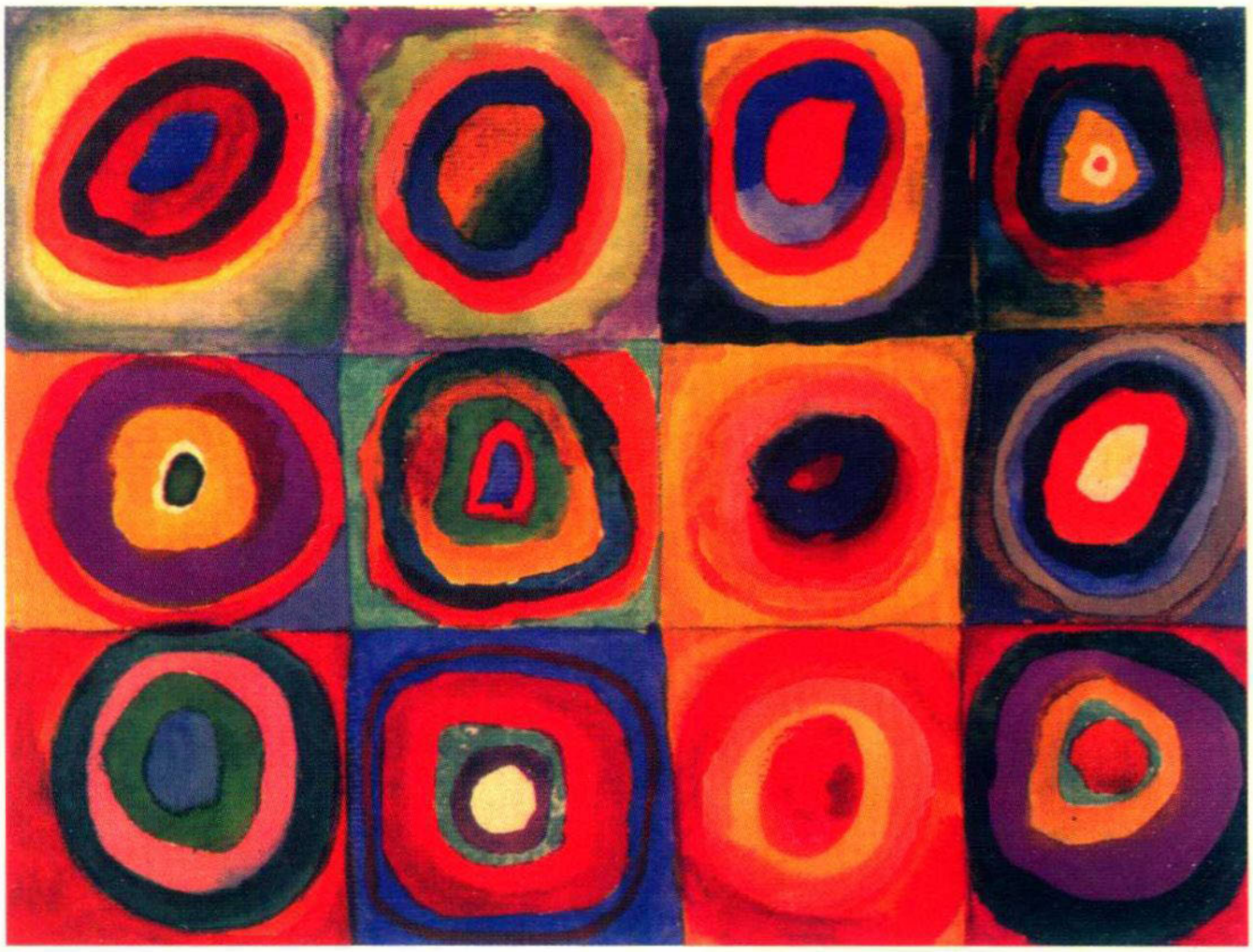

Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws

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PREFACE

In 1978, I attended the Private International Law summer course of the Hague Academy of International Law. Since then many things have changed. The old Academy building has been replaced by a beautiful glass house with all its sophisticated equipment. In my time as a Hague Academy student we sat on wooden chairs writing on our knees. We had no internet, nobody used a computer and PowerPoint was still to be invented. Convenient services like plinklet, now provided by the Peace Palace library, were simply not available. More significantly, since then the law of private relationships with cross-border implications has changed considerably. At the end of the 1970s the Vienna Sales Convention of 1980 was in the course of being negotiated. At the same time, and in the years thereafter, negotiations proceeded apace on several Conventions of the Hague Conference on Private International Law which later turned out to be highly successful. At that time they were hardly to be seen on the horizon. Nobody imagined back then, as far as the European Union is concerned, that the European legislator would make laws in the field of cross-border relationships through Regulations which in some areas would bind almost 27 Member States. No one had a clue that not only in Europe but also worldwide, many academic initiatives to harmonize substantive private law would be undertaken, covering even family law. Many of these initiatives take as an example American law-making techniques, such as Restatements ; some of them even go far beyond the Restatement of the law. Compared to some 30 years ago we are currently experiencing exciting times which raise questions as to how the plethora of instruments relate to each other.

Undeniably, increasing globalization and the consequent internationalization of the law poses new questions and challenges. It is beyond doubt that in a few years from now — let us say within the next 20 to 25 years — participants in the summer courses on private international law of today will be lecturing on private international law topics at the Hague Academy of International Law tomorrow. My prediction is that by then the developments and trends which I present in this book concerning the interaction between instruments for the unification and harmonization of substantive law on the one hand and rules of conflict of laws on the other will become more visible and substantive than they are today. This prediction will fall to be assessed critically by the following generation and without doubt they will share their views with new generations who are interested in the magnificent world of international private law.

Katharina Boele-Woelki,
Utrecht, December 2009.

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CHAPTER I

SETTLING THE PRELIMINARIES

1. The Law to Be Applied in Private Law Relationships with Cross-border Elements

1. Generally, private law relationships with foreign elements, such as differing nationalities of the parties or their habitual residence/place of business in different countries, are subject to national substantive law. The "conflict" as to which possible substantive law of the legal systems involved is to be applied falls to be decided by the respective rules of private international law determining the law applicable. These rules use a connecting factor such as the common nationality or place of habitual residence of the person, say, who is performing the most characteristic contractual obligation in order to "connect" the private relationship with a specific set of legal rules under the relevant national law. The choice of the connecting factor is based on the consideration that, on the one hand, the factor must be relevant to the specific relationship and, on the other, that a national system is to be applied which is found to have, conceptually, the closest connection with that relationship. In family law we used to use nationality which to an increasing extent has been replaced by the habitual residence of one or more of the parties.

2. In the law of obligations these connecting factors make no sense. Instead, the principle of the place of business of the party, who is performing the most characteristic obligation of the contract, is decisive or — to provide another example of a claim based on delictual or tortious liability — in the main the place where the