract of Carriage of Goods by Inland Waterway. See for details Brignardello, supra note 27, 255 ff.

³¹ Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air (as amended); Montreal Convention of 28 May 1999 for the Unification of Certain Rules relating to International Carriage by Air. See for details Alexander von Ziegler, Air Transportation (Contractual Liability), in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 1, 38 ff.; Alexander von Ziegler & Giovanna Montanaro, Air law (uniform law), in Encyclopedia of Private International Law, supra note 13, Volume 1, 39 ff.

³² International Convention of 25 August 1924 for the Unification of Certain Rules relating to Bills of Lading (as amended); United Nations Convention of 31 March 1978 on the Carriage of Goods by Sea; Athens Convention of 1 November 2002 relating to the Carriage of Passengers and their Luggage by Sea; United Nations Convention of 11 December 2008 on Contracts for the International Carriage of Goods wholly or partly by Sea. See for details Paola Ivaldi, Carriage of goods by sea, in Encyclopedia of Private International Law, supra note 13, Volume 1, 261 ff.; Bevan Marten, Maritime law (uniform law), in Encyclopedia of Private International Law, supra note 13, Volume 2, 1210 ff.

how commercial parties actually conduct their transactions and, hence, play an important role in day-to-day commercial practice.

Soft law instruments come in different forms and with different aspirations.³³ A first category strives for non-legislative codification of **general principles of law**. Famous examples are the Principles of European Contract Law (PECL)³⁴ drafted by a group of academics around the Danish law professor Ole Lando and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT PICC)³⁵ adopted by the International Institute for the Unification of Private Law (UNIDROIT). They establish a fairly comprehensive, general framework for international commercial contracts and are meant to apply where they have been chosen by the parties or where the parties have opted for application of general principles of law (or the "lex mercatoria"). In addition, they are meant to support legislatures and judges when they adopt or interpret international or domestic legal instruments.

A second category of soft law instruments sets out to codify **trade usages and commercial custom**. Prominent examples include the International Commercial Terms (INCOTERMS)³⁶ and the Uniform Customs and Practice for Documentary Credit (UCPDC),³⁷ both prepared by the International Chamber of Commerce (ICC). In their aim they are less ambitious than the soft law instruments that fall into the first category. Instead of providing a general framework for international commercial contracts, they merely set out to codify existing international commercial practices. The INCOTERMS, for example, define a small number of commercial terms relating to common contractual sales practices and, thus, set out to distribute the obligations, costs, and risks associated with the international sale of goods. In a similar vein, the UCPDC contain standardized rules relating to the issuance and the use of letters of credit. Both the INCOTERMS and the UCPDC, thus, primarily enhance legal certainty and predictability while at the same time providing for rules specifically tailored to the needs of international commerce.

A third category of soft law instruments, finally, provides for **standard or model contracts**.³⁸ Well known examples are the Uniform General Charter prepared by the Baltic and International Maritime Council (BIMCO) or, more generally, the many model contracts

³³ See for a more detailed discussion Jürgen Basedow, *The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Law Making*, *Am. J. Comp. L.* 56 (2008) 703 ff.; Graf-Peter Calliess, *Lex Mercatoria*, in *Encyclopedia of Private International Law*, supra note 13, Volume 2, 1119 ff. See also David V. Snyder, *Private Lawmaking*, *Ohio St. L. J.* 64 (2003) 371, at 389 ff.

³⁴ Ole Lando & Hugh Beale, *Principles of European Contract Law, Part I and II* (2000); Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann, *Principles of European Contract Law, Part III* (2003).

³⁵ International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contract* (2016). See for a more detailed account Jan Kleinheisterkamp, *UNIDROIT Principles of International Commercial Contracts*, in *Max Planck Encyclopedia of European Private Law*, supra note 4, Volume 2, 1727 ff.

³⁶ ICC Incoterms, ICC Publication No 720E (2011). See for an overview Ulrich Magnus, *Incoterms*, in *Max Planck Encyclopedia of European Private Law*, supra note 4, Volume 1, 855 ff.

³⁷ ICC Uniform Customs and Practice for Documentary Credits – UCP 600, ICC Publication No 600E, 2006. See for an overview Ulrich Drobnig, *Letter of Credit*, in *Max Planck Encyclopedia of European Private Law*, supra note 4, Volume 2, 1084 ff.

³⁸ Peter Benjamin, *The ECE General Conditions of Sale and Standard Forms of Contract*, *J.B.L.* 1961, 113, at 114 f.; Alejandro M. Garro, *Rule-Setting by Private Organizations, Standardization of Contracts, and the Harmonization of International Sales Law*, in Ian Fletcher, Loukas Mistelis & Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (2001) 310 ff.

prepared by the International Chamber of Commerce (ICC).³⁹ They are meant to ease international trade through the provision of a set of ready-to-use contractual terms moulded to the specific needs of certain industries. Just like soft law instruments of the second category, standard or model contracts, thus, serve to enhance certainty and predictability by providing tailor-made rules for international commercial transactions.

Together the above-mentioned soft law instruments clearly shape how commercial transactions take place in the 21st century. They provide commercial parties with useful guidance and offer uniform rules for international commercial transactions where the applicable national law fails to do so. It goes without saying, however, that they do not amount to a comprehensive framework for commercial contracts.

2.1.2. Choice of law

The preceding analysis shows that the most important source of substantive commercial law is – still – national law. As a consequence, there is a need to determine which national law applies if a commercial contract has a connection to more than one state. Choice of law rules that help parties and courts to do so, are to be found in national, European and international law. However, in contrast to substantive commercial law national choice of law rules have lost in importance over recent decades.⁴⁰ They come only into the picture if European instruments and international conventions do not claim application. It follows, that European instruments (infra 2.1.2.1.) and international conventions (infra 2.1.2.2.) are the most important legal sources if the determination of the applicable law is at stake. In addition, soft law instruments have recently gained popularity (infra 2.1.2.2.).

2.1.2.1. European instruments

There are a number of European instruments that deal with issues of choice of law. As regards commercial relationships two are of particular importance. The first one is the so-called **Rome I Regulation**.⁴¹ Adopted on the basis of the near to full competence of the European legislature introduced with the Treaty of Amsterdam⁴² (Articles 61, 65 ECT, now Article 81 TFEU), it contains choice of law rules that help to determine the law applicable to contractual obligations.⁴³ The most important choice of law rule is to be found in Article 3. It embodies the principle of party autonomy and allows the parties to a contract to choose the applicable law at any time before or after conclusion of the contract.⁴⁴ The parties' freedom to choose the applicable law, however, does not come without limits. Articles 5 to 8 Rome I Regulation, for example, curtail the parties' freedom to choose the applicable law with regard to contracts

³⁹ See, for example, the ICC Model International Sale Contract, the ICC Model Commercial Agency Contract, and the ICC Model Distributorship Contract, all available at <https://iccwbo.org/resources-for-business/model-contracts-clauses/>.

⁴⁰ See for an overview of the sources of choice of law Giesela Rühl, Private International Law, foundations, in Encyclopedia of Private International Law, supra note 13, Volume 2, 1380, at 1382 f.

⁴¹ Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 2008, L 177/6. See for an overview Francisco Garcimartín Alférez, Rome Convention and Rome I Regulation, in Encyclopedia of Private International Law, supra note 13, Volume 2, 1553 ff.

⁴² Consolidated version of the Treaty establishing the European Community, OJ EC 1997, C 340/173.

⁴³ See Article 1(1) Rome I Regulation.

⁴⁴ For details regarding the principle of party autonomy including comparative observations see Giesela Rühl, Choice of Law by the Parties, in Max Planck Encyclopedia of European Private Law, supra note 4, Volume 1, 190 ff.

that involve weaker parties, notably consumers and employees.⁴⁵ With regard to commercial contracts, in contrast, only Articles 3(3) and (4), 9 and 21 Rome I Regulation restrict the potential effect of a party choice of law.⁴⁶

The second European instrument that matters for commercial relationships is the so-called **Rome II Regulation**.⁴⁷ It complements the Rome I Regulation in that it applies to non-contractual obligations, most importantly obligations arising out of tort or delict.⁴⁸ As regards the applicable choice of law rules, the Rome II Regulation is closely modelled on the Rome I Regulation: according to Article 14 Rome II Regulation commercial parties are free to choose the applicable tort law at any time before or after occurrence of the event giving rise to the damage. And according to Articles 14(2) and (3), 16 and 26 Rome II Regulation the parties' freedom to choose the applicable law is limited in similar ways as per Articles 3(3) and (4), 9 and 21 Rome I Regulation. Under both the Rome I and the Rome II Regulation, however, the overarching principle is that commercial parties are allowed to choose the applicable law. As we will see further below, this finding holds a number of important implications.

2.1.2.2. International conventions

While the Rome I and II Regulations are the most important choice of law instruments from a European perspective, they are certainly not the only ones. In fact, both Regulations are complemented by a number of international conventions adopted by international or intergovernmental organizations⁴⁹ such as the **Hague Conference on Private International Law**.⁵⁰ Those conventions mostly deal with issues that are excluded from the scope of the Rome I and II Regulations. This holds true, for example, for the law applicable to obligations arising out of negotiable instruments⁵¹ which is determined with the help of two Geneva Conventions dating back to 1930⁵² and 1931,⁵³ and the law applicable to agency,⁵⁴ which falls into the scope of the Hague Agency Convention of 1978.⁵⁵

⁴⁵ See for a detailed discussion of these provisions Rühl, *supra* note 3, at 340 ff.

⁴⁶ See for a more detailed discussion of some of these restrictions *infra* 4.2.1.

⁴⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ EU 2007, L 199/40. See for an overview Andrew Dickinson, Rome II Regulation (non-contractual obligations), in *Encyclopedia of Private International Law*, *supra* note 13, Volume 2, 1562 ff.

⁴⁸ See Article 1 and 2(1) Rome II Regulation.

⁴⁹ See for an overview Marta Pertegás, Treaties in Private International Law, in *Encyclopedia of Private International Law*, *supra* note 13, Volume 2, 1743 ff.

⁵⁰ All Hague Conventions are available at <<http://www.hcch.net>>. See for details Marta Pertegás, Hague Conference on Private International Law, in *Encyclopedia of Private International Law*, *supra* note 13, Volume 1, 870 ff.; Jörg Pirrung, Hague Conference on Private International Law, in *Max Planck Encyclopedia of European Private Law*, *supra* note 4, Volume 1, 815 ff.

⁵¹ Excluded from the scope of the Rome I Regulation by virtue of Article 1(2) lit. d).

⁵² Geneva Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes of 7 June 1930. See for details Matthias Lehmann, Bill of exchange, in *Encyclopedia of Private International Law*, *supra* note 13, Volume 1, 187 ff.

⁵³ Convention of 19 March 1931 for the Settlement of Certain Conflicts of Laws in Connection with Cheques. See for details Matthias Lehmann, Cheques, in *Encyclopedia of Private International Law*, *supra* note 13, Volume 1, 295 ff.

⁵⁴ Excluded from the scope of the Rome I Regulation by virtue of Article 1(2) lit. g).

⁵⁵ Hague Convention of 14 March 1978 on the Law Applicable to Agency. See for details Jens Kleinschmidt, Agency and authority of agents, in *Encyclopedia of Private International Law*, *supra* note 13, Volume 1, 29 ff.

Other conventions, in contrast, regulate issues of choice of law which are also governed by the Rome I and II Regulations. Examples are the Hague Sales Convention of 1955⁵⁶ which determines the law applicable to international sale of goods as well as the Hague Product Liability Convention of 1973⁵⁷ which determines the law applicable to liability for damage caused by a product. As regards these conventions, Article 25 Rome I Regulation and Article 28 Rome II Regulation provide that the existence of European instruments does not prejudice the application of international conventions by Member States, unless the convention is in force only between Member States. However, since most conventions in the field and notably the Hague Sales Convention and Hague Product Liability Convention, have a sizeable number of contracting states from outside the EU, the Rome I and II Regulations usually do not apply where they overlap with international conventions.

2.1.2.3. Other instruments

In addition to European instruments and international conventions, **soft law instruments** have recently gained popularity in the field of choice of law.⁵⁸ They usually come in the form of model laws or general principles. And just like soft law instruments pertaining to substantive commercial law, they do not qualify as legal sources in the strict sense. However, they influence the development of choice of law rules because legislatures can – and actually do – consider such instruments as models for the development and reform of their domestic choice of law systems.

The most prominent example for soft law instruments in choice of law – and certainly the most relevant for this study⁵⁹ – are the **Hague Principles on Choice of Law in International Commercial Contracts**.⁶⁰ Prepared by the Hague Conference on Private International Law and approved in March 2015 they focus on the principle of party autonomy and provide for a comprehensive, albeit non-binding framework of the parties' freedom to choose the applicable contract law. According to the Preamble they may be used in three different ways: first, as a model for national, regional, supranational or international instruments; second, as a means to interpret, supplement and further develop existing rules of choice of law, especially in novel situations; and, third, as a source of law for courts and arbitral tribunals where other choice of law rules are lacking.

⁵⁶ Hague Convention of 15 June 1955 on the law applicable to international sales of goods. See for an overview Franco Ferrari, Sale contracts and sale of goods, in *Encyclopedia of Private International Law*, supra note 13, Volume 2, 1588 ff.; Ulrich Magnus, Sale of Goods, *International (Conflict of Laws)*, in *Max Planck Encyclopedia of European Private Law*, supra note 4, Volume 2, 1504 ff.

⁵⁷ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability. See for an overview Thomas Kadner Graziano, in *Encyclopedia of Private International Law*, supra note 13, Volume 2, 1413 ff.

⁵⁸ See for a brief account Pertegás, supra note 49, at 1744 f.

⁵⁹ Other soft law instruments relate, for example, to intellectual property and consumer law. See, for example, the CLIP Principles, prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property as well as the ILA Resolution No 1/2016 of the Committee on the International Protection of Consumers, Guidelines on the best Practices on the Law Applicable to International Protection of Consumers, available at <www.ila-hq.org>.

⁶⁰ Hague Principles on Choice of Law in International Commercial Contracts, available at <<http://www.hcch.net>>. See for a brief overview Jürgen Basedow, The Hague Principles on Choice of Law: Their Addressees and Impact *Uniform L. Rev.* 22 (2017) 304 ff.; Daniel Girsberger & Neil B. Cohen, Key Features of the Hague Principles on Choice of Law in Commercial Contracts, *Uniform L. Rev.* 22 (2017) 316 ff.; Johannes Landbrecht, The Hague Conference on private international law: shaping a global framework for party autonomy, *Int'l Bus. L. J.* 2017, 35 ff.; Yuko Nishitani, Party Autonomy in Contemporary Private International Law, *Japanese Yb. Int'l L.* 59 (2016) 300 ff.

Against this background, the Hague Principles could, for example, serve as a model for a future reform of Article 3 Rome I Regulation.⁶¹ Or they could help European courts to interpret Article 3 Rome I Regulation where the meaning of that provision is unclear. Thus far, however, neither the European legislature nor European courts have expressly resorted to the Hague Principles. And it remains to be seen whether this will ever happen. In other regions of the world, in contrast, the Hague Principles have been received as envisioned by the drafters. In particular, they have served as model for national lawmakers. Paraguay, for example, enacted a verbatim adoption of the Hague Principles into law in 2015.⁶² It is to be expected that other countries will sooner or later follow suit and thereby gradually create more uniformity as regards choice of law clauses in international commercial contracts.

2.1.3. Dispute resolution

Where a commercial relationship, notably a commercial contract has a connection to more than one state, the question of which law applies is not the only question the parties have to answer. In many instances they also have to determine how to settle a dispute that arises out of the relationship. Once they decide that they want to go to court – and not resolve the dispute with the help of mediation or arbitration⁶³ – they need to determine where they can bring a claim and how they can enforce a judgement.⁶⁴ Rules that help the parties – and eventually the courts – to do so, are to be found in national law. However, more important than national law are European instruments (infra 2.1.3.1.) and international conventions (infra 2.1.3.2). In addition, soft law instruments have recently been enacted in order to improve the conduct of international proceedings as such (infra 2.1.3.3.).

2.1.3.1. European instruments

The most important European instrument relating to the settlement of international commercial disputes is the **Brussels Ia Regulation**.⁶⁵ It regulates, for all Member States, issues of jurisdiction of Member State courts as well as recognition and enforcement of Member State judgments. In view of jurisdiction, the core provision is Article 25. It codifies the principle of **party autonomy** and allows commercial parties to choose the courts of a Member State even if they are not domiciled in the EU.⁶⁶ What is more, however, is that the

⁶¹ The European legislature could, for example, follow the Hague Principles and allow commercial parties the choice of a non-state law. See infra 4.2.1.2.

⁶² Law 5393 of 15 January 2015 regarding the Applicable Law to International Contracts, English translation reprinted in Encyclopedia of Private International Law, supra note 13, Volume 4, 3611 ff. See for a brief overview José A. Moreno Rodríguez, Paraguay, in Encyclopedia of Private International Law, supra note 13, Volume 3, 2397, at 2405 ff.

⁶³ Dispute settlement through other means than litigation, notably via arbitration is beyond the scope of this study. See supra 1.2.

⁶⁴ Other issues of interest for the parties may relate to the service of documents and the taking of evidence. However, for reasons of time and space these issues are not further discussed here. Suffice it to note that both aspects are covered by two European instruments, namely the Service Regulation and the Evidence Regulation, see infra notes 178 and 179. To the extent that these Regulations do not apply, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters may claim application.

⁶⁵ 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 (recast) OJ EU 2012, L 351/1. See for an overview Burkhard Hess & Vicent Richard, Brussels I (Convention and Regulation), in Encyclopedia of Private International Law, supra note 13, Volume 1, 219 ff.

⁶⁶ See for a detailed discussion Tena Ratković & Dora Zgrabljić Rotar, Choice-of-Court Agreements under the Brussels I Regulation (Recast), J. Priv. Int'l L. 9 (2013) 243 ff.

Brussels Ia Regulation does not impose any limits on the parties' freedom to choose a Member State court if both parties are commercial parties. Articles 15, 19, 23 and 24 Brussels Ia Regulation only limit the parties' freedom if a case involves weaker parties, notably consumers and employees, and if a case relates to certain matters, notably disputes about rights in rem in immovable property. As a consequence, jurisdiction under the Brussels Ia Regulation follows a fairly liberal path.

The same holds essentially true for recognition and enforcement under the Brussels Ia Regulation. According to Article 39 Brussels Ia Regulation a judgment given in a Member State is enforceable in any other Member State without any declaration of enforceability being required. And according to Article 41 Brussels Ia Regulation the procedure for the enforcement of a judgment from another Member State will be the same as for domestic judgments. The Brussels Ia Regulation, thus, establishes a system of **direct and immediate enforcement of foreign judgments** which is unique and worldwide unprecedented. Its reach is only limited by virtue of Article 45 Brussels Ia Regulation which allows Member State courts to refuse enforcement if certain conditions are met. However, enforcement may only be refused upon application and only on very narrow grounds, notably public policy.

2.1.3.2. International conventions

Next to the Brussels Ia Regulation a number of international conventions deal with jurisdiction as well as recognition and enforcement of foreign judgments. Two deserve to be mentioned. The first is the **Lugano Convention of 2007**.⁶⁷ Applicable in the EU Member States on the one hand and Switzerland, Norway and Iceland on the other, it regulates jurisdiction as well as recognition and enforcement of foreign judgments in basically the same way as the Brussels I Regulation before the recast of 2012.⁶⁸ According to Article 23 of the Convention the parties may, therefore, choose to confer jurisdiction upon the courts of a Contracting State, if at least one of the parties is domiciled in a Contracting State. And according to Articles 38 to 52 of the Convention judgments given in a Contracting State are enforced in another Contracting State according to a simplified exequatur procedure.

The second convention that deserves to be mentioned is the **Hague Choice of Court Convention of 2005**.⁶⁹ Adopted by the Hague Conference on Private International Law and applicable since 2015 in the EU Member States, Mexico and Singapore, it regulates exclusive choice of forum clauses as well as recognition and enforcement of judgments based on such clauses.⁷⁰ It subjects choice of court agreements to provisions that resemble Article 25 Brussels Ia Regulation.⁷¹ To the extent that differences remain, conflicts have to be resolved with the help of Article 26(6) of the Convention. According to this provision the Brussels Ia Regulation prevails in purely EU cases, i.e. if both parties reside in an EU Member State and

⁶⁷ Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2007, L 339/3.

⁶⁸ See for an overview Sabine Giroud, Lugano Convention, in Encyclopedia of Private International Law, supra note 13, Volume 2, 1175 ff.

⁶⁹ Hague Convention of 30 June 2005 on Choice of Court Agreements.

⁷⁰ Note that the Hague Conference on Private International Conference is currently working on a more comprehensive convention dealing with recognition and enforcement of judgments and presented a first draft in May 2018. More information on the project is available at <http://www.hcch.net>.

⁷¹ See for a detailed account of remaining differences Matthias Weller, Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes, J. Priv. Int'l L. 13 (2017) 91 ff.

if recognition or enforcement of a Member State judgment is sought in another Member State.⁷² In all other cases the Hague Convention applies.

2.1.3.3. Other instruments

The preceding analyses shows that European instruments and international conventions are important legal sources when it comes to the settlement of international disputes. However, they are limited in their scope in that they only deal with issues of jurisdiction, recognition and enforcement while leaving the conduct of international court proceedings as such unregulated. To fill this gap and to reconcile differences among various national rules of civil procedure, international institutions have started to adopt soft law instruments in recent years. The most prominent are the **Principles of International Civil Procedure** adopted jointly by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) in 2004.⁷³ Consisting of 31 provisions the Principles establish standards for the adjudication of transnational disputes, taking into account their peculiarities as compared to purely domestic ones.⁷⁴ They are meant to serve as model for national and international legislatures and, hence, aim for harmonization from the bottom-up – just like other soft law instruments, notably the Hague Principles on Choice of Law in International Commercial Contracts.

The ALI/UNIDROIT Principles were originally meant to be accompanied by another soft law instrument, the **Rules of Transnational Civil Procedure**. These Rules contained detailed provisions illustrating the working of the Principles and designed to serve as an implementation model for national legislation or as basis for the further adaption in various legal systems. The Rules were never formally adopted by either UNIDROIT or ALI. However, they have stimulated the launch of a research project led by UNIDROIT and the European Law Institute (ELI).⁷⁵ The project focuses on the implementation of the ALI/UNIDROIT Principles in Europe taking into account the growing body of European rules relating to civil procedure. Its ultimate goal is to adopt **European Rules of Civil Procedure** that will improve the resolution of international disputes and provide a basis for application of the ALI/UNIDROIT Principles in the EU.

2.2. Current commercial practice

The above analysis suggests that commercial contracts operate in an extremely complex legal environment. This finding triggers the question of how commercial parties deal with this situation in practice? How do they create the much-needed legal certainty in a fragmented legal world? Naturally, the answer to this question is complex because businesses resort to many different strategies only some of which are legal in nature.⁷⁶ However, the two most important tools in practice are **choice of law and choice of forum clauses**: they allow parties to ensure that their relationship will, substantively and procedurally, be subject to essentially one legal system. In addition, they allow parties to submit their relationship to

⁷² See for a more detailed discussion of the complex interplay of the Brussels Ia Regulation and the Hague Convention the 2013 Explanatory Report on the Hague Convention prepared by Trevor C. Hartley and Masato Dogauchi, available at <http://www.hcch.net>.

⁷³ American Law Institute & International Institute for the Unification of Law, Principles of Transnational Civil Procedure (2006), also available at <http://www.unidroit.org>.

⁷⁴ See for a concise introduction Rolf Stürner, The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions, *RebelsZ* 69 (2005) 201 ff.

⁷⁵ ELI/UNIDROIT, From Transnational Principles to European Rules of Civil Procedure. More information about the project is available at <https://www.europeanlawinstitute.eu> and at <http://www.unidroit.org>.

⁷⁶ See for a more detailed discussion Giesela Rühl, The Problems of International Transactions: Conflict of Laws Revisited, *J. Priv. Int'l L.* 6 (2010) 59 ff.

the one legal system which they think suits their substantive or procedural needs and interests the best.

Against this background the following analysis sheds light on how commercial parties use choice of law and choice of forum clauses to overcome the uncertainties associated with the above described patchwork of legal rules and regulations (infra 2.2.1. and 2.2.2.). In particular, it analyses which laws and which courts are the most popular among commercial parties (infra 2.2.1.1. and 2.2.2.1.). Additionally, it sheds light on the reasons for parties' choices (infra 2.2.1.2. and 2.2.2.2.). For analytical reasons choice of law and choice of forum will be discussed separately. However, in practice parties' decision as regards the applicable law and the competent forum are very often interconnected and interdependent.

2.2.1. Choice of law

Which law do commercial parties choose when they contract across borders and why? The following section sheds light on these two questions. It starts with an overview of existing studies relating to choice of law clauses (infra 2.2.1.1.) and then goes on to analyse the reasons for parties' choices (infra 2.2.1.2.).

2.2.1.1. Empirical findings

Choice of law clauses have been the subject of more than ten empirical studies over the past years.⁷⁷ However, only two provide insights that are of immediate relevance for present purposes. The following discussion will, therefore, mainly draw on these two studies whereas others will only be considered to the extent that they provide further insights. Studies that focus on certain contracts⁷⁸ or certain countries⁷⁹ only will not be discussed.

2.2.1.1.1. The Oxford European Contract Law Survey

The first study with immediate relevance for present purposes was conducted by Stefan Vogenauer and Stephen Weatherill together with the law firm Clifford Chance in 2005.⁸⁰ Dubbed the "Oxford European Contract Law Survey" it asked **175 small, medium-sized and big businesses from different industries and from eight Member States** (France, Germany, Hungary, Italy, Netherlands, Poland, Spain, UK)⁸¹ a number of questions relating

⁷⁷ For an overview see Stefan Vogenauer, *Regulatory Competition through Choice of Law and Choice of Forum: Theory and Evidence*, ERPL 21 (2013) 13, at 36 ff.

⁷⁸ See, for example, Thomas Dietz, *Institutionen und Entwicklung: Eine empirische Untersuchung am Beispiel von grenzüberschreitenden Softwareentwicklungsverträgen* (2010) (software contracts); Luiz Gustavo Meira Moser, *Parties' preferences in international sales contracts: an empirical analysis of the choice of law*, Uniform L. Rev. 20 (2015) 19 ff. (international sales contracts); Lisa Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choice of Law in International Sales Contracts*, J. Priv. Int'l L. 6 (2010) 417 ff. (international sales contracts); Corinne Truong, *The Law Applicable to the Merits in International Distribution Contracts: An Analysis of ICC Arbitral Awards*, ICC International Court of Arbitration Bulletin 12 (2001) 3 ff. (distribution contracts).

⁷⁹ See, for example, Theodore Eisenberg & Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, Cardozo L. Rev. 30 (2009) 1475 ff. (USA); The Law Society of England and Wales, *Firm's Cross Border Work* (2010) (UK); Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants & José del Rio, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts* (2015) (UK). The latter study, however, will be discussed infra 2.2.2.1. and 2.2.2.2.

⁸⁰ Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate*, in Stefan Vogenauer & Stephen Weatherill (eds), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (2006) 105 ff. See for a discussion of this study Vogenauer, supra note 77, at 39 ff.

⁸¹ For details see Vogenauer & Weatherill, supra note 80, at 117 f.

to choice of law clauses in order to determine the need for a harmonized European contract law.⁸²

The answers revealed that the possibility of choosing the applicable law mattered to 83% and, hence, a vast majority of the respondents.⁸³ In addition, 66% showed a clear preference for the choice of their home law.⁸⁴ However, the preference for the home law was unevenly distributed: whereas in the UK a staggering 97% of respondents expressed a preference for English law, only 42% of Spanish, 43% of Dutch companies, 63% of German and 73% of French companies preferred Spanish, Dutch, German or French law respectively. Asked what law they would choose instead of their home law, 46% companies did not know or refused to answer. From the remaining companies the vast majority, namely 26% pointed to **English law**, 6% to German law and 1% to French law.⁸⁵ Asked which law they would rather avoid, 32% named Italian law, 23% French and English law, 16% German and Spanish law and 15% Greek law.⁸⁶

2.2.1.1.2. The Oxford Civil Justice Study

The second study with immediate relevance for the present study was conducted three years later, in 2008, again by Stefan Vogenauer, but this time together with Christopher Hodges.⁸⁷ They asked **100 European businesses from various industries and various Member States** (France, Germany, Italy, Netherlands, Poland, Spain, UK and Belgium)⁸⁸ a number of questions that again revolved around their practice as regards choice of law.

The results were published as "Oxford Civil Justice Study" and confirmed most of the results of the Oxford European Contract Law Study. In particular, the study revealed that the possibility to choose the applicable contract was important or very important for 91% of the respondents.⁸⁹ In addition, 85% indicated that they had often or at least occasionally chosen a foreign contract law in the past.⁹⁰ Asked which laws they would normally choose, 21% named **English law** as their first choice, 16% pointed to German law, 14% to French and Swiss law and 9% to Dutch law. Italian and Polish law was only mentioned by 5% and Spanish law only by 3 % of the respondents.⁹¹ The results, however changed substantially once the respondents' home laws were taken out of the calculation. **Swiss law** then turned out to be the most preferred law (29%) closely followed by English law (23%).⁹² The numbers for

⁸² For details see Vogenauer & Weatherill, supra note 80, at 119 f.

⁸³ Vogenauer & Weatherill, supra note 80, at 120 (Table 2).

⁸⁴ Vogenauer & Weatherill, supra note 80, at 121 (Table 3).

⁸⁵ Vogenauer & Weatherill, supra note 80, at 124 (Table 6).

⁸⁶ Vogenauer & Weatherill, supra note 80, at 122 ff.

⁸⁷ Stefan Vogenauer & Christopher Hodges, *Civil Justice Systems in Europe: Implications for Choice of Law and Choice of Forum – A Business Survey (2008)*, available at <<http://denning.law.ox.ac.uk/iecl/ocjsurvey.shtml>>. See for a discussion of this study Vogenauer, supra note 77, at 41 ff.

⁸⁸ Vogenauer & Hodges, supra note 87, at 8 ff. (Questions 6 to 9).

⁸⁹ Vogenauer & Hodges, supra note 87, at 13 (Question 15).

⁹⁰ Vogenauer & Hodges, supra note 87, at 13 (Question 16).

⁹¹ Vogenauer & Hodges, supra note 87, at 14 (Question 17.1).

⁹² Vogenauer & Hodges, supra note 87, at 15 (Question 17.3).

French law, in contrast, dropped to 7%, for German law to 10%, for Dutch law to 4% and for Spanish law to 1%.⁹³

The Oxford Civil Justice Study, however, did not limit its survey to the choice of national law. It also asked respondents whether they had chosen or incorporated into their contract the **Principles of European Contract Law (PECL)**⁹⁴ or **UNIDROIT Principles on International Commercial Contracts (UNIDROIT PICC)**.⁹⁵ The answers showed a certain reluctance towards these soft law instruments. Only 4% replied that they had often chosen or incorporated the UNIDROIT PICC into their contract,⁹⁶ whereas 13% said that they had occasionally done so.⁹⁷ With regard to the PECL revealed even bigger reservations: only 4% of the respondents indicated that they had at least occasionally chosen or incorporated them into their contract. The vast majority of 96%, in contrast, said that they had never or almost never done so.⁹⁸

2.2.1.1.3. Other Studies

The Oxford European Contract Law Study and the Oxford Civil Justice Study provide a number of interesting insights into choice of law in international commercial contracts. Among others, they show that commercial parties value the possibility to choose the applicable law when conducting cross-border transactions. In addition, both studies show that there are some laws, notably English and Swiss law that are more popular than others. In the following, I will briefly shed light on three further studies which support this finding. However, all three studies focus on **choice of law in international commercial arbitration**. Therefore, the results can only cautiously be used for the present study which is mainly concerned with the settlement to international commercial disputes via litigation.⁹⁹

The **first study** relating to parties' choices in international commercial arbitration was conducted by Stefan Voigt in 2008.¹⁰⁰ He studied choice of law clauses in contracts that were referred to arbitration before the ICC International Court of Arbitration (ICA). He discovered that out of **580 cases filed with the ICA in 2003**, 82% contained a choice of law clause.¹⁰¹ In addition, he found that 24% of these clauses called for application of English law, whereas 20% relied on Swiss law and 19% on French law.¹⁰² Voigt, however, did not stop here, but went on to relate these results to the parties' home jurisdiction to calculate which laws were the most popular once the assumed home law preference was controlled for. He found that

⁹³ Vogenauer & Hodges, *supra* note 87, at 15 (Question 17.3).

⁹⁴ Vogenauer & Hodges, *supra* note 87, at 24 (Question 26).

⁹⁵ Vogenauer & Hodges, *supra* note 87, at 23 (Question 25).

⁹⁶ Vogenauer & Hodges, *supra* note 87, at 23 (Question 25).

⁹⁷ Vogenauer & Hodges, *supra* note 87, at 23 (Question 25).

⁹⁸ Vogenauer & Hodges, *supra* note 87, at 24 (Question 26).

⁹⁹ See for details as regards the scope of this study *supra* 1.2.

¹⁰⁰ Stefan Voigt, Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory, *J. Emp. Leg. Stud.* 5 (2008) 1 ff. Note that prior to Stefan Voigt Corinne Truong, *supra* note 78, analysed choice of law clauses in international commercial arbitration. However, she only looked at distribution agreements.

¹⁰¹ Voigt, *supra* note 100, at 12.

¹⁰² Voigt, *supra* note 100, at 12 ff.

Swiss law and English law were particularly appealing to foreign parties, with Swiss law being chosen six times and English law five times more often than expected.¹⁰³

The **second study** relating to choice of law clauses in international commercial arbitration was presented two years later by the Queen Mary School of International Arbitration together with the law firm White & Case.¹⁰⁴ They asked a total of **203 lawyers of various professions and from all over the world** a large number of questions revolving around choices in international arbitration including which law they would choose to govern an international contract. 40% of the respondents – of which 35% came from Asia, 31% from Western Europe and 12% from North America¹⁰⁵ – replied that, overall, English law was the law that was most frequently chosen.¹⁰⁶ New York law (17%) and Swiss law (8%) ranked second and third, leaving the fourth place to French law (6%).¹⁰⁷ Asked which law they would choose if they were free to do so, 44% pointed to the law of their home jurisdiction, 25% to English law, 9% to Swiss law, 6% to New York law and 3% to French law.¹⁰⁸ If, in contrast, the other party was in a position to impose the applicable law due to superior bargaining power, 53% of respondents indicated that the other party would choose the law of its home jurisdiction, 21% of the respondents said that the other party would choose English law, 10% named New York law, and 1% Swiss and French law respectively.¹⁰⁹ Finally, the Queen Mary International Arbitration Survey 2010 – just like the Oxford Civil Justice Study – also looked at the popularity of transnational laws rules to govern international law.¹¹⁰ The results turned out to be more uplifting than the results of the Oxford Civil Justice Study: 14% of the respondents indicated that they had often chosen “commercial law rules contained in codifications” such as the UNIDROIT Principles on International Commercial Contracts.¹¹¹ Another 48% said that they had sometimes done so.¹¹²

A **third study** relating to choice of law clauses in international commercial arbitration was presented by Gilles Cuniberti in 2015.¹¹³ Just like Stefan Voigt in his 2008 study, he looked at ICC Arbitration Proceedings and set out to determine the international attractiveness of a particular contract law by relating a choice of law to the nationality of the parties. Analysing the impressive number of **4.427 contracts concluded by 12.000 parties who participated in ICC arbitration between 2007 and 2012**,¹¹⁴ he found that the parties

¹⁰³ Voigt, supra note 100, at 14 ff. and 16 ff.

¹⁰⁴ Queen Mary School of International Arbitration, 2010 International Arbitration Survey: Choices in International Arbitration (2010), available at <http://www.arbitration.qmul.ac.uk/research/>. See for a discussion of this study Vogenauer, supra note 77, at 46 ff.

¹⁰⁵ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 35 (Chart 34).

¹⁰⁶ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 11 and 14 (Chart 11).

¹⁰⁷ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 14 (Chart 11).

¹⁰⁸ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 13 (Chart 9).

¹⁰⁹ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 13 (Chart 10).

¹¹⁰ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 15 (Chart 12).

¹¹¹ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 15 (Chart 12).

¹¹² Queen Mary School of International Arbitration Survey 2010, supra note 104, at 15 (Chart 12).

¹¹³ Gilles Cuniberti, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of Int'l L. & Bus.* 34 (2015) 455 ff.

¹¹⁴ See for details as regards the methodology including caveats relating to representativeness Cuniberti, supra note 116, at 460 ff.

had chosen the applicable law in 80% of the cases.¹¹⁵ In addition – and more importantly – he found that England and Switzerland law had the most attractive contract laws on offer. However, he did not arrive at that conclusion by simply counting the number of choice of law clauses in favour of English and Swiss law. Rather, he calculated the number of cases in which parties had chosen English or Swiss law as a neutral, third-state law. In so doing, he found that English and Swiss law appealed to foreign parties, on average, three times more often than US and French law and almost five times more often than German law.¹¹⁶

2.2.1.2. Analysis

The above-discussed studies show that choice of law is a tool frequently used by international commercial parties. In addition, they show that some laws, namely **English law and Swiss law**, are generally more popular than others. The details, notably the degree of popularity of these laws, depend, of course, on context. However, overall, there is no denying the fact, that the laws of England and Switzerland attract more commercial parties, notably foreign commercial parties, than, for example, the laws of France, Germany, Italy, the Netherlands, Poland and Spain. The interesting question, therefore, is, why is this so? What makes English and Swiss law more attractive than Dutch, French, German, Italian, Spanish or Polish law? Why do commercial parties choose English or Swiss law even if they are not located in the UK or in Switzerland?

2.2.1.2.1. The Oxford European Contract Law Study

The first study that meant to shed light on this question was the Oxford European Contract Law Study of 2005.¹¹⁷ It did not only ask commercial parties which laws they preferred and which laws they avoided when conducting cross-border business, it also asked what characteristics of a contract law influenced their choice.¹¹⁸ The answers provided, however, were fairly vague: 87% of the respondents replied that the extent to which the law **enabled trade** was a reason to choose a particular law, 79% pointed to **predictability**, 78% to **fairness**, 66% to **flexibility** and 61% to the **precision of the contract law** in question.¹¹⁹

Equally vague were the answers provided when businesses were asked why they avoided certain contract laws.¹²⁰ Here, most respondents simply argued that they were not familiar with certain, notably foreign contract laws.¹²¹ In addition, however, a number of respondents pointed to the inferior quality of some contract laws. French law, for example, was described as too protectionist, too focused on the interest of their citizens and not enough developed in the field of commercial law.¹²² However, no details were provided.

¹¹⁵ Cuniberti, *supra* note 116, at 468.

¹¹⁶ Cuniberti, *supra* note 116, at 458 f. and 472 ff. (Tables 5 and 6).

¹¹⁷ Vogenauer & Weatherill, *supra* note 80.

¹¹⁸ Vogenauer & Weatherill, *supra* note 80, at 121 f.

¹¹⁹ Vogenauer & Weatherill, *supra* note 80, at 121 f., footnote 51, and 137 (Table 18).

¹²⁰ Vogenauer & Weatherill, *supra* note 80, at 122 ff.

¹²¹ Vogenauer & Weatherill, *supra* note 80, at 124 f.

¹²² Vogenauer & Weatherill, *supra* note 80, at 122 ff.

2.2.1.2.2. The Oxford Civil Justice Study

The Oxford Civil Justice Study of 2008¹²³ set out to add to the debate and tried to determine driving forces for parties' choices by asking businesses which factors they took into account when choosing the governing contract law. In contrast to the Oxford European Contract Law Study, however, the Oxford Civil Justice Study requested respondents to **rate a mix of 23 very different factors** according to their importance for their choice.¹²⁴ Factors that had to be rated included language and advice by law firm, factors relating to the civil justice system of the chosen law (notably: predictability of the outcomes, fairness of the outcomes, speed of dispute resolution, quality of judges and courts, quality of lawyers, costs, availability or absence of disclosure/discovery, availability or absence of cross-examination, availability or absence of class/collective action procedure, availability or absence of judiciary to encourage parties to settle, other procedural aspects, bureaucracy, corruption), factors relating to the availability of alternative dispute resolution options (notably small claims procedure, arbitration, mediation and Ombudsman schemes) and factors relating to the applicable substantive law (notably contract law, employment law, company law, tax law).

The results revealed that parties' choices were mainly driven by **qualitative factors**, notably the **quality of the chosen contract law**, the fairness of outcomes, the absence of corruption and the predictability of outcomes.¹²⁵ In addition, **procedural factors**, notably the quality of judges and courts, the speed of dispute resolution, the availability of arbitration, the costs of proceedings, the quality of lawyers, as well as language, turned out to be important.¹²⁶ Other procedural factors, such as the availability of ombudsman schemes, the availability of small claims procedures, mediation or arbitration, in contrast, only had a minor influence on parties' decision to choose a particular law.¹²⁷

2.2.1.2.3. Other Studies

The preceding analysis shows that the Oxford European Contract Law Study and the Oxford Civil Justice Study have managed to shed some light on the factors that drive parties' choice of applicable contract law. In particular, they reveal that the **quality of contract law** influences parties' choice indicating that the contract laws of England and Switzerland are better than other contract laws. However, both studies do not flesh out what aspects of English and Swiss contract law matter for commercial parties and what makes both laws attractive for foreign parties. Unfortunately, the same holds true for most of the other studies that have set out to shed light on choice of law clauses. According to the above-mentioned Queen Mary International School of Arbitration Survey 2010,¹²⁸ for example, the choice of the governing law is mostly influenced by the perceived neutrality and impartiality of the legal system (66%), the appropriateness of the law for the type of contract in question (60%), and the familiarity with and the experience of the particular law (58%).¹²⁹ However, it remains unclear what exactly makes English or Swiss law more appropriate for certain contracts than others.

¹²³ Vogenauer & Hodges, *supra* note 87.

¹²⁴ Vogenauer & Hodges, *supra* note 87, at 17 (Question 19) and 20 (Question 21).

¹²⁵ Vogenauer & Hodges, *supra* note 87, at 17 (Question 19) and 20 (Question 21).

¹²⁶ Vogenauer & Hodges, *supra* note 87, at 17 (Question 19) and 20 (Question 21).

¹²⁷ Vogenauer & Hodges, *supra* note 87, at 17 (Question 19) and 20 (Question 21).

¹²⁸ Queen Mary School of International Arbitration Survey 2010, *supra* note 104.

¹²⁹ Queen Mary School of International Arbitration Survey 2010, *supra* note 104, at 11 and 12 (Chart 8).

The situation looks better when turning to the study by Gilles Cuniberti.¹³⁰ He analyses in great detail which factors might influence parties' preference for English and Swiss law.¹³¹ He starts by looking at **extrinsic factors** unrelated to the quality of English and Swiss contract law, notably the seat of arbitration,¹³² the widespread use of the English language,¹³³ the actual or perceived neutrality of Swiss law,¹³⁴ the use of English and Swiss law in model contracts,¹³⁵ the international presence and dominance of English law firms,¹³⁶ and, finally, the colonial past of the UK.¹³⁷ He concludes that, while all of these factors may contribute to the popularity of English and Swiss law in one way or the other, none of them alone can explain their overall attractiveness. Cuniberti, therefore, sets out to analyse whether parties' preference for English and Swiss law can be attributed to intrinsic factors.¹³⁸ He starts by exploring some **general characteristics of English and Swiss contract law** frequently cited by academics practitioners and interested institutions to back the claim that both laws are of superior quality.¹³⁹ In particular, he explores the validity of some of the most prominent claims relating to English law, namely (1) that it offers greater legal certainty than other laws, (2) that it is more flexible than other laws, (3) that it addresses the needs of modern commerce better than other laws, and (4) that it knows fewer mandatory rules than other laws. However, he concludes that none of these claims can stand and that they can hardly explain why English and Swiss law are so much more attractive than other laws.¹⁴⁰ He, therefore, proceeds to analyse a number of **specific features of English and Swiss contract law**,¹⁴¹ but again finds that there is no empirical evidence that these features actually drive parties' choices. He concludes, that the popularity of English or Swiss law is probably driven by other reasons, notably different attitudes towards the issue of choice of law.¹⁴² Among others, he ventures the hypothesis that parties' unwillingness to invest a lot of money into the search for the contract law that best suits their needs coupled with problems of bounded rationality make them stick to the market leader and, hence, English and Swiss law. This hypothesis, however, also awaits empirical foundation.

2.2.2. Dispute resolution

The previous analysis has revealed that commercial parties choose English and Swiss law more often as applicable law than other laws. Interestingly, the reasons for this finding are still not entirely clear. However, it triggers the question of whether the popularity of English and Swiss law also translates to English and Swiss courts? Do commercial parties who choose English and Swiss law also show a preference for settling international disputes in England

¹³⁰ Cuniberti, supra note 116.

¹³¹ Cuniberti, supra note 116, at 475 ff.

¹³² Cuniberti, supra note 116, at 475 ff.

¹³³ Cuniberti, supra note 116, at 482 ff.

¹³⁴ Cuniberti, supra note 116, at 484 ff.

¹³⁵ Cuniberti, supra note 116, at 486 ff.

¹³⁶ Cuniberti, supra note 116, at 488 ff.

¹³⁷ Cuniberti, supra note 116, at 490 ff.

¹³⁸ Cuniberti, supra note 116, at 493 ff.

¹³⁹ Cuniberti, supra note 116, at 497 ff.

¹⁴⁰ Cuniberti, supra note 116, at 500.

¹⁴¹ Cuniberti, supra note 116, at 501 ff.

¹⁴² Cuniberti, supra note 116, at 509 ff.

and Switzerland? In the following, I will, again, analyse available empirical evidence first (infra 2.2.2.1.) and before turning to potential explanations (infra 2.2.2.2.).

2.2.2.1. Empirical findings

Just like choice of law clauses, choice of forum clauses have been the subject of a number of empirical studies over the past years. The study that holds the most important insights for present purposes is the **Oxford Civil Justice Study** of 2008¹⁴³ discussed earlier.¹⁴⁴ It revealed that for a staggering 97% of respondents the possibility of choosing the dispute resolution forum was important or very important.¹⁴⁵ In addition, 90% indicated that they had often or at least occasionally chosen to litigate in a foreign country.¹⁴⁶ Asked what their preferred forum was, 17% of the respondents pointed to England, 12% to Italy, 10% to Germany and Switzerland, 9% to France, 6% to the Netherlands and 5% to Poland and Spain.¹⁴⁷ However, when the respondents' home jurisdiction was excluded, **Switzerland** emerged as the most popular forum (19%), followed by **England** (14%), France (13%), Germany (10%), Netherlands (3%) and Italy (1%).¹⁴⁸ The Oxford Civil Justice Study, thus, suggests that England and Switzerland do not only offer the most popular laws, they also offer the most popular courts.

In view of England, this finding is supported by a number of other studies, which, however, do not take a comparative approach. According to a study commissioned by the UK Ministry of Justice and conducted by a group of scholars around Eva Lein from the **British Institute of International and Comparative Law** in 2015,¹⁴⁹ for example, 88% of the respondents indicated that they had agreed or recommended a choice of English courts,¹⁵⁰ even though only roughly 56% of respondents (126 out of 205)¹⁵¹ came from the UK.¹⁵² In addition, respondents revealed that in a substantial number of cases the choice of English courts had been suggested by a party based outside the UK.¹⁵³

That English courts are popular for foreign parties is also suggested by data relating to the **London Commercial Court**. According to official statistics, the Court, which is a special sub-division of the English High Court, deals with roughly 1100 cases per year.¹⁵⁴ From these

¹⁴³ Vogenauer & Hodges, supra note 87.

¹⁴⁴ The other two studies discussed, notably the Oxford European Contract Law Study, supra note 87, did not deal with dispute resolution.

¹⁴⁵ Vogenauer & Hodges, supra note 87, at 25 (Question 28).

¹⁴⁶ Vogenauer & Hodges, supra note 87, at 25 (Question 29).

¹⁴⁷ Vogenauer & Hodges, supra note 87, at 26 (Question 30).

¹⁴⁸ Vogenauer & Hodges, supra note 87, at 26 (Question 31.1).

¹⁴⁹ Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants & José del Rio, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts (2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf.

¹⁵⁰ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 14.

¹⁵¹ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 45 (Question 2).

¹⁵² Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 5.

¹⁵³ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 50 (Question 21).

¹⁵⁴ HM Courts & Tribunals Service, Freedom of Information Request No 88097 (January 2014).

1100 cases roughly 80% involve at least one foreign party.¹⁵⁵ And in roughly 50% of the cases both parties are foreign.¹⁵⁶ To be sure, the notion of “foreign” in these statistics includes parties from Scotland and Northern Ireland.¹⁵⁷ However, it can be assumed that the number of Scottish and Northern Irish parties is not skyrocketing high. Unfortunately, the official statistics do not indicate where the foreign parties come from. However, according to studies conducted by Portland Communications, roughly 20% of the judgments delivered by the Commercial Court involve at least one party from the EU.¹⁵⁸ Assuming that number is representative for all the cases heard by the Commercial Court this means that more than 200 cases per year involve at least one party from the EU.

2.2.2.2. Analysis

The above discussion clearly suggests that England and Switzerland are not only Europe’s market leaders when it comes to choice of law. They also lead Europe’s litigation market. In the search for explanations for this finding, again, the **Oxford Civil Justice Study** of 2008 provides answers. It also asked businesses what factors influenced their choice of forum and requested the respondents to rate the various factors they had already been requested to rate when asked what factors influenced their choice of the applicable law.¹⁵⁹ And not surprisingly the answers revealed again a preference for **qualitative factors**, albeit in slightly different order:¹⁶⁰ The **quality of judges and courts** turned out to matter for most parties, followed by the fairness of the outcomes, absence of corruption, predictability of outcomes and the speed of dispute resolution.¹⁶¹ In addition, the quality of the contract law, the availability of arbitration, language, the costs of dispute resolution, the quality of lawyers, the absence of bureaucracy, law, company law, availability or absence of disclosure/discovery and advice by law firms turned out to be important.¹⁶² Other factors, notably the availability or absence of cross-examination, the availability or absence of class/collective action, the availability or absence of judiciary to encourage parties to settle, as well as the availability of other alternative disputes resolution mechanism such as ombudsman schemes, small claims procedures and mediation only had a minor influence on parties’ decision to choose a particular forum.

The findings of the Oxford Civil Justice Study are backed by the above-mentioned study relating to the attractiveness of English courts commissioned by the UK Ministry of Justice and conducted by the **British Institute of International and Comparative Law** in 2015. In that study, the participants – mainly lawyers from various backgrounds and from various

¹⁵⁵ HM Courts & Tribunals Service, Freedom of Information Request No 88097 (January 2014). See also Lein, McCorquodale, McNamara, Kupelyants & del Rio, *supra* note 149, at 10; Judiciary of England and Wales, Report of the Commercial and Admiralty Court 2004-2005, at 4 f.

¹⁵⁶ HM Courts & Tribunals Service, Freedom of Information Request No 88097 (January 2014). See also Lein, McCorquodale, McNamara, Kupelyants & del Rio, *supra* note 149, at 10; Judiciary of England and Wales, Report of the Commercial and Admiralty Court 2004-2005, 4 f.

¹⁵⁷ HM Courts & Tribunals Service, Freedom of Information Request No 88097 (January 2014). See also Lein, McCorquodale, McNamara, Kupelyants & del Rio, *supra* note 149, at 10, footnote 24.

¹⁵⁸ Portland Communications, Who Uses the Commercial Court? – 2015 (2015); Portland Communications, Who Uses the Commercial Court? – 2016 (2016); Portland Communications, Who Uses the Commercial Court? – 2017 (2017), available at <<http://www.portland-communications.com>>.

¹⁵⁹ Vogenauer & Hodges, *supra* note 87, at 28 (Question 33).

¹⁶⁰ Vogenauer & Hodges, *supra* note 87, at 28 (Question 33).

¹⁶¹ Vogenauer & Hodges, *supra* note 87, at 28 (Question 33).

¹⁶² Vogenauer & Hodges, *supra* note 87, at 28 (Question 33).

professions – were asked to rate different factors according to their relevance for a choice of English courts. The answers revealed that for most respondents the **reputation and experience of English judges**, their perceived neutrality as well as the choice of English contract law were very relevant or even decisive for an English choice of court agreement.¹⁶³ Other aspects, such as the efficiency of remedies, procedural effectiveness, quality of English legal counsel and legal services as well as language, speed and enforceability of English judgments in foreign countries were dubbed very relevant or relevant.¹⁶⁴ The overall costs of litigation as well as the court fees, in contrast, were considered to be of no or of little relevance by most respondents.¹⁶⁵

2.3. Conclusion

International commercial contracts operate in a **complex legal environment** (supra 2.1.). They are subject to a mix of various instruments of various origins depending on whether aspects of substantive law (supra 2.1.1.), choice of law (supra 2.1.2.) or dispute settlement (supra 2.1.3.) are at issue. Commercial parties which operate across borders, therefore, potentially face substantial legal uncertainty. To overcome this uncertainty, they usually resort to **choice of law and choice of forum clauses** (supra 2.2.1. and 2.2.2.). When they do, English law and English courts as well as Swiss law and Swiss courts turn out to be particularly popular. According to a number of empirical studies the laws and the courts of both countries are more often chosen than the laws and the courts of other countries (supra 2.2.1. and 2.2.2.). The same studies likewise suggest that parties' choices are mainly driven by qualitative factors, notably the **quality of the contract law** as such (supra 2.2.1.2.) and the **quality of courts and judges** (supra 2.2.2.2.).

¹⁶³ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 50 (Question 22).

¹⁶⁴ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 50 (Question 22).

¹⁶⁵ Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 50 (Question 22).

3. IMPLICATIONS

KEY FINDINGS

- Current commercial practice (supra 2.2.) indicates that the laws and the courts of some countries, notably **England and Switzerland**, appeal more to international commercial parties than the laws and the courts of others. Commercial law competence, thus, is not equally distributed across countries (infra 3.1.).
- This finding is not per se problematic. Problems, however, may occur when not all commercial parties can actually choose the law or the courts that are commonly perceived to be the best. Many parties, for example, are not able to bring their disputes before English courts because the costs of litigating in England are notoriously high. They will depend on good alternatives in their home country or in the home country of their contracting partner. However, when looking at the **civil justice systems of the Member States** it becomes clear that not all of them live up to the expectations of commercial parties (infra 3.1.).
- The **prospect of Brexit** adds to the problem (infra 3.2.). Since the UK will most likely lose its access to the European Judicial Area, English court proceedings will no longer benefit from the many European Regulations that ease judicial cooperation in civil matters (infra 3.2.1.). Moreover, English judgments will no longer be directly enforced in accordance with the Brussels Ia Regulation. Even commercial parties who were thus far happy to settle their dispute in England might, therefore, reconsider their decision and look for **alternatives in the remaining Member States**.
- In light of Brexit, some Member States have taken actions to make their civil justice systems more attractive for international commercial litigants (infra 3.2.2.). **Germany and France**, for example, have introduced special chambers that will conduct at least parts of the procedure in English if the parties so wish (infra 3.2.2.1. and 3.2.2.2.). In the **Netherlands and Belgium** plans are under way to establish specialized commercial courts for international matters (infra 3.2.2.3. and 3.2.2.4.).

The preceding analysis of current commercial practice has revealed that the laws and the courts of some countries, notably England and Switzerland, appeal more to international commercial parties than the laws and the courts of others. In the following I will first point to some general implications that follow from this finding (infra 3.1.). Then I will explore in more detail the implications of Brexit (infra 3.2.).

3.1. Implications in general

The first implication that follows from the above finding relates to **commercial law competence** in general. Apparently, that competence is not equally distributed across countries, and notably across EU Member States in the eyes of commercial parties: some laws are regarded as better, and some courts are regarded as more competent. Some European companies even prefer to choose a foreign law (English law, Swiss law) and a foreign court (English courts, Swiss courts) over their home law and their home courts. The question that naturally follows from this finding is, whether this is a problem?

As a matter of principle, there is, of course, nothing to be said against commercial parties actively choosing the laws and the courts which they think are the best. On the contrary, the

fact that parties make active choices may lead to regulatory competition that may help to improve the quality of legal systems across the board.¹⁶⁶ Problems, however, may occur when not all commercial parties can actually choose to submit their relationship to the law or the courts that are commonly perceived to be the best. Take, for example, England. While it seems to be agreed that English law and English courts hold a number of attractions for commercial parties, the costs of actually litigating in England, notably in the London Commercial Court, are notoriously high.¹⁶⁷ Many parties, notably **small and medium-sized companies or micro-businesses**, will, therefore, not be able to bring their disputes before English courts. They will depend on good alternatives in their home countries or in the home countries of their contracting partner to enforce their claims.¹⁶⁸ And those alternatives must be able to give commercial parties what they need.

However, when looking at the civil justice systems of other Member States it seems that not all are in a position to do just that. According to the earlier-mentioned **Oxford Civil Justice Study** 70% of respondents avoid certain fora, notably Italy and Eastern European countries, for reasons that pertain to the quality of their civil justice systems.¹⁶⁹ A recent **Eurobarometer survey** additionally shows, that a majority of companies from Bulgaria, Croatia, Italy, Slovakia, Slovenia and Spain openly rate the justice systems of their home countries as "bad".¹⁷⁰ And in the 2017-2018 **Rule of Law Index of the World Justice Project** the civil justice systems of these and some other Member States are ranked fairly lowly.¹⁷¹ Italy, for example, only comes out 52nd in civil justice, Bulgaria 49th, Greece 46th, Croatia 44th, and Slovenia 42nd. Quite obviously, some Member States do not live up to the expectations of commercial parties. However, the same also holds true for Member States whose civil justice systems are generally ranked highly. Germany, for example, is ranked 3rd in civil justice in the Rule of Law Index of the World Justice Project. Still, German courts have lost 35% of their cases between 2005 and 2015.¹⁷² And while not all of these cases are international commercial cases, this development certainly shows that the attractiveness of German courts has not increased over the last years.

Against this background, it is fair to say that many EU Member States lack the commercial law competence that make their laws and their courts attractive for international commercial parties. This, in turn, is problematic because it is of utmost importance for cross-border trade and, hence, for the **functioning of the internal market**, that parties trust that they will be able to go to court to enforce their rights. If this trust is missing or undermined, there is a risk that commercial parties and in particular small and medium-sized companies will abstain from engaging in cross-border commercial activity – or decide not to enforce their rights

¹⁶⁶ See for a more detailed discussion of the phenomenon of regulatory competition Giesela Rühl, *Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications*, ERCL 9 (2013) 61 ff. See also the contributions in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (2013).

¹⁶⁷ See, for example, Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation* (2009) at 57 ff., 172 ff.

¹⁶⁸ According to Article 4(1) of the Brussels Ia Regulation commercial parties may always be sued in the Member State where they are domiciled.

¹⁶⁹ Vogenauer & Hodges, *supra* note 87, at 30 (Question 34.2.).

¹⁷⁰ In Croatia 67% of all companies believe that the country's justice system is bad, in Slovakia it's 66%, in Italy 63%, in Bulgaria 61%, in Spain 59% and in Slovenia 53%. See for details Flash Eurobarometer 448, *Perceived independence of the national justice systems in the EU among companies*, Briefing Note, April 2017, available at http://ec.europa.eu/commfrontoffice/publicopinion/archives/flash_arch_en.htm.

¹⁷¹ World Justice Project, *Rule of Law Index 2017-2018*, available at <https://worldjusticeproject.org>.

¹⁷² See for a detailed analysis Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb* (2017) 93 ff.

across borders. The EU should, therefore, have a fundamental interest in increasing the overall commercial law competence in the EU Member States. This holds also true for another reason: courts in the EU Member States are not only competing with courts in other Member States for international cases. They are also competing with private dispute settlement institutions, notably arbitral institutions. If the Member States do not make an attractive offer, commercial parties will decide to settle their disputes out of court. Again, this is not per se problematic. On the contrary, private dispute resolution offers enormous advantages for the parties. However, going to court and settle a dispute in (public) court proceedings creates positive externalities:¹⁷³ public decisions rendered by public courts in public proceedings create knowledge about the law and its application in practice – knowledge that will benefit not only the immediate parties to the proceedings but also other parties. They will be placed in a position to adjust their behaviour to the law. When negotiating a contract, they may, for example, avoid clauses that have previously been held unenforceable. After a dispute has arisen they will be able to determine whether it makes sense to go to court or whether it is better to fulfil the contract or otherwise settle the matter. Public decisions, thus, create legal certainty which is of the essence for commercial parties. Therefore, it is not desirable – from a public good perspective – to have all or too many disputes settled out of court.

3.2. Implications of Brexit in particular

The preceding analysis suggests that the uneven distribution of commercial law competence across the EU comes with problems. The fact that the Member State with the most popular law and the most popular courts, the UK, is about to leave the EU, adds to the problem and triggers a number of questions. In the following I will dwell on two of them that matter for the present study: first, how will Brexit affect the attractiveness of English law and England as a place for settling commercial disputes (infra 3.2.1.)? And second, how will Brexit affect the attractiveness of other laws and courts (infra 3.2.2.)?

3.2.1. Settlement of international disputes in the UK

3.2.1.1. Judicial cooperation pre-Brexit

Judicial cooperation in cross-border civil and commercial matters has been high on the agenda of the European legislature ever since the adoption of the Treaty of Amsterdam. On the basis of Article 81 TFEU (ex-Art 61 lit. c), 65 ECT) it has – to date – adopted a total of eighteen Regulations. From these eighteen Regulations, twelve are applicable in the UK,¹⁷⁴ among them virtually all that relate to civil and commercial matters.¹⁷⁵ In force are in particular the earlier mentioned **Rome I and Rome II Regulations**¹⁷⁶ that determine the

¹⁷³ See Wagner, supra note 172, at 86 ff.

¹⁷⁴ The UK enjoys a special status when it comes to judicial cooperation in civil matters: according to Article 1 of Protocol No 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the UK does not participate in the adoption of any measures taken under Title V of Part Three TFEU ("Area of Freedom, Security and Justice") including measures adopted under Chapter 4 of Title V TFEU ("Judicial cooperation in civil matters"). According to Article 3 of the Protocol the UK may, however, declare on a case-by-case basis, that it wishes to take part in any such measures.

¹⁷⁵ The only Regulation in civil and commercial matters the UK has not adopted is Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ EU 2014, L 189/59.

¹⁷⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 2008, L 177/6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ EU 2007, L 199/40.

law applicable to contractual and non-contractual obligations as well as the **Brussels Ia Regulation**¹⁷⁷ that deals with jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters. In force are also a number of Regulations that are meant to ease the settlement of cross-border disputes more generally but which will not be discussed here. These include the Service Regulation,¹⁷⁸ the Evidence Regulation,¹⁷⁹ the Enforcement Order Regulation,¹⁸⁰ the Small Claims Regulation,¹⁸¹ the Payment Order Regulation¹⁸² and the Insolvency Regulation.¹⁸³ Together all these Regulations establish a fairly clear and predictable legal framework for the settlement of disputes with a foreign element.

3.2.1.2. Judicial cooperation post-Brexit

Once Brexit becomes effective, the above-mentioned regulations will cease to apply in the UK.¹⁸⁴ By the same token they will cease to apply in the remaining Member States in relation to the UK if and to the extent that they do not cover cases involving third states.¹⁸⁵ The interesting question, therefore, is which provisions will take their place?

The answer depends, of course, on the steps the UK and the EU will take (unilaterally, bilaterally or multilaterally) to fill the void. And as things stand at the moment these are largely unclear: the **Brexit negotiations between the EU and the UK** that have started in June 2017 have not yielded any tangible success as regards judicial cooperation in civil and commercial matters.¹⁸⁶ The Draft Agreement on the withdrawal of the UK from the EU

¹⁷⁷ Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2001, L 12/1, recast through 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 (recast), OJ EU 2012, L 351/1.

¹⁷⁸ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ EC 2000, L 160/37, recast through Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ EU 2007, L 324/79.

¹⁷⁹ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ EC 2001, L 174/1.

¹⁸⁰ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ EC 2004, L 143/15.

¹⁸¹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ EC 2007, L 199/1, recast through Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ EU 2015, L 341/1.

¹⁸² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ EC 2006, L 399/1.

¹⁸³ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ EC 2000, L 160/1 recast by Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ EU 2015, L 141/19.

¹⁸⁴ Richard Aikens & Andrew Dinsmore, *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?* *Eur. Bus. L. Rev.* 27 (2016) 903, at 904 f.; Guillaume Croisant, *Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international*, *J.T.* 2017, 24, at 26; Andrew Dickinson, *Back to the future: The UK's EU exit and the conflict of laws*, *J. Priv. Int'l L.* 12 (2016) 195, at 197 f.; Sara Masters & Belinda McRae, *What Does Brexit Mean for the Brussels Regime?* *J. Int'l Arb.* 2016, 483, at 483 f.

¹⁸⁵ Croisant, *supra* note 184, at 26.

¹⁸⁶ See for an overview of the evolving position as regards judicial cooperation Dickinson, *supra* note 184, at 544 ff.

published in March 2018¹⁸⁷ merely deals with the question of when the European regulations will stop to apply in the UK and in relation to the UK, but does not detail what the relationship might look like after the withdrawal. The same holds true for the Negotiation Guidelines published by the European Council in March 2018.¹⁸⁸

The UK, however, has laid out its vision for the future of judicial cooperation in civil and commercial matters in a presentation of June 2018,¹⁸⁹ a White Paper of July 2018¹⁹⁰ and a Position Paper of September 2018.¹⁹¹ Building on two earlier Position Papers¹⁹² as well as two White Papers,¹⁹³ the UK makes clear that it strives for a new, **bespoke bilateral agreement** with the EU to deal with core issues of choice of law, jurisdiction and recognition and enforcement of foreign judgments after Brexit. Unfortunately, however, the UK does not detail what this agreement might look like. In particular it does not deal with the difficult – and potentially deal-breaking – question of interpretation and the future role of the CJEU.¹⁹⁴ In addition, it ignores that a new bilateral agreement might not be too attractive for the EU. To be sure, adoption of a bilateral agreement would put the relationship between the UK and the EU – in the interests of businesses, families and consumers – on a new basis and provide legal certainty. However, it would also lead to further fragmentation and additional complexity of judicial cooperation. It would require parties and courts in the remaining Member States to apply different sets of rules to the same legal questions depending on whether the case has a connection to another Member State, to the UK or to some other third state.

¹⁸⁷ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018, available at https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

¹⁸⁸ European Council (Article 50) guidelines on the framework for the future EU-UK relationship, 23 March 2018, available at <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>.

¹⁸⁹ HM Government, Framework for the UK-EU partnership. Civil judicial cooperation, June 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715834/Framework_for_the_UK-EU_partnership_Civil_judicial_cooperation.pdf.

¹⁹⁰ HM Government, The Future Relationship between the United Kingdom and the European Union, July 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

¹⁹¹ HM Government, Handling civil legal cases that involve EU countries if there's no Brexit deal, 13 September 2018, available at <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal>.

¹⁹² HM Government, Providing a cross-border civil judicial cooperation framework. A Future Partnership Paper, 22 August 2017, available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>; HM Government, Enforcement and dispute resolution. A Future Partnership Paper, 23 August 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

¹⁹³ Department for Exiting the European Union, The United Kingdom's exit from and new partnership with the European Union, 2 February 2017, available at <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper#history>; Department for Exiting the European Union, Legislating for the United Kingdom's Withdrawal from the European Union, March 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf.

¹⁹⁴ See for a detailed discussion of the problems associated with a bilateral agreement Giesela Rühl, Judicial Cooperation in Civil and Commercial Matters after Brexit: Which way forward? ICLQ 67 (2018) 99 ff. See also Burkhard Hess, Das Lugano-Übereinkommen und der Brexit, in Burkhard Hess, Erik Jayme & Heinz-Peter Mansel (eds), Europa als Rechts- und Lebensraum, Liber Amicorum für Christian Kohler zum 75. Geburtstag (2018) 179, at 191 f. who insists that the binding jurisdiction of the CJEU is a "red line" for any negotiations about a bilateral agreement.

Against this background it is far from clear that the EU and the UK will be able to agree on the bespoke agreement the UK is hoping for. In any event, the negotiation of any such an agreement will be **time-consuming**. Considering how many years it took to agree on the existing EU instruments and considering that judicial cooperation will not be a priority during the Brexit negotiations, it is very unlikely that a new agreement can be negotiated, signed and enter into force at the end of the interim period on 31 December 2020. As a consequence, **chances are that the UK will leave the EU without any agreement** as regards judicial cooperation. What will happen in this case? In the Papers mentioned earlier the UK indicates that it is prepared to apply the Rome I and Rome II Regulations unilaterally should no special agreement with the EU be reached. In addition, the UK indicates that it will sign the Lugano Convention of 2007 as well as the Hague Convention on Choice of Court Agreements of 2005. The current legal framework as regards judicial cooperation will, therefore, most likely be replaced by a **complex patchwork of provisions** which are limited in their reach and their scope¹⁹⁵

3.2.2. Settlement of international disputes in other Member States

The above analysis indicates that, after Brexit, a number of essential features of the European judicial area, including the direct and immediate enforcement of judgements will no longer be available in the UK and in relation to the UK. Companies that have an interest in these features will, therefore, have to look for **alternative fora** to settle their disputes. This holds specifically true for small and medium-sized companies as well as micro-businesses which cannot easily resort to private dispute settlement mechanisms such as arbitration. A number of Member States, notably **Germany, France, the Netherlands, and Belgium** have, therefore, recently taken measures – or unveiled plans – designed to make their civil justice systems more attractive for international commercial parties.¹⁹⁶ In the following I will briefly elaborate on these measures. I will start with Germany (infra 3.2.2.1.) before moving on to France (infra 3.2.2.2.), the Netherlands (infra 3.2.2.3.) and Belgium (infra 3.2.2.4.).

3.2.2.1. Germany

In Germany, plans to make the local civil justice system more attractive for international commercial litigants have long been discussed.¹⁹⁷ However, only the prospect of Brexit has triggered actual results. First, it has induced the creation of a special chamber for international commercial matters in Frankfurt (infra 3.2.2.1.1.). And, second, it has revived plans to introduce English as optional court language (infra 3.2.2.1.2.).

3.2.2.1.1. Frankfurt Justice Initiative

In Frankfurt the expected withdrawal of the UK from the EU stimulated the launch of the "Frankfurt Justice Initiative".¹⁹⁸ Created to "strengthen Frankfurt as a hot spot for commercial

¹⁹⁵ See for a detailed discussion of all these options Rühl, supra note 194, 99 ff.

¹⁹⁶ See for an overview Xandra Kramer, A Common Discourse in European Private International Law? A View from the Court System, in Jan von Hein, Eva-Maria Kieninger & Giesela Rühl (eds), How European is European Private International Law? (forthcoming 2019).

¹⁹⁷ See for an overview Christoph Kern, English as Court Language in Continental European Courts, Erasmus L. Rev. 5 (2012) 187, at 197 ff.

¹⁹⁸ Georg Dalitz, Justizinitiative Frankfurt – too little too late? ZRP 2017, 247. See for an early account Burkhard Hess, The Justice Initiative Frankfurt am Main 2017, Conflictoflaws.net, 31 March 2017, available <<http://conflictolaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>>.

litigation in the European Judicial Area”¹⁹⁹ the Initiative successfully proposed to establish a **special chamber for international commercial matters** (Kammer für internationale Handelssachen) at the Landgericht Frankfurt (District Court).²⁰⁰ Operational **since 1 January 2018** the chamber hears cases in commercial matters 1) if the matter is international in nature and 2) if the parties declare that they want to conduct the proceedings in English and waive the use of a translator.²⁰¹

The new chamber, like all German commercial chambers at the District Court level, consists of three judges, a tenured full-time judge and two lay (non-lawyer) judges from the local business community appointed upon recommendation of the Chamber of Industry and Commerce (Industrie- und Handelskammer) for a term of five years. The new chamber will conduct the **proceedings in English**. However, since it is bound to follow the rules of the German Court Constitution Act (Gerichtsverfassungsgesetz)²⁰² and the Code of Civil Procedure (Zivilprozessordnung),²⁰³ the use of English will essentially be limited to the oral hearing and the submission of documents while judgments and any other court decisions as well as the minutes of the proceedings will have to be delivered in German.²⁰⁴ The chamber may, of course, prepare an English translation. However, any such translation will come on top and not replace the German version.

3.2.2.1.2. Establishment of International Commercial Chambers

Since the use of English before German courts is currently still limited, the prospect of Brexit has additionally revived **plans to introduce English as optional court language**.²⁰⁵ On 20 February 2018 the Upper House of the German Parliament (Bundesrat) introduced a draft bill that allows the federal states (Bundesländer) to establish international commercial chambers at the district courts (Landgerichte) which shall, upon request of the parties, conduct the entire proceedings in English freed from the restrictions of current German law.²⁰⁶ Appeals against any decision from the new international commercial chamber will likewise be conducted in English. According to the draft bill only the German Supreme Court may decide to deal with a case in German even if it originated in one of the international commercial chambers.

¹⁹⁹ Hess, supra note 198.

²⁰⁰ A brief (English language) presentation of the new chamber is available on the Landgericht Frankfurt’s website: <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lq-bezirk-frankfurt-m/lq-frankfurt-m/kammer-für-internationale-handelssachen#en>.

²⁰¹ Similar initiatives have been launched in other German states. The Justice Minister of North Rhine-Westphalia, for example, has recently announced to establish specialized commercial court in Düsseldorf in order to promote Düsseldorf as a place for settling international commercial disputes, see <https://rsw.beck.de/aktuell/meldung/nrw-will-london-als-top-justizstandort-in-wirtschaftssachen-abloesen>. See also Rupprecht Podszun & Tristan Rohner, Nach dem Brexit: Die Stärkung staatlicher Gerichte für wirtschaftliche Streitigkeiten, BB 2018, 480 ff.

²⁰² An official English translation is available at http://www.gesetze-im-internet.de/englisch_gvg/.

²⁰³ An official English translation is available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.htm.

²⁰⁴ Cf. §§ 184, 185 Court Constitution Act. See for details Michael Stürner, Litigation in the 21st century: how attractive is the German civil justice system? TCR 2016, 145 ff.; Wolfgang Hau, Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte, Ralf Michaels & Dennis Solomon (eds), Liber Amicorum Klaus Schurig (2012) 49 ff.

²⁰⁵ See for a more detailed discussion of this as well as other (older) initiatives aimed at introducing English as court language Kern, supra note 197, at 192 ff.

²⁰⁶ Gesetzesantrag der Länder Nordrhein-Westfalen, Bayern, Hamburg, Hessen, Niedersachsen vom 20. Februar 2018, Einführung von Kammern für Internationale Handelssachen, BR-Drucksache 53/18.

The draft bill has generally been well received both in practice and in literature. Nonetheless, it is unclear whether it will eventually be adopted: it was introduced twice before, in 2012 and 2016, but never even debated in Parliament. Therefore, it remains to be seen what will happen this time. However, in view of the hopes to attract international disputes from the UK in the wake of Brexit, the chances of success are better than ever before.

3.2.2.2. France

Similar activities as in Germany can be observed in France.²⁰⁷ Here, the prospect of Brexit has recently induced the establishment of an **international chamber at the Cour d'appel (Court of Appeals) in Paris** (Chambre Internationale de la Cour d'Appel de Paris – CICAP).²⁰⁸ Operational **since 1 March 2018**, the CICAP has jurisdiction over transnational commercial disputes, including disputes related to commercial contracts, transport, unfair competition, anti-competitive commercial practice, banking and finance.²⁰⁹ In addition, it hears cases in second instance coming from the international chamber at the Tribunal de commerce (Commercial Court) in Paris²¹⁰ which has been conducting proceedings in English since 2010.²¹¹

As regards language the CICAP follows the Commercial Court and allows parties to **submit documentary evidence in English**.²¹² In addition, it allows parties, witnesses, experts and non-French legal counsel to **plead in English**.²¹³ However, just like in Germany there are limits to the use of English: to begin with a simultaneous translation service must be arranged – with the translator chosen by mutual consent of the parties and the expenses borne by the party wishing to plead in English.²¹⁴ In addition, procedural acts including judgments have to be drafted in French.²¹⁵ However, in contrast to Germany where it is in the discretion of the judge whether the judgments and other decisions will be translated into English, an official translation has to be made in France.²¹⁶

Beyond language the Protocol relating to the CICAP provides for a number of **innovations as regards procedure** – all aimed at making Paris more attractive for international litigants. Those are too numerous to be detailed here.²¹⁷ Suffice it to say that the CICAP will conduct

²⁰⁷ See for a first English-language appraisal Duncan Fairgrieve & Solenn le Tutour, Doors open for First Hearing of International Chamber at Paris Court of Appeal, Conflictolaws.net, 5 June 2018, available at <<http://conflictolaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>>.

²⁰⁸ See for details the Protocol on Procedural Rules Applicable to the International Chamber of the Court of Appeals of Paris of January 26, 2018, available in both French and English at <<http://www.ca-paris.justice.fr/index.php?rubrique=11048&article=31537>>.

²⁰⁹ Article 1.1 of the Protocol, supra note 208.

²¹⁰ Article 1.2. of the Protocol, supra note 208.

²¹¹ See for a more detailed presentation of the 2010 initiative Emmanuel Jeuland, The International Division of the Paris Commercial Court, TCR 2016, 143 ff.; Kern, supra note 197, at 195 ff.

²¹² Article 2.3 of the Protocol, supra note 208.

²¹³ See for details Article 2.4 of the Protocol, supra note 208.

²¹⁴ Article 3.2. of the Protocol, supra note 208.

²¹⁵ Article 2.1 of the Protocol, supra note 208.

²¹⁶ Article 7 of the Protocol, supra note 208.

²¹⁷ See for details Article 4 ff. of the Protocol, supra note 208.

the proceedings in a manner that quite obviously follows the English (success) model. For example, it will set a timetable detailing 1) when the parties have to exchange their briefs, 2) when the parties have to appear in person, 3) when parties will have to submit the written statement, 4) when witness and expert will be heard, 5) when proceedings will be closed and 6) when the judgment will be delivered.²¹⁸ In addition, the CICAP may initiate a (limited) discovery process in order to obtain documents²¹⁹ and to cross-examine witnesses and experts.²²⁰

3.2.2.3. Netherlands

Even more ambitious reform plans are under way in the Netherlands. Here, a draft bill adopted by the Second Chamber (House of Representatives) of the Dutch Parliament in March 2018 and currently under discussion in the First Chamber (Senate), envisions the establishment of a **Netherlands Commercial Court (NCC)** and of a **Netherlands Commercial Court of Appeals (NCCA)**.²²¹ If the draft bill is adopted, the NCC and the NCCA is expected to be up and running by the end of 2018.²²² Set up as special chambers at the District Court (Rechtbank) and the Court of Appeals (Gerechtshof) Amsterdam respectively, the NCC and the NCCA will then offer a full first and second instance in English for international commercial cases.²²³

Cases before the NCC and the NCCA will be heard by a panel of three judges²²⁴ selected from all courts in the Netherlands based on their outstanding knowledge of business law, experience in international dispute resolution and proficiency in English. Proceedings will be governed by Dutch procedural law. However, additional rules specifically designed for complex international cases including special provisions for summary proceedings will be put in place.²²⁵ As regards language, these rules provide that the **procedure will be conducted in English** unless the parties unanimously agree to have the proceedings conducted in Dutch.²²⁶ If a party wishes to submit non-English Documents the court may order that party

²¹⁸ See for details Article 4 of the Protocol, supra note 208.

²¹⁹ See for details Article 5.1 of the Protocol, supra note 208.

²²⁰ See for details Article 5.4 ff. of the Protocol, supra note 208.

²²¹ Tweede Kamer der Staten-Generaal, Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam, vergaderjaar 206-2017, 34 761, nr. 2. See for details the draft Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (Netherlands Commercial Court) and the Amsterdam Court of Appeal (Netherlands Commercial Court of Appeal (The NCC Rules), available in English at https://www.rechtspraak.nl/SiteCollectionDocuments/concept-procesreglement-ncc_en.pdf).

²²² Originally, the NCC and the NCCA was supposed to open its doors on 1 January 2018. However, due to delays in the legislative process the opening had to be postponed. At the time of writing the exact opening date was still unclear.

²²³ See for details Article 1.1.1. and 1.2.1. of the draft NCC Rules, supra note 221. See also the presentation of the NCC at <https://www.rechtspraak.nl/English/NCC> as well as the contributions by Pauline Ernste & Freerk Vermeulen, The Netherlands Commercial Court – an attractive venue for international commercial disputes, TCR 2016, 127, at 132 ff.; Christoph Kern & Gregor Dalitz, Netherlands Commercial Court, ZZPInt 21 (2016) 119 ff.; Duco J. Oranje, The coming into being of the Netherlands Commercial Court, TCR 2016, 122 ff. See also Dalitz, supra note 198, at 249 f.

²²⁴ Article 3.5.1. of the draft NCC Rules, supra note 221.

²²⁵ See the draft NCC Rules, supra note 221.

²²⁶ Article 2.1.2. of the draft NCC Rules, supra note 221.

to provide a (certified) translation.²²⁷ However, if the document is in Dutch, French or German a translation will normally not be required.²²⁸ All communications with the court will proceed via an electronic online communication tool, the NCC/NCCA portal.²²⁹

3.2.2.4. Belgium

Equally ambitious plans as in the Netherlands are under way in Belgium: in October 2017 the Belgian Government announced its intention to establish a specialized English-speaking court, the **Brussels International Business Courts (BIBC)**, aimed at turning Brussels into a hub for commercial litigation in the wake of Brexit. After criticisms of the High Council of Justice (Conseil supérieur de la Justice),²³⁰ a revised draft bill was published on 15 May 2018.²³¹ According to the draft, the BIBC will hear international cases between commercial parties if the parties agree on the BIBC's jurisdiction before or after a dispute has risen.²³² In contrast to the special international chambers in Frankfurt and Paris – but just like the NCC and the NCCA – the BIBC will offer international litigants a **complete English procedure**.²³³ It will communicate in English and accept English submissions as well as English documentary evidence. In addition, it will hold English hearings, hear witnesses and experts in English and, most importantly, deliver judgments in English.

As regards procedure, the BIBC will not follow the normal rules of Belgium civil procedure, but the **UNCITRAL Model Law on international arbitration**.²³⁴ This, in turn means, that the judges will have a lot of discretion as regards the conduct of the proceedings.²³⁵ The BIBC, however, will not act as an arbitration tribunal, but will remain a state court. Judges will, therefore, not be appointed by the parties, but by the President of the BIBC.²³⁶ For the same reason hearings will be public and not private. And the BIBC's judgments will be recognized and enforced in accordance with the Brussels Ia Regulation and not in accordance with the New York Convention. However, just like the awards of an arbitration tribunal, judgments of the BIBC will not be subject to an appeal.²³⁷ And just like many arbitration

²²⁷ Article 2.1.1. Sentence 1 of the draft NCC Rules, supra note 221.

²²⁸ Article 2.1.1. Sentence 2 of the draft NCC Rules, supra note 221.

²²⁹ Article 3.2. of the draft NCC Rules, supra note 221.

²³⁰ Conseil supérieur de la Justice, Avis d'office. Avant-projet de loi instaurant la Brussels International Business Court (2018), available at http://www.hrj.be/sites/default/files/press_publications/avis-bibc-fr.pdf.

²³¹ Projet de loi instaurant la Brussels International Business Court, DOC 54 3072/001, available at <http://www.lachambre.be/FLWB/PDF/54/3072/54K3072001.pdf>. See for a discussion of the draft submitted in May 2018 Guillaume Croisant, Brussels unveils plans for the Brussels International Business Court (BIBC), Conflictoflaws.net, 22 May 2018, available at <http://conflictflaws.net/2018/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/> and Guillaume Croisant, The Belgian Government unveils its plan for the Brussels International Business Court (BIBC), Kluwer Arbitration Blog, 25 June 2018, available at <http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>.

²³² For details see Article 15 of the draft bill, supra note 231.

²³³ For details see Article 58 of the draft bill, supra note 231.

²³⁴ For details see Article 23 ff. of the draft bill, supra note 231. See also Exposé des Motifs in the draft bill, supra note 231, p. 12 f.

²³⁵ Article 24 of the draft bill, supra note 231.

²³⁶ For details see Article 6 of the draft bill, supra note 231, as well as Exposé des Motifs in the draft bill, supra note 231, p. 15 f.

²³⁷ Article 18 of the draft bill, supra note 231 ("premier et dernier ressort"). See for details including exceptions to the rule of no appeal Exposé des Motifs in the draft bill, supra note 231, p. 98 f.

tribunals, the BIBC will hear cases in ad hoc chambers of three judges drawn from a list of national and foreign international business law experts.²³⁸

The draft bill prepared by the Belgium government still has to be debated in the Belgium Parliament. Should the Parliament approve of the project, the BIBC is scheduled to start working on 1 January 2020.

3.3. Conclusion

Current commercial practice indicates that **commercial law competence** – or at least the perception of commercial law competence – is not equally distributed among the Member States (supra 3.1.). For many commercial parties this means that they have to choose a foreign law and a foreign court. And while some commercial parties are willing and able to opt into a foreign legal system, for others, notably for **small and medium-sized companies and micro-businesses** the cost of opting out will be too high. In the worst case they will abstain from engaging in cross-border commercial activity – or decide not to enforce their rights across borders.

The **prospect of Brexit** adds to the problem because choosing English law and settling disputes in the UK will become less attractive especially for those commercial parties who have an interest in having a judgment enforced in in the EU (supra 3.2.1.). Many commercial parties who have thus far submitted their contracts to English law and settled their disputes in London will, therefore, have to look for **alternative laws and alternative fora**. Germany and France have taken actions to make their civil justice systems more attractive for these commercial parties by allowing international parties to address special chambers (in Paris and Frankfurt respectively) that will conduct at least parts of the procedure in English (supra 3.2.2.1. and 3.2.2.2.). The Netherlands and Belgium are expected to follow suit (supra 3.2.2.3. and 3.2.2.4.).

²³⁸ For details see Article 6 of the draft bill, supra note 231, as well as Exposé des Motifs in the draft bill, supra note 231, p. 15 f.

4. RECOMMENDATIONS

KEY FINDINGS

- To make the **settlement of international disputes in the EU** more attractive, the European legislature should adopt a bundle of measures relating to choice of law on the one hand (infra 4.2.) and dispute resolution on the other (infra 4.3. and 4.4.).
- As regards choice of law, the European legislature should allow commercial parties to choose a **non-state law** such as the UNIDROIT Principles on International Commercial Contracts or the Principles of European Contract Law (infra 4.2.1.2. and 4.2.2.). In addition, the restrictions to be found in Article 3(2) and (3) Rome I Regulation as well as Article 14(2) and (3) Rome II Regulation should be removed to allow commercial parties to choose **a foreign or a third-state law in purely domestic and European cases** without the mandatory provisions of domestic or European law claiming application (infra 4.2.1.3. and 4.2.2.).
- As regards dispute resolution, the European legislature should first and foremost adopt a bundle of measures to improve the settlement of international disputes at the level of the Member States (infra 4.3.). In particular, it should introduce an **expedited procedure for cross-border commercial cases** and require Member States to establish **specialized courts or chambers** for such cases (infra 4.3.1. and 4.3.2.). Further measures should relate to better training of judges and lawyers, better access to European and foreign law as well as better legal education (infra 4.3.3.). At the level of the EU, the European legislature should additionally establish a European Commercial Court (infra 4.4.).

The preceding analysis has revealed that the uneven distribution of commercial law competence in the EU comes with problems, because not all commercial parties are in a position to choose the law and the courts which are perceived to be the best. To ensure that these parties, notably small and medium-sized commercial parties, have good alternatives available, the EU should take actions to make the settlement of cross-border commercial disputes in the Member States more attractive. In the following I will discuss various measures the EU could adopt. I will start with measures pertaining to the unification or harmonization of substantive commercial law (infra 4.1.). Then I will look at measures pertaining to the rule of choice of law (infra 4.2.). Finally, I will address measures relating to the settlement of international disputes at the level of the Member States (infra 4.3.) and at the level of the EU (infra 4.4.).

4.1. Unifying or harmonizing substantive commercial law

According to some of the above-mentioned studies one of the driving factors for the attractiveness of English and Swiss courts is the quality of English and Swiss law, notably the quality of English and Swiss contract law (supra 2.2.1.2.). In order to make the choice of a Member State law and, hence, the choice of a Member State court more attractive one could, therefore, consider to improve the **quality of commercial law** in the remaining Member States through unification or harmonization. This recommendation, however, would come with a number of problems.

The first problem is conceptual and relates to the question of whether unification or harmonization is desirable to begin with. This question has been the subject of a spirited

debate.²³⁹ And this study is not the place to provide answers.²⁴⁰ Suffice it to note that problems remain even if we assume that the benefits of having uniform or harmonized rules for commercial relationships outweigh the overall costs associated with it. First, the most recent, fairly limited attempt to provide for uniform rules for commercial parties, the project of a Common European Sales Law (CESL), famously failed in 2014. It is, therefore, unclear whether a new, and arguably more ambitious attempt to unify or harmonize the law of commercial contracts or even commercial law as such would have any tangible **chances of success**. Second, even if agreement could be reached, it is unclear what content any such legislative instrument should have. As discussed earlier, it is unclear what aspects of English and Swiss law make both laws attractive for international commercial litigants (supra 2.2.1.2.). Before one could start to draft uniform or harmonized rules, a lot of research would, therefore, be needed. As a consequence, unification and harmonization of Member States' commercial law is, if at all, a **long-term option**.²⁴¹

4.2. Reforming the rules on choice of law

The picture looks much brighter when turning to choice of law. The pertaining provisions are already to be found in European instruments, notably in the **Rome I and II Regulations**. In order to make the choice of a Member State law more attractive, the European legislature could, therefore, simply consider to improve these instruments. In the following I will first look at measures that might help to improve the Rome I Regulation (infra 4.2.1.). Then I will turn to the Rome II Regulation (infra 4.2.2.).

4.2.1. Rome I Regulation

As demonstrated in the second part (supra 2.1.2.1.), the Rome I Regulation allows commercial parties to choose the applicable contract law by virtue of Article 3. However, there are two restrictions in place that limit the ability of commercial parties to exercise their freedom of choice: first, parties are not allowed to choose a non-state law. Second, the effects of a choice of law is limited if the contract, except for the choice of law, is a purely domestic or a purely European one. In the following I will explain why these **restrictions should be removed**. I will start with the choice of non-state laws (infra 4.2.1.2.) and then move on to choice of law in domestic and European cases (infra 4.2.1.3.). However, before going into the details, I will briefly discuss in what respects the Rome I Regulation should *not* be changed (infra 4.2.1.1.)

4.2.1.1. Limiting the freedom of choice to connected laws?

The Rome I Regulation allows commercial parties to choose the applicable law even if the parties and the contract do not have a **relation to the chosen law**. As a consequence, parties may submit their contract to a neutral law that bears no relationship to either the parties or the contract. In order to make the settlement of disputes in a Member State more attractive one might, therefore, be inclined to reform **Article 3 Rome I Regulation** and to limit commercial parties' freedom of choice to connected laws. Commercial parties from the EU would then only be allowed to choose, for example, English or Swiss law if the contract had a connection to England or Switzerland. Limitations along these lines are not uncommon

²³⁹ See for a detailed account Gerhard Wagner, The Economics of Harmonization: The Case of Contract Law, C. M. L. Rev. 39 (2002) 995 ff.

²⁴⁰ See for a recent discussion of the pros and cons of unification and harmonization in the context of commercial law Lehman, supra note 4, at 18 ff.

²⁴¹ This view is shared by the proponents of a European Business Code. See, for example, Lehmann, supra note 17, at 266 ff.; Lehmann, Schmidt & Schulze, supra note 5, at 227 ff.

and, for example, to be found in the United States. According to § 187 (2) (a) Restatement (Second) of Conflict of Laws and § 1-105 (1) Uniform Commercial Code (UCC) the law of the state chosen by the parties will only be applied if the chosen state has a substantial or reasonable relationship to the parties or the transaction.²⁴²

For various reasons, however, the European legislature should not follow the American example. To begin with, a limitation of freedom of choice to connect laws would not be in line with the **liberal European tradition** and notably the liberal approach to party autonomy taken by the Rome I Regulation. In addition, it would not have the **intended effect**: whether a choice of law is valid, is determined according to the choice of law provisions of the forum. If European parties choose English law and English courts or Swiss law and Swiss courts and eventually end up before English or Swiss courts, these courts will look to their own choice of law rules – and not to the Rome I Regulation – to determine the admissibility of the choice. If these rules allow the choice of an unconnected law – and chances are that they do²⁴³ –, a choice of an unconnected law would be given effect even if the Rome I Regulation does not allow the choice of an unconnected law.

Finally, one could add that limiting the parties' freedom to connected laws would also lack a **sound theoretical basis**: as a matter of principle, the parties' right to choose the applicable law should only be limited if the parties, through their choice, impose costs on third parties or if one of the parties is perceived to be weaker than the other and, therefore, in need of protection.²⁴⁴ With respect to commercial contracts, one might argue that the parties, through the choice of an unconnected law, impose costs on courts because courts will have to determine the content of a remote foreign law they are not familiar with. However, drawing this conclusion would mean jumping to conclusions: whether courts – and, hence, the public – will have to bear the additional costs associated with the determination depends on how the applicable law is determined and who has to pay for it. Essentially two systems can be distinguished:²⁴⁵ According to the first one – dominant in England and the United States – the applicable law is considered as a fact that has to be argued and proven by the parties. Therefore, the parties bear the costs of researching and presenting the applicable legal rules. According to the second model – in place in continental Europe, notably in Germany – the applicable law has to be determined by the courts *ex officio*. The parties to the choice-of-law agreement, however, have to pay for the determination of the applicable law as part of the court fees. Under both the Anglo-American and the continental European system the parties, therefore, bear the increased costs of choosing an unconnected law.²⁴⁶ Hence, there is no need to reform the Rome I Regulation accordingly. On the contrary, any such change would

²⁴² See for a detailed discussion Giesela Rühl, Party Autonomy in the Private International Law of Contracts, in Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein (eds), *Conflict of Laws in a Globalized World* (2007) 153, at 160 ff.

²⁴³ See Article 116 of the Swiss Private International Law Act of 18 December 1988, English translation reprinted in *Encyclopedia of Private International Law*, supra note 13, Volume 4, at 3836 ff. See also Caroline Kleiner, Switzerland, in *Encyclopedia of Private International Law*, supra note 13, Volume 3, 2548, at 2553.

²⁴⁴ See for a detailed account with further references Giesela Rühl, *Statut und Effizienz* (2011) 443 ff. and 493 ff. See also Andrew Guzman, Choice of Law: New Foundations, *Geo. L. J.* 90 (2002) 883, at 914; Hans-Bernd Schäfer & Katrin Lantermann, Choice of Law from an Economic Perspective, in: Jürgen Basedow & Toshiyuki Kono (eds), *An Economic Analysis of Private International Law* (2006) 87, at 92 f.

²⁴⁵ Trevor C. Hartley, Pleading and Proof of Foreign Law: The Major European Systems Compared, *ICLQ* 45 (1996) 271 ff. See also Giesela Rühl, supra note 242, at 178 f.; Giesela Rühl, supra note 244, at 377 f.

²⁴⁶ See for a detailed discussion Giesela Rühl, Die Kosten der Rechtswahlfreiheit: Zur Anwendung ausländischen Rechts durch deutsche Gerichte, *RabelsZ* 71 (2007) 559 ff.

not be in the interest of the parties. And it would not make the choice of a Member State court more attractive.

4.2.1.2. Allowing the choice of non-state laws

The picture looks different when we turn to the **choice of non-state laws**. In line with most private international law regimes²⁴⁷ – but unlike, for example, Article 3 of the Hague Principles of Choice of Law in International Commercial Contracts²⁴⁸ – **Article 3 Rome I Regulation** does not allow the parties to choose a non-state law such as, for example, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT PICC) or the Principles of European Contract Law (PECL).²⁴⁹ As a consequence, a choice of any such law will be ignored and, if at all, given effect on the level of substantive law. Legal regimes such as the UNIDROIT Principles and the European Principles of Contract Law will, therefore, only govern a contract to the extent that they are in line with the mandatory provision of the otherwise applicable state law.

Two reasons are mainly put forward to justify this restriction:²⁵⁰ first, non-state laws are costly to apply because they are often, if not always, **incomplete and indeterminate**. Second, they lack democratic foundation and, hence, the quality of law because they are usually drafted by private entities. Both arguments, however, do not strike. The fear that application of a non-state law might incur higher costs than the choice of a state law is unfounded because determination and application of state laws may just as well be very costly if that state's law is difficult to access. In addition, and more importantly, the costs do not really matter because parties bear the costs relating to the determination of the applicable law and, hence, do not impose additional costs on courts or the public at large (supra 4.2.1.1.). In a similar vein, the **lack of democratic foundation** cannot be held against a choice of non-state laws. Democratic foundation is not a criterion that the Rome I Regulation applies when allowing parties to choose a foreign law. Article 3 of the Rome I Regulation, therefore, does not preclude parties to choose the law of a dictatorship or, for that matter, the law of a country that does not provide for neutral and balanced rules.

The European legislature should **reform the Rome I Regulation** to allow parties the choice of a non-state law such as the UNIDROIT Principles or the Principles of European Contract Law. In this way an unnecessary and theoretically unsound restriction to freedom of choice will be removed. In addition, the attractiveness of Member State courts for international commercial litigations will be increased. To be sure, according to the Oxford Civil Justice Study only a small number of commercial litigants actually seem to have an interest in

²⁴⁷ Rühl, supra note 244, at 489 ff.

²⁴⁸ See for a detailed discussion Peter Mankowski, Article 3 of the Hague Principles: the Final Breakthrough for the Choice of Non-State Law? *Uniform L. Rev.* 22 (2017) 369 ff.; Ralf Michaels, Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts, in Kai Purnhagen & Peter Rott (eds), *Varieties of European economic law and regulation: Liber Amicorum for Hans Micklitz* (2014) 43 ff.; Geneviève Saumier, The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract, *Brooklyn J. Int'l L.* 40 (2014) 1 ff.; Thomas Pfeiffer, Die Haager Prinzipien des internationalen Vertragsrechts – Ausgewählte Aspekte aus der Sicht der Rom I-VO, in Peter Mankowski & Wolfgang Wurmnest (eds), *Festschrift für Ulrich Magnus* (2014) 501 ff.

²⁴⁹ Rühl, supra note 244, at 485 ff. See with regard to the Rome I Regulation Galf-Peter Calliess, in Galf-Peter Calliess (ed), *Rome Regulations* (2015) Article 3 Rome I, para 20 ff.; Alexander Hellgardt, Das Verbot der kollisionsrechtlichen Wahl nicht-staatlichen Rechts und das Unionsgrundrecht der Privatautonomie, *RabelsZ* 82 (2018) 654 ff.

²⁵⁰ See for a detailed recent overview of the discussion Hellgardt, supra note 249, at 688 ff.

choosing a non-state law as the governing law.²⁵¹ However, if the Rome I Regulation is changed, a choice of a non-state law will most likely become more attractive for commercial litigants because Member State courts will be put on equal footing with arbitration tribunals which traditionally do not hesitate to apply non-state laws. That this hope is not entirely unfounded follows from the Queen Mary International Arbitration Survey 2010. As indicated earlier, 14% of the respondents said that they had often chosen “commercial law rules contained in codifications” such as the UNIDROIT Principles on International Commercial Contracts.²⁵² In addition, another 48% said that they had sometimes done so.²⁵³ As a consequence, there is ground to believe that a reform of the Rome I Regulation would make the choice of a non-state law and, hence, the choice of a Member State court more attractive.

4.2.1.3. Enhancing choice of law in domestic and European cases

A reform of the Rome I Regulation is also in order as far as a choice of law in purely domestic and in purely European cases is concerned. According to **Article 3(3) Rome I Regulation** the effects of a choice of law are limited if the contract, except for the choice of law, has connections to one state only. In this case the choice of law does not exclude application of the mandatory provisions of that one state’s mandatory laws. By virtue of **Article 3(4) Rome I Regulation** the same rule applies with regard to mandatory EU law if the case has only connections to EU Member States.

The reason for both restrictions is simple: parties shall not be allowed to “evade” the mandatory provisions of domestic or EU law if the choice of law is the only connection to a foreign or non-European law. However, again, this argument can hardly strike.²⁵⁴ First, Articles 3(3) and (4) Rome I Regulation will only apply if the parties eventually bring their dispute before a Member State court. If they choose the law of a third state and combine this choice with a choice of that state’s courts, the Rome I Regulation will not apply. The reach of both restrictions is, thus, fairly limited. In the worst-case scenario it will merely drive commercial parties to choose the law *and* the courts of a third state. Second, a restriction of freedom of choice is only in order where the parties, through their choice, impose costs on third parties (supra 4.2.1.1.). However, the parties usually bear any additional costs associated with the choice of an unconnected law via the court or lawyers’ fees (supra 4.2.1.1.).

Against this background, the European legislature should **delete Article 3(3) and (4) Rome I Regulation** and allow commercial parties the choice of any law they want even if the contract is a purely domestic or a purely European one.²⁵⁵ There should be little doubt that this would further increase the attractiveness of Member State courts.

4.2.2. Rome II Regulation

As demonstrated in the second part (supra 2.1.2.1.), European law does not only allow commercial parties to choose the applicable contract law. By virtue of **Article 14 Rome II**

²⁵¹ Vogenauer & Hodges, supra note 87, at 23 (Questions 25) and 24 (Question 26).

²⁵² Queen Mary School of International Arbitration Survey 2010, supra note 104, at 15 (Chart 12).

²⁵³ Queen Mary School of International Arbitration Survey 2010, supra note 104, at 15 (Chart 12).

²⁵⁴ Gerhard Wagner, The Virtues of Diversity in European Private Law, in Jan Smits (ed), The Need for a European Contract Law (2005) 3, at 14 f.

²⁵⁵ Note that for contracts that involve a weaker party, notably consumer and employment contract, Article 6 and 8 Rome I Regulation provide for special choice of law rules that protect the weaker party from the potential dangers of a free choice of law. Those choice of law provisions would, of course, remain intact and unaffected.

Regulation they may also choose the applicable tort law. However, the parties' freedom of choice is limited just as under Article 3 Rome I Regulation. As a consequence, the parties are not allowed to choose a non-state tort law such as, for example, the Principles of European Tort Law (PETL).²⁵⁶ And the effects of a choice of law are limited pursuant to Article 14(2) and (3) Rome II Regulation if the case is a purely domestic or a purely European one. It goes without saying that, in the light of the above discussion (supra 4.2.1.2. and 4.2.1.3.), both restrictions cannot stand. As a consequence, they should be removed just as they should be removed from the Rome I Regulation.

In addition, another modification is recommended: as Article 3 Rome I Regulation and Article 14 Rome II Regulation stand at the moment they are slightly differently worded. Whereas Article 3 Rome I Regulation requires a choice of the applicable contract law to be "made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case", Article 14(1) Rome II Regulation provides that it must be "expressed or demonstrated with reasonable certainty by the circumstances of the case". In addition, an ex-ante choice of law must be "freely negotiated". The first divergence is the result of the drafting history: the Rome II Regulation was adopted prior to the Rome I Regulation and Article 14 accordingly modelled on Article 3 Rome Convention. And there is broad agreement that, despite the different wording, an implied choice of law should be held against the same standard no matter whether it relates to contractual or non-contractual obligations.²⁵⁷ The second divergence, in contrast, has given rise to a discussion about what exactly a "free negotiated" choice of law is and whether, for example, it excludes a choice of law in general conditions of contract.²⁵⁸ In the end, however, it is unclear why a choice of tort law and a choice of contract law should be subject to different requirements. It only increases the risk that the parties draft a choice of law clause which is valid as regards the contract law and invalid as regards tort law. Therefore, the European legislature should **align Article 14(1) Rome II Regulation with Article 3 Rome I Regulation** and delete any requirement that an ex ante choice has to be "freely negotiated". In addition, the requirements for an implied choice of law should be adjusted to match the requirements established by Article 3 Rome I Regulation.

4.3. Improving dispute settlement in the Member States

The above recommendations relating to choice of law will certainly help to make the choice of a Member State court more attractive. However, they will not solve the much bigger problem that the civil justice systems of some Member States do not meet the expectations of international commercial parties (supra 3.1.). To be sure, some Member States, notably Germany, France, the Netherlands and Belgium have recently taken steps – or are in the process of taking steps – to make their national courts more attractive for international litigants (supra 3.2.2.). But these activities are fragmented and limited to just a few Member States. They do not ensure a high level of commercial law competence across the EU. Also, most of the initiatives rather aim for the attraction of high-volume disputes whereas they seem to be less interested in providing a good forum for smaller disputes involving small and medium-sized companies and micro-businesses.

²⁵⁶ European Group on Tort Law, Principles of European Tort Law (2005).

²⁵⁷ See, for example, Richard Plender & Michael Wilderspin, The European Private International Law of Obligations (2015) para 29-023; Jan von Hein, in Rome Regulations, supra note 249; Art 14 Rome II, at para 24; Andreas Vogeler, Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) 195 ff.

²⁵⁸ See, for example, Jan von Hein, in Rome Regulations, supra note 249, Art 14 Rome II, at para 27; Vogeler, supra note 257, at 275 ff.; Plender & Wilderspin, supra note 257, at para 29-023.

In the following part I will, therefore, submit two recommendations designed to ensure that commercial parties have access to high level dispute settlement mechanisms in all Member States no matter what their size is and no matter what their resources are. The first recommendation envisions the introduction of an expedited procedure for cross-border commercial cases similar to the one already existing for cross-border small claims (infra 4.3.1.). The second recommendation relates to the establishment of specialized commercial courts or commercial chambers for international matters in the Member States (infra 4.3.2). A number of further recommendations relate to smaller actions the EU should take to improve the settlement of international disputes in the Member States (infra 4.3.3.).

4.3.1. Introducing special procedures for cross-border commercial cases

One of the main concerns for international commercial parties when settling cross-border disputes relates to the **efficiency of court proceedings**, and notably the length of proceedings. According to the Oxford Civil Justice Study, for example, one of the top five reasons for choosing to settle a dispute in a certain forum is the **speed of dispute resolution**.²⁵⁹ By the same token, the speed of dispute resolution – or rather the absence of speed – is one of the top five reasons for avoiding certain jurisdictions.²⁶⁰ Obviously, offering speedy and efficient proceedings makes civil justice systems attractive for commercial parties. Unfortunately, however, many Member States do not do too well when measured against this yardstick: according to the 2017 EU Justice Scoreboard, court civil proceedings in many, even though not all in Member States take a lot of time.²⁶¹ In Italy, for example, courts need more than 500 days to render a first instance judgment in commercial matters, in Malta, Slovakia, Croatia and Greece roughly 400 days are needed. Against this background, one very obvious way to improve the commercial law competence of the Member States is to speed up civil proceedings. But how can this be done?

A proposal worth exploring has recently been made by the JURI Committee of the European Parliament.²⁶² Based on the EU's competence for judicial cooperation in civil matters with cross-border implications (Article 81 TFEU),²⁶³ it envisions the introduction of an **expedited procedure for cross-border commercial cases** that shall provide commercial parties with a fast and cost-saving option to settle their disputes.²⁶⁴ The procedure is meant to lead to a judgment in less than a year and shall feature tight, pre-determined deadlines, no separate appeal on procedural questions and limited possibilities of raising new circumstances after first submissions.²⁶⁵ It shall be available upon request by the parties and complement

²⁵⁹ Vogenauer & Hodges, *supra* note 87, at 28 (Question 33).

²⁶⁰ Vogenauer & Hodges, *supra* note 87, at 31 (Question 35).

²⁶¹ The 2017 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council the European central, the European Economic and Social Committee and the Committee of the Regions, COM(2017) 167 final, 8 (Figure 5). See for details the European Commission for the Efficiency of Justice (CEPEJ), European judicial justice. Efficiency and quality of justice, CEPEJ Study No 23, Edition 2016 (2014 data), at 47 ff., available at <http://www.coe.int/cepej>.

²⁶² JURI Committee of the European Parliament, Working Document of 8 June 2018 on Expedited settlement of commercial disputes in the EU, PE623.634v02-00.

²⁶³ Article 81(2) lit. f) TFEU allows the European legislature to adopt measures aimed at the "elimination of obstacles to the proper functioning of civil proceedings" and has previously been used to adopt the Small Claims Regulation and European Payment Order Regulation. Both regulations establish special European procedures to be applied by Member States' courts.

²⁶⁴ JURI Committee of the European Parliament, *supra* note 262, at 3.

²⁶⁵ JURI Committee of the European Parliament, *supra* note 262, at 3.

national procedures of the Member States in a similar vein as the European Small Claims Regulation.²⁶⁶

The details of the suggested procedure are, of course, still under discussion and will certainly need careful consideration in order to strike a fair balance between speed and the right to a fair trial.²⁶⁷ But the idea of introducing a special set of uniform procedural rules for the settlement for cross-border commercial cases is intriguing: first, a European expedited procedure could effectively ensure that in each Member State a **quick and efficient procedure** is available to settle international disputes.²⁶⁸ At least as a matter of principle, commercial parties would, therefore, no longer have to be afraid to litigate, for example, in Italy or some other Member States where court proceedings usually take a while. Second, a European expedited procedure would apply in the same way **across all Member States**. Over time commercial parties would, therefore, become familiar with the applicable rules which, in turn, would lower the bar for going to court and actually enforce claims. Third, through the introduction of an expedited procedure for commercial cases, the EU would draw level with the UK and some of the world's leading arbitral institutions which have successfully introduced fast track procedures in recent years. The UK, for example, has been operating a pilot "Shorter Trial-Scheme" at the Royal Courts of Justice in London since October 2015.²⁶⁹ It offers faster proceedings for business related disputes which do not require extensive disclosure, witness or expert evidence. In a similar vein the, ICC has been offering an expedited procedure since 2017, providing for a streamlined arbitration with reduced scales of fees.²⁷⁰ And the International Arbitration Centres in Singapore (SIAC) and Hong Kong (HKICA) have known expedited procedures for several years by now.²⁷¹

In the light of the above, it is, therefore, recommended that the European legislature takes up the proposal of the JURI Committee and adopts a European expedited procedure for cross-border commercial cases. This recommendation, however, comes with **three caveats**: first, while there is little doubt that court proceedings in some Member States take too much time, there is **no empirical data** that would shed light on the reasons for this finding. An insufficient number of judges and a lack of qualified judges may just as well be driving forces as a lack of resources, a lack of IT-infrastructure or inefficient rules of civil procedure. Against this background it remains an open question whether a European expedited procedure, as plausible as its introduction might appear, will actually tackle the real sources for lengthy proceedings. Chances are that inefficient and ineffective procedures are only one factor that impede speedy dispute settlement.

Second, while speed is an important factor for commercial parties' decision to settle a dispute in a certain forum, it is certainly not the only one. In fact, according to the Oxford Civil Justice

²⁶⁶ JURI Committee of the European Parliament, *supra* note 262, at 3.

²⁶⁷ See for a detailed discussion of the risks associated with expedited procedures Christoph Kern, *Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze*, JZ 2012, 389 ff.

²⁶⁸ See, however, the caveats discussed below.

²⁶⁹ See for details the Practice Direction 51N – Shorter and Flexible Trial Pilot Schemes, available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51n-shorter-and-flexible-trials-pilot-schemes>.

²⁷⁰ See for details Article 30 ICC Arbitration Rules, available at <https://cdn.iccwbo.org/>, as well as the Expedited Procedure Rules to be found in Appendix VI.

²⁷¹ See for details Article 5 SIAC Arbitration Rules, available at <http://www.siac.org.sg> and Article 41 HKIAC Arbitration Rules, available at <http://www.hkiac.org>.

Study **fairness and predictability of outcome** are even more important factors.²⁷² Commercial parties are, therefore, not only interested in speedy and low-cost dispute settlement, they are also – and probably even more – interested in good and effective results. A European expedited procedure will, therefore, not be a magic bullet. It will probably only help to reach better results in rather straightforward cases while it will be of a little help in more complex cases.

Third, the best procedure is of no use if the court and the judges do not have the **competence, expertise and experience** to deal with cross-border commercial cases. English courts, for example, are not only popular because the applicable procedure is perceived to be quick and efficient, but also because the courts and their judges are highly respected and regarded as commercial law experts.²⁷³ In addition, the best procedure does not help if it is not frequently applied in practice. Indeed, the European Small Claims Regulation was long considered to be a failure because it was hardly ever applied by Member State courts.²⁷⁴ The introduction of an expedited European procedure for cross-border commercial cases can, therefore, only be a first step to improve the overall commercial law competence in the Member States. It has to be accompanied by further actions. I will discuss some of them in the following two sections (infra 4.3.2. and infra 4.3.3.).

4.3.2. Establishing specialized courts for cross-border commercial cases

As indicated in the previous section (supra 4.3.1.), speed, fairness, predictability of outcomes are important factors that matters for commercial parties when choosing the competent court. However, according to the Oxford Civil Justice Study the most important factor for choosing – or avoiding – a particular forum is the **quality of courts and judges**.²⁷⁵ In addition to the above-mentioned measures the EU should, therefore, try to improve the court infrastructure in the Member States. How can this be done?

A recognized tool to improve court infrastructure and, hence, the quality of court proceedings and judgments, is **specialization**.²⁷⁶ In fact, according to the 2016 World Bank Report about Good Practices for Courts, the number one good practice is the availability of specialized

²⁷² Vogenauer & Hodges, supra note 87, at 28 (Questions 33) and 31 (Question 35).

²⁷³ See Lein, Corquodale, McNamara, Kupelyants & del Rio, supra note 149, at 15 and 50 (Question 22). See also Vogenauer & Hodges, supra note 87, at 28 (Questions 33) and 31 (Question 35).

²⁷⁴ Burkhard Hess, Harmonized Rules and Minimum Standards in the European Law of Civil Procedure. In-Depth Analysis for the JURI Committee of the European Parliament (2016), at 9 f., available at <http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html>>. See for a detailed comparative analysis relating to the application of the Small Claims Regulation in practice MPI Luxembourg for Procedural Law et al, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and of the equivalence of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 1: Mutual trust and free circulation of judgments (EU Procedural Law Study), JUST/2014/RCON/PR/CIVI082, at 342 ff., para 853 ff., available at <http://www.publications.europa.edu>.

²⁷⁵ Vogenauer & Hodges, supra note 87, at 28 (Questions 33) and 31 (Question 35). By the same token the main reasons for choosing to litigate in England is the reputation and experience of English judges. See Lein, McCorquodale, McNamara, Kupelyants & del Rio, supra note 149, at 50 (Question 22).

²⁷⁶ See for a discussion of the advantages – and potential disadvantages – of specialization Heike Gramckow & Barry Walsh, Developing Specialized Court Services: International Experiences and Lessons Learned, Justice and Development Working Paper Series World Bank 24 (2013), at 6 ff., available at <http://www.documents.worldbank.org>; Markus B. Zimmer, Overview of Specialized Courts, IJCA 2009, 1, at 1 ff. See also Kramer, supra note 196.

commercial courts or commercial divisions.²⁷⁷ Specialization is also a very common and popular tool when it comes to cross-border matters.²⁷⁸ Germany, for example, has successfully experimented with specialized courts in the context of judicial cooperation,²⁷⁹ particularly in the field of international adoptions and measures concerning the protection of children and vulnerable adults.²⁸⁰ In a similar vein, a number of Member States, notably Germany, Finland, Malta, and the Netherlands have concentrated application of the Small Claims or the Payment Order Regulation in a single court.²⁸¹ And on the level of the EU a tradition of using specialized courts can be found in the field of intellectual property rights: according to Article 80 of the Community Design Regulation,²⁸² for example, Member States are required to designate courts that act as **Community Design Courts** and hear cases relating to the infringement and the validity of Community Designs. In a similar vein, national courts act as EU trade mark courts in accordance with Article 123 of the new EU Trade Mark Regulation.²⁸³ Finally, the recently established **Unified Patent Court** will serve as a specialized court in relation to the newly introduced Unitary Patent.²⁸⁴

Against this background, what is the situation when it comes to cross-border commercial cases? Interestingly, no specialized commercial courts or chambers are available in the Member States.²⁸⁵ With the exception of the above-described national initiatives (supra 3.2.2.), cross-border cases are heard by the general courts. And while this does not have to be a problem, chances are that a lack of specialization will prolong proceedings and result in judgments that do not meet the expectations of the parties.²⁸⁶ It is, therefore, suggested that the European legislature follows the example of the Community Design and the EU Trade Mark Regulation and requires the Member States to designate at least one **specialized court or chamber for cross-border commercial cases**.²⁸⁷ These courts or chambers could quickly build competence and expertise because they would be more often charged with the same type of cases. In addition, they would effectively ensure that commercial parties have access to at least one specialized court or chamber in each Member

²⁷⁷ The World Bank, *Good Practices for Courts: Helpful Elements for Good Court Performance and the World Bank's quality of Judicial Process Indicators* (2016), at 7 ff., available at <<http://documents.worldbank.org/>>.

²⁷⁸ See for a brief overview Kramer, supra note 196.

²⁷⁹ See Kurt Siehr, *Special Courts for Conflicts Cases: A German Experiment*, Am. J. Comp. L. 25 (1977) 663. See for an overview of recent developments Jan von Hein, in Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum BGB*, Volume 11 (2018), *Einleitung zum Internationalen Privatrecht*, para 313 f. (with further references).

²⁸⁰ Jan von Hein, supra note 279, para 314.

²⁸¹ See for details the EU Procedural Law Study, supra note 274, at 51, para 117. See also the brief overview by Kramer, supra note 196.

²⁸² Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ EC 2002, L 3/1. See for details Christian Heinze, *Unitary Intellectual Property Rights and Jurisdiction*, in *Encyclopedia of Private International Law*, supra note 13, 1791, at 1792 f.

²⁸³ Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark, OJ EU 2017, L 154/1. See for details Heinze, supra note 282, at 1792 f.

²⁸⁴ Note that the Unified Patent Court was not established by the EU, but by the Member States through an international convention, the Agreement of 19 February 2013 on a Unified Patent Court, OJ EU 2013, C 175/1. See for details Heinze, supra note 282, at 1793 ff.

²⁸⁵ EU Procedural Law Study, supra note 274, at 50 ff., para 113 ff. See also the brief overview relating to specialized courts for cases involving Private International Law more generally Kramer, supra note 196.

²⁸⁶ EU Procedural Law Study, supra note 274, at 51, para 118 ff.

²⁸⁷ In a similar vein Lehmann, supra note 4, at 27, footnote 92.

State. Irrespective of whether they manage to agree on a forum a selection clause and irrespective of whether they will be the claimant or the defendant, commercial parties could, therefore, trust that disputes would end up before in a forum that is actually able to hear and deal with their case. Finally, the establishment of specialized courts or chambers for cross-border commercial matters would also nicely complement the measures that some Member States, notably, Germany, France, the Netherlands and Belgium have recently taken – or are in the process of taking – in order to make their civil justice systems more attractive for foreign litigants.

Naturally, the establishment of specialized courts or chambers for international matters raises a number of questions. In the following, I will discuss two of them: first, does the EU have the competence to require the establishment of specialized commercial courts or chambers for international matters in the Member States (infra 4.3.2.1.)? And, second, what features should these special courts and chambers have (infra 4.3.2.2.)?

4.3.2.1. EU Competence

According to the **principle of conferral**, embodied in Article 5(1) and (2) TEU, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein whereas competences not conferred upon the EU in the Treaties remain with the Member States. Now, when looking into the treaties there is no provision that would expressly allow the EU to set up or encourage the establishment of specialized commercial courts in the Member States.²⁸⁸ However, it is submitted that such courts and chambers could be established on the basis of **Article 81 TFEU**. The provision allows the EU to adopt measures to improve **judicial cooperation in civil matters having cross-border implications**. It contains a long list of measures that the European legislature may adopt. And the European legislature has not been shy to make use of that list. In fact, Article 81 TFEU has served as a basis for virtually all regulations adopted to foster cross-border judicial cooperation, including the Brussels Ia Regulation, the Service Regulation, the Evidence Regulation, the European Payment Order Regulation and the Small Claims Regulation.²⁸⁹ Article 81 TFEU should, therefore, be a natural basis for the establishment of specialized courts or chambers for cross-border commercial cases.²⁹⁰

The problem with this view, however, is that Article 81 TFEU, thus far, has not been used to implement measures relating to the **Member States' court infrastructure and the judiciary**. Both aspects are also traditionally considered to fall into the exclusive competence of the Member States.²⁹¹ However, this should not hinder the use of Article 81 TFEU for the above purpose: to begin with, the establishment of specialized commercial courts or chambers would not interfere with the Member States' right to organize their local court infrastructure. It would merely require the Member States to designate one court or chamber

²⁸⁸ Note, that Article 257 TFEU only allows the establishment of specialized courts at the General Court and, hence, within the CJEU.

²⁸⁹ The only exceptions relate to the ADR-Directive and the ODR-Regulation which were adopted on the basis of Article 114 TFEU. This decision, however, has been heavily criticized. See for a detailed discussion Giesela Rühl, *Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: A Critical Evaluation of the European Legislature's Recent Efforts to Promote Competitiveness and Growth in the Internal Market*, *J. Consum. Pol.* 38 (2015) 431 ff.

²⁹⁰ According to an inter-institutional compromise "cross-border" means that the parties to the proceedings are domiciled in different Member States. See for a detailed discussion Burkhard Hess, *Europäisches Zivilprozessrecht* (2010) § 2, para 11 ff.

²⁹¹ Hess, *supra* note 290, § 2, para 19. In a similar vein, *EU Procedural Law Study*, *supra* note 274, at 52, para 122.

that will be competent to hear cross-border commercial cases – just like the Community Design Regulation and the EU Trademark Regulation require the Member States to designate Community Design courts and EU Trademark courts. In addition, the points listed in Article 81(2) TFEU and especially lit. e) (“effective access to justice”) and f) (“elimination of obstacles to the proper functioning of civil proceedings”) are to be interpreted broadly.²⁹² They cover all measures that help to **establish a European Judicial Area** and to **improve the cross-border enforcement of claims**. In fact, according to the Hague Programme of 2005 the main policy objective of Article 81 TFEU is “that borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings ...”.²⁹³ There can be little doubt that the establishment of specialized courts and chambers for cross-border cases would serve this end. A purposeful interpretation of Article 81 TFEU, thus, should lead to the conclusion that it may serve as a basis for the present proposal.²⁹⁴

This finding alone, however, does not mean that the European legislature may actually become active. According to Article 5(1) and (4) TEU the use of any EU competence is governed and, in fact, limited by the **principle of subsidiarity**. The EU may, therefore, only act insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, for reasons of the scale or effects of the proposed action, be better achieved at EU level. As regards the establishment of specialized commercial courts or commercial chambers for international matters one might argue, that Member States are able to act without the help of the EU. In fact, some Member States have already started to introduce specialized courts or chambers for international cases (supra 3.2.2.). However, thus far only a fairly small number of Member States, namely Germany, France, the Netherlands, and Belgium have been willing to take actions (supra 3.2.2.). Hence, it is unlikely, that specialized commercial courts for cross-border commercial cases will be established across the board in all Member States without interference of the EU.

4.3.2.2. Organization and procedure

The establishment of special courts or chambers for cross-border commercial matters will certainly be good step forward and increase commercial law competence in the Member States. However, their simple existence will not be a guarantee for success. In order to actually increase the quality of cross-border dispute settlement, the European legislature should require the specialized courts and chambers to meet certain **minimum standards**. The details should be set out after consultation with academics and practitioners taking into account **commercial parties’ needs, international best practice** as well as existing **soft law instruments** relating to transnational dispute resolution, notably the ALI/UNIDROIT Principles of Transnational Civil Procedure and the ELI/UNIDROIT European Rules of Civil Procedure (supra 2.1.3.3.). In the following, I will, therefore, only shed light on some of the most salient features the specialized commercial courts and chambers should have. Those relate to jurisdiction, language, qualification of judges, and procedure.

²⁹² See, for example, Matthias Rossi, in Christian Calliess & Matthias Ruffert (eds), EUV/AEUV (2016), Article 81, para 1.

²⁹³ The Hague Programme: strengthening freedom, security and justice in the European Union, OJ EU 2005, C 53/1, at 13.

²⁹⁴ Alternatively, the European legislature could, of course, resort to Article 352 TFEU. According to this provision the EU may adopt measures even if the Treaties do not provide for the necessary powers 1) if action by the EU is necessary to attain one of the objectives set out in the Treaties and 2) if the Council acts unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

As regards **jurisdiction** it goes without saying that the specialized commercial courts and chambers should only be competent to hear **cross-border commercial cases**, i.e. cases between commercial parties from different Member States. However, their jurisdiction should depend on a party agreement. As a consequence, parties should be allowed to choose the commercial court or commercial chamber of a Member State in accordance with Article 25 Brussels Ia Regulation. If the parties have not agreed on the jurisdiction of the specialized commercial court or commercial chamber, other courts should be required to ask the parties whether they want to have their case transferred. A case should be transferred if both parties agree or if the specialized commercial courts or chambers are evidently in a better position to deal with the case.

As regards **language**, the specialized commercial courts and chambers should, of course, be easily accessible for foreign commercial litigants. Judges should, therefore, be prepared to offer a **complete English procedure**,²⁹⁵ and, hence, a complete “English file”.²⁹⁶ In particular, they should be prepared to communicate with the parties in English, allow parties to make written submissions in English, accept documents in English, hear witnesses and experts in English and deliver judgments and any other decision in English. However, courts and parties should be allowed to agree that communications, submissions or hearings may also (or only) be made in another, notably in the court’s language. If they do, parties should still be allowed to submit documents in a foreign language, notably in English, if all agree.

The fact that proceedings should be conducted in English implies that the **judges and staff** working at the specialized commercial courts and chambers should have a very good command of the English language.²⁹⁷ However, this should not be the only qualification judges should bring. In addition, they should have the **expertise and experience** necessary to deal with cross-border commercial cases. Member States should, therefore, make ensure that judges working at the specialized commercial courts or court chambers have business experience as well as knowledge in relevant areas of commercial law including private international law and international civil procedure. At any rate, only professional judges – and as the case may be lawyers – should be allowed on the bench. Lay-persons who are in some Member States, notably France and Germany, called to the regular commercial courts should be precluded from joining the specialized commercial courts or chambers for international matters.

As regards **procedure** the specialized commercial courts should apply the European expedited procedure for cross-border commercial cases (supra 4.3.1.). This would incidentally ensure that the expedited procedure is actually and regularly applied in practice. At the same time, it would ensure that the expedited procedure does not suffer from the same problems as the Small Claims Regulation.²⁹⁸

²⁹⁵ Kern, supra note 197, at 192 f.

²⁹⁶ See for a detailed discussion of the legal as well as practical problems associated with conducting proceedings in English including suggestions how they can be overcome Kern, supra note 197, at 204 ff.

²⁹⁷ According to a survey conducted in 2011, 81% of Member State judges know English as a second language. As regards the level of proficiency, 36% of the respondents said that they were proficient in reading while roughly 20% claimed to be proficient in writing and speaking. See for details John Coughlan, Jaroslav Opravil & Wolfgang Heusel, Judicial training in the European Union Member States (2011), at 121 f., available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOLJURI_ET\(2011\)453198_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOLJURI_ET(2011)453198_EN.pdf).

²⁹⁸ See for a detailed empirical analysis of the operation of the Small Claims Regulation in practice EU Procedural Law Study, supra note 274, at 342 ff., para 853 ff.

4.3.3. Further actions

In the preceding sections (supra 4.3.1. and 4.3.2.) I have presented two “hard” measures the EU should implement to improve the settlement of international disputes in the Member States. However, to make these measures fully effective, a number of additional “soft” measures should be adopted. They relate to the training of judges and lawyers (infra 4.3.3.1.), access to European and foreign law (infra 4.3.3.2.) and legal education (infra 4.3.3.3.).

4.3.3.1. Better training of judges and lawyers

Even after more than 50 years of European integration, recent studies show that there is still a broad lack of knowledge of European law in general²⁹⁹ and European private international law and European international civil procedure in particular.³⁰⁰ In fact, many judges do not know the applicable provisions. And many do not know that for certain cases special European procedures exist. Against this background – and to ensure that Member States have a sufficient number of judges who may actually work in the above-suggested specialized commercial courts and chambers for international matters and who are actually in a position to apply the suggested expedited procedure for cross-border commercial cases – the European legislature should intensify existing measures relating to the **training of judges and lawyers**. In particular, it should encourage current actors and programmes to cover fields relevant for cross-border commercial cases, notably **European private international law** and **international civil procedure**.³⁰¹ In addition, existing programmes should be extended to include measures pertaining to language training, notably training designed to improve national judges’ proficiency in (legal and business) English.

4.3.3.2. Better access to European and foreign law

In addition to improving training of judges and lawyers the European legislature should also take measures aimed at easing the work of courts and judges. Even today courts and judges in many Member States have difficulties to access relevant legal material when faced with international cases. The EU should, therefore, seek to improve access to European law and to the laws of other Member States.³⁰² In particular, it should seek to build – or encourage the building of – a **centralized database** with cases relating to European private international law and international civil procedure.³⁰³ In addition, it should introduce a **preliminary reference procedure between Member States**.³⁰⁴ This procedure would allow Member States’ courts to directly address (higher) courts in other Member States with questions relating to the application and interpretation of that Member State’s national law. It would complement the already existing (mostly diplomatic) ways of ascertaining the content of foreign law, notably in the framework of the London Foreign Law Convention of

²⁹⁹ Coughlan, Opravil & Heusel, supra note 297, at 25 f.

³⁰⁰ EU Procedural Law Study, supra note 274, at 49, para 110 f.

³⁰¹ EU Procedural Law Study, supra note 274, at 49, para 110 f.; Kramer, supra note 196. See for a list of proposals Coughlan, Opravil & Heusel, supra note 297, at 141.

³⁰² Giesela Rühl & Jan von Hein, Towards a European Code on Private International Law? *RabelsZ* 79 (2015) 701, at 748 f.

³⁰³ Rühl & von Hein, supra note 302, at 748 f.

³⁰⁴ Rühl & von Hein, supra note 302, at 749. See also Oliver Remien, Die Anwendung und Ermittlung ausländischen Rechts im System des Europäischen Internationalen Privatrechts, *ZVglRwiss* 115 (2016) 570, at 582.

1968,³⁰⁵ by establishing a direct link to the very court that knows the applicable law better than any other institution.

4.3.3.3. Better legal education

Finally, the European legislature should also adopt measures relating to legal education in the field of cross-border commercial matters. As things stand at the moment, Member States approach the teaching of relevant subjects, notably private international law and international civil procedure but also comparative law in many different ways.³⁰⁶ While these subjects are mandatory in some Member States, they are not part of legal education at all in others. To ensure that judges across all Member States have a sufficient – minimum – understanding of the applicable rules and regulations, the European legislature should take actions to make sure that **European private international law, European international civil procedure** as well as **comparative law** play a much more prominent role in the education of future lawyers and judges.³⁰⁷ This may, for example, include the introduction of a provision that makes the basic core of these fields mandatory for all law students across the EU.

4.4. Establishing a European Commercial Court

The measures presented in the previous section (supra 4.3.) focus on improving dispute settlement in the Member States through Member States' courts. In particular, they envision the introduction of a new European procedure (supra 4.3.1.) and the establishment of specialized commercial courts or chambers for cross-border commercial matters (supra 4.3.2.). The European legislature, however, should not stop here, but additionally improve the settlement of disputes at the level of the EU. In particular, it should seek to establish a **European Commercial Court**.³⁰⁸ This Court would complement the courts of the Member States and offer commercial litigants one more forum for settling cross-border commercial disputes. It would come with a number of advantages that national courts are not able to offer.

To begin with, a European Commercial Courts would be a **truly international forum**. As such it could better respond to the needs of international commercial parties than national courts which are embedded in existing national judicial structures.³⁰⁹ In particular, it could better position itself as a highly experienced and neutral forum for the settlement of international disputes:³¹⁰ just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different states. These judges would ensure that the Court has the necessary legal expertise and experience to settle international disputes. And they would credibly signal that the Court offers neutral dispute settlement that is unlikely

³⁰⁵ European Convention of 7 July 1967 on Information on Foreign Law.

³⁰⁶ See for an overview of the current state of European private international law and international civil procedure in legal education Thomas Kadner Graziano, Private International Law in Legal Education in Europe and Selected Other Countries, in Jan von Hein, Eva-Maria Kieninger & Giesela Rühl (eds), *How European is European Private International Law?* (forthcoming 2019).

³⁰⁷ Rühl & von Hein, supra note 302, at 750. See also with regard to comparative law Giesela Rühl, *Who's Afraid of Comparative Law? The (Side) Effects of Unifying Private International Law in Europe*, ERPL 25 (2017) 485, at 516 f.

³⁰⁸ Giesela Rühl, *Ein europäisches Handelsgericht*, FAZ, 5 July 2018, 6; Giesela Rühl, *Towards a European Commercial Court?* Conflictoflaws.net, 11 August 2018, <available at <http://conflictflaws.net/2018/towards-a-european-commercial-court/>>. See also Thomas Pfeiffer, *Ein europäischer Handelsgerichtshof und die Entwicklung des europäischen Privatrechts*, ZEuP 2016, 795, 797 ff.

³⁰⁹ Rühl, supra note 308, at 6.

³¹⁰ Rühl, supra note 308, at 6. See also Pfeiffer, supra note 308, at 797.

to favour one of the parties.³¹¹ A European Commercial Court could, therefore, offer commercial parties much of what they get from international commercial arbitration – without sacrificing the inherent advantages associated with a state court.³¹²

A European Commercial Court, however, would not only enrich the European dispute settlement landscape and offer international commercial litigants an additional, an international forum for the settlement of their disputes. It could also participate more convincingly in the **global competition for international disputes** that has gained momentum during the past years and triggered the establishment of international commercial courts around the world: Singapore, for example, opened the **Singapore International Commercial Court** in 2015 to offer a special court for cases that are “of an international and commercial nature”.³¹³ **Qatar** has been running the Qatar International Court and Dispute Resolution Centre (QICDRC) for a number of years by now.³¹⁴ **Abu Dhabi** is hosting the Abu Dhabi Global Markets Courts (ADGMC)³¹⁵ and **Dubai** is home to the International Financial Centre Courts (DIFC).³¹⁶ And in June 2018 **China** joined the bandwagon and created an international commercial court for countries along the modern silk road as part of the OBOR (One Belt, One Road) initiative.³¹⁷ Clearly, a European Commercial Court would be the right answer here – and would certainly have a good chance of developing into an attractive global place for settling international legal disputes.³¹⁸ This, in turn, would benefit European companies both in their dealings with other European companies and in their dealings with parties from third states.

In the following, I will briefly discuss two questions that will inevitably arise should the EU actually decide to establish a European Commercial Court: first, does the European legislature have the competence to build an international court alongside the CJEU on the one hand and the courts of the Member States on the other (infra 4.4.1.)? And, second, what features should the European Commercial Court have in order to become a success (infra 4.4.2.)?

4.4.1. EU Competence

As indicated earlier (supra 4.3.2.1.), the **principle of conferral** embodied in Article 5 TEU allows the EU only to become active if the Treaties expressly so provide. With regard to the establishment of a European Commercial Code an express provision allowing the EU to step

³¹¹ Rühl, supra note 308, at 6. See also Pfeiffer, supra note 308, at 797.

³¹² Rühl, supra note 308, at 6. See also Pfeiffer, supra note 308, at 797.

³¹³ See for details <<http://www.sicc.gov.sg/Home.aspx>>. See for a more detailed presentation C. Yee Leong, The Singapore International Commercial Court, TCR 2015, 148 ff.

³¹⁴ See for details <<http://www.qicdrc.com.qa>>.

³¹⁵ See for details <https://www.adgm.com/doing-business/adgm_courts/home>.

³¹⁶ See for details <<https://www.difccourts.ae>>.

³¹⁷ See for details <http://cicc.court.gov.cn>. See for a first appraisal Wei Sun, International Commercial Court China: Innovations, Misunderstandings and Clarifications, Kluwer Arbitration Blog, 4 July 2018, available at <<http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>>.

³¹⁸ Note that in the light of the just described development also Australia is discussing the establishment of an International Commercial Court. See, for example, Marilyn Warren and Clyde Croft, An International Commercial Court for Australia – Looking beyond the New York Convention, 13 April 2016, available at <<http://assets.justice.vic.gov.au/supreme/resources/2a7ead53-9ae9-4e26-9bad-56ef25d7d34c/aninternationalcommercialcourtforaustraliainlookingbeyondthenewyorkconvention.pdf>>

in could be **Article 257 TFEU**. According to this provision the EU may establish specialized courts attached to the General Court within the CJEU to hear and determine at first instance certain classes of actions or proceedings brought in specific areas. However, a closer look reveals that the provision is no suitable basis for the establishment of a European Commercial Court: Article 257 TFEU envisions the establishment of courts that are meant to hear and determine cases in specific areas of EU law.³¹⁹ These courts are meant to lessen the case load of the General Court and the CJEU with a view to improving the quality of decisions through specialization. A European Commercial Court, in contrast, would not primarily be responsible for the interpretation of EU law. Rather it would be responsible for the settlement of international disputes and hence, the application of national law. It would not complement the CJEU, but the courts of the Member States. A proper legal basis, however, could be Article 81 TFEU.

4.4.1.1. Article 81 TFEU

As detailed earlier (supra 4.3.2.1.) Article 81 TFEU allows the European legislature to adopt measures to improve judicial cooperation in civil matters having cross-border implications. In particular, it allows the EU to adopt measures that **improve access to justice** (Article 81(2) lit. e) TFEU) and measures that **eliminate obstacles to the proper functioning of civil proceedings** (Article 81(2) lit. f) TFEU). A European Commercial Court for the settlement of cross-border commercial cases could be understood to do both: improving access to justice and to eliminating obstacles to the proper functioning of civil proceedings.

The problem with this view, however is, that the establishment of a European Commercial Court would not really serve to improve judicial cooperation between the Member States as envisioned by Article 81 TFEU. Rather it would result in the **establishment of a fully-fledged European institution** that would complement – and to a certain extent: replace – institutions of the Member States. However, there is broad agreement that Article 81 TFEU does not limit the EU's competence to measures that merely approximate the laws of the Member States or to measures that merely foster the compatibility of the rules of civil procedure of the Member States.³²⁰ Rather it is broadly accepted that Article 81 TFEU allows the EU to adopt self-standing European procedures that replace national procedures.³²¹ Based on this **broad understanding** of its competences, the European legislature has, for example, adopted the Small Claims Regulation, the Payment Order Regulation and the Insolvency Regulation. As a consequence, it is submitted that Article 81 TFEU could also be applied to establish a European Commercial Court.³²²

This finding, however, does not mean that all problems were solved. On the contrary, the coming into being of a European Commercial Court would trigger difficult questions relating to the Court's relation to the CJEU on the one hand and its relation to the courts of the Member States on the other. In the following I will take a closer look at both relationships.

³¹⁹ See, for example, Bernhard Wegener, in EUV/AEUV, supra note 292, Article 257, para 1.

³²⁰ See, for example, Rossi, supra note 292, Article 81, para 28. See also Hess, supra note 290, § 2, para 15.

³²¹ See, for example, Rossi, supra note 292, Article 81, para 29. See also Hess, supra note 290, § 2, para 18.

³²² Alternatively, the European legislature could, of course, resort to Article 352 TFEU. However, this provision requires unanimity in the Council. If unanimity cannot be achieved, Member States who want to move forward and establish a European Commercial Court could still consider to do so by way of a treaty and, hence, outside the EU legal system. This is the path some Member States chose in order to establish the Unified Patent Court. See for details Heinze, supra note 282, at 1793 ff.

4.4.1.2. Relation to the CJEU

In view of the CJEU the core question is, whether it would be willing to accept and to tolerate another European court. Doubts are in order for two reasons: first, according to TEU and TFEU it is the CJEU that is entrusted with the final **interpretation of EU law**. And, second, the CJEU has recently – and repeatedly – emphasized that it does not want to leave the interpretation of EU law to other courts. In its **Achmea judgment** of 6 March 2018,³²³ for example, the CJEU held that an arbitration clause in a bilateral investment treaty between two Member States was incompatible with EU law because such that clause allowed arbitral tribunals to apply and interpret EU law without being part of the EU judicial system.³²⁴ And in its **Opinion 01/2009** the CJEU struck down the first draft convention providing for the establishment of a Unified Patent Court arguing that it was charged with the application and interpretation of EU law while operating outside the EU judicial system.³²⁵

Would these considerations also challenge the establishment of a European Commercial Court? It is submitted that the answer should be no: a European Commercial Court would primarily be responsible for settling international disputes between commercial parties – and not for interpreting EU law. It would – like any national court and any arbitral tribunal – primarily **apply national law**.³²⁶ And as a Court set up by the EU it would be entitled and obliged to refer matters concerning EU law to the CJEU by way of a **preliminary reference**.³²⁷ In fact, the CJEU has long held that courts that are set up by a number of Member States, such as the Benelux Court of Justice, are allowed to submit questions to the Court for a preliminary ruling in the same way as the courts or tribunals of any one of the Member States.³²⁸ A European Commercial Court would, therefore, not call the CJEU's function and role within the European judicial system into question. On the contrary, it would accept and defer to the jurisdiction of the CJEU.

4.4.1.3. Relation to the courts of Member States

Another question would be, of course, how a European Commercial Court would relate to the courts of the Member States. Would a European Commercial Court not undermine their authority if it were to decide disputes that have so far come within their jurisdiction? Would it not undermine their competence to apply and interpret national law? The question is justified. However, the very existence of international commercial arbitration proves that national courts have **no monopoly to settle private disputes and to interpret national law**.³²⁹ In addition, the parties can, by virtue of Article 25 Brussels Ia Regulation and Article 3 Rome I Regulation, agree – or exclude – the jurisdiction of a certain court as well as the applicability of a certain law. A European Commercial Court would fit smoothly into that system because it would only offer European companies an **additional option to settle disputes**. In addition, its activity would depend on the parties actively agreeing on its jurisdiction.

³²³ Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158.

³²⁴ Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, para 38 ff., 43 ff.

³²⁵ Opinion 01/09 of 8 March 2011, ECLI:EU:C:2011:123.

³²⁶ Pfeiffer, supra note 308, at 799; Rühl, supra note 308, at 6.

³²⁷ Pfeiffer, supra note 308, at 799; Rühl, supra note 308, at 6.

³²⁸ Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, para 47 f. with reference to its judgment of 4 November 1997, *Parfums Christian Dior*, C-337/95, ECLI:EU:C:1997:517, para 21 and its judgment of 14 June 2011, *Miles and Others*, C-196/09, ECLI:EU:C:2011:388, para 40.

³²⁹ Pfeiffer, supra note 308, at 799M; Rühl, supra note 308, at 6.

4.4.2. Organization and procedure

It goes without saying that the coming into being of the European Commercial Court would raise a number of questions regarding its overall design.³³⁰ The details should, again, be set out after consultation with academics and practitioners taking into account **commercial parties' needs, international best practice** as well as existing **soft law instruments** relating to transnational dispute resolution, notably the ALI/UNIDROIT Principles of Transnational Civil Procedure and the ELI/UNIDROIT European Rules of Civil Procedure (supra 2.1.3.3.). In addition, inspiration might be sought from the Unified Patent Court as well as from other international commercial courts that have recently been established around the world (supra 4.4.). In the following, I will, therefore, confine myself to a discussion of the most salient features the court should have in order to become a success. Those relate to jurisdiction, applicable law, language, qualification of judges and integration of the Court into the European judicial area.

As regards **jurisdiction**, a European Commercial Court would, of course, only be allowed to hear **cross-border commercial cases**, i.e. cases relating to commercial parties from different states. The parties, however, would not necessarily have to come from different Member States: Article 81(2) TFEU allows the European legislature to adopt measures for the purpose of Article 81(1) TFEU, "particularly when necessary for the proper functioning of the internal market", meaning that Article 81 TFEU also allows adoption of measures that are unrelated to the internal market.³³¹ The jurisdiction of the European Commercial Court could and should, therefore, include disputes between commercial parties irrespective of whether they are domiciled in or outside the EU. However, the Court should only be competent to hear a case if the parties have agreed on the jurisdiction of the Court before or after a dispute has arisen.³³²

As regards the **applicable law**, the European Commercial Court should be bound to apply national law (supra 4.4.1.2.). That law should be determined with the help of the pertaining European Regulations, notably the **Rome I and II Regulations**.³³³ Where the Regulations do not offer choice of law rules, which is, for example, the case with regard to agency or corporate law, the Court should apply general principles of European private international law to be determined through a comparative analysis of the Member States' laws.³³⁴ To the extent that application of the pertaining European Regulations or the applicable substantive law raises questions of EU law, the European Commercial Court should be allowed and, in fact, be required to address the CJEU in accordance with Article 267 TFEU (supra 4.4.1.2.).

As an international court, the European Commercial Court should, of course, offer **proceedings in English**. It should be equipped with experienced **judges from different Member States**, ideally representing different legal traditions. Judges should be professional judges or experienced practitioners and, of course, be **experts in commercial law**, well versed in the English language and in the communication with parties from different (legal and cultural) backgrounds. The Court should apply flexible rules of procedure allowing for an

³³⁰ Pfeiffer, supra note 308, at 800.

³³¹ See, for example, Rossi, supra note 292, Article 81, para 13.

³³² Pfeiffer, supra note 308, at 797; Rühl, supra note 308, at 6.

³³³ Pfeiffer, supra note 308, at 798.

³³⁴ See, however, Pfeiffer, supra note 308, at 798, who favours application of the choice of law rules in force in the state that would be competent to hear the case had the parties not agreed on the jurisdiction of the European Commercial Court.

active and efficient case management in response to businesses' needs. Finally, the Court should have **appropriate staff, appropriate buildings, appropriate resources and a good IT-infrastructure**. That infrastructure should allow electronic filing of claims, electronic communication with the Court, electronic submission of documents and witness statements as well as electronic payment of court fees. Ideally, the Court should offer two instances.

Finally, it goes without saying that a European Commercial Court should be **fully integrated into the European Judicial Area**.³³⁵ In particular, it should count as a court of a Member State for the purpose of all European Regulations adopted in the field of judicial cooperation. As a consequence, the Court would, for example, be allowed to serve documents in accordance with the Service Regulation and to take evidence in accordance with the Evidence Regulation. Its judgments would, of course, be recognized and enforced in all Member States pursuant to the Brussels Ia Regulation, i.e. without the need for exequatur.

4.5. Conclusion

To increase the overall attractiveness of settling international disputes in the EU, the European legislature should adopt a bundle of measures relating to choice of law on the one hand (supra 4.2.) and dispute resolution on the other (supra 4.3. and 4.4.).

As regards choice of law, the European legislature should set out to reform the **Rome I and II Regulations** (supra 4.2.1. and 4.2.2.). In particular, it should reform Article 3 Rome I Regulation and Article 14 Rome II Regulation to allow commercial parties to choose a non-state law, such as the UNIDROIT Principles on International Commercial Contracts or the Principles of European Contract Law (supra 4.2.1.2.). In addition, the restrictions to be found in Article 3(2) and (3) Rome I Regulation as well as Article 14(2) and (3) Rome II Regulation should be removed to allow commercial parties the choice of a foreign or a third-state law in purely domestic and European cases without the mandatory provisions of domestic or European law claiming application (supra 4.2.1.3.).

As regards dispute resolution, the European legislature should first and foremost adopt measures meant to improve the settlement of international disputes in the Member States (supra 4.3.). To this end, it should introduce an **expedited procedure for cross-border commercial cases** similar to the one already existing for cross-border small claims (supra 4.3.1.). In addition, it should require the Member States to establish on their territory at least one **specialized court or chamber for cross-border commercial matters** (supra 4.3.2.). Further measures to be adopted (supra 4.3.3.) should envision 1) better **training of judges and lawyers** in European private international law and international civil procedure (supra 4.3.3.1.), 2) better access to European and foreign law through the establishment of a **centralized database** as well as the introduction of a **preliminary reference procedure between Member States** (supra 4.3.3.2.) and 3) better **legal education** that increases the overall knowledge of European private international law and international civil procedure across the EU (supra 4.3.3.3.).

The EU, however, should not only adopt measures aimed at improving the settlement of international disputes at the Member States level. It should also seek to establish a **European Commercial Court** at the level of the EU (supra 4.4.). That Court would offer international commercial litigants an additional, an international forum for the settlement of their disputes. It would enrich the European dispute resolution landscape and provide

³³⁵ Rühl, supra note 308, at 6.

commercial parties with an alternative to both the courts of the Member States and international commercial arbitration. In addition, it could play an important role in the global quest for international legal disputes.

CONCLUSIONS

- Cross-border commercial contracts operate in a **complex legal environment** (supra 2.1.). They are subject to a patchwork of national, European and international rules depending on whether aspects of substantive law (supra 2.1.1.), choice of law (supra 2.1.2.) or dispute settlement (supra 2.1.3.) are at issue.
- To overcome the **legal uncertainty** that may result from this patchwork of legal rules and regulations, commercial parties very often **choose the applicable law and the competent court** with the help of choice of law and choice of forum clauses (supra 2.2.). When they do, **English and Swiss law** as well as **English and Swiss courts** turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States (supra 2.2.1. and 2.2.2.).
- The fact that some laws and some courts are more popular than others indicates that **commercial law competence** is unevenly distributed across countries and notably across the EU. This finding is not per se problematic. Problems, however, may occur when not all commercial parties can actually choose the law or the courts that are commonly perceived to be the best. Many parties, for example, are not able to bring their disputes before English courts because the costs of litigating in England are notoriously high. They will depend on good alternatives in their home country or in the home country of their contracting partner. However, when looking at the **civil justice systems of the Member States** it becomes clear that not all of them live up to the expectations of commercial parties (supra 3.1.).
- The **prospect of Brexit** adds to the problem. Since the UK will most likely lose its access to the European Judicial Area, English court proceedings will no longer benefit from the many European Regulations that ease judicial cooperation in civil matters. Moreover, English judgments will no longer be directly enforceable in accordance with the Brussels Ia Regulation. Even commercial parties who were thus far happy to settle their dispute in England might, therefore, reconsider their decision and look for alternatives in the remaining Member States (supra 3.2.).
- In light of the above, the European legislature should adopt a bundle of measures to improve the **settlement of cross-border commercial disputes in the EU** (supra 4.). In particular, it should remove restrictions that limit commercial parties' freedom to choose the applicable law (infra 4.2.). In addition, it should introduce an expedited procedure for cross-border commercial cases and require Member States to establish specialized courts or chambers for cross-border commercial matters (supra 4.3.1. and 4.3.2.). Finally, the EU should establish a European Commercial Court (supra 4.4.).
- If implemented, the suggested bundle of measures will fundamentally change – and improve – the dispute resolution landscape in the EU. It will ensure that commercial parties have access to **high-quality courts and procedures in all Member States** irrespective of their size and their resources. In addition, the EU as such will develop into an attractive place for the settlement of cross-border commercial disputes. It will be able to compete with some of the leading dispute settlement centres of the world which, in turn, should enhance the EU's attractiveness as a place for doing business.

REFERENCES

- American Law Institute & International Institute for the Unification of Law, Principles of Transnational Civil Procedure (2006), also available at <<http://www.unidroit.org>>.
- Richard Aikens & Andrew Dinsmore, Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit? *European Business Law Review* (Eur. Bus. L. Rev.) 27 (2016) 903 ff.
- Association Henri Capitant, *La construction européenne en droit des affaires: Acquis et perspectives* (2016).
- Jürgen Basedow, The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Law Making, *American Journal of Comparative Law* (Am. J. Comp. L.) 56 (2008) 703 ff.;
- Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (2012).
- Jürgen Basedow, The Hague Principles on Choice of Law: Their Addressees and Impact *Uniform Law Review* (Uniform L. Rev.) 22 (2017) 304 ff.
- Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (2017).
- Peter Benjamin, The ECE General Conditions of Sale and Standard Forms of Contract, *Journal of Business Law* (J.B.L.) 1961, 113 ff.
- Christian Calliess & Matthias Ruffert (eds), *EUV/AEUV* (2016).
- Graf-Peter Calliess (ed), *Rome Regulations* (2015).
- Guillaume Croisant, Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international, *Journal des tribunaux* (J.T.) 2017, 24 ff.
- Guillaume Croisant, Brussels unveils plans for the Brussels International Business Court (BIBC), *Conflictoflaws.net*, 22 May 2018, available at <<http://conflictolaws.net/2018/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>>.
- Guillaume Croisant, The Belgian Government unveils its plan for the Brussels International Business Court (BIBC), *Kluwer Arbitration Blog*, 25 June 2018, available at <<http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>>
- John Coughlan, Jaroslav Opravil & Wolfgang Heusel, Judicial training in the European Union Member States (2011), available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET\(2011\)453198_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf)>.
- Gilles Cuniberti, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Business Law* (Northwestern J. Int'l L. & Bus.) 34 (2015) 455 ff.

- Georg Dalitz, Justizinitiative Frankfurt – too little too late? Zeitschrift für Rechtspolitik (ZRP) 2017, 247 ff.
- Andrew Dickinson, Back to the future: The UK’s EU exit and the conflict of laws, Journal of Private International Law (J. Priv. Int’l L.) 12 (2016) 195 ff.
- Thomas Dietz, Institutionen und Entwicklung: Eine empirische Untersuchung am Beispiel von grenzüberschreitenden Softwareentwicklungsverträgen (2010).
- Pauline Ernste & Freerk Vermeulen, The Netherlands Commercial Court – an attractive venue for international commercial disputes, Tijdschrift voor Civiele Rechtspleging (TCR) 2016, 127 ff.
- Horst Eidenmüller (ed), Regulatory Competition in Contract Law and Dispute Resolution (2013).
- Theodore Eisenberg & Geoffrey Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts, Cardozo Law Review (Cardozo L. Rev.) 30 (2009) 1475 ff.
- European Group on Tort Law, Principles of European Tort Law (2005).
- European Max Planck Group on Conflict of Laws in Intellectual Property, Conflict of laws in intellectual property: the CLIP principles and commentary (2013).
- Duncan Fairgrieve & Solenn le Tutour, Doors open for First Hearing of International Chamber at Paris Court of Appeal, Conflictoflaws.net, 5 June 2018, available at <<http://conflictflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>>.
- Alejandro M. Garro, Rule-Setting by Private Organizations, Standardization of Contracts, and the Harmonization of International Sales Law, in Ian Fletcher, Loukas Mistelis & Marise Cremona (eds), Foundations and Perspectives of International Trade Law (2001) 310 ff.
- Daniel Girsberger & Neil B. Cohen, Key Features of the Hague Principles on Choice of Law in Commercial Contracts, Uniform Law Review (Uniform L. Rev.) 22 (2017) 316 ff.
- Heike Gramckow & Barry Walsh, Developing Specialized Court Services: International Experiences and Lessons Learned, Justice and Development Working Paper Series World Bank 24 (2013), at 6 f., available at <<http://www.documents.worldbank.org>>.
- Andrew Guzman, Choice of Law: New Foundations, The Georgetown Law Journal (Geo. L. J.) 90 (2002) 883 ff.
- Wolfgang Hau, Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte, Ralf Michaels & Dennis Solomon (eds), Liber Amicorum Klaus Schurig (2012) 49 ff.
- Trevor C. Hartley, Pleading and Proof of Foreign Law: The Major European Systems Compared, International & Comparative Law Quarterly (ICLQ) 45 (1996) 271 ff.

-
- Alexander Hellgardt, Das Verbot der kollisionsrechtlichen Wahl nicht-staatlichen Rechts und das Unionsgrundrecht der Privatautonomie, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 82 (2018) 654 ff.
 - Burkhard Hess, *Europäisches Zivilprozessrecht* (2010).
 - Burkhard Hess, Harmonized Rules and Minimum Standards in the European Law of Civil Procedure. In-Depth Analysis for the JURI Committee of the European Parliament (2016), at 9 f., available at <http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html>.
 - Burkhard Hess, The Justice Initiative Frankfurt am Main 2017, *Conflictolaws.net*, 31 March 2017, available at <http://conflictolaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.
 - Burkhard Hess, Das Lugano-Übereinkommen und der Brexit, in Burkhard Hess, Erik Jayme & Heinz-Peter Mansel (eds), *Europa als Rechts- und Lebensraum, Liber Amicorum für Christian Kohler zum 75. Geburtstag* (2018) 17 ff.
 - Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation* (2009).
 - Emmanuel Jeuland, The International Division of the Paris Commercial Court, *Tijdschrift voor Civiele Rechtspleging (TCR)* 2016, 143 ff.
 - Thomas Kadner Graziano, Private International Law in Legal Education in Europe and Selected Other Countries, in Jan von Hein, Eva-Maria Kieninger & Giesela Rühl (eds), *How European is European Private International Law?* (forthcoming 2019).
 - Christoph Kern, English as Court Language in Continental European Courts, *Erasmus Law Review (Erasmus L. Rev.)* 5 (2012) 187 ff.
 - Christoph Kern, Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze, *JuristenZeitung (JZ)* 2012, 389 ff.
 - Christoph Kern & Gregor Dalitz, Netherlands Commercial Court, *Zeitschrift für Zivilprozess International (ZZPInt)* 21 (2016) 119 ff.
 - Xandra Kramer, A Common Discourse in European Private International Law? A View from the Court System, in Jan von Hein, Eva-Maria Kieninger & Giesela Rühl (eds), *How European is European Private International Law?* (forthcoming 2019).
 - Johannes Landbrecht, The Hague Conference on private international law: shaping a global framework for party autonomy, *International Business Law Journal (Int'l Bus. L. J.)* 2017, 35 ff.
 - Matthias Lehmann, Braucht Europa ein Handelsgesetzbuch? *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht (ZHR)* 181 (2017) 9 ff.
 - Matthias Lehmann, Das Europäische Wirtschaftsgesetzbuch – Eine Projektskizze, *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2017, 262 ff.

- Matthias Lehmann, Jessica Schmidt & Reiner Schulze, Das Projekt eines Europäischen Wirtschaftsgesetzbuches, Zeitschrift für Rechtspolitik (ZRP) 2017, 225 ff.
- Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants & José del Rio, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts (2015).
- Ralf Michaels, Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts, in Kai Purnhagen & Peter Rott (eds), Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz (2014) 43 ff.
- Peter Mankowski, Article 3 of the Hague Principles: the Final Breakthrough for the Choice of Non-State Law? Uniform Law Review (Uniform L. Rev.) 22 (2017) 369 ff.
- Heinz-Peter Mansel, Party Autonomy, Legal Doctrine on Choice of Law, and the General Section of the European Conflict of Laws, in Stefan Leible (ed), General Principles of European Private International Law (2016) 131 ff.
- Sara Masters & Belinda McRae, What Does Brexit Mean for the Brussels Regime? Journal of International Arbitration (J. Int'l Arb.) 2016, 483 ff.
- Luiz Gustavo Meira Moser, Parties' preferences in international sales contracts: an empirical analysis of the choice of law, Uniform Law Review (Uniform L. Rev.) 20 (2015) 19 ff.
- MPI Luxembourg for Procedural Law et al, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and of the equivalence of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 1: Mutual trust and free circulation of judgments (EU Procedural Law Study), JUST/2014/RCON/PR/CIVI082, available at <http://www.publications.europa.edu>.
- Yuko Nishitani, Party Autonomy in Contemporary Private International Law, Japanese Yearbook of International Law (Japanese Yb. Int'l L.) 59 (2016) 300 ff.
- Duco J. Oranje, The coming into being of the Netherlands Commercial Court, Tijdschrift voor Civiele Rechtspleging (TCR) 2016, 122 ff.
- Thomas Pfeiffer, Die Haager Prinzipien des internationalen Vertragsrechts – Ausgewählte Aspekte aus der Sicht der Rom I-VO, in Peter Mankowski & Wolfgang Wurmnest (eds), Festschrift für Ulrich Magnus (2014) 501 ff.
- Thomas Pfeiffer, Ein europäischer Handelsgerichtshof und die Entwicklung des europäischen Privatrechts, Zeitschrift für Europäisches Privatrecht (ZEuP) 2016, 795 ff.
- Richard Plender & Michael Wilderspin, The European Private International Law of Obligations (2015).
- Rupprecht Podszun & Tristan Rohner, Nach dem Brexit: Die Stärkung staatlicher Gerichte für wirtschaftliche Streitigkeiten, Betriebsberater (BB) 2018, 480 ff.
- Portland Communications, Who Uses the Commercial Court? – 2015 (2015), available at <http://www.portland-communications.com>.

-
- Portland Communications, Who Uses the Commercial Court? – 2016 (2016), available at <http://www.portland-communications.com>.
 - Portland Communications, Who Uses the Commercial Court? – 2017 (2017), available at <http://www.portland-communications.com>.
 - Queen Mary School of International Arbitration, 2010 International Arbitration Survey: Choices in International Arbitration (2010), available at <http://www.arbitration.qmul.ac.uk/research/>.
 - Queen Mary School of International Arbitration, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018, available at <http://www.arbitration.qmul.ac.uk/research/>.
 - Tena Ratković & Dora Zgrabljic Rotar, Choice-of-Court Agreements under the Brussels I Regulation (Recast), *Journal of Private International Law (J. Priv. Int'l L.)* 9 (2013) 243 ff.
 - Oliver Remien, Die Anwendung und Ermittlung ausländischen Rechts im System des Europäischen Internationalen Privatrechts, *Zeitschrift für vergleichende Rechtswissenschaft (ZVglRwiss)* 115 (2016) 570 ff.
 - Giesela Rühl, Die Kosten der Rechtswahlfreiheit: Zur Anwendung ausländischen Rechts durch deutsche Gerichte, *Rabels Zeitschrift für ausländisches und internationale Privatrecht (RabelsZ)* 71 (2007) 559 ff.
 - Giesela Rühl, Party Autonomy in the Private International Law of Contracts, in Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein (eds), *Conflict of Laws in a Globalized World* (2007) 153 ff.
 - Giesela Rühl, The Problems of International Transactions: Conflict of Laws Revisited, *Journal of Private International Law (J. Priv. Int'l L.)* 6 (2010) 59 ff.
 - Giesela Rühl, Statut und Effizienz. Ökonomische Grundlagen des Internationalen Privatrechts (2011).
 - Giesela Rühl, The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime? *Maastricht Journal of European and Comparative Law (Maastricht J. Eur. & Comp. L.)* 19 (2012) 148 ff.
 - Giesela Rühl, Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications, *European Review of Contract Law (ERCL)* 9 (2013) 61 ff.
 - Giesela Rühl, The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy, *Journal of Private International Law (J. Priv. Int'l L.)* 10 (2014) 335 ff.
 - Giesela Rühl, Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: A Critical Evaluation of the European Legislature's Recent Efforts to Promote Competitiveness and Growth in the Internal Market, *Journal of Consumer Policy (J. Consum. Pol.)* 38 (2015) 431 ff.
 - Giesela Rühl, Who's Afraid of Comparative Law? The (Side) Effects of Unifying Private International Law in Europe, *European Review of Private Law (ERPL)* 25 (2017) 485 ff.

- Giesela Rühl, (Ex post) Evaluations of legislative actions in the European Union: the example of private international law, *Netherlands Journal of Private International Law (NIPR)* 2017, 433 ff.
- Giesela Rühl, Judicial Cooperation in Civil and Commercial Matters after Brexit: Which way forward? *International & Comparative Law Quarterly (ICLQ)* 67 (2018) 99 ff.
- Giesela Rühl, Ein europäisches Handelsgericht, *Frankfurter Allgemeine Zeitung (FAZ)*, 5 July 2018, 6.
- Giesela Rühl, Towards a European Commercial Court? *Conflictolaws.net*, 11 August 2018, available at <http://conflictolaws.net/2018/towards-a-european-commercial-court/>.
- Giesela Rühl & Jan von Hein, Towards a European Code on Private International Law? *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 79 (2015) 701 ff.
- Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum BGB* (2018).
- Geneviève Saumier, The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract, *Brooklyn Journal of International Law (Brooklyn J. Int'l L.)* 40 (2014) 1 ff.
- Hans-Bernd Schäfer & Katrin Lantermann, Choice of Law from an Economic Perspective, in: Jürgen Basedow & Toshiyuki Kono (eds), *An Economic Analysis of Private International Law* (2006) 87 ff.
- Kurt Siehr, Special Courts for Conflicts Cases: A German Experiment, *American Journal of Comparative Law (Am. J. Comp. L)* 25 (1977) 663 ff.
- David V. Snyder, Private Lawmaking, *Ohio State Law Journal (Ohio St. L. J.)* 64 (2003) 371 ff.
- Lisa Spagnolo, Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choice of Law in International Sales Contracts, *Journal of Private International Law (J. Priv. Int'l L.)* 6 (2010) 417 ff.
- Michael Stürner, Litigation in the 21st century: how attractive is the German civil justice system? *Tijdschrift voor Civiele Rechtspleging (TCR)* 2016, 145 ff.
- Rolf Stürner, The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 69 (2005) 201 ff.
- Wei Sun, International Commercial Court China: Innovations, Misunderstandings and Clarifications, *Kluwer Arbitration Blog*, 4 July 2018, available at <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>

-
- Corinne Truong, The Law Applicable to the Merits in International Distribution Contracts: An Analysis of ICC Arbitral Awards, ICC International Court of Arbitration Bulletin 12 (2001) 37 ff.
 - Stefan Vogenauer & Stephen Weatherill (eds), Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice (2006).
 - Stefan Vogenauer & Christopher Hodges, Civil Justice Systems in Europe: Implications for Choice of Law and Choice of Forum – A Business Survey (2008).
 - Stefan Vogenauer, Regulatory Competition through Choice of Law and Choice of Forum: Theory and Evidence, European Review of Private Law (ERPL) 21 (2013) 13 ff.
 - Andreas Vogeler, Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013).
 - Stefan Voigt, Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory, Journal of Empirical Legal Studies (J. Emp. Leg. Stud.) 5 (2008) 1 ff.
 - Gerhard Wagner, The Economics of Harmonization: The Case of Contract Law, Common Market Law Review (C. M. L. Rev.) 39 (2002) 995 ff.
 - Gerhard Wagner, The Virtues of Diversity in European Private Law, in Jan Smits (ed), The Need for a European Contract Law (2005) 3 ff.
 - Gerhard Wagner, Rechtsstandort Deutschland im Wettbewerb (2017).
 - Marilyn Warren and Clyde Croft, An International Commercial Court for Australia – Looking beyond the New York Convention, 13 April 2016, available at <<http://assets.justice.vic.gov.au/supreme/resources/2a7ead53-9ae9-4e26-9bad-56ef25d7d34c/aninternationalcommercialcourtforaustralialookingbeyondthenewyorkconvention.pdf>>
 - Matthias Weller, Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes, Journal of Private International Law (J. Priv. Int'l L.) 13 (2017) 91 ff.
 - World Bank, Good Practices for Courts: Helpful Elements for Good Court Performance and the World Bank's quality of Judicial Process Indicators (2016), available at <<http://documents.worldbank.org/>>.
 - C. Yee Leong, The Singapore International Commercial Court, Tijdschrift voor Civiele Rechtspleging (TCR) 2016, 148 ff.
 - Markus B. Zimmer, Overview of Specialized Courts, International Journal for Court Administration (IJCA) 2009, 1 ff.

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the European Parliament's Committee on Legal Affairs (JURI Committee), sheds light on cross-border commercial contracts and their operation in theory and practice. It describes the legal framework in which commercial contracts operate and analyses current commercial practice as regards choice of law and choice of forum. It concludes that the laws and the courts of some states are more popular than others and suggests to adopt a bundle of measures that will improve the settlement of international disputes in the EU. Among others, the study suggests to introduce an expedited procedure for cross-border commercial cases and to establish specialized courts or chambers for cross-border commercial matters in each Member State. In addition, the study suggests to establish a European Commercial Court.

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