Oliver Remien, Funktion der Wissenschaft bei der Identifikation des internationalen Privat- und Handelsrechts, in: Freiheit und Regulierung in der Cyberwelt – Rechtsidentifikation zwischen Quelle und Gericht, Berichte DGIR Bd. 47, Heidelberg 2016.

Summary

by Prof. Dr. Oliver Remien, Julius-Maximilians-Universität Würzburg

I. Legal identification and branches of law

1. Legal identification deals with locating the applicable legal rule, with better understanding it and with specifying it in more detail. The term probably comes from public international law. To private lawyers, the – other – question of identification and proof of the content of the applicable foreign law (§ 293 ZPO, i.e. German code of civil procedure) is familiar.

2. In textbooks on public international law there will be a section on "means for the determination of rules of international law" or something like that and on Art. 38 of the ICJ Statute. One can ask the same question for international private law. There are differences relating to the different branches of law.

II. Legal identification as an issue of development and quality – or: codification and rule of law (Rechtsstaat) – as well as function of legal science

3. Legal identification is dependent on the state of development and quality of the legal system. The problem has brought forth a great tool: codification. This is a means to help with legal identification.

4. See *Thibaut* (1814): "an endless morass of conflicting, shattering and variegated provisions clearly capable of separating the Germans from one another and to make the thorough knowledge of the law impossible for (the) judges and lawyers."

5. In the absence of a uniform legal culture, a problem of legal identification in the broader sense still remains. In Europe, however, there is "no homogeneous legal culture".

6. For European law, the view has been taken that basically there are many "national European Union laws" and that this should even be "no detriment". However, legal culture is not a fig-leaf for legal inequality.

7. Does the rule of law (Rechtsstaat) call for easy legal identification and for codification? Individual European constitutions contain mandates for codifications (Art. 107 Grondwet of the Netherlands).

8. Concerning the principle of the rule of law (Rechtsstaat) the German Constitutional Court states: "One of the essential elements of the rule of law is legal certainty." In a much broader sense, one will be able to derive from the rule of law (Rechtsstaat) a mandate for legislation and codification in areas of private law. The creation of a clear legal system is "service public", civil legislation a state task.

9. European law also calls for the rule of law (Rechtsstaat). At the global level the rule of law is rather an aim (rule of law dialogue or Rechtsstaatsdialog).

10. One of the functions of legal science is to be conducive to legislation and to the application of the law. Together with various other actors it constitutes the infrastructure of a legal system. They interact in their functions.

11. Three main areas, all with diverging stages of development, are to be examined here:

III. Private International Law and Law of International Civil Procedure

12. In private international law legal science has played an essential role in the reform of the German Private International Law of 1986, the German Federal Ministry of Justice has been supported for decades by the German Council on Private International Law. For over ten years the EU has been playing an essential role in this area and has issued a whole array of regulations.

13. In European law of international civil procedure we have a considerable network of legislation by regulations (Brussels I Regulation of 2001, 2012, etc.). The report on the Brussels convention is legendary. Commentaries are mostly national works, with the exception of: Magnus/Mankowski (ed.), "European Commentaries on Private International Law".

14. In case law the ECJ has delivered many diverse major decisions. Much of it is recognized and good, but some decisions are of varying quality. Are they quite formalistic, are they, perhaps, a "greek gift" (*timeo Danaos et dona ferentes*), or too extensive, or "not of exorbitantly great help"?

15. The Europeanisation of private international law on the whole constitutes a great step forward. However, it still does not eliminate one of the core problems of private international law: the lack of internationality. In this case, there is not a problem of identification but one of divergence: limping legal relationships. The new method of mutual recognition is quite another chapter.

16. In European private international law the development is less advanced than in European law of international civil procedure, but the former has caught up considerably in the past decade. Meanwhile, there is talk of codification (see "embryon", "Rome 0 Regulation"). The ECJ has issued only a few decisions so far. Occasionally it is aptly noted that there is a "lack of the desirable clarity" in the "unfamiliar matter". There is no room for unspoilt pleasure. Thus, legal identification through legal science becomes even more important.

17. In the national case laws different trends are to be found which are alas ignored by legal science. It must act in a common European sense. However, contexts of discourse remain predominantly national.

18. In the field of European private international law the loss of influence of national legal science has already been clearly addressed (W-H Roth). The question is how legal science can continue to perform its duties. In the flood of commentaries on the Rome Regulations, case law by courts from other member states can seldom be found. European legal sources, but national discourses are a strange finding for private international law in particular.

IV. European Private Law

19. Through directives and, more rarely, regulations a considerable mass of provisions has come about in the fields of consumer and corporate law, but it is rather concentrated on specific points or fields. Here, also the ECJ plays its role. This role, however, is quite diverse with regard to the various legal acts.

20. The ECJ has issued partly fuzzy decisions on European private law (e.g. concerning assembly and disassembly costs, revocation of loans acquired by doorstep transaction, volcanic ashes). Sometimes, the ECJ appears like an oracle. Furthermore, the decisions find quite different resonance in the various member states.

21. Legal science offers rather diverse textbooks, casebooks, European law reviews for private law. For the Council Directive on unfair terms in consumer contracts, the Commission had initiated a database project: CLAB Europe. This project has failed.

22. A new page would be turned in EU Private Law, if in fact it should come to an "optional instrument" in sales law or further arias (proposal of October 2011). In the background of the Common European Sales Law stands legal science – especially Lando's PECL, the DCFR and the Acquis Principles have made the draft possible. Already on the draft a commentary on the Common European Sales Law has been published (half of the authors coming from Germany). A German book review also deals with the contribution of French authors and shows differences in taste.

23. Recital 34 of the Proposal of the Regulation and Art. 14 of the Framework Regulation Proposal on the Common European Sales Law provide for the establishment of a case law database by the Commission. An official commentary is also mentioned, but the Commission has been taking lightly its obligation to give reasons under Art. 296 TFEU when proposing this sales law. The European Law Institute even proposes an "official advisory body".

V. International Business Law

24. Is there in the area of international business law a "lex mercatoria", a transnational law, a–national law, perhaps even a "lex petrolea", a "lex sportiva"? One will not be able to accept the "lex mercatoria" (etc.) as a legal system.

25. However, at least in arbitration the applicability of the lex mercatoria can be agreed upon, Art. 28 II UNCITRAL Model Law, § 1051 ZPO ("rules of law"). The draft of Hague conflict of laws principles will generally permit this, in so far as a "set of rules" is "generally accepted" and is "neutral and balanced". § 1051 ZPO rejects a "voie directe" to lex mercatoria.

26. With regard to the lex mercatoria the international commercial lawyer in arbitration will be faced with similar issues as those of a public international lawyer. There are various tools for legal identification.

27. One of which are lists of Principles – *Mustill* (twenty Principles), *Berger* ("creeping codification": at first 68 "principles, rules and institutions" then 130 in 2012, meanwhile 133 in Translex).

28. Restatements are more manageable. The UNIDROIT Principles for International Commercial Contracts (UPICC or the UPr.) stand out in particular, a twin of the European Lando Principles. They are very well accessible through the database UNILEX and an anglophone commentary.

29. The classic instrument of international business law are (state) treaties. The modern classic for uniform interpretation today is Art. 7 CISG. A "systematic comparison of case law" is recommended as a method (*Kramer*). The CISG is especially well accessible.

30. On the one hand this applies to commentaries. The CISG databases are impressive: Pace Law School, UNILEX of UNIDROIT, CISG online of the Basel Global Sales Law Project, CLOUT Case Law on UNCITRAL TEXTS).

31. The CISG Advisory Council is (also) interesting: a private initiative, in total 16 members, of which 8 Europeans, 3 Americans (1 from Argentina), 1 Turk, 1 Russian, 1 Japanese, 1 Chinese and 1 South African, all of them legal scholars. To date, there are 16 reports, sometimes they are cited in case law.

VI. Function of legal science

32. The picture is astonishing: Europeanization is to be regarded an asset for legal certainty in international private and procedural law. But in substantive private law in Europe, there is great legal uncertainty and apparently little real Europeanization. Paradoxically, in international business law this is different: Lex mercatoria probably does not exist as an independent legal system, but helpful tools for the identification of these "rules of law" are fairly well developed internationally. It is also amazing that the CISG appears to be better accessible than Brussels I or European private international law.

33. The ECJ is a generalist and dominated by small states. For private and commercial law, this is an antiquated and inadequate system. In order to improve the situation in the European conflict of laws and in private law, a reform of the ECJ should be considered. This is easier said than done, but it would be a Europeanization of the ECJ and simultaneously constitute its deep foundation in private law. At the same time, the ECJ should pay more attention to legal science. Until now Europeanization is threatening to mean a decline of the importance of private law doctrine.

34. As yet, legal science has not been admitted as amicus curiae in Europe. If a European amicus curiae existed, legal science could take advantage of this institution.

35. Instead of subsequent notes on decisions, essays on proposals for expected decisions could be full of merit, the incentives to do so, however, seem questionable.

36. A Europeanization of the institution of the commentary is necessary.

37. An "Official Advisory Council" as proposed by the European Law Institute, is a chimera. The free academic competition should be and remain decisive without mediatization.

38. The European Law Institute has an unfortunate monolingual approach. It seems to view itself less as a provider of service for legal science but perhaps more as a service provider for integration policy.

39. Nowadays databases are a good means to facilitate international and European legal identification. For the CISG, International Business Law offers outstanding proven examples.

40. Legal identification is, after all, also a task for the European and international civil and commercial law. The rule of law requires legal certainty in the identification of law. A detailed description of the task is proposed here.