International Academy of Comparative Law

Académie Internationale de Droit Comparé

Silvia Ferreri
Editor

COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITE DES SOURCES TRANSNATIONALES

Reports to the XVIIIth International Congress of Comparative Law

Rapports au XVIII^{e} Congrès international de droit comparé

Washington, D.C. 2010

BEA VERSCHRAEGEN

COMPLEXITY OF TRANSNATIONAL SOURCES
AUSTRIA

Electronic edition of the national reports presented to the XVIII[th] International Congress of Comparative Law on the theme «Complexity of Transnational Sources» prepared by the Isaidat Law Review for the *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

With the editorial assistance of Laura Lasagna

Version électronique des rapports nationaux présentés au XVIII[e] Congrès international de droit comparé sur le thème «La complexité des sources transnationales», préparée par la Revue Juridique de l'Isaidat pour la *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

Merci à Laura Lasagna pour la révision des textes

ISSN: 2039-1323

(2011) Volume 1 –Special Issue 3, Article 1

COMPLEXITY OF TRANSNATIONAL SOURCES
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BEA VERSCHRAEGEN [1]

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I. Introduction

The *furor codificandi* of international and national institutions also affects Austria. A vast amount of international conventions deals with similar issues. It is only in the last decade that these legal sources have also provided rules for "conflicts of conventions". The same holds true for sources of European law that entail provisions according to which special rules have priority over rules of a general nature. However, neither practitioners nor legal scholars are satisfied with such an abstract approach, since the complexity of legal sources is too comprehensive when it comes to solving problems of concrete cases. Many years ago, *Majoros* suggested that the rule of "maximum effectiveness" ought to apply when conventions come into conflict.[2] His work did not find the response it should have deserved. One of the reasons for this is that his main work was written in French.[3] But probably also his approach to conflicts of conventions demanded a different approach to traditional rules of interpretation (*lex specialis derogat lege generali lex posterior derogat lege priori* etc.), because the most efficient convention is to be applied. The *lex specialis (ratione*

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[1] Full professor at the Law Faculty of the University of Vienna, Dr., LL.M., E.M.M.; Professor at the Uninova Private University Bratislava (BVSP).

[2] *Majoros*, Les conventions internationales en matière de droit privé. Abrégé théorique et traité pratique I (« Les conventions I », 1976) ; II, Partie spéciale : Le droit des conflits de conventions (« Le droit des conflits II », 1980) ; *Dutoit/Majoros*, Le lacis des conflits de conventions en droit privé et leurs solutions possibles, Revue critique de droit international privé 1984, pp. 565 ff.

[3] Some of his articles were written in *German*, see e.g. *Majoros*, Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts, RabelsZ (Zeitschrift für ausländisches und internationales Privatrecht, Ernst Rabel) 46 (1982) pp. 84 ff.

materiae)-rule only comes into play when the international conventions at stake do not share common interests. The *lex specialis* is ascertained *ratione materiae*. This may lead to the result that a provision of a multilateral treaty is qualified as special by nature, whereas – quite contrary to traditional doctrine of international public law – a bilateral treaty is regarded as *lex generalis*.[4] Indeed, the Swiss Federal Court adopted *Majoros*' rule as a doctrine.[5] *Volken*, who dedicated his dissertation to the same topic, rejected *Majoros*' rule based on a double strategy of "therapy" and "diagnosis" and advocated a "prophylaxis", by which co-ordinated preparatory work should avoid conflicts of conventions. However, practice demonstrates that the best co-ordination during the elaboration of conventions does not avoid the problem of conflicts of conventions. One example may suffice to illustrate what is meant. The field of application *ratione materiae* of the Brussels II[a] - Regulation partly overlaps with international conventions, notably with the "Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children". Art 59 to Art 62 of the Brussels IIa-Regulation provide a set of rules on the relationship of the Regulation to international treaties, but there seem to remain some lacunae (e.g. with regard to the remaining jurisdiction according to Art 14 of the Hague Convention, or the applicable law for which the Brussels IIa-Regulation does not offer any provisions, whereas the Hague Convention does, etc.).[6] However, these problems are not an "*Austriacum*". Whenever States are bound to apply European

[4] For more details see *Majoros*, Les conventions I, pp. 308-313; *Majoros*, Le droit des conflits II, p. 182.

[5] Swiss Federal Court (*Bundesgericht*), opinion *Denysiana*, March 14, 1984, BGE (Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung) 110 I b, pp. 191-195; *Majoros*, Das Kollisionsrecht der Konventionskonflikte etabliert sich: Die Regel der maximalen Wirksamkeit in der *doctrine* des schweizerischen Bundesgerichts (Entscheidung *Denysiana* v. 14. März 1984), Festschrift Neumayer (1985) pp. 431 ff.

[6] See i.a. *Verschraegen*, Die Brüssel IIa-Verordnung: Ein Danaergeschenk?, in König/Mayr (eds), Europäisches Zivilverfahrensrecht in Österreich. Bilanz nach 10 Jahren (2007) 91 (103 ff with further references).

legal sources and/or international treaties, several European sources or international sources, such questions may arise. When it comes to the interpretation of European law, the European Court of Justice (ECJ) has jurisdiction; with regard to international treaties in the sphere of Private (International) Law, national (supreme) courts will decide the case, unless – as is the case with regard to e.g. the European Convention on the Law applicable to Contractual Obligations – the ECJ assumes jurisdiction, and – to a different degree – legal scholars will influence the law. Yet, there is a great diversity of national decisions on the interpretation and application of European legal sources and of international treaties. In *Austria*, the complexity of various transnational (legal) sources gives cause for concern. The main dilemma probably is that Private International Law is still regarded by practice and in legal education as a special branch that only touches upon some cases. Further, Private International Law is rightly conceived as a difficult branch of law and where there is a high degree of uncertainty as to what interests – party autonomy *versa* fundamental rights and / state interests – ought to prevail.

Some international treaties in the field of Private International Law, more specifically of contractual and non-contractual obligations, such as the Hague Convention of 4th May 1971 on the Law applicable to Traffic Accidents and the Convention on the International Sale of Goods (CISG) are well known in *Austrian* practice. But apart from the fact that their application can be excluded by choice of law, the Conventions not only have a rather narrow field of application *ratione materiae*, the CISG – with the exception of Art. 1 - also provides for *unified* law.[7] For the purpose of this contribution the CISG is, therefore, touched upon where deemed appropriate, but as such the CISG will not be treated here as a source of "transnational law". With regard to the Hague Convention on the Law applicable to Traffic

[7] See for more details *Posch*, in Schwimann[3], Praxiskommentar, Bd. 4 (2006) UN-Kaufrecht.

Accidents,[8] practitioners sometimes seem have problems when applying Art. 7 which reads:

> "Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident."

The duty to "take into account rules relating to the control and safety of traffic" seems to cause some uncertainty as to what those rules are and to what extent they can displace or complement the applicable law. The Rome II-Regulation on the Law applicable to Non-Contractual Obligations[9] has incorporated this duty in Art. 17. The Preamble explains why: The goal is to strike a "reasonable balance between the parties."[10] The "rules of safety and conduct" must only be taken into account "in as far as appropriate", even where the non-contractual obligation is governed by the law of another country. As under the Hague Convention it may be assumed that such rules must be considered when they have an impact on questions, such as "unlawfulness" and "negligence"; they refer "to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident".[11] These rules are - at least usually - not "customs and usages" developed in particular branches, but by domestic (local or regional) legislators (and courts). Therefore, they will not be dealt with in this contribution.

The present contribution focuses on issues of Private International Law, more specifically with *international mandatory law* and *rules of conduct*. First of all, there is no real consensus on what "international mandatory law" in Private International Law is supposed to be and its "authoritative application" is not accepted

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[8] See *Verschraegen*, in Rummel[3], ABGB II/6 ("Verschraegen, in Rummel[3]"; 2004) § 48 No 18.

[9] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11th July 2007 on the Law applicable to Non-Contractual Obligations (Rome II), OJ EU L 199/40 of 31st July 2007.

[10] See recital 34.

[11] Ibidem.

in all parts of the world[12], secondly, the legal nature of "trade customs" is rapped in mystery, although they play a significant role in (international) business.[13] These two areas in the application of conflict rules in *Austria* deserve special attention.

International mandatory law is particularly interesting, because States demonstrate their approach to and understanding of "regulating policy" that should primarily be a domain of the States or of supranational bodies, such as e.g. the EU. It goes without saying that this "clash of power" has become extremely intensive in the past decades. The denomination by States of norms as "international mandatory rules" of the forum widens the geographical field of application of their national law and limits party autonomy, whereas the EU-approach, particularly in the context of international company law,[14] based on the fundamental freedom of establishment demands more room for "indirect party autonomy" because any restriction of the freedom of the parties to indirectly choose the applicable company law by choosing the place of registration of the company in a State with milder registration requirements is considered a violation of EU-fundamental freedoms. This not only reflects the idea of the "competition of legal systems" that is practically unrestricted,[15] it also touches upon the quintessence of what Private International Law aims to realise: the equality of legal systems. Yet, behind this discussion, contradicting policies (political control and shaping / market liberalism) reflect not only a crisis of Private International Law, but also one of ideology. These problems cannot be examined in detail in this contribution. Rather, the way "international mandatory law" is conceived by the *Austrian* legislator and the courts lies at the core of this contribution.

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[12] See *Reimann*, Was ist wählbares Recht?, in Verschraegen (ed.), Rechtswahl – Grenzen und Chancen 2010, 1 (6).

[13] See *Reimann*, Was ist wählbares Recht?, in Verschraegen (ed.), Rechtswahl, 1 (15).

[14] See ECJ 9.3.1999, C-212/97, ECR 1999, I-1459, *Centros Ltd / Erhvervs- og Selskabsstyrelsen* and later decisions.

[15] See *Schacherreiter*, Eingriffsnormen und ihre Neuregelung in der Rom I-VO, in Verschraegen (ed.), Rechtswahl, 69 81 f).

Rules of conduct is an area of huge confusion in *Austria*, as will be demonstrated below. In court proceedings, such rules are one possibility to ascertain the law or at least the principles that will govern the case. From this perspective, rules of conduct pave the way to a less contradictory, and perhaps, also quicker court procedure. However, a clearer distinction between "rules on conduct" on the national level on the one hand, and those on the international level on the other, would be desirable. Both sets of rules can, but must not be applicable in cross-border cases, both may only be considered "general terms of contract" or, as the case may be, binding rules also in non-B-to-B contracts.

These areas will be dealt with throughout *Austrian* Private International Law cases. Therefore, this contribution does not specifically focus on special branches of law, such as transport law, intellectual property, trade of artistic / historical items, large building projects, sport law, etc. Neither will this paper deal with the impressive variety of "principles" elaborated by prestigious scholars and institutions, such as the "Principles of European Contract Law" (PECL),[16] the "Draft Common Frame of Reference (DCFR),[17] the "Principles of European Tort Law" (PETL),[18] etc. And finally, the " *lex mercatoria* is not focussed on, in this context. The reason for not dealing with these principles is that, according

[16] See *Lando/Beale* (eds.), Principles of European Contract Law, Part I and II (2000); *Lando/Clive/Prüm/Zimmermann* (eds.)., Principles of European Contract Law, Part III (2003). Translated and annotated by *von Bar/Zimmermann*, Grundregeln des Europäischen Vertragsrechts, Teile I und II (2002); *von Bar/Zimmermann*, Grundregeln des Europäischen Vertragsrechts, Teil III (2005).

[17] That incorporated the PECL, see *von Bar/Clive* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Vol I (2009), No. 30; *B. Jud*, Die Principles of European Contract Law als Basis des Draft Common Frame of Reference, in Schmidt-Kessel (ed.), Der Gemeinsame Referenzrahmen (2009) 71 (72).

[18] Elaborated by the European Group on Tort Law. See *European Group on Tort Law* (eds.), Principles of European Tort Law – Text and Commentary (2005). Further references in *Thiede*, Die Rechtswahl in den Römischen Verordnungen, in Verschraegen (ed.), Rechtswahl, 51 (62).

to Art 3 para 3 of the Rome I-Regulation, parties can – at least before State courts - not agree upon non-State law as *lex causae*.[19]

II. International Mandatory Law

A clear distinction is to be made between *international mandatory rules of the forum* on the one hand and *international mandatory rules of another State* on the other. In contractual obligations both the Rome I-Regulation[20] and the European Convention on the Law applicable to Contractual Obligations for "old cases" provide similar rules on international mandatory rules of the forum. However, with regard to *foreign* international mandatory rules, the

[19] It remains to be seen whether the EU will enact in the future a legal act according to which parties can – for the purpose of Private International Law – agree upon such rules. See recital 14 in the Preamble to the Rome I-Regulation. In the meantime, parties are free to agree upon such rules on the level of substantive law by replacing the non-mandatory law of the law applicable by non-State law, i.e. by incorporating them by reference. See recital 13 in the preamble to the Rome I-Regulation. The "*Proposal for a Regulation of the European Parliament and the Council on the Law applicable to Contractual Obligations (Rome I)*", presented by the Commission on 15 December 2005, had a quite different approach. The Explanatory Memorandum, COM(2005) 650 final, p. 5 stated: "To further boost the impact of the parties' will, a key principle of the Convention, paragraph 2 authorises the parties to choose as the applicable law a non-State body of law. The form of words used would authorise the choice of the UNIDROIT principles, the *Principles of European Contract Law* or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community." See for the lack of preciseness of the *lex mercatoria* i.a. *Kodek*, Praktische und theoretische Anforderungen an die Rechtswahl, in Verschraegen (ed.), Rechtswahl, 83 (100 f with further references).

[20] 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), OJ L 177, 4.7.2008.
Art 9 para. 1 and para. 2 provide:
"1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."

two legal sources deviate from one another.[21] The Rome I-Regulation provides that effect can be given to the international mandatory law ("overriding mandatory provisions") of the place of performance if they would render the performance of the contract unlawful. The European Convention on the Law applicable to Contractual Obligations provides that effect may be given to foreign international mandatory rules ("mandatory rules") if such rules must be applied to the contract whatever the law applicable to the contract.[22] Rome I limits the decisiveness of foreign international mandatory law in that it only "may" be applied if it would render the performance of the contract unlawful. On the other hand, the more States introduce domestic rules of substantive law on legal conditions of effective performance, the more they expand the hypothetical application of their international mandatory rules, even if such conditions do not touch upon "overriding public interests of the State", provided, of course, that the place of performance lies within their territory. This not only influences the relationship of EU-States to one another and to the EU as supranational organisation, it also touches upon the relationship with third (non-EU Member) States.

International mandatory law of the *forum* covers provisions of domestic law that apply notwithstanding the fact that the issue is governed by the law of another country. The concept is, therefore, a positive one, contrary to the negative concept of foreign rules

[21] Art 9 para. 3 1st sentence Rome I-Regulation provides as follows:
"3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."

[22] Art 7 para. 1 1st sentence European Convention on the Law applicable to Contractual Obligations reads as follows:
"1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract." With regard to international mandatory rules of the forum Art 7 para. 2 provides: "Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

that, for reason of public policy, are exceptionally not applied. International mandatory law is seldom characterised as such. It is rather *by way of interpretation* that its " *wish to be applied internationally*[23] can be determined. The reasons for doing so must be strong: the protection of public interests of the forum prevails to such an extent that the party autonomy is set aside. This means that, even in case of choice of law by the parties, the international mandatory law overrules the law governing the case,[24] quite different from merely "mandatory law" which does not wish -to be applied internationally and, hence, can be bypassed with choice of law or, lacking choice of law, overruled by simple application of the conflict rules.[25] "International mandatory law" impacts on relationships of private law. It reflects a *regulatory policy* [26] and its application requires a *close connection* to the law of the country from which the international mandatory law stems. "International mandatory rules" are applied directly, renvoi is excluded.[27]

With regard to *foreign* international mandatory law, *Austrian* courts have been of the opinion that it may be applied, provided there is a close connection to the state of which it emanates and it does not violate the public order of the forum.[28]

It is controversial under which *circumstances* mandatory provisions are to be regarded as "international mandatory law". Some argue that the rules must protect public interests exclusively; others say they must protect public interest predominantly. The latter is accurate for the simple reason of *complexity of law*. In any case, the *purpose* of the provision should answer the question

[23] OGH 29.3.2006, 3 Ob 230/05b, in *Schacherreiter*, Leading decisions zum Internationalen Privatrecht ("Leading Decisions"; 2008) No 170.
[24] OGH 21.6.2001, 6 Ob 88/01m, in *Schacherreiter*, Leading decisions, No 197.
[25] OGH 19.11.1986, 8 Ob 575/86, EvBl (Evidenzblatt / Österreichische Juristen-Zeitung) 1987/145; OGH 11.7.1990, 1 Ob 648/90, JBl (Juristische Blätter) 1992, 189 (*Schwimann*, 192) = IPRax (Praxis des Internationalen Privat- und Verfahrensrechts) 1992, 47 (*Posch*, 51).
[26] OGH 25.9.2001, 1 Ob 164/01a, SZ (Entscheidungen des Österreichischen Obersten Gerichtshofs in Zivilsachen) 74/160.
[27] OGH 14.7.1993, 8 Ob 634/92, *Schacherreiter*, Leading decisions, No 72.
[28] Lacking an explicit provision on "international mandatory law" reference was made to § 1 Private International Law Act (principle of the closest connection), see *Verschraegen*, in Rummel[3], Vor § 35 No 22.

whether it pursues goals that *transcend the balancing of private interests;* only when objectives are pursued that go beyond private interests can international mandatory law be at stake.

Some rules are of *mixed character*, they protect private interests as well as public interests. A very good example for mixed rules is *consumer protection*, in particular rules that transform EU-Directives into national law. Such rules should only be considered as "international mandatory law" if they protect *at least overwhelmingly public* instead of private interests.[29] However, opinions differ and those who firmly insist on rigid consumer protection tend to characterise more easily rules on consumer protection as international mandatory law. This demonstrates a clear distancing from traditional cornerstones of "modern Private International Law", notably from party autonomy and the decisiveness of the facts of the case – contrary to the priority of State's interests as reflected in legal provisions as was advocated by conflict lawyers in the first half of the 19th Century.[30]

Neither the European Convention on the Law applicable to Contractual Obligations (Art. 7) nor the Rome I-Regulation (Art. 9) are of great help in distinguishing between "mandatory law" and "international mandatory law". First the rule at stake must be characterised as "mandatory" or "international mandatory" and only then can Art. 3 ff or Art. 7 of the European Convention on the Law applicable to Contractual Obligations respectively be applied. The same holds true for Art. 3 ff or Art. 9 of the Rome I-Regulation. In this context it is very important to bear in mind that special provisions on *consumer contracts* and *labour contracts* already provide for special protection of the consumer and the employee respectively and these rules are complemented by the *public order-clause* (Art. 16 of the European Convention on the Law applicable to Contractual Obligations and Art. 21 of the Rome I-Regulation respectively). In addition, EU-law has *territorial limits*, and should not be applied world-wide, because such an approach would not only come into conflict with the equality of all legal systems, it

[29] See *Verschraegen*, in Rummel[3], Vor § 35 No 23.

[30] See *Schacherreiter*, Eingriffsnormen, in Verschraegen (ed.), Rechtswahl, 69 (71 ff with further references).

would also come very close to "legal imperialism" or would result in "hegemonic ambitions", devices of which the USA is traditionally accused of.

Therefore, general clauses, such as the provision on the *violation of the law* and of *boni mores* in the *Austrian* Civil Code (§ 879 ABGB)[31] and rules on *consumer protection* under the *Austrian* Consumer Protection Act[32] are *not* to be considered as being "international mandatory law". The reason is that these rules do *not* overwhelmingly protect public interests, they are *not* characterised by a specific nature of fundamental law that would allow overruling private autonomy and foreign applicable law. However, not only the Report elaborated by *Giuliano/Lagarde*[33] characterises consumer protection as "international mandatory law", but also the *Austrian* legislator explicitly regulated that certain provisions of the Consumer Protection Act (§ 6 KSchG) and provisions of the *Austrian* Civil Code (§§ 864a, 879 para. 3 ABGB) must be applied notwithstanding which law is applicable to the contract, provided the contract was concluded in connection with activities in *Austria* of a businessman or of persons acting on his behalf.[34] Hence, a close connection to the forum is required. The said rules are – to my opinion – *not* typically rules that would qualify as being "international mandatory law". § 6 KSchG reflects concrete sample applications of § 879 ABGB and in the late 1990s the EC-Directive on standard term contracts was transformed into *Austrian* domestic law, more precisely in § 6 KSchG and § 864a ABGB. It seems that, according to the *Austrian* legislator, at least *European* – and therefore also *Austrian* - consumer protection law is to be considered as "international mandatory law". If there is a

[31] Allgemeines Bürgerliches Gesetzbuch (ABGB).

[32] §§ 3 ff Konsumentenschutzgesetz (KSchG; Consumer Protection Act).

[33] *Giuliano/Lagarde*, Report on the Convention on the Law applicable to Contractual Obligations, OJ C 282, 31.10.1980, p. 1 (28), explaining that "(T)he origin of this paragraph is found in the concern of certain delegations to safeguard the rules of the law of the forum (notably rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage) which are mandatory in the situation whatever the law applicable to the contract may be".

[34] See § 13a para. 2 KSchG (Consumer Protection Act).

close connection to the forum, the said rules will apply even though the contract is governed by virtue of the contract statute, or by choice of law-agreement.

Indeed, such rules are based upon *mandatory EU-law*. It would be more logical and more systematic to treat them in the context of *European public order*. From a *practical point of view,* the difference is that in the context of public order, a specific rule will not be applied if its application would in the concrete case lead to a result which is (manifestly[35]) incompatible with the *Austrian* public order at the time when the case is decided. However, if such rules are considered as "international mandatory law", they apply *a priori* and as such.[36] The consumer travels with the domestic Consumer Protection Act across the world and the Act will be applied as soon as there is a close connection to *Austria*.

As already mentioned, *Austrian* legislation and practice tend to confirm easily the international mandatory character of such rules, especially in the sphere of *consumer protection*.[37] Companies that promise gains to consumers, or make the consumer believe that he / she won a certain prize, are bound to pay that prize (§ 5j KSchG). Of course, this provision intends to *protect* consumers against *unfair competition*; its main goal, though, lies in the *restriction / prohibition* of such competition. This is why the rule is considered by the *Austrian* Supreme Court (OGH) as internationally mandatory.[38] In a leading case the OGH also argued that the similar provision of *German* law[39], which actually reproduced the *Austrian* provision, was characterized by the *German* BGH (Federal Supreme Court) as being international mandatory law, because its main goal is to counteract unfair competition caused through

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[35] International treaties as well as the Rome I- Regulation (Art 21) and the Rome II-Regulation (Art 26) require "manifest incompatibility", whereas within the field of application *ratione materiae* of the *Austrian* Act on Private International Law (§ 6 IPRG) only "incompatibility" is required.

[36] See i.a. *Koloseus*, Begrenzungen der Rechtswahl, insbesondere durch den ordre public, in Verschraegen (ed.), Rechtswahl, 33 (38 f).

[37] See e.g. OGH 29.3.2006, 3 Ob 230/05b, on § 5j KSchG, in *Schacherreiter*, Leading decisions, No 170.

[38] OGH 29.3.2006, 3 Ob 230/05b, in *Schacherreiter*, Leading decisions, No 170.

[39] § 661a BGB (Bürgerliches Gesetzbuch; German Civil Code).

alleged gains.[40] According to the *Austrian* Supreme Court, the same holds true for § 5j KSchG. This provision, which is not reflected in all legal systems, could easily be bypassed by transferring the seat of the company to a country that lacks such protection. Admittedly, international contract law provides that lacking choice of law, the law of the country in which the other party (businessman) has his main seat, or habitual residence, will be applied.[41]

As already mentioned, *Austrian* case law distinguishes between *domestic international mandatory rules* and *foreign international mandatory rules*. Foreign mandatory rules may be applied by the domestic court if they can be internationalised, if there is a close connection to the respective foreign law and provided they do not violate *Austrian* public order. Case law deals with both sets of rules:

In a case on the power of representation of a *banking supervisory authority* of Liechtenstein the Liechtenstein rules on the appointment of a liquidator were applied as international mandatory law.[42]

Several special provisions of the *Austrian* legal system demand – either explicitly or implicitly – their application although, according to the rules of attachment, foreign law would be applicable:

The protection of domestic *spousal condominium* and the interests of the surviving spouse upon death of the other spouse reflect overriding public interests of the forum that shall be considered even if the applicable law is a foreign law.[43] In order to

[40] BGH 1.12.2005, AZ III ZR 191/03, BGHZ (Entscheidungen des Bundesgerichtshofs in Zivilsachen) 153, 82.

[41] See Art 5 European Convention on the Law applicable to Contractual Obligations. If the factual conditions of these provisions are not complied with, Art 4 of the Convention will apply in the absence of choice of law by the parties. See also Art 6 Rome I-Regulation and – in the absence of choice of law – Art 4 para. 2 Rome I-Regulation (attachment to the law of the country of the person who owes the characteristic performance in which that person has his habitual residence).

[42] OGH 14.7.1993, 8 Ob 634/92, *Schacherreiter*, Leading decisions, No 72.

[43] OGH 8.10.1991, 5 Ob 86/91, IPRax 1993, 255 (*Reichelt*), on § 10 Wohnungseigentumsgesetz (WEG; Condominium Act). On these issues see basically *Zemen*, Zum Statut der gesetzlichen Erbfolge nach dem

protect legitimate interests of the domestic *structure and economy of farms mirroring interests of national economy and agricultural policy*, *Austrian* law affirms that only one of several heirs will inherit the hereditary farm which belonged to the deceased as sole proprietor.[44]

In the interest of domestic *agriculture and forestry* the *Tyrol* Act on Real Estate Transactions[45] subjects the acquisition of specific agricultural and forested land to a duty to obtain a permit[46] with specific exceptions i.a. in the frame of succession and among family members[47]. The permit is basically due if the acquisition is in the *public interest* and serves the *preservation and consolidation of a viable farming community* in *Tyrol* and provided the acquirer declares that the establishment of a secondary residence is not envisaged.[48] Such a declaration is also necessary with regard to the acquisition of building sites.[49] Obviously, the acquisition of land by foreigners for recreational purposes is undesired and the acquisition of agricultural and forested land as well as of building sites is – with few exceptions - subject to a permit.[50] The *Austrian* Supreme Court considers the necessity to obtain a permit by the authority as "international mandatory law" that applies to all real estate in *Tyrol*.[51]

Only under specific conditions and with special admission can foreign workers be employed in *Austria*, for *labour market policy* reasons.[52] Labour market policy is also important with regard to

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Österreichischen IPR-Gesetz, ZfRV (Zeitschrift für Rechtsvergleichung) 1983, 63.

[44] See among the laws governing hereditary farms i.a. § 3 and § 5 Anerbengesetz (AnerbenG). The rules set aside the general succession statute of § 28 para. 1 IPRG and apply in order to ensure the special rules on distribution of the farm, see OGH 24.4.2003, 6 Ob 54/03i, JBl 2003, 940.

[45] Tiroler Grundverkehrsgesetz, LGBl 1996/61, latest amendment 2009/60.

[46] § 4 Tiroler Grundverkehrsgesetz.

[47] § 5 Tiroler Grundverkehrsgesetz.

[48] § 6 para. 1 Tiroler Grundverkehrsgesetz.

[49] §§ 9, 11 Tiroler Grundverkehrsgesetz.

[50] § 12 Tiroler Grundverkehrsgesetz.

[51] OGH 18.9.1991, 1 Ob 687/90, JBl 1992, 594.

[52] § 16 Arbeitskräfteüberlassungsgesetz (Act on the transfer of workers); OGH 25.4.2001, 9 Ob 83/01y, SZ 74/77; with regard to foreign international mandatory rules see OGH 19.5.2009, 3 Ob 35/09g, ecolex 2009/348.

the limited liability for damage of the employer towards the employee in case of accidents during employment.[53]

Restrictions to *foreign trade* are, for reasons of public policy and market policy, subject to certain export or import permits that override the contract statute.[54] The same applies to exchange restrictions in the area of *capital transactions* and *monetary transactions*.[55]

Quite some discussions arose concerning the question whether the requirement of a "notarial deed" for a *share deal inter vivos* [56] is an international mandatory rule and thus applies even when the deal is subject to another legal system. Hence, cheaper or milder forms, such as "notarial recording" of the transaction would not meet the standard of form under *Austrian* law. The only purpose of the *Austrian* form requirement is to exclude the circulation and negotiation of shares on the capital market in order

[53] According to § 333 Allgemeines Sozialversicherungsgesetz (General Act on Social Security), the employer's liability is limited to wilful injury. See i.a. OGH 21.6.2001, 6 Ob 88/01m, in *Schacherreiter*, Leading decisions, No 197; OGH 12.5.2005, 2 Ob 24/05a, ZfRV-LS 2005/25. In OGH 19.10.2006, 3 Ob 24/06k, ZVR (Zeitschrift für Verkehrsrecht) 2008/43, an accident occurred during training for the ski-world cup. To some extent the French and the German teams cooperated, a German leading trainer was injured through the collision with a French downhill racer, who ultimately died. The German trainer claimed damages from the French ski-federation. The limitation of liability did not apply to the French defendants because the German trainer had not been transferred to the French team, he was not bound by any instructions from the French team, and the cooperation of the French with the German team was not oriented towards a common result or success, hence, the liability privilege was not applicable.

[54] See Außenhandelsgesetz (Act on Foreign Trade). OGH 30.9.1992, 2 Ob 573/92; OGH 27.4.1989, 7 Ob 536/89, ZfRV 1990, 133 (*Zemen*); 5 Ob 634/89, in *Schacherreiter*, Leading decisions, Nos 67, 69 f; OGH 24.6.1959, 6 Ob 204/59, ZfRV 1961, 18 (*Bydlinski*); OGH 21.5.1968, 4 Ob 308/68, SZ 41/62.

[55] According to the Foreign Exchange Law 2004 (Devisengesetz 2004). See i.a. under the former law of 1946 OGH 30.9.1992, 2 Ob 573/92, in *Schacherreiter*, Leading decisions, No 67 = ÖBA (Österreichisches Bankarchiv) 1994, 641 (*Schurig*); OGH 27.3.2001, 1 Ob 155/00a, in *Schacherreiter*, Leading decisions, No 76.

[56] See § 76 para. 2 Gesellschaft mit beschränkter Haftung-Gesetz (GmbHG; Act on Private Company Limited).

to protect against the acquisition of the participation of a corporation whose control of management is by far less transparent to the general public as in case of joint stock companies.[57] Clearly, the intensive costs of notarial deeds under *Austrian* law incited many to make share deals in countries with less harsh and less costly form requirements, such as e.g. under *German* law. Interestingly, the *Austrian* Supreme Court considered the form requirement as an "international mandatory rule",[58] although in *Austrian* Private International Law[59] matters of form are subject to the *locus regit actum*-rule: A legal act made in a country, according to the law of that country, is formally valid. This rule is favourable to *international business transactions.*[60] Between these two options (form requirement as international mandatory rule according to the *Austrian* Supreme Court on the one hand, *lex loci* and *locus regit actum*-rule on the other according to some legal scholars) lies a third option which advocates the examination of the foreign form requirement's function. Provided it has a *similar function* to the domestic form requirement – protection of creditors, preservation of evidence, seriousness test, etc. – the stricter form requirement can be substituted by the milder one.

Reasons of *social policy* together with the *protection of employees* lead to the result that provisions on the *restriction of security deposits* made by the employee on demand of the employer are considered as "international mandatory rules". Such security deposits may only be demanded in order to cover damages against the employee based on violations of the terms of employment.[61] The purpose of

[57] See OGH 23.2.1989, 6 Ob 525/89, in *Schacherreiter*, Leading decisions, No 80.
[58] OGH 23.2.1989, 6 Ob 525/89, in *Schacherreiter*, Leading decisions, No 80.
[59] Private International Law Act (IPRG), resp. European Convention on the Law applicable to Contractual Obligations, and Rome I-Regulation.
[60] See i.a. *N. Adensamer*, zur kollisionsrechtlichen Anknüpfung von Formfragen bei der Übertragung von GmbH-Geschäftsanteilen, wbl (Wirtschaftsrechtliche Blätter) 2004, 508 ff.
[61] § 1 para. 1 Kautionsschutzgesetz (Bundesgesetz, betreffend Kautionen, Darlehen und Geschäftseinlagen von Dienstnehmern; Federal law on security deposits, loans and investments in a business by employees); OGH 21.10.1992, 9 Ob A 252/92, Arb (Sammlung arbeitsrechtlicher Entscheidungen der Gerichte und Einigungsämter) 11.048.

law is to prevent the employer from disposing unilaterally of the deposit made by the employee.

However, *EU-company law* and case law of the ECJ on the *freedom of establishment* demand that companies legally established in one EU-country and with their seat in an EU-country have the right to move freely within the EU.[62] EU-law within its field of application sets clear benchmarks with the *prohibition of discrimination* [63] and the four basic liberties (freedom of persons, goods, services and capital).[64] This means that also national (mandatory) rules must be *in conformity* with the prohibition of discrimination and basic liberties. Such national rules must be necessary, appropriate and proportionate, and they shall neither be discriminatory nor restrictive.

Generally, the following rules are regarded as "international mandatory law" in the sphere of *EU-law* : exchange restrictions and restrictions by anti-trust law[65], specific rules of secondary EU-law in order to guarantee a certain level of protection, such as compensation of commercial agents provided the commercial agent carries out his activities in the EU.[66]

But even if a rule cannot be identified as an "international mandatory rule", effect can be given to that rule on the level of *substantive law*, always provided that there is a close connection to the forum. The *German* Supreme Court decided that a contract of *German* merchants on war material, that should be delivered from the USA to the GDR, was contrary to good morals and hence, void, because of breach with the *American* **embargo**.[67] The same

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[62] See i.a. ECJ, C-212/97, ECR 1999, I-1459, *Centros*; ECJ, C-208/00, ECR 2002, I-9919, *Überseering*; ECJ, C-167/00, ECR 2003, I-10155, *Inspire Art*.

[63] Art 18 Treaty on the Functioning of the European Union, OJ C 115 of 9.5.2008 (Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union).

[64] ECJ, C-369/96 & C-376/96, ECR 1999, I-8453, 8526 f, *Arblade und Leloup*.

[65] Art 101 ff and Art 284 of the Treaty on the Functioning of the European Union, OJ C 115 of 9.5.2008.

[66] ECJ, C-381/98, ECR 2000, I-9305, 9335, *Ingmar GB Ltd / Eaton Leonhard Technologies Inc*. See also *Schacherreiter*, Eingriffsnormen, in Verschraegen (ed.), Rechtswahl, 69 (77 f).

[67] BGH BGHZ 34, 169, 177.

court held that a sales contract on African masks and bronze violated good morals and was void, because it violated the export ban.[68] *Austrian* courts and legal scholars do observe how *German* courts decide and what *German* legal scholars write. One may assume that *Austrian* courts would decide similarly.

Legal acts of third states *limiting international trade* – e.g. restrictions imposed by the *USA* with regard to *Cuba*, *Iran* and *Libya* – induced the EU to enact a *blocking statute*.[69] The Regulation protects the interests of natural and legal persons established in the EU against the consequences of the extra-territorial application of such legal acts. Any person affected by such acts shall inform the European Commission.[70] No such person shall comply with any requirement or prohibition resulting from such laws as specified in the Annex of the Regulation.[71] Neither judgments of a court, or a tribunal, nor decisions of an administrative authority located outside the EC shall be recognised.[72] Any person who suffers damage within the scope of application of the Regulation is entitled to recover damages.[73]

Quite a considerable number of EU acts deal with *international trade* and may *affect* Private International Law (contract state or statutes entailed in special laws, e.g. on exchange business, insider dealing, money laundering, foreign investments, international transport and liability).

Such influence is also noticeable in conflict rules on *non-contractual obligations*. Art 6 Rome II-Regulation e.g. provides for conflict rules on unfair competition and acts restricting free competition and Art 8 Rome II-Regulation deals with the infringement of intellectual property rights. Both provisions *exclude*

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[68] BGH BGHZ 59, 82, 86.

[69] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, 1 ff.

[70] Art 2 para. 1 Council Regulation No 2271/96.

[71] Art 5 Council Regulation No 2271/96.

[72] Art 4 Council Regulation No 2271/96.

[73] Art 6 Council Regulation No 2271/96.

the possibility of the parties to choose the applicable law,[74] hence limit party autonomy and leave only the following options: The application of EU-law as overriding law and the decisiveness of "international mandatory law" within the limits of the Regulation.

III. Rules of Conduct

Introduction

The *Rules of Conduct* embrace a whole range of different rules that vary with regard to their binding force and legal character considerably. The most important "rules of conduct", that practice in *Austria* deals with, will be explored in this section. Most of the cases in which "rules of conduct" are invoked concern domestic / local ones. Some of them are (apparently) internationally applicable, other are restricted to domestic cases, unless they are agreed upon by parties of cross-border cases. However, foreign parties expanding their activities and thereby creating a "close connection" to Austria may well be assumed to know the local law.

The *Austrian* Federal Economic Chamber (AFEC)[75] is, by law, the representative of the entire *Austrian* business community. The AFEC communicates the results of investigations on *trade customs* to the president of the Commercial Court of Vienna.[76] Previously the president published the trade customs in a separate monograph[77], but for several years till now, the administration of the index has been delegated to specific judges. However, due to the high rate of personnel change among judges, they first try to deal with the files and by the time they could devote some attention to the updating of the index on the trade customs, they have been promoted . In the meantime they have started working

[74] See Art 6 para. 4 and Art 8 para. 3 Rome II-Regulation.

[75]Wirtschaftskammer Österreichs (WKÖ;http://wko.at/awo/chamberinfo.htm).

[76] Handelsgericht Wien. As to the legal character of such investigations see *Filzmoser*, Haben Verhaltensregeln von Wirtschaftskammern Verordnungscharakter? Am Beispiel Compliance-Code und Sorgfaltspflichterklärung des österreichischen Bankwesens, ÖBA 1994, 437.

[77] See *E.M. Weiss*, Handelsbräuche in Österreich, supplement 7a (1991).

at another court or are absent for other reasons (e.g. maternity or paternity leave).

Whenever a party refers to a trade custom, that is not listed in the index, the court requests the AFEC to conduct a survey. This process is based on an internal order of the Federal Ministry of Justice of June 8 1974, according to which the trade customs shall be published to make them publicly accessible.[78] In addition, the Commercial Court of Vienna regularly updates the index which is also open to public during the opining hours of the library.

The AFEC sends a questionnaire with a statement of facts made anonymous to all relevant trade businesses in *Austria*. The questionnaire is drawn up in such a way that the questions can be answered with "yes" or "no". The answers are then analysed by the AFEC. The members of the AFEC, which represents all trade businesses in *Austria,* are not obliged to answer the questionnaire. The entire procedure turns out to be very time-consuming for all persons concerned. However, according to judges who were questioned for the purpose of this contribution, the parties involved seem to be quite satisfied with this procedure. A questionnaire is only sent on the occasion of a concrete court procedure during which the judge concerned asks the AFEC whether a trade custom exists. The enquiry is free of charge. Trade businesses are requested to answer the questionnaire by observing their individual knowledge and experience, without further inquiries. The names of the trade businesses, that cooperate in this evaluation, remain secret. All the trade customs evaluations of the AFEC are put online on AFEC homepage.

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[78] JABl (Amtsblatt der Österreichischen Justizverwaltung herausgegeben vom Bundesministerium für Justiz), 9.8.1974, No 14, p. 75; see also the internal order of 17.6.1985 on notifications of the president of the Commercial Court on advisory opinions on customs and usages, JABl, 26.7.1985, No 24, p. 7. For such notifications see i.a. JABl, 10.10.1986, No 49, p. 125; JABl, 15.6.1987, No 23, p. 135 f; JABl, 22.5.1989, No 24, p. 60 f; JABl, 31.3.1992, No 13, p. 59 f; JABl, 12.2.1998, No 5, p. 80 ff. See also *Aktuelle Handelsbräuche unter Kaufleuten. Mitteilung des Handelsgerichts Wien aufgrund von Gutachten*, SWK (Österreichische Steuer- und Wirtschaftskartei) 1987, B II 6; *Aktuelle Handelsbräuche*, RdW (Recht der Wirtschaft) 1992, 170; *Handelsbräuche in Österreich*, in RdW 1995, 458.

The AFEC confirms a trade custom if more than 2/3 of the *incoming responses* of the trade businesses respond in the affirmative. A trade custom cannot be ascertained if less than 2/3 of the trade businesses respond in the affirmative. A trade custom does not exist if less than half of the trade businesses respond in the affirmative.

Increasingly the *Austrian* Supreme Court deals with the *interaction of European / international and national law* in the field of conflict of laws as well as in International Jurisdiction. In a very recent case, the Court had to decide on the content of a bill of loading – more specifically on the inclusion of a jurisdiction clause - as "custom and usage".[79] The clause stated that any dispute should be decided by the court and according to the law of the country in which the carrier is seated, unless the contract deviates from this rule. In the case at stake the (1988 version of the) "Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters" was relevant.[80] According to the Preamble of the Protocol No 2 of the Lugano Convention, all the contracting parties are informed on the case law of the ECJ on the interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Hence, the case law of the ECJ until September 16, 1988 is a binding source of interpretation of the Lugano Convention. If parties, one of whom is seated in a Contracting State, agree upon the jurisdiction of the court of a Contracting State, such court will have exclusive jurisdiction. The form of such an agreement can correspond with a "custom and usage" of that trade or commerce of which the parties are, or ought to, have been aware .[81] The *Austrian* Supreme Court referred to the

[79] OGH 8.7.2009, 7 Ob 18/09m, JusGuide 2009/40/6936 (OGH).

[80]Convention of 16. September 1988, see http://curia.europa.eu/common /recdoc/convention/en/c-textes/_lug-textes.htm .

[81] As provided for in Art 17 para. 1 lit. c Lugano Convention. Art 17 Lugano Convention 1988 reads as follows:

"1. If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall

Transporti Castelletti Spedizione Internazionali SpA / Hugo Trumpy SpA case [82], in which the ECJ decided i.a. that the contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware. The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch, when concluding contracts of a particular type. Such course of conduct does not need to be established in all the Contracting States, neither can a specific form of publicity be required in all cases. The ECJ further

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have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing, or
(b) in a form which accords with practices which the parties have established between themselves, or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
2. The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
3. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.
4. If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.
5. In matters relating to individual contracts of employment, an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen."

[82] ECJ 16.3.1999, C-159/97, ECR 1999, I – 1597.

held that the awareness of the usage is to be assessed with respect to the original parties to the agreement conferring jurisdiction. Their nationality is not relevant. Such *awareness* is established when, in the branch of trade or commerce in which the parties operate, a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an *established usage*. The *Austrian* Supreme Court applied these principles to the Lugano Convention and confirmed "customs and usages" in the case at stake.

Whether *international customs and usages* in a particular branch exists shall, as stated by the ECJ-case law and the *Austrian* Supreme Court, be decided according to the applicable law (*lex causae*).[83] The *Austrian* Supreme Court also held that a jurisdiction clause can be agreed upon by stating such on the invoice, provided the other party does not object to the clause.[84] Such a clause does not have to correspond with "international customs and usages"; it suffices when the parties, during their ongoing business relationship of some intensity, "used to" rely upon them.[85]

Terminology

Several legal domestic and international sources deal with *trade customs* and *related usages*. There seems to be a high degree of confusion as to the terminology. This is also reflected in the *Austrian* case law. For this reason, the different notions will be exemplified and defined.

The Commercial Code of May 10, 1897 (Handelsgesetzbuch [HGB])[86] was renamed in, and partly replaced by, the Business

[83] See OGH 14.3.2001, 7 Ob 38/01s, RdW 2001/676, with reference to ECJ 20.2.1997, C-106/95, ECR 1997, I – 911, *MSG / Les Gravières Rhénanes*.

[84] OGH 14.3.2001, 7 Ob 38/01s, RdW 2001/676, again with reference to ECJ 20.2.1997, C-106/95, ECR 1997, I – 911, *MSG / Les Gravières Rhénane*.

[85] OGH 14.3.2001, 7 Ob 38/01s, RdW 2001/676, with reference to the opinion of the Advocate General *Slynn* in ECJ 19.6.1984, C-71/83, ECR 1984, 2442, *Tilly Russ / Nova*.

[86] Handelsgesetzbuch vom 10. Mai 1897 mit den Ausgleichs- und Ergänzungsbestimmungen der Vierten Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich vom 24. Dezember 1938

Enterprise Code (Unternehmensgesetzbuch [UGB]).[87] The relevant provisions are Art 346 HGB and Art 346 UGB. Art 346 HGB reads as follows:

> "In view of the importance and the effects of actions and omissions among merchants, consideration shall be taken of customs and usages in effect in commerce."[88]

Art 346 UGB reads:

> "In view of the importance and the effects of actions and omissions among businessmen, consideration shall be taken of customs and usages in effect in business."[89]

The HGB was a special code for commerce; the UGB is one for business enterprises. This has not changed the terminology and the meaning of (commercial or business) *customs and usages*.

In connection with the conclusion of a contract, the *Austrian* Civil Code provides in § 863 para. 2:

> "With regard to the importance and the effect of acts and omissions, regard shall be taken of customs and usages that mirror common usage".[90]

(EV HGB). As to § 346 HGB see i.a. *Barfuß*, Der Handelsbrauch, JBl 1993, 230; *Kramer*, in Straube, HGB online (2003) § 346 Nos. 26 ff.

87 BGBl (Bundesgesetzblatt; Official Journal) I 2005/120.

88 Unofficial translation. In *German*: "Unter Kaufleuten ist in Ansehung der Bedeutung und Wirkung von Handlungen und Unterlassungen auf die im Handelsverkehr geltenden Gewohnheiten und Gebräuche Rücksicht zu nehmen".

89 Unofficial translation. In *German*: "Unter Unternehmern ist im Hinblick auf die Bedeutung und Wirkung von Handlungen und Unterlassungen auf die im Geschäftsverkehr geltenden Gewohnheiten und Gebräuche Rücksicht zu nehmen".

90 Unofficial translation. In *German*: "In Bezug auf die Bedeutung und Wirkung von Handlungen und Unterlassungen ist auf die im redlichen Verkehr geltenden Gewohnheiten und Gebräuche Rücksicht zu nehmen".

In the context of interpretation of contracts § 914 of the Austrian Civil Code provides:

> "When interpreting contracts not the literal meaning of the term, but rather the intention of the parties shall be decisive and the contract shall be construed according to the common usage."[91]

Common usage (*allgemeine Verkehrssitte*) represents conduct that is common in the ordinary course of transactions. It is important with regard to the interpretation of actions and omissions when concluding a contract and for the interpretation of contracts. "Customs and usages in effect in business" reflect the " "common usage in business".[92] Common usage is not a legal norm, quite contrary to *legal business custom* (*Handelsgewohnheitsrecht*). It is acknowledged that the distinction between "customs and usages" on the one hand and "common usage" on the other is rather blurred.[93]

By and large, the provisions of the HGB and the UGB can be considered as a "commercial" or "business" application of §§ 863, 914 of the *Austrian* Civil Code.[94]

Trade practice (usance) is regarded as contractual or commercial *general terms of a contract* (standard form contracts) relevant in certain branches of trade[95]; they are usually published.

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[91] Unofficial translation. In *German*: "Bei Auslegung von Verträgen ist nicht an dem buchstäblichen Sinne des Ausdrucks zu haften, sondern die Absicht der Parteien zu erforschen und der Vertrag so zu verstehen, wie es der Übung des redlichen Verkehrs entspricht."

[92] See *Weiss*, Der Handelsbrauch (§ 346 HGB), with regard to the terminology in the HGB.

[93] See *Schauer*, in Krejci, RK UGB (2007) § 346 No 2.

[94] See *Schauer*, in Krejci, RK UGB (2007) § 346 Nos 1 f.

[95] E.g. general contract terms of the Austrian savings banks (Österreichische Sparkassen, see pdf-file online: AGB-5-allg-geschaeftsbed_2009), the General Austrian Forwarder's Conditions (Allgemeine Österreichische Spediteu rsbedingungen [AÖSP], see as of November 10, 2009: http://www.condor.co.at/index.php/de/serviceundinformation/rechtinformation/48allgemeineoesterreichischespediteurbedingungen-aoesp),

They may eventually develop as "common usage in business", provided they are applied as such.[96] Whether "general terms of a contract" mirror "common usage in business" is open to debate. One may assume that, in case of doubt, they simply reflect the terms of specific types of contract rather than what is commonly accepted and applied in business. The question is of *general importance*, because if the general terms of contract have become "common usage in business", they are regarded as generally accepted and *no specific consensus* is needed upon conclusion of the contract. Problems arise when the rules of specific branches are only accessible within limits, e.g. against payment (by non-merchants).

The *Austrian* Standards Institute is a neutral and independent service organisation , that since 1920 has provided the platform for the development of *norms*, *rules* and *standards*.[97] The activities of the Institute are based on the Standardisation Act 1971.[98] The so-called *ÖNORMEN* are considered as informal directives; they are binding legal sources if they are announced in the official journal as an "act" or a (national) "regulation".[99] Lacking notice in the official journal, the access to ÖNORMEN is limited and, as far as is apparent, only against payment. The main fields covered by the *Austrian* Standards Institute are construction engineering,[100] electrical engineering and mechanical engineering. More than 20,000 norms have been elaborated by the Institute, most of them

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the general terms of timber trade (limited access), the directives for agents of real-estate (limited access), the stock exchange rules (see http://www.smbbrokerage.at/servlet/sls/Tornado/notesdat/iwp/contentiwp/B7620FBF282DF2D2C1256F1D003500DB and http://www.wienerborse.at/marketplace_products/conditions/abg_gesetzestexte.html).

[96] *Rummel*, Vertragsauslegung durch Verkehrssitte (1972) 197.

[97] See http://www.as-institute.at/en/asi-wirueberuns/asi-profil/?type=1

[98] Normengesetz 1971, BGBl 1971/240.

[99] See § 5 Normengesetz 1971.

[100] Interestingly, an arbitration court for construction matters was set up which is attached to the Austrian Standards Institute. The arbitration court decides on disputes concerning the building industry and the allocation of public monies for building.

consisting in the transformation of European norms[101] into *Austrian* norms. In addition, the *Austrian* Standards Institute elaborates *ÖN-rules* (*ÖN-Regeln*) of less formal character and, hence, quicker to develop.

It must be assumed that the various (national) business branches are well informed on the respective norms and rules, either because they are informed by the AFEC to which they – *ex lege* – must belong and / or because they are involved in the elaboration of the norms and rules. Non-members of the AFEC may face – at least financial – barriers when trying to gain access to such sources. This seems particularly questionable as the norms and rules may form part of the applicable law and may, under certain conditions, also be applied to non-merchants.[102]

The *accepted standards* (*Verkehrsanschauung*) of the specific business branch reflect prevailing conceptions on the fair conduct of businesses (businessmen). They are not necessarily (commercial or business) *customs and usages*, but may be a factor to consider in the context of "business diligence".

The International Chamber of Commerce (ICC)[103] recorded the *Incoterms* dealing with the delivery of goods in contracts on the international sale of goods. In order to be part of the contract, the Incoterms must be agreed upon by the parties. Common Incoterms 2000 are EX Works (EXW); Free carrier (FCA), Free Alongside Ship (FAS); Free On Board (FOB); Cost And Freight (CFR); Cost Insurance Freight (CIF); Carriage Paid To (CPT); Carriage Insurance Paid (CIP); Delivered At Frontier (DAF); Delivered Ex Ship (DES); Delivered Ex Quay (DEQ); Delivery Duty Unpaid (DDU); Delivery Duty Paid (DDP).[104] Whether Incoterms are *international* (*commercial or business*) *customs and usages* is

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[101] EU-norms elaborated by the CEN (Comité Européen de Normalisation / European Committee for Standardisation).

[102] See *Kramer*, in Straube, HGB online (2003) § 346 Nos 26 ff.

[103] See also the website of the ICC International Court of Arbitration as the world's leading institution for resolving international commercial and business disputes: http://www.iccwbo.org/court/arbitration/id4400/index.html

[104] See e.g. http://www.iccwbo.org/incoterms/id3040/index.html,
and http://www.skymartworldwide.com/incoterms-2009.html with of a chart of the seller's and buyer's duties.

controversial.[105] According to *Austrian* case law, Incoterms summarise the "trade usages" (*Handelsusancen*) and (commcercial or business) "customs and usages" (*Handelsgebräuche*) on the interpretation of standard contract forms in international trade.[106] Their interpretation is a *question of law*, and, thus, can be decided by the *Austrian* Supreme Court.

It goes without saying that parties can also agree upon other terms, such as the *Uniform Customs and Practice for Documentary Credits* (UCP), published and regularly revised by the ICC. The unified rules deal with the issuance and use of letters of credit and are applied world widein international trade finance. The International Chamber of Commerce also publishes *Uniform Rules for Collections* (URC), which are standards of draft (bill of exchange) collection practices, used worldwide by financial institutions. As the UCP, the URC can be excluded by the contractual parties. Lacking such exclusion, the rules will apply as they are, so well known and so widely used, that parties are supposed to know them.

The "Common European Usages for the Domestic and International Sale of Edible Fruits and Vegetables" (COFREUROP) also contain rules that must be agreed upon to give them binding force between the parties.[107] According to Art 1 COFREUROP,

> "1.1. These conditions hereinafter called COFREUROP will be applicable to all national and international trade in fruit and vegetables whether fresh, frozen or intended for industrial use.
> 1.2. These conditions reflect the current commercial custom and usage of the trade."

The rules impose on the buyer the obligation to monitor the goods in an appropriate way and to immediately notify any defect.

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[105] See *Kramer*, in Straube, HGB online (2003) § 346 Nos. 39 ff with further references.

[106] OGH 15.5.1974, 5 Ob 79/74, HS (Sammlung handelsrechtlicher Entscheidungen) 9238; OGH 6.2.1996, 10 Ob 517/94, SZ 69/24.

[107] See e.g .http://www.pronatura.com/AnciensSites/pronatura.com/www.pronatura.com/telechargement/cofreurope.pdf

In a case decided by the *Austrian* Supreme Court,[108] the COFREUROP-rules were incorporated into a contract. The OGH applied Art 27 CISG to the case and exempted the party dispatching the notice of lack of conformity from the risk of delay or loss. As the Court of First Instance failed to make any findings of fact on whether the notice of defects had been submitted in due time, the case had to be remitted. The *identification* of "customs and usages" as such is a *question of fact* and not subject to judicial review.[109]

Older case law of the *Austrian* Supreme Court characterises the "1992 Cooperation agreement on the agency of board and lodging of the Austrian Trade Association of Hotels and Lodgings with the Austrian Trade Association of Travel Agencies" explicitly as a codification of existing "customs and usages" (*Kodifikation bestehender Handelsbräuche*).[110] Whether this was, or is the case, remains doubtful.[111] According to the Cooperation Agreement in the version accessible to non-members of the AFEC[112], some of the rules were approved by the *Austrian* Anti-Trust Court as "recommendation" advanced by the trade association, which is in clear contradiction to the qualification by the *Austrian* Supreme Court, just to name one point. The decision of the *Austrian* Supreme Court does not reveal on which basis it reached its qualification. If an opinion of the AFEC served as background, *serious concerns* remain: The said rules were elaborated by trade

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[108] OGH 30.6.1998, 1 Ob 273/97x, JBl 1999, 232.

[109] OGH 30.6.1998, 1 Ob 273/97x, JBl 1999, 232, with reference to former decisions SZ 68/105; OGH 27.4.1994, 7 Ob 550/94, HS 25.324.

[110] Kooperationsabkommen über die Vermittlung von Unterkunft und Verpflegung des Österreichischen Fachverbandes der Hotel und Beherbergungsbetriebe mit dem Österreichischen Fachverband der Reisebüros (KOAB,1992),see http://www.reisebueros.at/down/kooperationsabkommen.pdf; http://www.wko.at/wknoe/tf/koab.pdf and with limited access http://portal.wko.at/wk/format_liste.wk?sbid=1825&typ=1&AZ=1&pos=81 (presumably an updated version of 2009); OGH 15.7.1997, 1 Ob 219/97f, wbl 1999, 89.

[111] See the critical analysis by *Saria*, Touristisches Kooperationsabkommen als Kodifikation von Handelsbräuchen?, wbl 1999, 89.

[112] See http://www.reisebueros.at/down/kooperationsabkommen.pdf.

associations that are at the same time sub-divisions of the AFEC, responsible for the realisation of the survey.[113] By contrast, there are no objections to qualify such rules as "standard form rules", in which case they only apply when the parties agreed upon them.

Increasingly, such "customs and usages" are measured against the *prohibition of distortion of competition* under EU-law.[114] It remains to be seen whether the existing "customs and usages" can claim their binding force as such or whether they need to be agreed upon by the parties. Legal standards, such as "violation of the law" and "public morals" (internal public policy) derive "customs and usages" from their ability to be a binding source; the same applies to EU-law. There is no doubt that the parties may *exclude* the application of customs and usages by *choosing the law* that shall govern the case. Unless the legislator explicitly refers to such "rules", they are not considered as "law", and certainly not as "international mandatory law".

However, according to § 5 para. 1 No 4 Anti-Trust Act[115], it is an *abuse* of a dominant market position to make the conclusion of the contract subject to the acceptance of further services that have no material connection nor any other connection based on "customs and usages" to the subject-matter of the contract. The Anti-Trust Act declares "customs and usages" as part of the law and thus applicable between merchants and non-merchants.[116]

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[113] See also *Saria*, Touristisches Kooperationsabkommen als Kodifikation von Handelsbräuchen?, wbl 1999, 89.

[114] E.g. as to the general terms of banks the transformation of the Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 101, 1.4.1998, pp. 17 ff, into national law (§§ 7, 13 f KSchG) lead to an amendment of the terms. The consumers have, since then, the possibility to recognise the terms used to indicate the "annual percentage rate of charge".

[115] § 5 para. 1 No 4 2005 Anti-Trust Act (Kartellgesetz, KartG 2005; BGBl I 2005/61) corresponds with the former version of the Anti-Trust Act in § 35 para. 1 No 4.

[116] See OGH 9.12.1996, 16 Ok 12/96, ÖBl (Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht) 1997, 246 (on the linking of hire contracts with exclusive distribution contracts on liquefied gas tanks and

Austrian Case Law – Some Examples

The (commercial or business) *customs and usages* apply to business enterprises. Their application *ratione materiae* and *ratione loci* varies depending on the branch and the market concerned. There is no doubt that such "customs and usages" must be applied by the *Austrian* forum as soon as the *lex fori* (*Austrian* law) is applicable.[117]

In *cross-border cases* in which the CISG is applicable, "customs and usages" may become part of the contract, provided the parties referred to them (Art 9 para. 2 CISG).[118]

However, the *Austrian* Supreme Court also affirmed that the *Austrian* "general terms of timber trade", applicable to all transactions on wood, not only reflect "customs and usages" in the sense of § 346 HGB (now § 346 UGB), but are also binding when the parties did *not agree* upon them, they need *not* even *know* them. The reason is that if the law refers to "customs and usages", these become directly part of the law and are binding as such.[119] Art 4 CISG does not deal with "customs and usages" but refers to national law, and Art 9 CISG merely deals with their applicability.[120]

The *customs and usages* (impliedly) agreed upon by the parties need not to be internationally applied. Art 9 para. 2 CISG presumes that the parties are bound to the "customs and usages" of international trade if they knew them or should have known

liquefied gas for a minimum period of five years): considered as consistent with Art 86 lit. d ECT.

[117] See OGH 21.6.1983, 5 Ob 651/82, JBl 1984, 383, referring to Art 346 HGB.

[118] OGH 6.2.1996, 10 Ob 518/95, SZ 69/26: no customs and usages in the branch of mineral oil to conclude contracts in a written form only.

[119] OGH 15.10.1998, 2 Ob 191/98x, JBl 1999, 319 (*Karollus*).

[120] Art 9 CISG reads as follows:

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

them. These "customs and usages" must be known and applied internationally by specific parties. This is the case when they are recognised by the majority of the merchants of that particular branch. In addition, Art 9 para. 2 CISG requires that the parties knew, or should have known, those "customs and usages", which is the case when the parties are seated or are involved in trade there. Such "customs and usages" have *priority* over the provisions of the CISG. Whether the general terms of timber trade are binding "customs and usages" in *Austria* is a *question of fact*; the same holds true for the question whether these terms are generally known and applied in international sales of goods.[121] In the present case both parties (implicitly) agreed upon the "Tegernsee customs and usages" and they must, hence, be primarily applied.

The *surveys of the AFEC* cover a *variety of branches* made on the occasion of ongoing cases:

In *2009* on the limited liability for defective surface coating of compression rings, on the restriction of such liability to ordinary or gross negligence, on the limitation of such liability to a certain quantum, on the quality of surface coating for the purpose of motor racing[122];

In *2008* on the liability of agencies for the collectability of printing costs from their clients[123] and on the inclusion of the commission for commercial agents in the price premium of 100 % in the cosmetics branch [124], on the binding force of standard terms of contract of the trade association of the machine and steel industry as to the entitlement to loss of profits when specific machines are delivered with delay[125];

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[121] See OGH 15.10.1998, 2 Ob 191/98x, JBl 1999, 319 (*Karollus*); see also OGH 21.3.2000, 10 Ob 344/99g, ecolex 2000/306 (*Wilhelm*).

[122] Ref. no. 38g 22/08d, Rp. 770/08/MG/ls (website AFEC): "custom and usage" as to all questions denied.

[123] Rp. 770/08/MG/ls (website AFEC): "customs and usages" were denied.

[124] Ref. no. 141/07m 333, 10.9.2008, Rp. 770/08/MG/Va (website AFEC): "customs and usages" were denied.

[125] Ref. no. 14 Cg 44/07v-18, Rp. 770/08/MG/Va (website AFEC): "customs and usages" were denied.

In *2007* on the description of city litter in litres instead of kilogrammes[126], on the liability to pay costs for the provision of samples of carpets[127];

In *2006* on the caveat emptor between merchants of second-hand Audi vehicles in general, only between the merchants of the VW-Audi-group or also between merchants of the VW-Audi-group and agents of Seat[128];

In *2005* on the duty to pay the double net-price in case of late payment by the merchant of lighting and lamps and on the inclusion of such clauses in terms and conditions of delivery and payment[129], on the applicability of the ÖNORMEN (B 2110) for lowering the ground water, and on whether acceptance of partial payment equals waiver of full payment[130], on the duty of the carrier, or of the recipient party, to unload industrial paper rolls lacking an agreement between the parties[131];

In *2004* on the *international applicability* of the "general forwarder's conditions" of the country where the carrier is seated[132], on frequency of agreements on (exclusive) customer protection between the sub-carrier and the carrier and on the forfeiture of the freight claim in case of violation of such an agreement[133], on the duty of the carrier to secure the freight when the order contains a duty to bring fastening and tarpaulin

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126 Ref. no. 3790/2007, 4.7.2007, Rp. 770/07/MG/Va (website AFEC): "customs and usages" not ascertainable.

127 Ref. no. 3C 446/07b, 31.5.2007, Rp. 770/07/MG/Va (website AFEC): "customs and usages" were denied.

128 Ref. no. 512 5 C 185/06h – 15, Rp. 770/07/MG/Va (website AFEC): "customs and usages" confirmed.

129 Ref. no. 16 Cg 207/04x 21, Rp. 770/05/MG/Va (website AFEC): "customs and usages" were denied.

130 Ref. no. 007 20 Cg 47/03w – 52, Rp. 770/05/CN/Va (website AFEC): "customs and usages" were denied.

131 Rp. 770/05/CN/Va (website AFEC): "customs and usages" were not ascertainable.

132 Ref. no. 1 C 676/04s-10, Rp. 770/04/CN/Va (website AFEC): "customs and usages" denied.

133 Ref. no. 6 C 206/03t-23, Rp. 770/04/CN/Va (website AFEC): "customs and usages" as to the first question confirmed, as to the second question denied.

equipment[134], on the standard to pack oranges in wooden boxes instead of cardboard boxes for longer (cross-border) transport and on the standard to transport such oranges in a refrigerated truck[135], on the agreement of net-prices for real estate between merchants[136];

In *2003* on the liability of the new account holder for overdrafts after the transfer of the account from the former account holder to the new account holder, on such liability before the transfer took place, on the release from liability of the former account holder even without a formal statement by the bank, on the necessity of a written agreement between the customer and the bank on the liability of non account holders, on the liability of non account holders (e.g. authorised signatory) for overdrafts only if agreed upon in due form, on the question whether the transfer of the account without change of the bank account number equals a new bank account[137], on the duty of the buyer of an IT-server system that is installed by the seller to send back a defective hard disk (Bring-In-Service) and on the duty of the seller to repair the installation on-site[138];

In *2002* on the question whether "gypsy-mustard" (*Zigeunersenf*) is usually understood as a "descriptive statement" and

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134 Ref. no. 13 C 75/03b, Rp. 770/04/CN/Va (website AFEC): "customs and usages" confirmed.

135 Ref. no. 1 C 918/01/h, Rp. 770/04/CN/Va (website AFEC): "customs and usages" as to the first question confirmed, as to the second question not ascertainable.

136 Ref. no. 35 Cg 127/02/v, Rp. 770/04/CN/Va (website AFEC): "customs and usages" not ascertainable.

137 Ref. no. 4 C 1018/01/m-38, Rp. 770/03/CN/Va (website AFEC): "customs and usages" as to the first question not ascertainable, as to the second question denied, as to the third question denied, as to the fourth question confirmed, as to the fifth question confirmed, and as to the last question not ascertainable.

138 Ref. no. 4 Cg 191/00/a, Rp. 770/03/CN/Va (website AFEC): "customs and usages" as to the first question denied, as to the second question not ascertainable.

to what such a statement alludes[139], on whether during price negotiations between merchants prices are considered as net prices, whether in price agreements between merchants prices are considered as net prices, whether oral agreements between merchants based on an advert in the newsletter of the AFEC indicate the net price, whether prices indicated in the newsletter of the AFEC are net prices[140], on the question whether the clause "acceptance under reserve" (*u. V.*, *unter Vorbehalt*), used by the supplier of iron and steel, indicates that the supply of goods depends on the ability to supply, does the clause mean that the supplier is not liable for delay due to the previous supplier, and, is it generally accepted that in this case the supplier using such a clause is not obliged to compensate covering purchases[141];

In *2000* on the transport and packing of window foils using specific cardboard rolls[142], on a minimum term of notice of six months for both parties with regard to storing agreements and storages using computerised support linked with the customers, also if the contract lacking notice of termination is automatically prolonged for another year[143], on whether the purchase of motor vehicles between merchants requires a written form of such agreements, and whether they are only valid when drawn up in writing[144].

[139] Ref. no. NM 142/98-6,7, Rp. 16/02/CF/Ra (website AFEC): "customs and usages" as to the first question not ascertainable, as to the second question confirmed (such a mustard alludes to a spicy and hot mustard).

[140] Rp. 406/01/SU (website AFEC): "customs and usages" as to the first question confirmed, as to the second question confirmed, as to the third price confirmed, as to the fourth question confirmed

[141] Ref. no. 6 Cg 44/00a, Rp. 408/01/LG (website AFEC): "customs and usages" as to the three questions denied.

[142] Rp. 418/00/LG/NA (website AFEC): "customs and usages" denied.

[143] Ref. no. 22 Cg 137/96g-23, Rp. 403/00/LG/NA (website AFEC): "customs and usages" as to both questions denied.

[144] Ref. no. 5 C 1206/99t, Rp. 429/00/LG/NA (website AFEC): "customs and usages" as to both questions not ascertainable.

Summary

"Customs and usages" may be excluded by the parties. Depending on the branch in question and the scope of application, they serve as rules for the *interpretation* of the contract and, eventually, for *contractual supplementation*.[145] "International mandatory law" cannot be overruled by the parties' choice of law.

International mandatory law is a *question of law* and, hence, subject to revision by the *Austrian* Supreme Court. *Customs and usages* are regarded as a *question of fact* and, therefore, are not revisable by the *Austrian* Supreme Court.

Both "international mandatory law" and "customs and usages" reflect certain policies that underlie *developments* and *changes*. They must also be measured against *EU-law*. Such an endeavour overstrains practitioners and scholarly research has only slowly become aware of *competing interests* that may call for a fundamental restructuring of Private International Law and its methodology.

The *complexity of transnational sources* such as the two sources exemplified above is considerable. Contacts with practitioners confirmed this evaluation. Summarising the questions advanced by the general reporter, Prof. Silvia *Ferreri*, they can be answered as follows:

- There is a growing concern about the fragmentation of international sources in *Austria*. This concern is expressed by legal scholars, universities, politicians, the executive branch and by professional legal associations (Bar, notaries, judges).

- It seems that the problems caused by fragmentation and proliferation are to a great extent located in EU-law and International Public law. This may be due to the fact that there are only a few experts on Private International Law in *Austria*. Most lawyers dealing with civil law claim that they deal with conflict cases only rarely, with the exception of international family, international succession law, the Hague Convention of 4 May 1971 on the Law applicable to Traffic Accidents, and last, but not least (in commercial cases) the CISG. The reaction by universities and

[145] See i.a. OGH 29.3.1990, 6 Ob 546/90, JBl 1991, 116: on the Austrian General Terms of Timber Trade (ÖHHU).

professional legal associations has been to deepen the knowledge on EU-law, but also to advise students to study abroad and to strengthen cooperation of *Austrian* practitioners with those from other EU-countries.

- The *Austrian* Federal Ministries, especially the Federal Ministry of Justice, are very well informed on the international duties; they observe exemption clauses and reservations. Whether other authorities keep track of the developments depends on several factors: workload, staff, priorities set, degree of urgency and frequency of dealing with conflict issues.

- The legal training of judges focuses on knowledge of law in various fields of law, with regard to cross-border issues especially on EU-law. Special knowledge on conflict rules is gained on the basis of "learning by doing" when facing specific problems in specific cases and additional focussed learning. Obviously, a judge of the Commercial Court of Vienna certainly does not deal with international family law. In the countryside more "generalist" knowledge is required. Hence, detailed knowledge is neither feasible nor necessary in most cases.

- The specialisation of courts and judges improves the quality of decisions.

- Administrative courts, civil courts, criminal courts and commercial courts all have to deal with transnational legal sources. By and large, their attitude – provided such a focus can be substantiated – is to observe the law and to comply with the case law of the *Austrian* Supreme Courts. Much depends, then, on whether the question touches upon a "question of fact" (e.g. whether a trade custom exists) that is not subject to revision by the *Austrian* Supreme Court, or a "question of law" (e.g. international mandatory law) that is subject to revision. The "power" lies in the former case in the hands of lawyers, in the latter case in the hands of judges.

- Focussing on cases of Private International Law, the legal quality of decisions definitely improves by the fact that judges have to find and apply the law and that the Supreme Court is the last instance to correct what may have gone wrong in the lower instances.

- Some tendencies to elude complexity can be ascertained: When the applicable law and its consequences lead to a similar

result, the *lex fori* is applied by the courts (Supreme Court included). Contrary to the European Convention on the Law applicable to Contractual Obligations, the former provisions of the *Austrian* Act on Private International Law, applicable until 1998, allowed the application of the *lex fori* if the parties did not invoke foreign law. This is not possible under the said Convention, or under the Rome I- and Rome II-Regulations.

- Lower courts in *Austria* do not always recognise the Private International Law-implications of cases, or do not always solve the conflict problems properly. It is not possible to measure the efficiency of courts in this respect, because: 1) not all cases are appealed against, and are then decided by, the *Austrian* Supreme Court; 2) some problems are a question of fact (e.g. whether a trade custom exists) while other questions are questions of law (e.g. international mandatory law); 3) sometimes there is not enough money to pay legal experts, in this case the judge directs the question(s) at stake to the Federal Ministry of Justice, which is time-consuming and does not always lead to a result (due to lack of time, sometimes expertise) or the parties are asked to advance the information. In some cases the procedure ends in a settlement.