X. Further reading

1. Books and articles written in English

HUGH BEALE, ARTHUR HARTKAMP, HEIN KÖTZ AND DENIS TALLON (eds), *Cases, Materials and Text on Contract Law*, Oxford: Hart Publishing, 2002, Ch. 1.1.3.C, 20–21; Ch. 1.1.4., Ch. 1.1.4.A. 28–31.

PETER BENSON, "Law and Morality: Contract Law: Contract as a Transfer of Ownership", 48 (2007) *Wm and Mary L. Rev.* 1673–1731.

ULRICH DROBNIG, "Transfer of property", in Arthur Hartkamp *et al.* (eds), *Towards a European Civil Code*, 3rd edn, Nijmegen: Kluwer Law International, 2004, Ch. 40, 725–40.

LARS VAN VLIET, "Transfer of movable property", in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar Publishing Ltd, 2006, 730–37.

LARS VAN VLIET, "Iusta causa traditionis and its history in European private law", *ERPL* 2003, 342–78.

LARS VAN VLIET, *Transfer of movables in German, French, English and Dutch law*, Nijmegen: Ars Aequi Libri, 2000.

2. Books and articles written in German

ULRICH EISENHARDT, "Die Entwicklung des Abstraktionsprinzips im 20. Jahrhundert", in Gerhard Köbler and Hermann Nehlsen, *Wirkungen europäischer Rechtskultur, Festschrift für Karl Kroeschell zum 70. Geburtstag*, München: Beck, 1997, 215–32.

FRANCO FERRARI, "Vom Abstraktionsprinzip zum Konsensualprinzip zum Traditionsprinzip – Zu den Möglichkeiten der Rechtsangleichung im Mobiliarsachenrecht", *ZEuP* 1993, 52–78.

FILIPPO RANIERI, *Europäisches Obligationenrecht*, Wien/New York: Springer, 379–431.

ANDREAS ROTH, "Abstraktions- und Konsensprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien", *ZVglRWiss* 92 (1993), 371–94.

KURT SIEHR, "Der gutgläubige Erwerb beweglicher Sachen – Neue Entwicklungen zu einem alten Problem", *ZVglRWiss* 80 (1981), 273–92.

KARSTEN THORN, "Mobiliarerwerb vom Nichtberechtigten, Neue Entwicklungen in rechtsvergleichender Perspektive", *ZEuP* 1997, 442–74.

ANDREAS WACKE, "Eigentumserwerb des Käufers durch schlichten Konsens oder erst mit Übergabe? Unterschiede im Rezeptionsprozess und ihre mögliche Überwindung", *ZEuP* 2000, 254–62.

HANS WIELING, "Das Abstraktionsprinzip für Europe!", *ZEuP* 2001, 301–07.

Chapter III

The law applicable to cross-border contracts and the future of European contract law

Case 9: The law applicable to cross-border contracts (introduction)

"Si l'Europe doit être un vrai marché unique, ne faudrait-il pas qu'une opération contractuelle entre deux entreprises de part et d'autre de la frontière soit aussi bien balisée qu'un contrat conclu entre deux entreprises au sein d'un même Etat?"[1]

Scenario

An English car dealer sends an order for 15 sports cars to a German manufacturer. The German manufacturer receives the order and makes a note of it. Before he is able to send an acceptance, the English car dealer revokes his order by fax.

Nevertheless, the German manufacturer sends a message accepting the order, relying on § 145 of the German Civil Code (BGB), according to which an offeror is bound by his offer. The English car dealer relies on the general rule that offers are revocable, which is set out in English case law, and also on the "postal rule", according to which an offer can be revoked at any time up until the acceptance is dispatched.[2]

A variation on the above

An English jeweller orders a batch of watch mechanisms from a Swiss manufacturer. The Swiss manufacturer receives the order. Before he can send his acceptance, the English jeweller cancels his order. The manufacturer nevertheless gives the jeweller notice that he accepts the order, relying on Article 5 of the Swiss Code of Obligations, according to which an offeror is bound by his offer up until the moment that he could expect to receive a reply dispatched properly and in a timely fashion.[3]

1 CLAUDE WITZ, "Plaidoyer pour un code européen des obligations", *Recueil Dalloz* 2000, Chroniques, p. 79 (81). Translation: If Europe is to be a real single market, should it not be the case that a contractual transaction between two companies on different sides of a border be as well marked out as a contract concluded between two companies in the same State?

2 For further discussion of § 145 BGB and the "postal rule", see above **Case 3.**

3 On Art. 5 of the Swiss Code of Obligations, see above, **Case 3.**

Questions

(1) Under what conditions is the United Nations Convention on Contracts for the International Sale of Goods (CISG or Vienna Sales Convention) applicable? The CISG is in force in all the Member States of the European Union except the UK, Ireland, Malta and Portugal. Would the Vienna Convention be applicable if the facts of the scenario were litigated before:
(a) the German courts;
(b) the English courts? [4]

Where appropriate, refer to the Rome I Regulation as applicable for contracts concluded after 17 December 2009.

(2) In the above scenario, which of the parties is right?

(3) Would the CISG be applicable in the *variation* if the case were brought before the Swiss courts?[5]

(4) Would a contract of sale concluded between a seller with its place of business in the USA (e.g. in New York) and a buyer with its place of business in:
(a) Switzerland
(b) England
be governed by the CISG, the Uniform Commercial Code or by English law if brought before a court in the USA? (See Articles 1 and 95 of the CISG.)

(5) What law would apply to the Anglo-German contract in the *scenario* if the parties had agreed on the application of "Swiss law" (i.e. they chose the law of a third State) when the contract was concluded?

Would your answer be different if the parties had expressly referred in their contract to the relevant articles in the Swiss Code of Obligations?

(6) (a) What would the applicable law be in the *scenario* if the parties, when contracting, had stipulated that the contract should be governed by:
- the Principles of European Contract Law (PECL);
- the UNIDROIT Principles; or
- the *lex mercatoria*?[6]

(b) What would the applicable law be if the parties had, at the same time as choosing the PECL, the UNIDROIT Principles, or the *lex mercatoria*, also agreed to submit their case to arbitration?

[4] It is presumed that the courts have jurisdiction.
[5] Switzerland is not a Member State of the European Union. It is a Contracting State of the CISG.
[6] The *lex mercatoria* is "that part of transnational commercial law which consists of the unwritten customs and usages of merchants, so far as these satisfy certain externally set criteria for validation", ROY GOODE, HERBERT KRONKE AND EWAN MCKENDRICK, *Transnational Commercial Law*, Oxford: Oxford University Press, 2007, at 1.04 and 1.60.

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I.

1. United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG)[7]

Art. 1
(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application of the law of a Contracting State.
[...]

Art. 2
This Convention does not apply to sales:
(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
[...]

Art. 3
(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Art. 6
The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Art. 16
(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
(2) However, an offer cannot be revoked:
(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

[7] A list of the Contracting States is available at: http://www.unilex.info.

Art. 95
Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.[8]

2. 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)[9]

Article 1
Material scope
1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. [...]

Article 2
Universal application
Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 3
Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

[...]

Article 4
Applicable law in the absence of choice
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
[...]

[8] This reservation was declared, e.g., by the USA, Canada (with respect to British Columbia), and China.
[9] OJ L 177, 4.7.2008, pp. 6–16.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 10
Consent and material validity
1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11
Formal validity
1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

[...]

Article 19
Habitual residence
1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of *renvoi*

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

[...]

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

3. Herbert Bernstein and Joseph Lookovsky, *Understanding the CISG in Europe*, 2nd edn, pp. 14–16[10]

§ 2-4. Article 1 (1) (b) and Article 95 Declarations

[...]

Illustration 2a: Merchant-buyer B in England mails an order for 10 dozen designer dresses (FOB Le Havre) to seller-manufacturer S in France. S purports to accept the order by posting a brief confirmation letter to B. Later, claiming non-conformity of the goods, B refuses to accept them, and S demands to be paid.

A *French* court asked to decide the ensuing dispute between S and B could not apply the CISG by virtue of Article 1(1) (a) because the United Kingdom is not [...] a Contracting State. But in this situation, the court would be bound to apply the CISG nonetheless,

10 Some footnotes omitted.

because the relevant French private international law rule calls for the application of the "seller's law"[18].

In all likelihood, the result would be the same if the dispute were brought before an *English* court, in that the private international law of England would presumably point to French law[19], which in this case should lead to the application of the CISG[20]. Thus a *non*-Contracting State, such as presently [...] the United Kingdom, may end up applying the CISG because of an interaction of the forum's private international law and Art. 1(1) (b) of CISG[21].

[...]

18 Re, the 1955 Hague Convention [...]

19 In the absence of a choice by the parties, under [Art. 4(1)(a) of the Rome I Regulation, a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence].

20 When English private international law rules refer to French law, this includes a reference to Art. 1(1)(b) CISG which, under French private international law [1955 Hague] rules, points to the seller's law, i.e. the CISG. [...]

21 When a court in a *non*-Contracting State applies the rule in Article 1(1)(b), it is obviously not acting in performance of the (public international law) obligation based on the CISG treaty. Rather, such a court applies this rule as a provision of the *internal law of the Contracting State* whose application is *prescribed by the forum's conflicts rule*. [...]

4. *Dicey, Morris & Collins on The Conflict of Law*, 14th edn, Vol. 2

33-123 There is one possible circumstance in which an English court might be required to apply the United Nations Convention[11] despite the fact that the United Kingdom has not ratified the Convention. This is where the law applicable to the contract of sale under the Rome [I Regulation] is found to be the law of a country which is a party to the United Nations Convention and that country would regard the Convention as applicable. This conclusion cannot be stated with any certainty, however, since it is possible to construe Article 21 of the Rome Convention [Article 25(1) of the Rome I Regulation] as rendering international conventions applicable, even in this circumstance, only as between Contracting States which are parties thereto. If this latter view is correct, then since the United Kingdom is not a party to the United Nations Convention, the law applicable to a contract of sale, if that of a foreign country which is a party to the United Nations Convention, will be the contract law of this country, excluding the rules of that latter Convention.

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

II.

1. Schweizerisches Bundesgesetz über das Internationale Privatrecht (*Swiss Federal Act on Private International Law*)

Art. 116
(1) Der Vertrag untersteht dem von den Parteien gewählten Recht.
(2) Die Rechtswahl muss ausdrücklich sein oder sich eindeutig aus dem Vertrag oder aus den Umständen des Falles ergeben. Im übrigen untersteht sie dem gewählten Recht.

Art. 116
(1) The contract is governed by the law chosen by the parties.
(2) The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. It is governed by the law chosen.

Art. 118
(1) Für den Kauf beweglicher körperlicher Sachen gilt das Haager Übereinkommen vom 15. Juni 1955 betreffend das auf internationale Kaufverträge über bewegliche körperliche Sachen anzuwendende Recht.

[...]

Art. 118
(1) The sale of movables is governed by the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

[...]

2. Convention on the Law Applicable to International Sales of Goods (Hague Sales Convention 1955)[12]

Art. 1
(1) This Convention shall apply to international sales of goods.
(2) It shall not apply to sales of securities, to sales of ships and of registered boats or aircraft, or to sales upon judicial order or by way of execution. It shall apply to sales based on documents.
(3) For the purposes of this Convention, contracts to deliver goods to be manufactured or produced shall be placed on the same footing as sales provided the party who assumes delivery is to furnish the necessary raw materials for their manufacture or production.

[12] The Convention is in force in Denmark, Finland, France, Italy, Norway, Sweden, and Switzerland.

(4) The mere declaration of the parties, relative to the application of a law or the competence of a judge or arbitrator, shall not be sufficient to confer upon a sale the international character provided for in the first paragraph of this Article.

Art. 2
(1) A sale shall be governed by the domestic law of the country designated by the Contracting Parties.
(2) Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract.
(3) Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law.

Art. 3
(1) In default of a law declared applicable by the parties under the conditions provided in the preceding Article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated.
(2) Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller.
(3) In case of a sale at an exchange or at a public auction, the sale shall be governed by the domestic law of the country in which the exchange is situated or the auction takes place.

III.

1. Österreichischer Oberster Gerichtshof (*Austrian Supreme Court of Justice*), 22.10.2001, 1 Ob 77/01g, http://www.unilex.info/

[...]

Entscheidungsgründe:

Die klagende ungarische Aktiengesellschaft als Verkäuferin schloss am 4. Februar 1994 mit der beklagten österreichischen Aktiengesellschaft als Käuferin einen Liefervertrag über die Lieferung von Gasölen und Benzinen für den Zeitraum 1. Februar 1994 bis 31. Jänner 1995; vereinbart wurde darin die Anwendung österreichischen Rechts. [...]

[...]

b) Die Vorinstanzen setzten sich mit der Frage nach dem anzuwendenden Recht eingehend auseinander, bejahten das Zustandekommen einer Rechtswahlvereinbarung der Streitteile und unterstellen die Rechtsbeziehung der Streitteile ex contractu nach §§ 11 und 35 Abs 1 [des österreichischen IPR-Gesetzes] [...] zutreffend dem österreichischen Sachrecht. [...]

Die beklagte Partei zieht die von den Vorinstanzen [...] vorgenommene Einbeziehung des UN-K in den Kreis des anzuwendenden Rechts zu Unrecht in Zweifel: Bei Vertragsabschluss stand das UN-K sowohl in Ungarn [...] als auch in Österreich [...] in Geltung: Die Parteien, die ihre Niederlassung in verschiedenen Staaten haben, schlossen einen (Rahmen-)Liefervertrag über Waren ab (Art. 1 Abs 1 lit a UN-K). Grundsätzlich ist daher das UN-K – als Teil der österreichischen Rechtsordnung - von der Rechtswahl mitumfasst. Ist das UN-K anwendbar, so müssen die Parteien, die seine Anwendung nicht wollen, eine entsprechende Ausschlussvereinbarung treffen; der Ausschluss kann ausdrücklich oder stillschweigend erfolgen [...] Den ausdrücklichen Anwendungsausschluß behauptet die beklagte Partei nicht einmal; zur Annahme eines stillschweigenden Ausschlusses besteht entgegen dem Rechtsmittelvortrag kein Anlass, darf dieser doch nur dann angenommen werden, wenn ihn ein hinreichend deutlicher Parteiwille nahelegt. Ergibt sich [...] nicht mit hinreichender Deutlichkeit, dass ein Ausschluss gewollt ist, so bleibt es bei der Anwendung des UN-K [...] Die pauschale Wahl des Rechts eines Ratifizierungsstaats des UN-K kann nach ganz herrschender Ansicht für sich mangels zusätzlicher – hier aber fehlender – Anhaltspunkte nicht den Ausschluss des UN-K bedeuten [...] In der Entscheidung 2 Ob 328/97t [...] wurde ausgesprochen, hätten die Vertragsparteien eines Sukzessivlieferungsvertrags ihre Niederlassungen in verschiedenen Staaten und wählten sie das Recht eines UN-K Mitgliedstaats, so sei das UN-K auch ohne ausdrückliche Erwähnung, dass sie dessen Anwendung wünschten, anzuwenden. Die Rechtswahl ohne Kundgabe eines dahingehenden Abwahlwillens ist nicht als konkludenter Ausschluss des UN-K zu werten, weil dieses als Bestandteil des vereinbarten Rechts auch von dieser Verweisung erfasst wird und im Rahmen seines Anwendungsbereichs dem sonst zur Anwendung kommenden unvereinheitlichten Recht vorgeht [...]

Auch die Vereinbarung von INCOTERMS – wie hier – deutet nicht notwendigerweise auf die Abbedingung des UN-K hin, weil diese nur einzelne Aspekte des Kaufvertrags regeln und deshalb nicht die Anwendung eines bestimmten, vom UN-K abweichenden Kaufrechts als Basis voraussetzen [...] Das Rechtsmittel vermag auch nicht aufzuzeigen, in welchem Punkt die INCOTERMS dem UN-K vorgehen sollten. Die Anwendung des UN-K wurde somit nicht gemäß Art. 6 wirksam ausgeschlossen [...], ist doch nach dem vorliegenden Sachstand die österreichische Rechtsordnung als Ganzes und nicht bloß in Teilbereichen Gegenstand der Rechtswahlvereinbarung.

[...]

Translation[13]

[...]

On 4 February 1994, the Hungarian Plaintiff [Seller] and the Austrian Defendant [Buyer] concluded a supply contract over the delivery of gasoline and gas oil for the period of 1 February 1994 to 31 January 1995. The contract contained a choice of law clause in favor of Austrian law. [...]

[...]

b) The previous instances considered the question of the applicable law, affirmed the valid agreement of a choice of law clause between the parties, and correctly applied Austrian domestic law to the parties' contractual relationship following IPRG §§ 11 and 35(1) [Austrian Code on Private International Law]. [...]

[Buyer]'s appeal wrongly doubts the finding of the previous instances [...] that the CISG is to be included in the law governing the contract. At the time of the conclusion of the contract, the CISG had entered into force both in Hungary [...] and in Austria [...] The parties, who have their places of business in different Contracting States, concluded a (framework) contract for the delivery of goods (Art. 1(1)(a) CISG). Therefore, the choice of Austrian law generally includes the CISG, which forms part of the Austrian legal system. If the CISG is applicable, parties who do not wish to have the Convention govern their contract need to reach a corresponding agreement to exclude its application; the exclusion may be made expressly or impliedly [Art. 6 CISG]. [...] [A]n implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. If it cannot be established with sufficient clarity that an exclusion of the Convention was intended [...], then the CISG is to be applied [...]

According to the prevailing opinion, the general choice of law of a Contracting State to the Convention does not lead to its exclusion, unless there are further indications to the contrary – which is not the case in the present dispute [...] In decision 2 Ob 328/97t, [...], the Supreme Court held that the CISG applies if two parties to an installment contract have their places of business in different States and choose the law of a CISG member State, even if they do not explicitly agree on its application. The choice of law without an explicit declaration that the Convention be excluded does not constitute an implicit exclusion, because the CISG is a part of the chosen law, it is therefore included in the

[13] Translation by RUTH M. JANAL, ed. by Jan Henning Berg, at http://cisgw3.law.pace.edu/cases/011022a3.html.

referral, and takes precedence over the non-unified law which would otherwise be applicable [...]

The agreement to apply Incoterms – as in the present case – also does not necessarily indicate an agreement to exclude the CISG, because they provide only for singular aspects of the sales contract and do not require the basis of a certain sales law that diverges from the CISG [...] The [Buyer]'s appeal further fails to show in which point Incoterms are supposed to take priority over the CISG. The application of the CISG was consequently not validly excluded under its Art. 6 [...], because the facts reveal that the choice of law clause referred to the Austrian legal system as a whole and not to only parts of it.

2. Tribunale Civile di Monza (*Civil Court of Monza, Italy*), 14.01.1993 (Nuova Fucinati S.p.A. ./. Fondmetal International A.B.), http://www.unilex.info/

Su ricorso della Fondmetall International AB con sede in Kyrgogatan 44-S-411 15 Goteborg (Svezia) il Presidente del Tribunale di Monza ingiungeva in data 20.7.88 alla s.p.a. Nuova Fucinati con sede in Monza di consegnare alla ricorrente mille tonnellate metriche di ferrocromo 'Lumpy' così come ordinate con scrittura del 3.2.88 [...]

[...]

MOTIVI DELLA DECISIONE

[...]

Poichè si discute di una vendita internazionale di cose mobili intervenuta tra un'impresa italiana (venditrice) ed un'impresa svedese (acquirente), la prima questione da risolvere è se il contratto sia o meno soggetto alla Convenzione di Vienna 11.4.1980, resa esecutiva in Italia con legge dell'11.2.1985, n. 765 ed ivi entrata in vigore l'1.1.1988. [...]

[...]

Ora, è vero che la legge convenzionalmente applicabile al contratto è quella italiana, in virtù della esplicita clausola inserita nella conferma d'ordine ('law: italian law to apply'); ed è anche vero che, essendo la Convenzione di Vienna ormai vigente nell'ordinamento interno, deve essere valutata alla stregua di qualsiasi altra legge di questo Stato.

[...]

Translation[14]

On the appeal of Fondmetal International AB with its headquarters in Kyrgogatan 44-S-411 15 Gothenburg (Sweden) the President of the Court of Monza orders on 20 July 1988 Nuova Fucinati S.p.A. with its headquarters in Monza to deliver to the appellant one thousand metric tons of ferrochrome "Lumpy" as ordered in the written document dated 3 February 1988 [...]

14 Translation by ML.

[...]

GROUNDS FOR THE DECISION

[...]

As this is a case involving the international sale of goods between an Italian company (the seller) and a Swedish company (the purchaser), the first question to be answered is whether the contract is or is not governed by the Vienna Convention of 11 April 1980, which was implemented in Italy by the law of 11 February 1985, n. 765 and which entered into force on 1 January 1988. [...]

[...]

It is true that the law applicable to the contract by agreement is the Italian law in accordance with the express clause contained in the order confirmation ("law: Italian law to apply"); and it is also true that, the Vienna Convention, as it is, from now on, part of the internal legal system, must be considered to be like any other law of that State.

[...]

3. Tribunal cantonal (*Cantonal court, Canton of Vaud, Switzerland*), 8.12.2000, G. & L. C. I.), SZIER/RSDIE 2002, pp. 147–50

[...] Lorsque les parties sont convenues d'une clause d'élection de droit en faveur d'un Etat contractant, il faut déterminer si elles ont voulu désigner le droit interne national de ce pays ou le droit spécial régissant la vente internationale, puisqu'il fait aussi partie du droit interne. [...] La doctrine est partagée sur la portée à attribuer, dans ce cadre, à une clause d'élection de droit. [...] Au niveau jurisprudentiel, une certaine tendance se dessine en faveur d'une application restrictive de l'article 6 de la Convention de Vienne. Les tribunaux refusent, en principe, de voir dans une clause d'élection de droit une mise à l'écart de la Convention de Vienne (Arrêt du Tribunal cantonal lucernois du 6 octobre 1995, rapporté in RSDIE 4/96 p. 132; Arrêt de la Cour de cassation française du 17 décembre 1996, rapportée in RSDIE 1/98 p. 89; Arrêt de la Cour d'arbitrage de la Chambre du commerce et de l'industrie de Budapest du 8 mai 1997 dans la cause Vb 96038; Witz, L'application de la Convention de Vienne en France, in: Les ventes internationales, pp. 1 ss, p. 12; contra: jugement du Tribunal de district de Weinfelden du 23 novembre 1998, rapporté in RSDIE 2/99 p. 198).

[...] [L]es termes utilisés par l'article 6 CV ("les parties peuvent exclure") doivent être compris dans le sens d'une présomption d'applicabilité de la Convention. Force est donc d'admettre que le simple renvoi au droit d'un Etat contractant (élection de droit) n'est pas encore suffisant pour écarter la Convention de Vienne, puisque celle-ci est devenue partie intégrante de ce droit [...]

Translation

[...] When the parties have agreed on a choice of law clause stipulating the law of a Contracting State, it is necessary to decide whether they wanted to designate the domestic law of that country or the special regime governing international sales, as this also forms part of internal law. [...] Academic opinion is divided on the scope that should be given to a choice of law clause in this context. [...] Case-law seems to tend towards a restrictive application of Art. 6 of the Vienna Convention. In general, courts refuse to interpret a choice of law clause as excluding the Vienna Convention (see the decision of the Cantonal Court of Lucerne, 6 October 1995, reported in RSDIE 4/96 p. 132; Decision of the French *Cour de Cassation*, 17 December 1996, reported in RSDIE 1/98 p. 89; Decision of the Arbitral Court of the Chamber of Commerce and Industry of Budapest, 8 May 1997 in the case Vb 96038; Witz, "L'application de la Convention de Vienne en France", in: *Les ventes internationales*, pp. 1 ff., p. 12; *contra*: Judgement of the District Court of Weinfelden, 23 November 1998, reported in RSDIE 2/99 p. 198)

[...]

[T]he terms used in Art. 6 of the Vienna Convention ("the parties may exclude") should be understood as a presumption in favour of the applicability of the Convention. One is thus driven to the conclusion that a simple reference to the law of a Contracting State (choice of law) is not enough to exclude the Vienna Convention as the Convention has become an integral part of this law [...]

4. Oberlandesgericht Rostock (*Appellate Court of Rostock, Germany*), Urt. v. 10.10.2001, Az. 6 U 126/00, http://www.unilex.info/

Zwischen den Parteien ist ein Kaufvertrag über die Lieferung von 240 halben Langusten zu einem Preis von 8,60 DM/Stück zustande gekommen. [...]

[...] Auf den vorliegenden Rechtsstreit finden die Vorschriften des UN-Übereinkommens über den internationalen Warenkauf (CISG) Anwendung, da die Vertragsparteien ihre Niederlassung in verschiedenen Vertragsstaaten haben und Kaufverträge über bewegliche Sachen abgeschlossen haben [...] Zwar haben die Parteien durch die Benennung der Normen des HGB eine Rechtswahl dahingehend getroffen, dass deutsches Vertragsrecht Anwendung findet und damit die Vorschriften des Code civil ausgeschlossen; auch bei Geltung deutschen Vertragsrechts ist das CISG als unmittelbar geltendes deutsches Recht anzuwenden. Es ist in Deutschland nach seiner Ratifikation am 26.05.1981 am 01.01.1991 in Kraft getreten, Frankreich hat die Normen am 27.08.1981 ratifiziert und am 01.01.1988 in Kraft gesetzt [...] Die Parteien haben auch im Laufe des Rechtsstreits keine ausdrückliche Rechtswahl hinsichtlich des unvereinheitlichten deutschen Rechts nach Art. 27 EGBGB (HGB und BGB) getroffen. Zwar kann eine stillschweigende Vereinbarung deutschen Rechts angenommen werden, wenn beide Parteien während der gesamten Dauer des zivilrechtlichen Verfahrens, ohne Zweifel zu äußern, von der Geltung deutschen Rechts ausgingen (BGHZ 53, 189, 191 f.);

OLG Düsseldorf, NJW-RR 1987, 483 m. w. N.); dies kann sich insbesondere durch Anführung der Vorschriften dieser Rechtsordnung äußern oder durch übereinstimmende und rügelose Hinnahme der Anwendung durch die Vorinstanz [...] Da das CISG jedoch ebenfalls deutsches geltendes Recht ist, kann ein Ausschluß dieser Normen nur dann angenommen werden, wenn die Parteien dies deutlich zum Ausdruck gebracht haben, etwa durch eine eindeutige Bezugnahme auf das unvereinheitlichte Recht, die ein Erklärungsbewusstsein und einen Erklärungswillen erkennen läßt (Beispiel: "Es gilt Kaufrecht des BGB"; [...]). Eine solche Erklärung haben die Parteien trotz Hinweises des Senats nicht vorgenommen. Das bloße Verhandeln unter Bezugnahme auf die Regeln der § 377 ff. HGB genügt insofern nicht, weil es ebenso in der Meinung erfolgen kann, die Regeln seien ohnehin anwendbar [...]

Translation[15]

The parties have concluded a sales contract for 240 half crawfish at a price of 8.60 DM each. [...]

[...] The CISG is applicable to the dispute because the parties have their permanent establishments in different countries which have both adopted the CISG and because the contract concerns moveable goods [...] By naming provisions of the German Commercial Code (HGB) in their contract, the parties have impliedly agreed on the law applicable to the contract. This choice of law can, however, only be understood as an exclusion of the French Code Civil and a choice of German contractual law in general. The CISG is therefore applicable as a part of the German contractual law. It came into force in Germany on 1 September 1991, after its ratification on 26 May 1981. France ratified the CISG on 27 August 1981. The CISG entered into force in France on 1 January 1988 [...] The parties have not made a choice of the non-unified German law (HGB and BGB) according to Art. 27 EGBGB.

A silent choice of German law can be assumed if both parties assumed the applicability of German law without any doubt through the entire proceeding (BGHZ 53, p. 189, 191 et seq.; OLG Düsseldorf, NJW-RR 1987, p. 483 with further references). Such an assumption by the parties can especially be inferred from the citing of provisions of that law or by both parties not criticizing the application of that law by a court of first instance [...] However, as the CISG is German law, an exclusion of that law would need to be expressed clearly enough, for example, by a reference to non-unified law which shows the parties knew to make a legally relevant declaration and had the will to do so (e.g., "The law applicable is the sales law of the BGB", [...]). The parties have not made such a declaration even though they had been informed of its necessity by this Chamber. Merely referring to § 377 HGB is insufficient, because such reference might also be made because the parties think that that law was applicable anyway [...]

[15] http://cisgw3.law.pace.edu/cases/011010g1.html. Translation by LINUS MEYER; ed. by the Institut für ausländisches und Internationales Privat- und Wirtschaftsrecht der Universität Heidelberg, Daniel Nagel, editor.

IV.

1. Commission on European Contract Law: *Principles of European Contract Law*

Scope of the Principles

Art. 1:101. Application of the Principles.
(1) These Principles are intended to be applied as general rules of contract law in the European Union.
(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
(3) These Principles may be applied when the parties:
(a) have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; or
(b) have not chosen any system or rules of law to govern their contract.
(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

2. UNIDROIT: *Principles of International Commercial Contracts*

PREAMBLE
(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.
They shall be applied when the parties have agreed that their contract be governed by them.(*)
They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
They may be applied when the parties have not chosen any law to govern their contract.
They may be used to interpret or supplement international uniform law instruments.
They may be used to interpret or supplement domestic law.
They may serve as a model for national and international legislators.

(*) Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:
"This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles ...]".
Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:
"This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles ...], supplemented when necessary by the law of [jurisdiction X]".

3. 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)

Recitals
(13) Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.
(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

4. *Dicey, Morris & Collins on The Conflict of Laws*, 14th edn

32-081 General principles of law. [...] Article 1(1) of the Rome Convention [now: Rome I Regulation] makes it clear that the reference to the parties' choice of "the law" to govern a contract is a reference to the law of a country. It does not sanction the choice or application of a non-national system of law, such as the *lex mercatoria* or general principles of law. [...] [I]t had been said in England that "contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words ..." It is suggested that a choice of *lex mercatoria* or general principles of law is not an express choice of law under the Rome Convention. So also in *Shamil Bank of Bahrain EC* v. *Beximco Pharmaceuticals Ltd* the Court of Appeal held that a choice of the principles of Sharia law was not a choice of law of a country for the purposes of the Rome Convention.

5. Schweizerisches Bundesgericht (*Swiss Federal Court*) 20.12.2005, BGE 132 III 285

A. Die X. AG mit Sitz in St. Gallen (Klägerin), vertreten durch einen FIFA-Agenten, schloss am 16. August 1999 mit der Y. mit Sitz in A. (Beklagte), einer griechischen Aktiengesellschaft, einen Vertrag über den Transfer eines von der Klägerin vertretenen Spielers. Gemäss dieser Vereinbarung sollte die Klägerin [mehrere Vermittlungsgebühren] erhalten [...]

B.
[...]

1. In Art. 3 des Vertrages vom 16. August 1999, auf welchen die Klägerin ihre Forderung stützt, haben die Parteien bestimmt, ihre Vereinbarung solle den FIFA-Regeln und dem Schweizer Recht unterstehen ("This agreement is governed by FIFA rules and Swiss law").

Die Vorinstanz hat diese Vertragsklausel als kumulative Rechtswahl in dem Sinne interpretiert, dass die FIFA-Regeln dem nationalen schweizerischen Recht als lex specialis vorgehen sollten. Sie hat das Reglement angewendet, das die FIFA speziell für Spielervermittlungen am 10. Dezember 2000 erlassen hat und das ein Verfahren für Streitigkeiten vorsieht. Danach sind unter anderem Rechtsvorkehren spätestens zwei Jahre nach den zugrunde liegenden Vorfällen den zuständigen Organen einzureichen. Die Vorinstanz hat diese Bestimmung als Verwirkungsfrist interpretiert und die Klage mit der Begründung abgewiesen, im Zeitpunkt der Klageeinreichung sei die zweijährige Verwirkungsfrist bereits abgelaufen gewesen.

Die Klägerin rügt, die Vorinstanz habe Art. 116 Abs. 1 IPRG verletzt, denn das FIFA-Reglement könne nicht Gegenstand einer Rechtswahl sein.

1.1 Nach Art. 116 Abs. 1 IPRG untersteht der Vertrag dem gewählten Recht. Die Rechtswahl als kollisionsrechtliche Verweisung hat zur Folge, dass sowohl die dispositiven als auch die zwingenden Normen der gewählten Rechtsordnung zur Anwendung gelangen und die Bestimmungen des ohne Rechtswahl (im Rahmen einer "objektiven" Anknüpfung nach Art. 117 IPRG) anwendbaren Vertragsstatuts ersetzen [...] Dagegen lässt die materiellrechtliche Verweisung die gewählten Normen zum Vertragsinhalt werden. Sie ermöglicht den Parteien, ihre Rechtsbeziehung in den Schranken des anwendbaren Sachrechts frei zu gestalten [...]

1.2 Ob die Parteien im Rahmen von Art. 116 Abs. 1 IPRG nur staatliche Rechtsordnungen wählen können oder ob auch die Wahl anationaler Normen zulässig ist, geht aus dem Wortlaut der Bestimmung nicht eindeutig hervor [...]
In der Lehre ist die Frage umstritten [...]

1.3 Nach der Praxis des Bundesgerichts kommt Regelwerken privater Organisationen auch dann nicht die Qualität von Rechtsnormen zu, wenn sie sehr detailliert und ausführlich sind wie beispielsweise die SIA-Normen (BGE 126 III 388 E. 9d S. 391 mit Hinweisen) oder die Verhaltensregeln des internationalen Skiverbandes (BGE 122 IV 17 E. 2b/aa S. 20; BGE 106 IV 350 E. 3a S. 352, je mit Hinweisen). Von privaten Verbänden aufgestellte Bestimmungen stehen vielmehr grundsätzlich zu den staatlichen Gesetzen in einem Subordinationsverhältnis und können nur Beachtung finden, so weit das staatliche Recht für eine autonome Regelung Raum lässt [...] Sie bilden kein "Recht" im Sinne von Art. 116 Abs. 1 IPRG und können auch nicht als "lex sportiva transnationalis" anerkannt werden [...] Die Regeln der (internationalen) Sportverbände können nur im Rahmen einer materiellrechtlichen Verweisung Anwendung finden und daher nur als Parteiabreden anerkannt werden, denen zwingende nationalrechtliche Bestimmungen vorgehen [...]

1.4 [...] Dem Verweis auf das FIFA-Reglement kann nur die Bedeutung einer materiellrechtlichen Verweisung, d.h. einer (globalen) Übernahme in den Vertrag der Parteien zukommen. [...] Die Bestimmung in Ziffer 3 des Vertrages der Parteien ist als materiellrechtliche Verweisung zu verstehen, während die Rechtswahl sich allein auf die schweizerische Rechtsordnung bezieht, deren zwingende Normen somit Anwendung finden.

2. Nach herrschender Meinung verbietet Art. 129 OR eine vertragliche Verkürzung der Verjährungsfrist [...] [E]ine Bedingung, wonach die Forderung binnen bestimmter Frist irgendwie gerichtlich einzuklagen sei, [ist] der Abkürzung der Verjährungsfrist gleichzustellen. Indem die Vorinstanz Art. 22 Abs. 3 des FIFA-Reglements im Ergebnis als Abkürzung der gesetzlichen Verjährungsfrist (Art. 127 OR) ausgelegt hat, hat sie die zwingende Norm von Art. 129 OR des schweizerischen Rechts missachtet, das die Parteien in Ziffer 3 des Vertrages gewählt haben. Der angefochtene Entscheid ist aus diesem Grund aufzuheben. [...]

Translation[16]

The following decision of the Swiss Federal Court illustrates the predominant international opinion on the issue of the choice of non-State rules by the parties to a contract and on the scope of such a choice (note by the author):

SUMMARY

PRIVATE INTERNATIONAL LAW. CHOICE OF LAW. SCOPE OF THE FIFA REGULATIONS IN COMPARISON WITH STATE LAW. – PRIVATE INTERNATIONAL LAW ACT, ART 116(1), CODE OF OBLIGATIONS, ART 129.

Facts:
A contract concluded by Company X-AG, with its headquarters in St.-Gall, and Y., a company under Greek law, with its headquarters in A., provided in Art. 3 for the application of the FIFA Regulations, as well as the rules of Swiss law.

When dealing with a claim made by Company X-AG, the Commercial Court in St. Gall rejected the claim, considering it to be time-barred, the FIFA Regulations providing for a limitation period of two years from the events in question.

On appeal, allowed by the Federal Court, the applicant cited a breach of Art. 116(1) [Swiss] Private International Law Act [LDIP] on the grounds that the FIFA Regulations could not be the object of a choice of law.

Law:
1.1 – According to Art. 116(1) LDIP, a contract is governed by the law chosen by the parties. A choice of law, as a subjective conflict-of-law rule, leads to the application of both the mandatory and optional provisions of the chosen legal order. These rules, chosen by the parties, replace those applicable in the absence of a choice of law (Art. 117 LDIP). On the other hand, a choice made on the level of the substantive law [instead of at the private international law level] incorporates the rules referred to in the contract. It allows the

16 Translation of a case summary published in French in *Semaine Judiciaire* (*SJ*) 2006, 390–91.

parties to freely regulate their legal relationships within the framework of the applicable law (*Amstutz/Vogt/Wang*, Commentaire bâlois, N. 11 ad art. 116 LDIP; *Keller/Kren Kostkiewicz*, Commentaire zurichois, N. 8 et 83 ss ad art. 116 LDIP).

1.2 – Art. 166(1) LDIP does not clearly say whether the parties can only choose a national law or whether they have the option to choose non-State rules.

1.3 – Whilst academic opinion is divided, the Federal Court has already had the chance to clarify, in its case law, that the autonomous rules of private organisations do not have the status of legal rules, even if they are very detailed [...] (like, for example, the SIA [Swiss Association of Engineers and Architects] rules: ATF 126 III 388 c. 9d p.391, with reference; or the International Ski Federation's rules of conduct for skiers: ATF 122 IV 17 c. 2b/aa p. 6, 106 IV 350 c. 3a p. 352, with reference). Provisions drawn up by private organisations find themselves in a subordinate role to State laws; they can only be taken into consideration when permitted by the State law (*Jérôme Jaquier*, La qualification juridique des règles autonomes des organisations sportives, thèse Neuchâtel 2004, N. 212).

They do not constitute a "law" in the sense of Art. 116(1) LDIP and cannot even be recognised as "lex sportiva transnationalis", as recommended by *Jaquier* (op. Cit., N. 293 ff.). The autonomous rules of international sporting organisations can only be chosen at the substantive law level [as opposed to the private international law level] *i.e.* they can only replace those rules of the applicable State law that are non-mandatory; insofar as the rules of the national law are mandatory, these rules must prevail (*Keller/Kren Kostkiewicz*, Commentaire zurichois, N. 84 ad art. 116 LDIP).

2. – According to the predominant opinion, Art. 129 of the Code of obligations [CO] prohibits a contractual agreement reducing the limitation period. [...] [A clause] according to which the claim must be legally made within a certain period, [is] assimilated to a reduction of the limitation period.

When the cantonal court interpreted the FIFA Regulations as reducing the legal limitation period (Art. 127 CO), it failed to recognise the mandatory rule of Swiss law in Art. 129 CO, to which the parties declared to submit themselves (Art. 3 of the contract). Consequently, the appeal must be allowed and the case sent back to the cantonal court for a new decision.

(Federal Court, 1st Civil Court. 20 December 2005. X. AG v. Y. 4C.1/2005).

6. UNIDROIT: *Principles of International Commercial Contracts*

4. The Principles as rules of law governing the contract

a. Express choice by the parties

Parties who wish to choose the Principles as the rules of law governing their contract are well advised to combine such a choice of law clause with an arbitration agreement. The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate. [...]

The situation is different if the parties agree to submit disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as *amiable compositeurs or ex aequo et bono*. But even in the absence of such an authorisation parties are generally permitted to choose "rules of law" other than national laws on which the arbitrators are to base their decisions. See in particular Art. 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration; see also Art. 42(1) of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).

In line with this approach, the parties would be free to choose the Principles as the "rules of law" according to which the arbitrators would decide the dispute, with the result that the Principles would apply to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract.

V. Summary

Overview of the answers to questions 1–6[17]

Questions 1(a) and 2: The law applicable before the German courts[18]

I. Uniform substantive law in this field?

To find out which law is applicable, the first question to ask is whether there is a *uniform substantive law* governing this area.

The uniform substantive law governing the international sale of goods is the UN Convention on Contracts for the International Sale of Goods (CISG). Germany is a Contracting State. The CISG must therefore be applied by the German courts if the conditions for the application of the CISG are met.[19]

II. Conditions for the application of the CISG

1. According to Article 1(1), for the CISG to be applicable there must be (i) a contract (ii) for the sale of goods (iii) between parties whose places of business are in different States.

   This dispute relates to the conclusion of a contract for the sale of 15 sports cars. The parties' places of business are in Germany and England. The three conditions for the applicability of the CISG set down in Article 1(1) are therefore fulfilled.
2. Article 1(1)(a) goes on to stipulate that the States in which the parties have their places of business must be Contracting States.

   Germany is a Contracting State but England is not, so the requirement set down in Article 1(1)(a) is *not* fulfilled.
3. Where the requirement in Article 1(1)(a) is not fulfilled, the CISG may still be applicable if the Private International Law (PIL) of the forum leads to the application of the law of a Contracting State of CISG, Article 1(1)(b).

   The PIL relating to contractual obligations is governed by the Rome I Regulation in all EU Member States:

   (a) According to Article 1 of the Rome I Regulation, it shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. According to Article 10, the existence and validity of a contract are determined by the law that would govern it if the contract were valid. In our scenario these conditions are met.

17 This overview is aimed at helping students who are not familiar with Private International Law/Conflicts of Law to answer the questions. The overview should be used in conjunction with the materials. For suggestions for further reading on this topic see V.2. below.

18 It is presumed that the German courts have jurisdiction; for issues of jurisdiction, see Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

19 Finding the CISG applicable means that there will be no national laws conflicting with each other. In this case, it is not necessary to coordinate national laws using Private International Law (PIL) rules.

   Article 3 of the Rome I Regulation states that the parties are *free to decide* upon the applicable law.

   In our case scenario, the parties have not made an express choice of the applicable law, neither have they clearly demonstrated by the terms of the contract or the circumstances of the case that they wished a certain law to apply. As the parties have not jointly agreed on the law applicable to the contract, it must be determined by way of reference to objective criteria.

   (b) Where parties have not chosen the applicable law, Article 4(1) of the Rome I Regulation stipulates that "a contract for the sale of goods shall be governed by the *law of the country where the seller has his habitual residence*" (emphasis added). According to Article 19, "the habitual residence of companies and other bodies, corporate or unincorporated, shall be the *place of central administration*" (emphasis added).

   In our case scenario, the seller's central administration is in Germany. Article 4(1) of the Rome I Regulation therefore leads to the application of German law. According to Article 20 of the Rome I Regulation, the substantive rules of German law are applicable.
4. The PIL of the forum thus leads to German law, i.e. the law of a Contracting State of the CISG. The conditions of Article 1(1)(b) of the CISG are therefore fulfilled and the CISG is applicable to the contract.

III. Solution on the substantive law under the CISG

Under Article 16(1) of the CISG, an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. According to the general rule laid down in Article 16(1), up until the moment the German manufacturer sent an acceptance, the English car dealer was free to revoke his offer (as none of the exceptions provided for in Article 16(2) was applicable).

Questions 1(b) and 2: The law applicable before the English courts[20]

I. Uniform law in this field?

The CISG is not in force in England so the English courts are, at this point, not bound to apply it.

II. Applicable law under the PIL of the forum

The PIL relating to contractual obligations is governed by the Rome I Regulation in all EU Member States:

1. According to Article 3 of the Rome I Regulation, the parties are free to decide upon the applicable law.

   In this case scenario, the parties have not agreed upon the applicable law as allowed under Article 3 of Rome I so it must be determined using objective criteria.
2. In accordance with Article 4(1) of the Rome I Regulation, where parties have not chosen the applicable law, "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". According to Article 19, "the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration".

20 It is presumed that the courts have jurisdiction.

In our case scenario, the seller has his central administration in Germany so Article 4(1) of the Rome I Regulation leads to the application of German law. According to the dominant opinion in Europe, this reference to a law of a *Contracting State* of CISG (here, German law) also includes the CISG which is an integral part of this law (see e.g. Bernstein and Lookovsky, at **I.3.** above; Dicey, Morris & Collins, at **I.4.** above, citing also a minority opinion). The English courts will therefore most probably solve the case under the CISG (even though England is not a Contracting State of the CISG).

III. Solution on the substantive law under the CISG

As a result of Article 16(1) of the CISG, the English car dealer is able to revoke the offer at any point until an acceptance has been sent.

However, if the English court were to disregard the dominant opinion mentioned above and apply German law excluding the CISG, § 145 of the German Civil Code (*BGB*) would be applicable and the offer would not be revocable. The English car dealer would then be bound by his offer.

Question 3: The law applicable before the Swiss courts (Variation)[21]

1. Switzerland is a Contracting State of the CISG, so Swiss judges, like German judges, are bound to examine the case and see whether the CISG applies.

   According to Article 1(1)(a) of the CISG, in order for CISG to apply the parties must have their central administration in a Contracting State (see above).

   The Swiss party has its central administration in a Contracting State but the English party does not, so the conditions set down in Article 1(1)(a) of the CISG are, as in the first scenario, not fulfilled.

2. The CISG can nevertheless be applicable if Article 1(1)(b) applies. This article states that the CISG is applicable if the PIL of the *lex fori*, in the variation the Swiss Federal Act on Private International Law, leads to the application of the law of a Contracting State.

   Under Article 118 of the Swiss Federal Act on Private International Law, the sale of movables is governed by the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods. Where the parties have not decided on the applicable law (by choosing the applicable law under Article 2 of the Hague Convention), it is determined under Article 3(1) of the Hague Convention, according to which a sale is governed by the domestic law of the country in which the vendor's establishment is situated at the time when he receives the order.

   The seller's establishment is in Switzerland. This leads to the application of Swiss law. Switzerland is a Contracting State of the CISG, so Article 1(1)(b) of the CISG is fulfilled. The contract is therefore covered by the CISG.

3. Article 16(1) of the CISG allows an offeror to revoke his offer up until the moment an acceptance is sent.

   The Swiss manufacturer sent his acceptance after having received the revocation of the offer from the English company. The English company thus successfully revoked its offer under Article 16(1) of the CISG.

[21] It is presumed that the courts have jurisdiction.

Question 4(a): Seller's place of business in the USA and buyer's place of business in Switzerland, case brought before US courts

I. Uniform substantive law in this field?

To find out which law is applicable, the first question to ask is, once again, whether there is a uniform substantive law governing this area.

The uniform substantive law governing the international sale of goods is the UN Convention on Contracts for the International Sale of Goods (CISG). The USA is a Contracting State, so the CISG must be applied by the courts in the USA if the conditions for its application are met.

II. Conditions for the application of the CISG

1. ~~According to Article 1(1), for the CISG to be applicable there must be (i) a contract (ii) for~~ the sale of goods (iii) between parties whose places of business are in different States.

   The dispute relates to a contract for the sale of watch mechanisms. The parties' places of business are in the US and Switzerland. The three conditions for the applicability of the CISG set down in Article 1(1) are therefore fulfilled.

2. Article 1(1)(a) goes on to stipulate that the States in which the parties have their places of business must be Contracting States.

   The US and Switzerland are Contracting States of the CISG. The case is thus governed by the CISG.

Question 4(b): Seller's place of business in the US and buyer's place of business in England, case brought before US courts

I. Uniform substantive law in this field?

The USA is a Contracting State, so the CISG must be applied by the courts in the US if the conditions for the application of the CISG are met.

II. Conditions for the application of the CISG

1. According to Article 1(1), for the CISG to be applicable there must be (i) a contract (ii) for the sale of goods (iii) between parties whose places of business are in different States.

   The three conditions set down in Article 1(1) are fulfilled.

2. Article 1(1)(a) stipulates that the States in which the parties have their places of business must be Contracting States.

   The US is a Contracting State of the CISG but England is not. The requirement set down in Article 1(1)(a) is therefore *not* fulfilled.

3. US courts would *not* apply Article 1(1)(b) of the CISG as the US has declared that it will not be bound by subparagraph (1)(b) of Article 1 of the CISG (see above, note 8).

   Before US courts, a sales contract between a seller in the US and a buyer in England would therefore not be governed by the CISG. The courts would instead apply their own choice of law rules which would, depending on the US state in which the claim is brought, lead to the application of the UCC (or of English law).

Question 5: What law would apply to the Anglo-German contract in the scenario if the parties had agreed on the application of 'Swiss law'?

1. Before German and English courts, the contract between the English dealer and the German manufacturer would be governed by the CISG (see above, **Question (1)(a)**).

However, Article 6 of the CISG provides the possibility for the parties to opt out of the Convention and to exclude the application of the CISG if they wish to do so.

According to the dominant opinion of the courts and the dominant international academic opinion, the choice of the law of a Contracting State of CISG is, in principle, *not* regarded as an exclusion of the CISG. On the contrary, the law of the Contracting State chosen includes the international conventions that are in force in that State and that are an integral part of the legal order chosen (see the extracts above, III). The contract would therefore be governed by Swiss law, including the CISG.

2. An exclusion of the CISG would need to be expressed clearly enough (for example, by a statement such as "The law applicable is the sales law of the Swiss Code of Obligations"). Arguably, merely referring to the rules of the relevant articles in the Swiss Code of Obligations is insufficient, because such a reference might also be made because the parties think that that law was applicable anyway (see, e.g. the decision of the Rostock court at **III. 4** above).

Question 6(a): What would the applicable law be in the scenario if the parties, when contracting, had stipulated that the contract should be governed by (i) the Principles of European Contract Law, (ii) the UNIDROIT Principles, or (iii) the lex mercatoria?

As we have seen above, **Question (1)(a)**, before German and English courts, the contract between the English dealer and the German manufacturer would, in principle, be governed by the CISG.

Article 6 of the CISG provides the possibility for the parties to opt out of the Convention and to exclude the application of the CISG. If the parties expressly choose other rules of law, as they did in the present scenario, in doing so they implicitly exclude the CISG (Article 6 CISG).

The next step is to determine the law applicable to the contract according to the PIL rules of the forum, i.e. the rules of the Rome I Regulation. According to Article 3, the parties are free to decide upon the applicable "law".

According to the dominant case law and legal literature, "law" refers to the law of a State. The autonomous rules of private organisations do not have the status of legal rules, even if they are very detailed. In a proposal submitted in 2003, the European Commission suggested extending party autonomy to the choice of "principles of law", such as the Principles of European Contract Law and the UNIDROIT Principles, which would, if chosen by the parties have entirely replaced State laws.[22] However, this proposal was eventually rejected in the legislative process. Therefore, arguably, "law", in the sense of Article 3 of the Rome I Regulation, comprises only State laws. A reference made by the parties to the principles will therefore be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the PIL rules of the forum. In the scenario of Question 6(a), the parties have therefore not chosen a *law* in the sense of Article 3 of the Rome I Regulation.

[22] The proposal provided: "The parties may also choose as the applicable law the principles or rules of the substantive law of contract recognized internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation."

Where parties have not chosen the applicable law, Article 4(1) of the Rome I Regulation stipulates that "a contract for the sale of goods shall be governed by the *law of the country where the seller has his habitual residence*", i.e. the country in which he has his *"place of central administration"* (Article 19).

In our case scenario, the seller's central administration is in Germany, so Article 4(1) of the Rome I Regulation leads to the application of German law, i.e. to the application of the BGB, as in this scenario the parties have, arguably, excluded the CISG by choosing a different set of rules to govern their contract.

Where parties refer to the Principles of European Contract Law or the UNIDROIT Principles, they incorporate them into their contract where the relevant rules of German law are not mandatory. The contract is thus governed by the chosen principles.

Question 6 (b): What would be the answer if the parties had also agreed to submit their case to arbitration?

Arbitrators are not bound by a particular domestic law so, in arbitration procedures, the parties are free to choose principles as the "rules of law". The chosen principles would apply to the exclusion of any particular national law, subject only to the application of those (very few) rules of domestic law that are mandatory irrespective of which law governs the contract (see **IV.6.** above: UNIDROIT: *Principles of International Commercial Contracts*, Preamble, Official Comment).

2. Further reading

On the applicability of the Vienna Sales Convention/CISG

CHRISTOPHE BERNASCONI, "The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)", *Netherlands International Law Review* 1999, 137–72.

PETER HUBER AND ALASTAIR MULLIS, *The CISG: A New Textbook for Students and Practitioners*, Munich: Sellier, 2007.

Casebooks on the CISG

INGEBORG SCHWENZER AND CHRISTIANA FOUNALAKIS, *International Sales Law*, London: Routledge Cavendish, 2007.

See also: www.unilex.info

On the law applicable to contractual obligations in Europe

Dicey, Morris & Collins on the Conflict of Laws, 14th edn, London: Sweet & Maxwell, 2006, Vol. 2, Ch. 32.

MATTHIAS LEHMANN, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws", 41 (2008) *Vand. J. Transnat'l L.* 381–434.

On the choice of non-State rules

LAURO DA GAMA E SOUZA JR, "The Unidroit Principles of International Commercial Contracts and their Applicability in the Mercosur Countries", 36 (2002) *R.J.T.* 375–419.

EMMANUEL S. DARANKOUM, "L'application des Principes d'Unidroit par les arbitres internationaux et par les juges etatiques", 36 (2002) *R.J.T.* 421–79.
CATHERINE KESSEDJIAN, "Party Autonomy and Caracteristic Performance in the Rome Convention and the Rome I Proposal", in Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective*, Tübingen: Mohr Siebeck, 2008, 105–25 (at 114–17).
RALF MICHAELS, "Privatautonomie und Privatkodifikation – Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien", *RabelsZ* 62 (1998), 580–626.
GIAN PAOLO ROMANO, "Le choix des Principes UNIDROIT par les contractants à l'épreuve des dispositions impératives", in Eleanor Cashin Ritaine and Eva Lein (eds), *The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification*, Zürich: Schulthess, 2007, 35–54.
WULF-HENNING ROTH, "Zur Wählbarkeit nichtstaatlichen Rechts", in H.-P. Mansel, Thomas Pfeiffer, Herbert Kronke, Christian Kohler and Rainer Hausmann (eds), *Festschrift für Erik Jayme*, Vol. I, München: C.H. Beck, 757–72.
FRIEDERIKE SCHÄFER, "Die Wahl nichtstaatlichen Rechts nach Art. 3 Abs. 2 des Entwurfs einer Rom I VO – Auswirkungen auf das optionale Intrument des europäischen Vertragsrechts", *GPR* 2006, 54–59.

On non-State rules in general

MICHAEL BONELL, *An International Restatement of Contract Law, The UNIDROIT Principles of International Commercial Contracts*, 3rd edn incorporating the UNIDROIT Principles 2004, Ardsley, New York: Transnational Publishers Inc., 2005.
MICHAEL BONELL, "The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law", *Uniform Law Review* 2004, 5–40.
MICHAEL JOACHIM BONELL, "The CISG, European Contract Law and the Development of a World Contract Law", 56 (2008) *Am. J. Comp. L.* 1–28.
ELEANOR CASHIN RITAINE AND EVA LEIN (eds), *The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification*, Zurich: Schulthess, 2007.
ARTHUR HARTKAMP, "Principles of Contract Law", in Hartkamp *et al.* (eds), *Towards a European Civil Code*, 3rd edn, Nijmegen, 2004, Ch. 7, 125–43.
OLE LANDO, "CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law", 53 (2005) *Am. J. Comp. L.* 379–401.
VERNON VALENTINE PALMER, "From Lerotholi to Lando: Some Examples of Comparative Law Methodology", 53 (2005) *Am. J. Comp. L.* 261–90.
GRACE XAVIER, "Global harmonisation of contract laws fact – or fiction?", *Const. L.J.* 2004, 20(1), 3–18.

Case 10: The future of European contract law

> *"On peut être bon Européen et considérer avec réticence l'unification des droits européens; on ne peut être bon Européen et vouloir maintenir, sans effort d'harmonisation, la situation actuelle, c'est-à-dire la complète insularité de chaque système juridique européen."*[1]

Scenario

The European Parliament, in two resolutions of 1989 and 1994, called for work to be started on the possibility of developing a European Code of Private Law. The Parliament was of the opinion that harmonisation of certain sectors of private law would be essential to the completion of the internal market and that the unification of major branches of private law in the form of a European Civil Code would be the most effective way of meeting the Community's legal requirements in order to achieve a single market without frontiers. In a third resolution in 2000, the European Parliament once again declared that greater harmonisation of civil law would be essential in the internal market.

In response to these resolutions, the European Commission published a communication on European contract law in 2001. The Commission made a public request seeking information as to whether divergences in contract law between Member States cause problems. The Commission also wanted to receive information on the need for a more comprehensive European legislation on contract law or even a European contract code.

Following these initiatives, the debate on the eventual harmonisation of European contract law has intensified.

1 Translation: One can be pro-European and be reluctant with regard to the unification of European laws; one cannot be pro-European and want to maintain, without any attempt at harmonisation, the status quo, that is to say the total insularity of each European legal system. RENÉ DAVID, "L'avenir des droits européens: unification ou harmonisation" (1955), reproduced in David René, *Le droit comparé – Droits d'hier, droits de demain*, Paris: Economica, 1982, p. 295 (at 296).