Ingeborg Schwenzer, Hybridisierung der Rechtsordnungen - Internationale privatrechtliche Standarts, in: Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen?/ Immunität, Berichte DGIR Bd. 46, Heidelberg 2014.

Summary

Hybridization of legal systems – International civil law standards

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I. Introduction

During the past several decades the common law and civil law private law systems have been converging. The catalyst for this development is the rapid globalization of trade and commerce.

II. Standardization tendencies in the substantive law of legal remedies

1. General

During the last three decades the United Nations Convention on Contracts for the International Sale of Goods (CISG) has significantly influenced the domestic as well as the international development of contract law.

The CISG as well as the numerous private law reforms modeled after it exemplarily bridge the gap between common law and civil law by combining both systems to a practice-oriented compromise.

2. 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. Civil law systems distinguish the remedies applicable according to the respective cause of the breach. In contrast, the remedial system for breach of contract in common law is based on a unitary approach. The CISG and the modern rules following its example have convincingly opted for the common law breach of contract-approach.

3. Specific performance

In civil law systems the primary remedy is specific performance. In common law specific performance is rather an exception. During 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. The CISG generally allows for specific performance.

4. Avoidance of contract

There is hardly any remedy as complex and disparate in both civil law and common law as avoidance of contract. The CISG on the other hand follows a unitary approach. Under the CISG the remedy of avoidance does not depend on the reason causing the non-performance, but only on the gravity of the breach. The unitary approach is also reflected in the mechanism how avoidance occurs. In all cases avoidance must be declared by the aggrieved party.

5. Damages

With regard to the remedy of damages again, civil law and common law differ fundamentally. Generally, in common law any breach of contract allows for a claim of dam-

ages. Civil law systems, on the other hand, grant damages only if the breach was due to the fault of the obligor. The CISG takes a simpler and thus more convincing approach. Every breach of contract triggers liability for damages irrespective of whether or not the breach was due to the obligor's fault or not. The obligor may be exempted from paying damages, however, if the failure to perform was due to an impediment beyond the obligor's control. Again, it has been achieved to merge civil law and common law in a modern way accommodating the needs of today's trade.

6. Limitation of actions

Major differences between common law and civil law exist in the field of limitation of actions. Notwithstanding a certain convergence, at the time being the gap seems to be too big to be bridged yet.

7. Preliminary conclusion

Summarizing, the CISG has had a great influence on both the international and the domestic remedial systems during the past two decades. The CISG, in turn, strongly builds upon the structure of remedies in common law, but overcomes its antiquated approaches.

III. Standardization tendencies in procedural law, namely in the law of international arbitration

1. General

In contrast to substantive law domestic civil procedure law has remained largely unaffected by harmonization or unification efforts. There have been a number of endeavors initiated mainly by academia, though. A comprehensive harmonization, however, has not exceeded the heavily criticized proposal of the so-called Storme Commission in 1993.

The situation is different with regard to the law of international commercial arbitration. The legal foundations for international commercial arbitration have been laid by UNCITRAL in 1958; the New York Convention has ensured the enforceability of both arbitral agreements and arbitral awards. UNCITRAL also took the lead in harmonizing the rules for international commercial arbitration. The 1976 UNCITRAL Arbitration Rules, recently revised in 2010, were a major impulse for the harmonization of arbitration rules.

2. Party autonomy and applicable law

With regard to the question of the applicable law both modern domestic arbitration laws and modern arbitration rules follow a clear uniform trend. The primarily applicable law is the law chosen by the parties. Remarkably, the most recent arbitration laws and arbitration rules allow for the parties to agree not only on national law, but also on so-called a-national law.

3. Converging practice in international arbitration procedure

Apart from international convergences of arbitration laws and arbitration rules it is also the practice of international arbitration procedure itself that is experiencing signif-

icant globalization. The parties, their lawyers and the arbitrators more often than not come from different regions of the world. In order to find a solution acceptable to all parties involved, those different legal cultures have to be adequately balanced. The coalescence of common law and civil law in international arbitration has frequently been termed the lex mercatoria of procedural law.

a) The principle of *iura novit curia* in international arbitration

The principle of *iura novit curia* is more or less known in all legal systems. The effects accorded to this principle, however, differ in civil law and common law jurisdictions. Civil law litigation systems support the principle almost unconditionally. Common law jurisdictions, on the other hand, are much less supportive of the *iura novit curia* principle. The differences in applying the *iura novit curia* principle grow even stronger with regard to foreign law.

As in international arbitration there is no national law of the tribunal, every law applied is "foreign" law. Today it is common in international arbitration practice, that the parties submit detailed opinions regarding the substantive law and support their submissions with corresponding evidence and expert witnesses.

b) Document production in international arbitration

Major differences between civil law and common law exist with regard to document production. Nonetheless, the past fifteen years have witnessed a gradual convergence of civil law and common law approaches. In international arbitration practice both approaches are combined. Most arbitration rules provide for some level of document production.

c) Examination of witnesses in international arbitration

Corresponding to the different roles of the judge in civil litigation the manner of taking evidence differs significantly in civil law and common law. In civil law litigation systems the judge is in control of the examination of witnesses. The situation is completely different in common law jurisdictions. Here, both the summoning and questioning of witnesses lie within the responsibility of the parties and their advocates. International arbitration practice, in turn, has picked up elements from both legal systems.

4. Preliminary conclusion

Summarizing, 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.

IV. Conclusion

The advancing globalization in the 21st century 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 privatized and delocalized. It is evident that common law has played the major role in shaping the emerging harmonized private law standards.

Although there already exist harmonized private law standards it cannot be ignored that wide areas of private law are still entirely non-harmonized. A true harmonization

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 whether future work in the area of globally harmonizing general contract law is desirable and feasible.