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# THE EMERGENCE OF GLOBAL STANDARDS IN PRIVATE LAW

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## 1 INTRODUCTION

Much has been written and said about the new *lex mercatoria*,<sup>1</sup> transnational law<sup>2</sup> and the hybridisation of legal systems<sup>3</sup> in recent years. The concepts behind these terms

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<sup>1</sup> The term *lex mercatoria* dates back to the Middle Ages. The so-called ancient *lex mercatoria* refers to the trade usages and practices which were developed by merchants in the eleventh and twelfth centuries and applied across Western Europe. In the eighteenth and nineteenth centuries those trade usages were codified at the nation state level; the ancient *lex mercatoria* lost its transnational character. The notion of transnational trade law, however, regained attention in the twenty-first century. With regard to the exact meaning of the new *lex mercatoria*, opinions differ significantly. For an overview of the various concepts, see Bamodu, G., "Exploring the Interrelationships of Transnational Commercial Law, 'the New Lex Mercatoria' and International Commercial Arbitration" (1998) 10 *Afr J Int & Comp L* 31, at pp. 31ff. For further information on the new *lex mercatoria*, see also Baron, G., "Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?" (1999) 15 *Arb Int* 115 at pp. 115ff.

<sup>2</sup> *Supra* fn 1, Bamodu, "Exploring the Interrelationships," at pp. 31ff.

<sup>3</sup> Tuori, K., "On Legal Hybrids" in Micklitz, H.W. and Svetiev, Y. (eds), *EUI Working Paper LAW 2012/13, A Self-Sufficient European Private Law – A Viable Concept?*, 2012, European University Institute, San Domenico di Fiesole, at pp. 67ff, available at <[http://cadmus.eui.eu/bitstream/handle/1814/24534/Law\\_2012-31.pdf](http://cadmus.eui.eu/bitstream/handle/1814/24534/Law_2012-31.pdf)>.

are rather vague and differ amongst authors.<sup>4</sup> However, there can be no doubt that legal systems have been and are converging. The catalyst of this development is the rapid globalisation of trade and commerce. Different national rules have always been perceived as trade barriers.<sup>5</sup> In the nineteenth century this prompted a unification of laws at the nation state level. Today, harmonisation of laws takes place not only on the European level but also globally. Leaving aside theoretical intricacies, this will serve as the starting point of this paper.

This paper will neither address the progressing convergence of private and public law,<sup>6</sup> nor the harmonisation of laws following from the so-called “Europeanisation” of private law;<sup>7</sup> instead, it will focus on the convergence of common law and civil law that we have witnessed during the past four to five decades. Naturally, only a small range of emerging international standards of private law can be discussed here. This paper will therefore exemplarily discuss one of the (if not *the*) core areas of contract law – remedies in case of breach of contract. Harmonisation and unification of substantive law, however, will reach a stalemate if harmonised procedural laws do not accompany them. For this reason, this paper will also address some fundamental questions of procedural law that are closely connected to the role of the judge in civil litigation and arbitration.

## 2 HARMONISING TRENDS IN THE LAW OF CONTRACTUAL REMEDIES

During the last three decades the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) has significantly influenced contract law all over the world. The CISG has proved to be by far the most successful private law international convention.<sup>8</sup> Given that the CISG has been adopted by eighty contracting states,<sup>9</sup> with the number continuously increasing, it can be assumed that approximately

<sup>4</sup> Other subjects of lively discussion are the emergence of global law and the denationalisation of law. On the phenomenon of global law, see Le Goff, P., “Global Law: A Legal Phenomenon Emerging from the Process of Globalization” (2007) 14 *Ind J Global Legal Stud* 119, at pp. 119ff; on the delocalisation of law, see Reimann, M., “Die Entstaatlichung des Rechts und die Rechtsvergleichung” in Zimmermann, R. (ed), *Globalisierung und Entstaatlichung des Rechts, Nichtstaatliches Privatrecht: Geltung und Genese*, vol 2, 2008, Mohr Siebeck, Tübingen, at pp. 1ff.

<sup>5</sup> McKendrick, E., “Harmonisation of European Contract Law: The State We Are In” in Vogenauer, S. and Weatherill, S. (eds), *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice*, 2006, Hart Publishing, Portland, at pp. 14-5.

<sup>6</sup> See van Gerven, P.W.M., “Mutual Permeation of Public and Private Law at the National and Supranational Level” (1998) 5 *Maastricht J Eur Comp L* 7, at pp. 7ff.

<sup>7</sup> Micklitz, H.W., “A Self-Sufficient European Private Law – A Viable Concept?” in Micklitz and Svetiez (eds), *EUI Working Paper*, at pp. 5ff.

<sup>8</sup> Schwenger, I. and Hachem, P., “The CISG – A Story of Worldwide Success” in Kleineman, J. (ed), *CISG Part II Conference*, 2009, Iustus Förl., Uppsala, at pp. 119ff.

<sup>9</sup> For a list of the current Contracting States to the CISG, available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

eighty per cent of international sales contracts nowadays are potentially governed by the CISG.<sup>10</sup>

Moreover, a truly great success is the strong influence the CISG has exerted at both domestic and international levels. The Uniform Act on General Commercial Law by the Organisation for the Harmonisation of Business Law in Africa (OHADA) is in its sales part in many respects practically a transcript of the CISG.<sup>11</sup> The UNIDROIT Principles of International Commercial Contracts,<sup>12</sup> the Principles of European Contract Law,<sup>13</sup> the Draft Common Frame of Reference<sup>14</sup> and now the Draft Common European Sales Law<sup>15</sup> are all modeled on the CISG. The same holds true for the Principles of Asian Contract Law (PACL) that are currently being prepared.<sup>16</sup> Furthermore, the EC Consumer Sales Directive<sup>17</sup> heavily draws on the CISG. Similarly, the Sale of Goods Acts in the Nordic Countries,<sup>18</sup> the modernised German

<sup>10</sup> Schlechtriem, P. and Schwenger, I., "Introduction I" in Schwenger, I. (ed), Schlechtriem and Schwenger, Commentary on the Convention on the International Sale of Goods (CISG), 3rd ed, 2010, Oxford University Press, Cambridge.

<sup>11</sup> *Acte uniforme portant sur le Droit Commercial General*, 15 February 2011, available at: <<http://www.droit-afrique.com/images/textes/Ohada/AU/OHADADA%20-%20AU%20Droit%20commercial.pdf>>; See also, Schwenger, I., "Regional and Global Unification of Sales Law" (2011) 13 *Eur J L Reform* 370, at pp. 373ff; Schroeter, U., "Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht" (2001) *Recht in Afrika* 163, at pp. 163 and 166ff.

<sup>12</sup> UNIDROIT Principles of International Commercial Contracts (PICC 2010), available at: <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>>; See Bonell, M., "CISG, European Contract Law and the Development of a World Contract Law" (2008) 56 *Am J Comp L* 1, at pp. 16ff.

<sup>13</sup> Principles of European Contract Law (PECL 1999), available at: <[http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/Skabelon/pecl\\_engelsk.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm)>.

<sup>14</sup> See von Bar, C. et al. (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Oxford University Press, 2010; See also Schlechtriem, P., "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations" (2005) 10 *Juridica International* 27, at p. 29, available at: <[http://www.juridicainternational.eu/public/pdf/ji\\_2005\\_1\\_27.pdf](http://www.juridicainternational.eu/public/pdf/ji_2005_1_27.pdf)>.

<sup>15</sup> Commission, "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law" (2011) COM 635 final, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>>; See Schwenger, I. "The Proposed Common European Sales Law and the Convention on the International Sale of Goods" (2012) 44 *UCC L J* 457, at pp. 457ff.

<sup>16</sup> Further information on the Principles of Asian Contract Law (PACL), available at: <[http://www.fondation-droitcontinental.org/jcms/c\\_7718/projet-commun-de-droit-des-contrats-en-asiе-du-sud-est](http://www.fondation-droitcontinental.org/jcms/c_7718/projet-commun-de-droit-des-contrats-en-asiе-du-sud-est)>; See also, Han, S., "Principles of Asian Contract Law: An Endeavour of Regional Harmonization of Contract Law in East Asia" (2013) 58 *Vill L Rev* 589, at pp. 589ff.

<sup>17</sup> Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L171/12 (Dir 1999/44/EC), 7 July 1999, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF>>.

<sup>18</sup> Kjelland, C., *Das neue Kaufrecht der nordischen Länder im Vergleich mit dem Wiener Kaufrecht (CISG) und dem deutschen Kaufrecht*, Shaker, 2000.

Law of Obligations,<sup>19</sup> the Contract Law of the People’s Republic of China and other East Asian codifications,<sup>20</sup> and the majority of the recent post-Soviet codifications in Eastern Europe,<sup>21</sup> Central Asia<sup>22</sup> and in two of the Baltic States<sup>23</sup> build on the CISG. Likewise, the draft for a new Civil Code in Japan follows the CISG.<sup>24</sup> It is reported that in developing countries the CISG is used to teach traders the structures of contract law so as to improve their level of sophistication.<sup>25</sup>

The CISG, and consequently the numerous private law reforms modeled after it, exemplarily seek to bridge the gap between common law and civil law by combining both systems in a practice-oriented compromise. The following part will illustrate the different starting points in the law of remedies for breach of contract in both civil law and common law before moving on to the uniform standards that have emerged therefrom.

## 2.1 CAUSE-ORIENTED APPROACH VS. BREACH-OF-CONTRACT APPROACH

The starting points for remedies in case of breach of contract differ fundamentally in civil law and common law. Influenced by Roman law, civil law systems distinguish the remedies applicable according to the respective cause of the breach (cause-oriented approach).<sup>26</sup> The well-known trichotomy of impossibility, delay and defective performance and its different consequences have not only caused significant problems in practice, but also impose a cumbersome challenge for law students. Unsatisfying outcomes resulting from this three-fold system have given rise to numerous dogmatic adventures in civil law countries: the differentiation between *peius* and *aliud*,<sup>27</sup> the breach of contract by positive action (*positive Vertragsverletzung*)<sup>28</sup> or the invention

<sup>19</sup> Schlechtriem, P., “International Einheitliches Kaufrecht und neues Schuldrecht“ in Dauner-Lieb, B. *et al.* (eds), *Das neue Schuldrecht in der Praxis*, 2003, Carl Heymanns Verlag, Cologne, at p. 71.

<sup>20</sup> Bell, G.F., “Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG” (2005) *Sing J Leg Stud* 362, at pp. 365ff.

<sup>21</sup> Knieper, R., “Celebrating Success by Accession to CISG” (2005) *25 J L & Com* 477, at pp. 477-78.

<sup>22</sup> *Ibid.*

<sup>23</sup> Käerdi, M., “Die Neukodifikationen des Privatrechts der baltischen Staaten in vergleichender Sicht” in Heiss, H. (ed), *Zivilrechtsreform im Baltikum*, 2006, Mohr Siebeck, Tübingen, at pp. 19ff.

<sup>24</sup> The English version of the draft proposal is available at: <[http://www.shojihomu.or.jp/saikenhou/English/index\\_e.html](http://www.shojihomu.or.jp/saikenhou/English/index_e.html)>.

<sup>25</sup> Schwenzler, I. *et al.*, *Global Sales and Contract Law*, 2012, Oxford University Press, Cambridge, at para. 3.21.

<sup>26</sup> *Ibid* at para. 41.05ff.

<sup>27</sup> See BGE 121 III 453 (CH); Fountoulakis, C., “The Parties’ Choice of ‘Neutral Law’ in International Sales Contracts” (2005) *7 Eur J L Reform* 303, at pp. 303 and 308ff; See also, Honsell, H., in Honsell, H. *et al.* (eds), *Basler Kommentar, Obligationenrecht I*, 5th edn, 2011, Helbing Lichtenhahn, Basel, at Art. 20, paras 2ff.

<sup>28</sup> Staub, H., “Die positiven Vertragsverletzungen und ihre Rechtsfolgen” in Dernburg, H. (ed), *Festschrift für den 26. Deutschen Juristentag*, Guttentag, 1902, Berlin, at pp. 29ff.

of the so-called *Weiterfresserschaden*,<sup>29</sup> damage to the chattel itself as a result of defective goods, are just a few examples. In addition, the question of which remedy is to be applied may also depend on whether the breached obligation is classified as a primary or secondary obligation.<sup>30</sup>

In contrast, the remedial system for breaches of contract in common law is based on a unitary approach (breach-of-contract approach). The applicable remedies do not differ depending on the cause of the breach, but rather primarily on the severity of the breach. Also, common law systems do not make the subtle distinction between primary and secondary obligations.<sup>31</sup>

The CISG and the modern rules following its example have convincingly opted for the common law breach-of-contract approach.<sup>32</sup> Likewise, a unitary approach has been adopted with regard to the conformity of goods. No significance is attached to the distinction, familiar for example to Swiss law, between *peius* and *aliud*, nor to the distinction between ordinary characteristics of goods (*Sacheigenschaft*) and a specific warranty of particular characteristics (*Zusicherung*). The French distinction between *vice caché* and *vice apparent* and the distinctions between condition and warranty or express and implied warranty found in English and American law respectively have not been included in the CISG. Also, a lack of conformity may not only result from differences in quality but also from differences in quantity and defects in packaging.<sup>33</sup> The remedial system thereby created, is like no other capable of meeting the standards set by trade and commerce in the twenty first century. Thus, we now proceed to discuss key remedies for breach of contract.

## 2.2 SPECIFIC PERFORMANCE

In civil law legal systems the primary remedy for breach of contract is specific performance. This remedy has been labelled the “backbone of the obligation” (“*Rückgrat der Obligation*”).<sup>34</sup> In common law legal systems, specific performance is, by contrast, an exception. According to traditional English law the obligee in case of non-compliance could (except for money debts) only claim damages. It was only under the principles of equity that the remedy of specific performance was developed

<sup>29</sup> See also BGH, (1998) NJW 2282 (FRG); BGH, (1992) NJW 1225 (FRG); BGH, (1977) NJW 379, 381 (FRG); Wagner, G. in Jürgen Säcker, F.J. *et al.* (eds), *Münchener Kommentar, Bürgerliches Gesetzbuch*, vol 5, 6th ed, 2013, C.H. Beck, Munich, at § 823, paras. 189ff, with further examples from legal practice.

<sup>30</sup> Schwenger *et al.*, *Global Sales*, *supra* fn 25, at paras. 41.32ff.

<sup>31</sup> *Ibid.* paras. 41.34ff.

<sup>32</sup> Compare, for example, CISG 45 and 61; See also, Müller-Chen, M. in *Schlechtriem and Schwenger*, at Art. 45, paras. 2ff; Hager, G. and Maultzsch, F., in *Schlechtriem and Schwenger*, at Art. 61, paras 2ff; Schwenger *et al.*, *Global Sales Law*, *supra* fn 25, at paras. 41.45ff; Zweigert, K. and Kötz, H., *An Introduction to Comparative Law*, Tony Weir, 3rd edn, 1998, Clarendon Press, Gloucestershire, at pp. 513ff.

<sup>33</sup> Schwenger, in *Schlechtriem and Schwenger*, *supra* fn 10, at Art. 35, para 4.

<sup>34</sup> Rabel, E., *Das Recht des Warenkaufs*, vol 1, 1936, J. C. B. Mohr (Paul Siebeck), Tübingen, at p. 375.

to suit singular cases in which damages were found not to provide for adequate compensation.<sup>35</sup>

In the drafting process of the CISG no common approach could be achieved to bridge this gap. The starting point of the CISG is derived from civil law. CISG 46 grants the buyer the right of requesting the seller to perform his obligations under the contract.<sup>36</sup> Exceptions only apply with regard to the delivery of substitute goods and repair in cases where the seller's legitimate interests militate against granting the buyer the right to specific performance.<sup>37</sup> In order to meet the concerns of the common law representatives in the CISG's drafting process, a provision was included in the CISG according to which a court is not bound to enter a judgement for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the CISG.<sup>38</sup> Despite these insurmountable differences between civil law and common law the widely bemoaned lack of harmonisation has not led to diverging rulings and problems in practice.<sup>39</sup> This development, however, is not due to courts issuing rational rulings but rather owes to the rationality of the market participants. No reasonable business person, independent of his or her civil law or common law background, will claim specific performance of the contract if he or she can make a cover purchase from a third party. If the buyer cannot enter into a substitute transaction and therefore is reliant on the remedy of specific performance, however, specific performance is also granted in common law.

In contrast, more recent instruments, especially PICC and PECL, provide for restricting the remedy of specific performance to cases in which damages may not adequately satisfy the obligee's interests.<sup>40</sup> A different approach seems to be taken with regard to monetary debts,<sup>41</sup> for the common law has always provided for the action of debt and therefore granting specific performance.<sup>42</sup>

### 2.3 AVOIDANCE OF CONTRACT

There is hardly any other remedy as complex and disparate in both civil law and common law as avoidance of contract. Again, in civil law the avoidance of the

<sup>35</sup> Compare Zweigert, K. and Kötz, H., *supra* fn 32, at p. 479ff; Compare also, for the United Kingdom, s 52(1) of the Sale of Goods Act 1979; For the United States, compare, s 2-711(2) and s 2-716 of the Uniform Commercial Code 2002.

<sup>36</sup> See also, CISG 62.

<sup>37</sup> CISG 46(2), (3).

<sup>38</sup> CISG 28.

<sup>39</sup> *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2012, at p. 126: 'There is little case law on this provision; only a few cases, and even fewer with relevant discussion of article 28, have been reported thus far', available at: <<http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-c.pdf>>.

<sup>40</sup> PICC 7.2.2; PECL 9:102; DCFR III.-3:302.

<sup>41</sup> PICC 7.2.; PECL 9:101; DCFR III.-3:301.

<sup>42</sup> For further information on the action for the price, see Schwenger *et al.*, *Global Sales*, *supra* fn 25, at para. 43.31.

contract is attached to the respective grounds for the breach of contract. If the contract cannot be performed because of supervening events (impossibility), those events void the contract automatically or, if the impossibility already existed at the time of contract conclusion, which hinders the formation of the contract, then the contract is void *ab initio*. If performance is merely delayed but still possible, the aggrieved party must first fix an additional period of time for the other party to perform (*Nachfrist*). Only once the obligor has allowed this additional period to fruitlessly expire may the obligee avoid the contract. The delivery of non-conforming goods, on the other hand, allows for immediate avoidance thereby following its Roman model, the *actio redhibitoria*. A similarly intricate approach is pursued in common law systems. Here, factual impossibility of the performance of a contract can be due to frustration, impracticability or impossibility in its narrow sense. Of further relevance is the distinction between conditions, warranties and intermediate terms.<sup>43</sup>

The situation is further complicated by the fact that the contract is either terminated automatically *ipso iure* or requires a respective declaration in order to be terminated depending on the nature of the breach of contract.<sup>44</sup> The obligee, however, will only rarely know the exact reason causing the non-performance. It would therefore be advisable to take no chances and declare the contract avoided in any case.

The CISG, on the other hand, follows a unitary approach. Under the CISG the remedy of avoidance is independent of the reason causing the non-performance. Non-performance in this broad sense covers impossibility, delayed performance and delivery of non-conforming goods as well as breach of so-called ancillary obligations. The only issue when determining whether avoidance is justified is the gravity of the breach.<sup>45</sup> Only if the breach of contract is fundamental, *id est* if it results in such a detriment to the other party as to substantially deprive him or her of what he or she is entitled to expect under the contract, can the contract be avoided.<sup>46</sup> If fundamentality cannot (yet) be established, the obligee can set a *Nachfrist* and, once this period has ineffectively expired, may declare the contract avoided.<sup>47</sup> In order to prevent costly and economically unreasonable return transports, the second option, however, is not available in cases of delivery of non-conforming goods but only applies where the non-performance is fundamental.<sup>48</sup> The unitary approach is further reflected in the mechanism of the remedy. In order to effectively terminate the contract, the aggrieved party has to declare avoidance, regardless of the cause of the breach of contract.<sup>49</sup>

## 2.4 DAMAGES

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<sup>43</sup> See, on the whole, *ibid.* paras 47.18ff.

<sup>44</sup> *Ibid.*

<sup>45</sup> CISG 49(1)(a) and 64(1)(a).

<sup>46</sup> CISG 25.

<sup>47</sup> CISG 49(1)(b) and 64(1)(b).

<sup>48</sup> CISG 49(1)(b).

<sup>49</sup> CISG 49(1) and 64(1) in conjunction with CISG 26.

With regard to the remedy of damages, civil law and common law again differ fundamentally. Generally, in common law every breach of contract may lead to a claim for damages. The strict liability principle leaves room only for few exceptions arduously developed by case law.<sup>50</sup>

Civil law systems, on the other hand, follow the Roman law approach and grant damages only if the breach was due to the fault of the obligor.<sup>51</sup> In numerous civil law countries liability for the delivery of non-conforming goods is further limited. Following the Roman structure of sales law the seller is only liable where it has either acted fraudulently or expressly stipulated the lacking feature of the good to be present. In legal systems belonging to the French legal family the seller is only liable in damages where it was aware of the defect.<sup>52</sup> The Roman law-based remedial system, however, soon proved inadequate, which forced the courts and scholars in numerous civil law countries to make considerable efforts to circumvent the Roman doctrine. French law, for example, distinguishes between so-called *obligations de moyens* and *obligations de résultat*. While in cases of *obligations de moyens* the fault principle applies, the seller is strictly liable for the breach of an *obligation de résultat*.<sup>53</sup> It is further, consistent court practice in France that professional sellers are always deemed to have knowledge of the defect factually leading to a general and strict liability for damages in case of delivery of non-conforming goods.<sup>54</sup> Dogmatic constructions to circumvent the fault principle have also been made use of by the Swiss courts. As the exact wording in Swiss law provides for a seller delivering non-conforming goods to be liable only for direct losses,<sup>55</sup> the courts established a broad interpretation of the notion “direct” and found that also consequential losses may be deemed “direct”.<sup>56</sup> With regard to Germany it was the European Court of Justice in its prominent decision *Putz/Weber* that significantly interfered with the German fault principle establishing a strict liability for de- and installation costs.<sup>57</sup>

The CISG takes a simpler approach. Every breach of contract leads to liability for damages irrespective of whether or not the breach was due to the obligor’s fault.<sup>58</sup> To

<sup>50</sup> Zweigert and Kötz, *Introduction to Comparative Law*, supra fn 32, at pp. 503ff.

<sup>51</sup> Schwenger et al., *Global Sales Law*, supra fn 25, at paras. 44.63ff.

<sup>52</sup> *Ibid*, at paras. 44.77ff.

<sup>53</sup> Demogue, R., *Traité des obligations en general*, vol 5, 1925, at para. 1237; See also Zweigert and Kötz, *Introduction to Comparative Law*, supra fn 32, at pp. 501ff; Jones, G.H. and Schlechtriem, P., “Chapter 15: Breach of Contract” in von Mehren, A.T. et al. (eds), *International Encyclopedia of Comparative Law*, vol. 7, *Contracts in General*, 1999, Mohr Siebeck, Tübingen, at para. 236.

<sup>54</sup> Schwenger et al., *Global Sales Laws*, supra fn 25, at para. 44.83 with references from legal practise.

<sup>55</sup> Art. 208(2) of the Law of Obligations (*Obligationenrecht*) (CH) (OR 1911).

<sup>56</sup> See, in particular, BGE 133 III 257 (CH); See criticism by Honsell et al., *Basler Kommentar, Obligationenrecht I* at Art. 208, para. 8.

<sup>57</sup> C-65/09 *Weber v Wittmer* and C-87/09 *Putz v Medianess Electronics*, ECJ, (2011) NJW 631 with a comment by Piltz, B.; Stephan Lorenz, “Ein- und Ausbauverpflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung“ (2011) NJW 2241.

<sup>58</sup> CISG 45(1)(b), 61(1)(b).

balance the strict liability principle, CISG 79 provides for an exemption from liability for damages if the failure to perform was due to an impediment beyond the obligor's control. Again, the CISG is an excellent example of successfully merging the approaches of civil law and common law into a modern system of rules that meets the needs of today's trade practise.

## 2.5 LIMITATION OF ACTIONS

Major differences between civil law and common law also exist in the field of limitation of actions. The traditional starting point in civil law codifications provided for rather long limitation periods, varying between ten and thirty years.<sup>59</sup> Based on Roman law tradition the limitation periods in case of non-conformity, on the other hand, were or still are extremely short, with periods between only thirty days, sixty days, six months or one year.<sup>60</sup> The common law approach, in contrast, is rather simple: there is only one limitation period for all contractual claims ranging between four and six years.<sup>61</sup>

The harmonisation of the limitation of actions has been a rather sluggish process. Adopting the common law approach of a four-year limitation period the United Nations Convention on the Limitation Period in the International Sale of Goods was met with little approval in civil law countries.<sup>62</sup> Only following the EU Consumer Sales Directive of 1999, which was inspired by the CISG's preclusion period in Art. 39(2), were the European Union's limitation periods for claims in relation to non-conforming goods extended to a uniform two year period.<sup>63</sup> The last decade was further marked by several domestic reforms that fundamentally revised domestic laws on the limitation of actions. Mainly modelled on the limitation rules of PECL, the reforms aim at harmonising the limitation periods while shortening the general limitation period and introducing the distinction between relative and absolute limitation periods.<sup>64</sup> Modern legal systems provide for a limitation period between two

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<sup>59</sup> Schwenger *et al.*, *Global Sales Law*, *supra* fn 25, at para. 51.23 with numerous examples from domestic legal systems.

<sup>60</sup> *Ibid.* para. 51.27 with numerous examples from domestic legal systems; for further information on the limitation of actions in Roman law, see Pickenbrock, A., *Befristung, Verjährung, Verschweigung und Verwirkung*, 2006, Mohr Siebeck, Tübingen, at pp. 195ff.

<sup>61</sup> Schwenger *et al.*, *Global Sales Law*, *supra* fn 25, at para. 51.33.

<sup>62</sup> Arts. 8-10 of the United Nations Limitation Convention; for the current status, available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html)>.

<sup>63</sup> Art. 5 of the Dir 1999/44/EC.

<sup>64</sup> On the reform of the law of limitation of actions in Germany, see, Leenen, D., "Die Neugestaltung des Verjährungsrechts durch das Schuldrechtsmodernisierungsgesetz" (2002) *DStR*, at pp. 34ff; on the reform of the law of limitation of actions in France, see also, Ancel, P., "Charakter, System und Fristen der Verjährung in Frankreich nach der Reform" in Remien, O. (ed), *Verjährungsrecht in Europa – zwischen Bewahrung und Reform*, 2011, Mohr Siebeck, Tübingen, at pp. 9ff; for the current attempts at

and five years commencing when the obligee becomes aware or could not have been unaware of its claim.<sup>65</sup> This so-called relative limitation period is complemented by an absolute limitation period ranging between ten and thirty years starting at the time of the accrual of the action.<sup>66</sup> Whether common law systems will embrace this trend remains an open question. At the time being, however, notwithstanding a certain convergence, the gap seems to be too big to be bridged yet.

## 2.6 INTERIM RESULTS

As the foregoing examples demonstrate, the CISG has had great influence on both international and domestic remedial systems during the past two decades. The CISG in turn strongly builds upon the structure of remedies in common law while overcoming its antiquated parts. The civil law's influential period, in contrast, seems to be over. Based on the Roman law concept of remedies that particularly dealt with slave and cattle trade the traditional civil law system of remedies seems no longer suitable to meet the demands of a globalised market. The Germanic legal family has further been strongly influenced by the Historical School and pandectistics of the 19<sup>th</sup> century, the drafting of practice-oriented rules not being their first concern. However, most decisive in today's international trade are legal certainty and predictability, which have been of first priority in English law for centuries.

## 3 HARMONISING TRENDS IN THE PROCEDURAL LAW OF INTERNATIONAL ARBITRATION

Closely linked to the notions of justice and fairness in society, domestic civil procedure law has remained largely unaffected by harmonisation efforts.<sup>67</sup> Although there have been a number of endeavors initiated mainly by academia,

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reforming the law of limitation of actions in Switzerland, see also Art. 210 OR 1911, which entered into force in the beginning of 2013 as well as the Report Regarding the Preliminary Draft of the Law of Obligations (Revision of the Law of Limitation of Actions) by the Federal Department of Justice and Police from August 2011 (*Bericht zum Vorentwurf Obligationenrecht (Revision des Verjährungsrechts) des Eidgenössischen Justiz- und Polizeidepartements*), available at: <<http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/verjaehrungsfristen/vn-ber-d.pdf>>.

<sup>65</sup> PECL14.201; PICC 10.2(1); art III.-7:201 (all three years); for numerous examples from domestic legal systems, see Schwenger *et al.*, *Global Sales Law*, *supra* fn 25, at para. 51.35 n. 95.

<sup>66</sup> PECL 14.307; PICC 10.2(2); DCFR III.-7:307.

<sup>67</sup> As observed by C.J. Hamson already in 1949, 'legal procedure is a ritual of extreme social significance. If we can appreciate the meaning of this ritual in the case of our own and even of one other community, we obtain a remarkable insight into the fundamental and largely unformulated beliefs accepted by, and acceptable to, those societies; we begin to understand their collective and perhaps contrasted social sense of what is just and fair', at Jolowicz, J.A., "On the Comparison of Procedures" in Nafziger, J.A.R. and Symenides, S.C. (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren*, 2002, Transnational Publishers, Ardsley, New York, at pp. 721 and 734. On the comparison of procedural law, see *ibid.* 721ff. On the comparison of procedural law as well as on the state of play of the harmonisation of procedural law, see also van Rhee, C.H., "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in Kramer, X.E. and van Rhee, C.H. (eds), *Civil Litigation in a Globalising World*, 2012, Springer, Berlin, at pp. 39ff.

the drafted model laws and rules have met with little success. The most prominent example is the Principles of Transnational Civil Procedure, which was jointly prepared by the American Law Institute and UNIDROIT in 2004.<sup>68</sup> On the European level there are numerous isolated harmonised rules, for example regarding jurisdiction as well as the recognition and enforcement of judgements, the cooperation between courts of the member states in the taking of evidence, a European enforcement order, an order for payment procedure, small claims procedures, and mediation.<sup>69</sup> The most recent attempt to comprehensively unify procedural law was the heavily criticised proposal of the so-called Storme Commission in 1993.<sup>70</sup>

The situation is completely different with regard to international commercial arbitration. The legal foundations were laid by UNCITRAL back in 1958; ensuring the enforceability of both arbitral agreements and arbitral awards, the New York Convention today has 149 member states, the few exceptions mostly being sub-Saharan African States and Pacific Islands.<sup>71</sup> In addition, a lot of domestic legislation on international arbitration is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration;<sup>72</sup> by now more than 90 jurisdictions have followed this trend.<sup>73</sup> UNCITRAL also took the lead in harmonising the rules for international commercial arbitration. The 1976 UNCITRAL Arbitration Rules, recently revised in 2010,<sup>74</sup> were the major starting point in the harmonisation of arbitration and, although originally designed for *ad hoc* arbitrations, served as a basis

<sup>68</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, available at: <<http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>>; See also Stürner, R., "The Principles of Transnational Civil Procedure – An Introduction to Their Basic Conception" (2005) 69 *RebelsZ* 201, at pp. 201ff.

<sup>69</sup> See the listing at van Rhee, *Civil Litigation*, at pp. 53ff.

<sup>70</sup> For the official version of the proposal as it was submitted to the European Commission, see Storme, M.E., *Approximation of Judiciary Law in the European Union*, Kluwer Academic Publisher, 1994; See criticism, for example, from Lindblom, P.H., "Harmony of the legal spheres" (1997) 5 *Eur Rev Priv Law* 11, at pp. 11ff; Roth, H., "Die Vorschläge der Kommission für ein europäisches Zivilprozeßgesetzbuch – das Erkenntnisverfahren" (1996) *ZZP* 271, at pp. 308ff; Schilken, E., "Die Vorschläge der Kommission für ein europäisches Zivilgesetzbuch – einstweiliger summarischer Rechtsschutz und Vollstreckung" (1996) *ZZP* 315, at pp. 330ff.

<sup>71</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text and current status are available at: <http://www.uncitral.org/uncitral/texts/arbitration/NYConvention.html>.

<sup>72</sup> The 2006 revised version is available at: <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>.

<sup>73</sup> The current status is available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_text/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_text/arbitration/1985Model_arbitration_status.html)>.

<sup>74</sup> The 2010 version of the UNCITRAL Arbitration Rules is available at: <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>.

for many arbitral institutions to develop their own institutional rules.<sup>75</sup> Notably, the recent revisions of institutional rules in 2012 show considerable similarities.<sup>76</sup>

### 3.1 PARTY AUTONOMY AND APPLICABLE LAW

With regard to the question of the substantive law being applied in international commercial arbitration, both modern domestic arbitration laws and modern institutional arbitration rules follow a uniform trend. The primary applicable law is that chosen by the parties. Thereby, any designation of the law or legal system of a given state is construed as directly referring to the substantive law of that state instead of to its conflict of laws rules.<sup>77</sup> In the absence of such a designation the tribunal shall determine the applicable law. Most arbitration laws and rules grant the tribunal the power to directly apply the substantive law it considers appropriate without referring to the conflict of laws rules at the seat of the arbitration.<sup>78</sup> Under some laws and rules tribunals are to apply the law with which the dispute has the closest connection.<sup>79</sup> Remarkably, the most recent arbitration laws and institutional arbitration rules allow for the parties to agree not only on a national law, but also on so-called a-national

<sup>75</sup> Born, G.B., *International Commercial Arbitration*, vol 1, 2009, Kluwer Law International, at pp. 151ff.

<sup>76</sup> On the revised ICC Arbitration rules, see Voser, N., “Overview of the Most Important Changes in the Revised ICC Arbitration Rules” (2011) 29 *ASA Bull* 783, at pp. 783ff; on the revised Swiss Arbitration Rules, see Habegger, P., “The Revised Swiss Rules of International Arbitration – An Overview of the Major Changes” (2012) 30 *ASA Bull* 269, at pp. 269ff; on the revised CIETAC Arbitration Rules, see Lu, S., “The New CIETAC Arbitration Rules of 2012” (2012) 29 *J Int Arb* 299, at pp. 299ff. The revisions focus *inter alia* on multiparty arbitration and aim at improving the efficiency of arbitration proceedings.

<sup>77</sup> Böckstiegel, K.H., “Die Internationalisierung der Schiedsgerichtsbarkeit“ in Bachmann, B. *et al.* (eds), *Grenzüberschreitungen, Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit, Festschrift für Peter Schlosser*, 2005, Mohr Siebeck, Tübingen, at pp. 49 and 53; See, for example, § 1051(1) ZPO (FRG); § 23(1) DIS Arbitration Rules 1998; Art. 28(1) UNCITRAL Model Law 2006.

<sup>78</sup> Born, *International Commercial Arbitration*, at pp. 2116ff; Art. 47(2) CIETAC Arbitration Rules 2012; Art. 21(1) ICC Arbitration Rules 2012; Art. 22(3) LCIA Arbitration Rules 1998; Art. 28(2) UNCITRAL Model Law 2006.

<sup>79</sup> See § 1051(2) ZPO (FRG); Art. 187(1) IPRG (CH); § 23(2) DIS Arbitration Rules 1998; Art. 33(1) Swiss Arbitration Rules 2012.

law,<sup>80</sup> such as, for example, the UNIDROIT Principles for International Commercial Contracts.<sup>81</sup>

### 3.2 ACTUAL CONVERGENCES IN ARBITRATION LAW

Apart from international convergences of arbitration laws and arbitration rules it is also the practice of the international arbitration procedure itself that is experiencing significant globalisation. The parties, their lawyers and the arbitrators called upon to jointly solve the dispute more often than not come from different regions of the world with different educational backgrounds and legal cultures. In order to find a solution acceptable to all parties involved, those legal cultures have to be adequately balanced.<sup>82</sup> The coalescence of common law and civil law in international arbitration has frequently been termed the *lex mercatoria* of procedural law.<sup>83</sup> Three examples of this convergence shall illustrate this fact: the *iura novit curia* principle, document production, and witness examination.

#### 3.2.1 IURA NOVIT CURIA IN INTERNATIONAL ARBITRATION

The principle of *iura novit curia* is more or less known in all legal systems, although in different shapes. The judge is expected to at least know his or her domestic law and how to apply it. The effects accorded to the principle, however, differ in civil law and common law jurisdictions. Civil law litigation systems support the principle almost unconditionally.<sup>84</sup> For the Germanic legal family this is in no small part due to the pandectistics of the 19<sup>th</sup> century.<sup>85</sup> Common law jurisdictions, on the other hand, are much less supportive of the *iura novit curia* principle, in some cases denying it altogether.<sup>86</sup> The reasons for this major difference become evident once regard is had to the role of the judge in the respective litigation systems.<sup>87</sup> Whereas in common law

<sup>80</sup> See, § 1051(1) ZPO (FRG); Art. 187(1) IPRG (CH); Art. 21(1) ICC Arbitration Rules 2012; Art. 22(3) LCIA Arbitration Rules 1998; Art. 33(1) Swiss Arbitration Rules 2012; Art. 28(1) UNCITRAL Model Law 2006. The possibility to agree on a-national law is derived from the use of the term “rules of law” (German “Rechtsvorschriften” or “Rechtsregeln”, French “règles de droit”) instead of “law”; on this Born (fn 75) 2143ff; cf for Münch, G.J., in Krüger, W., and Rauscher, T., (eds), *Münchener Kommentar zur Zivilprozessordnung*, 3rd edn, 2008, C.H. Beck, Munich, at § 1051 para. 12.

<sup>81</sup> See, *supra* fn 12.

<sup>82</sup> Kaufmann-Kohler, G., “Globalization of Arbitral Procedure” (2003) 36 *Vand J Trans L* 1313, at p. 1323; See also Böckstiegel, at pp. 49ff.

<sup>83</sup> Kaufmann-Kohler, at pp. 1322ff; See also Sachs, K., “Use of Documents and Document Discovery: ‘Fishing Expeditions’ Versus Transparency and Burden of Proof” (2003) *SchiedsVZ* 193, at p. 198, with regard to document production.

<sup>84</sup> Waincymer, J., “International Arbitration and the Duty to Know the Law” (2011) 28 *J Int Arb* 201, at p. 204.

<sup>85</sup> On the development of the German law in the 19th century as well as the pandectistics, see Zweigert and Kötz, *supra* fn 32, at pp. 132ff.

<sup>86</sup> Mann, F.A., “Fusion of the Legal Professions?” (1977) 93 *L Q R* 367, at p. 375; see also Waincymer, at p. 204.

<sup>87</sup> Waincymer, *supra* fn 84, at p. 206; on the role of the judge in civil law jurisdictions on the one hand and common law jurisdictions on the other hand see Taruffo, M., “Chapter 7: Evidence” in Cappelletti, M.,

systems the judge is assigned a rather passive role with the parties submitting not only the facts but also the law (adversarial system)<sup>88</sup> the civil law litigation system has often been described as “inquisitorial”, especially by common law jurists, which obviously is an exaggeration, but essentially contains a core of truth.<sup>89</sup> Another reason might be the diverse structures and recruitment processes in the domestic courts.<sup>90</sup> In common law countries the profession of the judge is typically entered at a later stage of the legal career. In contrast, in many civil law systems, the judicial career as a judge often begins right after law school. Also, many civil law litigation systems pursue a differentiated court system with chambers and departments specialising in particular fields of law. A civil law judge may therefore be expected to have more specialised legal knowledge than a common law judge who usually has a more generalist background.<sup>91</sup>

The differences in applying the *iura novit curia* principle grow even stronger with regard to foreign law.<sup>92</sup> Thus, in England and France, for example, foreign law is qualified as fact as opposed to law and has to be proven by the parties.<sup>93</sup> Germany and Switzerland as well as the United States regard the assessment of foreign law as a question of law but limit the application of *iura novit curia* to a certain degree.<sup>94</sup>

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(ed), *International Encyclopedia of Comparative Law, vol 16, Civil Procedure*, 2010, Mohr Siebeck, Tübingen, at paras. 37ff.

<sup>88</sup> Craig, W.L., “Common Law Principles on the Taking of Evidence” in Böckstiegel, K.H. (ed), *Beweiserhebung in internationalen Schiedsverfahren*, 2001, Carl Heymanns Verlag, Cologne, at pp. 12ff: ‘In a caricatural form, the perfect judge in common law litigation is said to limit his intervention to saying “good morning” at the opening of the day’s proceeding and “good evening” at its close’; See also Stürner, R., “Parteiherrschaft versus Richtermacht, Materielle Prozessleitung und Sachverhaltsaufklärung im Spannungsfeld zwischen Verhandlungsmaxime und Effizienz” (2010) ZJP 147, at pp. 150ff.

<sup>89</sup> Craig, *supra* fn 88, at pp. 12ff.

<sup>90</sup> On the historical development of courts and judges, nowadays’ court structure as well as the profession of the judge today in common law and civil law, see also Lundmark, T.W., *Charting the Divide between Common and Civil Law*, 2012, Oxford University Press, Cambridge, at pp. 176ff, 212 with the demonstrative description: ‘In short, from a functional standpoint, it could be said that English and Welsh advocates (barristers) and American advocates (attorneys) are acting like German and Swedish judges, and that German and Swedish judges are acting like common law advocates’.

<sup>91</sup> Gerber, D.J., “Comparing Procedural Systems: Toward an Analytical Framework” in Nafziger and Symenides, at pp. 665 and 671.

<sup>92</sup> Cappelletti, M. and Garth, B.G., “Chapter 1: Introduction – Policies, Trends and Ideas in Civil Procedure” in Cappelletti, M. (ed), *International Encyclopedia of Comparative Law, vol 16, Civil Procedure*, 1997, Mohr Siebeck, Tübingen, at para. 26.

<sup>93</sup> Kaufmann-Kohler, *supra* fn 82, at pp. 1331ff; Alberti, C.P., “Part I: International Commercial Arbitration, Chapter 1: Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?” in Kröll, S., *et al., International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Liber Amicorum Eric Bergsten*, 2011, Kluwer Law International, 3, 9ff.

<sup>94</sup> Compare § 293 ZPO (FRG); Art. 16(1) IPRG (CH); Rule 44.1 US Federal Rules of Civil Procedure (US); See also Alberti, *supra* fn 93, at pp. 7ff.

In international arbitration, of course, there is no such thing as foreign law. As there is no “national law” of the tribunal, every law applied is foreign.<sup>95</sup> Consequently, the question of how the principle of *iura novit curia* is to be applied in international arbitration is answered in very different ways.<sup>96</sup> The Swiss Supreme Court has answered this question in the affirmative and applied the originally domestic principle in an international arbitration proceeding.<sup>97</sup> To what extent this may collide with the parties’ right to be heard remains a different issue.<sup>98</sup> Apart from these theoretical questions, today it is common practice that the parties to an international arbitration proceeding submit detailed opinions regarding the substantive law and support their submissions with corresponding evidence and expert witnesses.<sup>99</sup>

### 3.2.2 DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION

Major differences between common law and civil law exist also with regard to document production. Traditionally, civil law litigation systems do not provide for a general duty to produce documents promoting the opponent’s case.<sup>100</sup> The common law tradition stands in sharp contrast; the US-American pre-trial discovery is an instrument greatly feared by continental European lawyers.<sup>101</sup> Nonetheless, the past fifteen years have witnessed a gradual convergence of common law and civil law approaches.<sup>102</sup> In 2002 Germany introduced a provision that allows for the court to order the production of documents;<sup>103</sup> a similar provision is found in the Swiss Code

<sup>95</sup> Kaufmann-Kohler, *supra* fn 82, at p. 1331; Giovannini, T., “International Arbitration and Jura Novit Curia – Towards Harmonization” in Fernández-Ballesteros, M.A., and Arias, D., *Liber Amicorum Bernardo Cremades*, 2010, La Ley, Madrid, at pp. 495, 497.

<sup>96</sup> Kaufmann-Kohler, *supra* fn 82, at pp. 1331ff; Most domestic international arbitration laws as well as most of the institutional arbitration rules are silent on the question of whether and if yes, to what extent, the principle *iura novit curia* applies in international arbitration. Exceptions are Art. 34(2)(g) English Arbitration Act 1996 and Art. 22(1)(c) LCIA Arbitration Rules 1998. On the further question – assuming the principle applies – of whether its application is merely legally possible or mandatory see Alberti, *supra* fn 93, at pp. 24ff; Giovannini, *supra* fn 95, at pp. 499ff.

<sup>97</sup> BGer, 9 February 2009, 4A\_400/2008 (CH).

<sup>98</sup> Alberti, *supra* fn 93, at pp. 19ff.

<sup>99</sup> Girsberger, D. and Voser, N., *International Arbitration in Switzerland*, 2012, 2nd ed, Schulthess, Basel, at para. 942.

<sup>100</sup> Kaufmann-Kohler, G. and Bärtsch, P., “Discovery in International Arbitration: How Much is Too Much?” (2004) *SchiedsVZ* 13, at p. 14; See also, Craig, *supra* fn 88, at p. 15.

<sup>101</sup> For more details on pre-trial discovery see Craig, *supra* fn 88, at pp. 14ff; Taruffo, *supra* fn 87, at para. 78; Elsing, S.H., “Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds” (2011) *SchiedsVZ* 114, at pp. 121ff.

<sup>102</sup> Kaufmann-Kohler, *supra* fn 82, at pp. 1326ff; Kaufmann-Kohler and Bärtsch, *supra* fn 100, at p. 17; Sachs, *supra* fn 83, at p. 198.

<sup>103</sup> See § 142 ZPO (FRG).

of Civil Procedure that entered into force in 2011.<sup>104</sup> Convergence is also promoted from the other side; in 1999 the Woolf Reform led to a restriction of the British discovery provisions.<sup>105</sup>

Again, today's practice in international commercial arbitration is an excellent example of the convergence of common law and civil law traditions.<sup>106</sup> It is now well established that the tribunal may grant some level of document disclosure.<sup>107</sup> US-American style discovery, however, will only rarely occur in international arbitration proceedings.<sup>108</sup> Today's standard is reflected by the IBA Rules on the Taking of Evidence,<sup>109</sup> which allow for the production of documents if the requesting party, *inter alia*, can show that the documents requested are relevant to the case and material to its outcome.<sup>110</sup> So-called fishing expeditions, as are common in the United States, are hence precluded.<sup>111</sup>

### 3.2.3 WITNESS EXAMINATION IN INTERNATIONAL ARBITRATION

Corresponding to the different roles of the judge in civil litigation the manner of the taking of evidence diverges significantly in civil law and common law countries. In civil law litigation systems the judge is in control of the examination of witnesses.<sup>112</sup> In many countries, ethical conduct rules even prohibit advocates from simply

<sup>104</sup> Art. 160(1)(b) ZPO (CH).

<sup>105</sup> Rule 31 Civil Procedure Rules 1999 (UK); See also The Right Honourable the Lord Woolf, Master of the Rolls, 'Access to Justice: final Report to the Lord Chancellor on the civil justice system in England and Wales' (Her Majesty's Stationary Office 1995) ch. 12 para. 37, available at: <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/index.htm>>.

<sup>106</sup> Cf Elsing, S.H. and Townsend, J.M., "Bridging the Common Law-Civil Law Divide in Arbitration" (2002) 18 *Arb Int* 59, at p. 61; Wirth, M., "Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden" (2003) *SchiedsVZ* 9, at pp. 11ff; Böckstiegel, *supra* fn 77, at p. 55; See also Kaufmann-Kohler, *supra* fn 82, at p.1325.

<sup>107</sup> See, § 27(1) DIS Arbitration Rules 1998; Art. 25(5) ICC Arbitration Rules 2012; Art. 22(1)(e) LCIA Arbitration Rules 1998; Art. 24(3) Swiss Arbitration Rules 2012; Art. 27(3) UNCITRAL Arbitration Rules 2010.

<sup>108</sup> Elsing and Townsend, *supra* fn 106, at p. 61.

<sup>109</sup> International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules 2010), available at: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#takingevidence](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence)>; Kühner, D., "The Revised IBA Rules on the Taking of Evidence in International Arbitration" (2010) 27 *J Int Arb* 667, at pp. 667ff; von Segesser, G., "The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010" (2010) 28 *ASA Bull* 735, at pp. 735ff.

<sup>110</sup> Art. 3(2), (3) IBA Rules 2010.

<sup>111</sup> IBA Working Party, "Commentary on the New IBA Rules of Evidence" in Weigand, F., (ed), *Practitioner's Handbook on International Arbitration*, 2002, Stämpfli, Bern, pp. 372-379; See also, Ylikantola, T., "Document Discovery in Current International Arbitration Practice: Are There Differences Between Common Law and Civil Law Traditions?" (2012) 16 *VJ* 123, at pp. 130ff.

<sup>112</sup> Taruffo, *supra* fn 87, at para. 84; Wirth, *supra* fn 106, at p. 14.

contacting the witnesses prior to the hearing.<sup>113</sup> Again, the situation is quite different in common law jurisdictions. Here, both the summoning and questioning of witnesses lie within the responsibility of the parties and their advocates respectively. In general, the examination will start with a direct examination by the party calling the witness, followed by the cross-examination by the opponent and the re-direct examination conducted again by the prior party.<sup>114</sup> In order to make the witness examination as proficient as possible, it has become established practice amongst common law advocates to comprehensively prepare their own witnesses by way of so-called witness coaching.<sup>115</sup>

International arbitration practice, in turn, has picked up elements from both legal systems. Primarily it has to be highlighted that, as is the case in common law,<sup>116</sup> both parties as well as their advocates can act as witnesses.<sup>117</sup> The oral examination in the proceedings conducted by the party calling the witness is often replaced by written witness statements; cross-examination and re-direct examination are common practice. Unlike common law practice, however, the arbitrator is allowed to interfere with the parties' examinations at any time in order to direct his or her own questions at the witness.<sup>118</sup> Also, it is well established that parties can question and prepare their witnesses prior to the oral proceedings.<sup>119</sup>

<sup>113</sup> See, Art. 7 Swiss Rules of Professional Conduct of the Swiss Bar Association (Schweizerische Landesregeln des Schweizerischen Anwaltsverbands) (2012); See also Meredith, I. and Khan, H., "Witness Preparation in International Arbitration – A Cross Cultural Minefield" (2011) 26 *Mealeys's Int Arb Rep* 1, at p. 3; Wirth, *supra* fn 106, at p. 13.

<sup>114</sup> Taruffo, *supra* fn 87, at para. 83; Craig, *supra* fn 88, at p. 19.

<sup>115</sup> For an overview see Meredith and Khan, at pp. 1ff; See also Ludwig, C. and Hartzler, J., "Will the New Year Bring Resolution to the Recurring Ethical Drama of How Far to Go in Preparing Your Witnesses?" Kluwer Arbitration Blog, 21 December 2012, available at: <<http://kluwerarbitrationblog.com/blog/2012/12/21/will-the-new-year-bring-resolution-to-the-recurring-ethical-dilemma-of-how-far-to-go-in-preparing-your-witnesses/>>.

<sup>116</sup> Craig, *supra* fn 88, at pp. 19ff.

<sup>117</sup> See, Art. 20(7) LCIA Arbitration Rules 1998; Art. 25(2) Swiss Arbitration Rules 2012; Art. 27(2) UNCITRAL Arbitration Rules 2010; Art. 4(2) IBA Rules 2010; Griffin, P.R., "Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings" (2000) 17 *J Int Arb* 19, at pp. 26ff.

<sup>118</sup> See, § 27 DIS Arbitration Rules 1998; Art. 25(3) ICC Arbitration Rules 2012; Art. 20(5) LCIA Arbitration Rules 1998; Art. 25(4) Swiss Arbitration Rules 2012; Art. 25(4) UNCITRAL Arbitration Rules 2010; Art. 8(3)(g) IBA Rules 2010; Griffin, *supra* fn 117, at p. 28; Elsing and Townsend, *supra* fn 106, at pp. 62ff.

<sup>119</sup> Griffin, *supra* fn 117, at p. 28; Wirth, *supra* fn 106, at p. 13. See also, Guideline 24 of the IBA Guidelines on Party Representation in International Arbitration adopted in May 2013. On the question of how far this preparation may go, see von Schlabrendorff, F., "Interviewing and Preparing Witnesses for Testimony in International Arbitration Proceedings: The Quest for Developing Transnational Standards of Lawyer's Conduct", in Fernández-Ballesteros, M.A., and Arias, D., *Liber Amicorum Bernardo Cremades*, 2010, La Ley, Madrid, at pp. 1161ff. On the IBA Guidelines see Waincymer, J., "IBA Guidelines on Party Representation in International Arbitration" Kluwer Arbitration Blog, 10 July 2013, available at: <<http://kluwerarbitrationblog.com/blog/2013/07/10/iba-guidelines-on-party-representation-in-international-arbitration/>>.

### 3.3 INTERIM RESULTS

It has been illustrated that although certain civil law practices have found their way into international arbitration practice, today's international arbitration proceedings are significantly shaped by common law techniques.<sup>120</sup> This holds true especially for the taking of evidence.

The law applicable in international arbitration proceedings only rarely corresponds to the domestic laws of all arbitrators. Naturally, it is primarily up to the parties to present and prove, if necessary by recourse to expert witnesses, the substance of the law applicable. The Anglo-American litigation traditions of document production and witness coaching are closely connected to the idea of conducting the oral proceedings as efficiently as possible, which in turn draws heavily on the possibility of conducting civil litigation proceedings with the involvement of jury trials.<sup>121</sup> The situation in international arbitration is quite similar: parties, counsels and arbitrators often come from different continents. Fixing a date may be difficult given the already high demand on resources. Consequently, there is simply not time nor money for, for example, postponing the oral proceedings because documents were unknown or unavailable prior to the hearing. Finally, in contrast to state courts, arbitral tribunals render definite decisions that are, apart from gross procedural errors, not subject to judicial review. An arbitral tribunal will therefore rather follow a litigation system committed to a comprehensive fact-finding as is the case in common law civil procedure.<sup>122</sup>

## 4 CONCLUSION

The advancing globalisation of trade has always been the driving force behind harmonisation and unification of private law. Whereas in the 19<sup>th</sup> century industrialisation provoked unification at the nation state level, in the 21<sup>st</sup> century globalisation leads to a convergence of private law at the transnational level. This, in turn, challenges the original notion of the nation state. Private law and private law dispute resolution are becoming increasingly privatised and delocalised. It is evident that common law has played and still plays the major role in shaping the evolving harmonised international standards. This also holds true for fields of private law other than those focussed on here. Irrespective of global power structures the common law system seems to be more suitable than civil law to meet the needs of a globalised legal

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<sup>120</sup> Wirth, *supra* fn 106, at pp. 9ff.

<sup>121</sup> For further details on the so-called trial model see Taruffo, *supra* fn 87, at para. 79; On jury trials see Craig, *supra* fn 88, at pp. 11 and 18.

<sup>122</sup> Wirth, *supra* fn 106, at pp. 9ff.

world. Notably, however, while civil law might not have significant influence on the substance of harmonised private law standards it does influence the form of how those standards are laid down. Harmonisation and unification do not follow from case law but are codified in writing in international conventions, model laws, principles and rules. Also, the originally Germanic literary genre of the commentary has found its way onto the international level.

Although there already exists a variety of harmonised private law standards it cannot be ignored that wide areas of private law are still entirely non-harmonised. A true harmonisation even of key areas as the entire contract law will probably take several decades. A first step towards this direction has been taken by Switzerland, which in 2012 called upon UNCITRAL to embark upon the question of whether future work in the area of globally harmonising general contract law is desirable and feasible.<sup>123</sup>

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<sup>123</sup> United Nations Commission on International Trade Law, “Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law” 45th session, New York, 25 June-6 July 2012, A/CN.9/758, 8 May 2012, available at: <[www.uncitral.org/uncitral/commission/sessions/45th.html](http://www.uncitral.org/uncitral/commission/sessions/45th.html)>.