International Academy of Comparative Law

Académie Internationale de Droit Comparé

Silvia Ferreri
Editor

COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ 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

EVA-MARIA KIENINGER
KARIN LINHART

COMPLEXITY OF TRANSNATIONAL SOURCES
GERMANY

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 5

COMPLEXITY OF TRANSNATIONAL SOURCES
GERMANY

EVA-MARIA KIENINGER*
KARIN LINHART**

Question 1 - I. Academic writing. - II. Other sources. – Question 2 - Question 3- Common Rules for the Federal Ministries (GGO). - Guidelines for the Administration of International Treaties (RvV). - Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations (RiVeVo) - Question 4 - Deutsche Richterakademie. European Law Academy. - Länder-Academies for members of the judiciary (Justizakademien). - Other Länder-Institutions. - Question 5 - Specialization within German Higher Regional Courts. - Plans for the introduction of "Chambers for International Commercial Matters". – Question 7

Question 1. Is the concern about fragmentation of international sources (regional v. universal conventions, codes of conduct and usages of the trade) expressed in your country? By whom (literature, case-law, executive branch of the State, professional association of the Bar)?

I. Academic writing

Law journal articles and commentaries on international conventions, or European regulations, will invariably include some remarks about the relationship with existing transnational law[1] and

* Prof. Dr. Eva-Maria Kieninger, Lehrstuhl für Deutsches und Europäisches Privatrecht sowie Internationales Privatrecht, Julius-Maximilians-Universität Würzburg .

** Dr. Karin Linhart, Julius-Maximilians-Universität in Würzburg, Germany

[1] It is impossible to account for all literature on international conventions and European regulations which, *inter alia*, covers the relationship between different layers of international, European, and national legal sources. However, to give the reader an impression of how German literature deals with these problems, the following examples on the relationship between the Brussel IIbis Regulation (no. 2201/2003) and the Hague Conventions 1961 (concerning the powers of authorities and the law applicable in respect of the protection of infants) and 1996 (on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children) are given: *Pirrung, Jörg* in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (13th edition 2009) Internationales Kindschaftsrecht 2, Vorbemerkung zu Art. 19

may, if applicable, also criticise that insufficient attention has been paid to this aspect, but rarely elevate these concerns to the level of general critique.[2] Publications on unification of law in general do elaborate on the different layers of transnational law (and here in particular the relationship between European Union/Community Law and national law) and their relationship among each other, but mostly without explicitly addressing the issue of complexity itself in more than a subtly underlying way.[3]

EGBGB, para. C 5 et seq.; *Siehr, Kurt* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 10 (5th ed. 2010), Anhang I zu Art. 21 EGBGB para. 1 et seq.; *Rauscher, Thomas* in: id. (ed.) Europäisches Zivilprozessrecht Kommentar Band I (2nd ed. 2006), Einleitung Brüssel IIa-VO, para. 6. On the difficult relationship between European regulations and Hague Conventions on the enforcement of maintenance obligations see *Kropholler, Jan/Blobel, Felix*: Unübersichtliche Gemengelagen im IPR durch EG-Verordnungen und Staatsverträge, in: Festschrift für Hans Jürgen Sonnenberger (2004) 453; *Mankowski, Peter*: Im Dschungel der für die Vollstreckbarerklärung ausländischer Unterhaltsentscheidungen einschlägigen Abkommen und ihrer Ausführungsgesetze, IPRax 2000, 188.

[2] Exceptions are: *Kropholler/Blobel* (fn. 1) and *Rauscher, Thomas* in: id. (ed.) Europäisches Zivilprozessrecht Kommentar Band I (2nd ed. 2006), Einleitung Brüssel IIa-VO, para. 6 who critisises the EU for creating, with the Brussels IIa Regulation its own system next to the 1996 Hague Convention without an imminent need, and very often by simply reformulating the Hague solutions with slightly different words, so that unnecessary conflicts will arise. *Rauscher* ends with the warning that the EU, when inventing multiple new wheels for the Internal Market, should not be surprised, if in the end, the car will not drive properly.

[3] Cf. *Ferid, Murad:* Methoden, Möglichkeiten und Grenzen der Privatrechtsvereinheitlichung (1965); *Kegel, Gerhard/Schurig, Klaus:* Internationales Privatrecht, 9th edition (2004), chapter 4; *Kreuzer, Karl:* Entnationalisierung des Privatrechts durch globale Rechtsintegration?, in: Festschrift Universität Würzburg (2002) 247; *Linhart, Karin:* Internationales Einheitsrecht und einheitliche Auslegung (2005), pp. 15 et seq.; *Philipps, Günther:* Erscheinungsformen und Methoden der Privatrechtsvereinheitlichung (1965); *Rauscher, Thomas*: Internationales Privatrecht (3rd ed. 2009) para. 144 et seq.; *Remien, Oliver:* Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht, RabelsZ 1998, 627 at 633; *Roth, Wulf-Henning:* Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht, IPRax 2006, 338; *idem*, Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht, RabelsZ 55 (1991) 623; *Schwartz, Ivo:* Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft, ZEuP 1994, 559; *Sonnenberger, Hans Jürgen*, in: Münchener

Among the few publications which explicitly raise the question of complexity, concerns about fragmentation of international sources of law have been voiced by academics such as *Jayme*[4], *Kegel*[5], *Kohler*[6], *Kropholler*[7], *Majoros*[8] and *Reimann*[9]. Some publications elaborate on the issue of complexity in general, some concentrate on specific conflicts, mostly between European legislation and international conventions.

Kommentar zum Bürgerlichen Gesetzbuch, vol. 10 (5th edition 2010), vor Art. 3 EGBGB; *Sturm, Fritz/Sturm, Gudrun,* in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (13th ed. 2003), Einleitung zum IPR, in particular para. 305 et seq.; *Thorn, Karsten*, in: Palandt, Kommentar zum Bürgerlichen Gesetzbuch, 70th edition (2011), comments on Art. 3 EGBGB (including its introduction); *von Bar, Christian:* Typen des internationalen Einheitsrechts und das IPR (1985) as well as *Wagner, Rolf:* Die Haager Konferenz für Internationales Privatrecht zehn Jahre nach der Vergemeinschaftung der Gesetzgebungskompetenz in der justiziellen Zusammenarbeit in Zivilsachen, RabelsZ 73 (2009) 215. See also the contributions of *Bonell, Flessner, Kötz, Lando, Mertens, Remien* and *Storme* made at a conference on alternatives for legislative unification of law ("Alternativen zur legislatorischen Rechtsvereinheitlichung") in 1991, published in RabelsZ 65 (1992) 215.

[4] *Jayme, Erik:* Staatsverträge zum Internationalen Privatrecht – Internationalprivatrechtliche, staatsrechtliche, völkerrechtliche Aspekte, Berichte der Deutschen Gesellschaft für Völkerrecht, BerGesVölkR 16 (1975) 7 at 12.

[5] *Kegel, Gerhard:* Sinn und Grenzen der Rechtsangleichung, in: Carstens, Karl/Börner, Bodo (eds.), Angleichung des Rechts der Wirtschaft in Europa, Internationaler Kongreß 18. bis 20. März 1969, Köln (1971) 9 at 42.

[6] *Kohler, Christian*: Verständigungsschwierigkeiten zwischen europäischem Gemeinschaftsrecht und internationalem Privatrecht, in: Festschrift für Jayme, 2004, volume I, 445.

[7] *Kropholler, Jan:* Internationales Einheitsrecht, Tübingen (1975), pp. 174/5 and 345 as well as his treatise Internationales Privatrecht (6th ed. 2006) pp. 71 /72, elaborating on the controversy whether international treaties in the area of private international law and international civil procedure have led to an improvement of the situation. As to the conflict between European regulations and Hague Conventions on maintenance obligations see *Kropholler, Jan/Blobel, Felix*: Unübersichtliche Gemengelagen im IPR durch EG-Verordnungen und Staatsverträge, in: Festschrift für Hans Jürgen Sonnenberger (2004) 453.

[8] *Majoros, Ferenc:* Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts, RabelsZ 46 (1982) 84.

[9] *Reimann, Matthias:* Conflict of Laws in Western Europe, A Guide through the Jungle, Irvington (1995).

Already in 1975, *Jayme* has pointed out that some agreements among states are elaborated and ratified without prior consideration to the works done by other organisations or conferences in the same area.[10] As a result, *Jayme* regards conflicts of international agreements as a new topic in the field of conflicts of laws.[11]

Similar concerns have been expressed by *Majoros* in 1982. Following *Majoros*, it has not been done enough to find solutions for conflicts of international treaties, especially in the area of private law,. This lacuna has lead authors to criticise international unification as such, instead of thinking about possible solutions to the problem.[12] *Majoros*, instead, argues for a more constructive approach and develops a methodology to determine the applicable international treaty in case of a conflict.[13]

Kropholler and *Neuhaus'* article on the question "Unification of Law – Improvement of Law?"[14] points out that unification of law should always serve a specific purpose, in particular adding some value to the pre-existing legal landscape by prescribing a better solution, or by achieving more legal certainty, when applied in a particular case.[15] *Dreher* calls this a precondition for any unification measure (particularly against the background of another important feature of international and transnational law, competition among various legal systems) the "legitimacy of unification of law" (*Legitimation von Rechtsvereinheitlichung*).[16] *Kropholler* and *Neuhaus*

[10] *Jayme* (fn. 4) at 11.
[11] *Jayme* (fn. 4) at 12.
[12] *Majoros* (fn. 8) at 86.
[13] *Majoros* (fn. 8) at 88 et seq.
[14] *Neuhaus, Paul H./Kropholler, Jan:* Rechtsvereinheitlichung – Rechtsverbesserung?, RabelsZ 45 (1981) 73.
[15] *Neuhaus/Kropholler* (fn. 14) at 74/75.
[16] *Dreher, Meinrad:* Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa?, JZ 1999, 105. International and European legal unification is vigourously criticised by German economic doctrine, but less because it adds to the complexity of transnational law. The main argument against unification is the loss of regulatory or institutional competition, cf. *Kerber, Wolfgang*: Rechtseinheitlichkeit und Rechtsvielfalt aus ökonomischer Sicht, in: Grundmann, Stefan (ed.), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (2001) 67; *Kerber, Wolfgang/Heine, Klaus*: Zur Gestaltung von Mehr-Ebene-Rechtssystemen aus ökonomischer Sicht, in: Ott,

emphasise that the question, whether unification of law also leads to an improvement of the law itself, has only been discussed rarely in (German) doctrine.[17] Among other things the authors criticise an "over-activity" in the area of the unification of law, an activity which leads to unified rules which are superfluous, narrowly tailored and often overlapping in their respective scopes of application.[18] *Kropholler* and *Neuhaus* nevertheless close on an optimistic note: despite the risk of deteriorating the law rather than improving it, the outcome of international unification, in most cases so far, can be considered an improvement.[19]

A problem, that has raised particular attention, is the fact that sometimes individual conflict of law rules are included into legal instruments of substantive law. This may happen when different unification agencies, which are working on different levels (e.g. international/regional), legislate in the same area. The 2001 UN Convention on the Assignment of Receivables in International Trade, which primarily aims at the unification of substantive law but also includes a private international law provision on priority conflicts (Art. 22) because no binding substantive solution could be reached for the question of priorities (see the non-binding annex with no less than four different choices). This conflicts rule has the potential to clash with general European PIL unification, such as formerly, Art. 12 of the 1980 Rome Convention on the law applicable to contractual obligations,[20] and now Art. 14 of the Rome I Regulation on the law applicable to contractual obligations

Claus/Schäfer, Hans-Bernd (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002) 167; *Ott, Claus/Schäfer, Hans-Bernd*: Die Vereinheitlichung des europäischen Vertragsrechts – Ökonomische Notwendigkeit oder akademisches Interesse?, in: idem (eds.) Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002) 203; *Schmidtchen, Dieter*: Vereinheitlichung des Vertragsrechts in Europa – eine Lösung auf der Suche nach einem Problem?, in: Eger, Thomas/Schäfer, Hans-Bernd (eds.), Ökonomische Analyse der europäischen Zivilrechtsentwicklung (2007) 1.

[17] *Neuhaus/Kropholler* (fn. 14) at 74.

[18] *Neuhaus/Kropholler* (fn. 14) at 78.

[19] *Neuhaus/Kropholler* (fn. 14) at 83.

[20] Official Journal (OJ) 1980, L 266, at 1.

and its envisaged enlargement or amendment (Art. 27 s. 2 Rome I regulation).[21] [22]

A further example for unnecessary complexity that has happened even within the same legislating agency, i.e. the EU, and has been amply discussed in Germany,[23] is the duplication of conflicts rules on specific consumer contracts such as distance selling, timeshare contracts and contracts including standard terms and the general provisions on consumer contracts in the 1980 Rome Convention and the Rome I regulation respectively. The differences and potential conflicts between those two regimes are further aggravated by the fact that the directive provisions must be incorporated into national PIL leaving member states ample room for individual solutions.

Another major concern is the co-existence of sources of European Union law on the one hand and sources of law elaborated under the auspices of the Hague Conference on Private

---

[21] Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177 at 6.

[22] See *Kieninger, Eva-Maria/Sigman, Harry*: The Rome I Proposed Regulation and the Assignment of Receivables, EuLF 2006, 1.

[23] *Cfr. Basedow, Jürgen* in: Schnyder/Heiss/Rudisch (eds.), Internationales Verbraucherschutzrecht (1995) 11 at 34; *Freitag, Robert/Leible, Stefan*, Ergänzung des kollisionsrechtlichen Verbraucherschutzes durch Art. 29a EGBGB, EWS 2000, 342 at 350; *Leible*, Kollisionsrechtlicher Verbraucherschutz im EVÜ und in EG-Richtlinien, in: Schulte-Nölke, Hans/Schulze, Reiner (eds.), Europäische Rechtsangleichung und nationale Privatrechte (1999) 353 at 379 et seq.; *Magnus, Ulrich/Mankowski, Peter*, The Green Paper on a Future Rome I Regulation – on the Road to a Renewed European Private International Law of Contracts, ZVglRWiss 103 (2004) 131 at 142; *Roth, Wulf-Henning*, Grundfragen im künftigen internationalen Verbrauchervertragsrecht der Gemeinschaft, FS Sonnenberger, 2004, 591 at 592; *Stoll, Hans* in: Basedow, Jürgen *et al.* (eds.), Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht, 2001, 463; *Max Planck Institute for Foreign Private and Private International Law*, Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, RabelsZ 68 (2004) 1 at 14; *Kieninger, Eva-Maria*: Der grenzüberschreitende Verbrauchervertrag zwischen Richtlinienkollisionsrecht und Rom I-Verordnung, in Baetge, Dietmar/von Hein, Jan/ von Hinden, Michael (eds.), Festschrift für Jan Kropholler (2008) 499; *Martiny, Dieter*: Neuanfang im Europäischen Internationalen Vertragsrecht mit der Rom I-Verordnung, ZEuP 2010, 747 at 751 et seq.

International Law on the other hand, for example on the enforcement of maintenance obligations or the protection of children.[24]

II. Other sources

Case-law that complains about, or critically assesses, the complexity of transnational law was not to be found. This is primarily due to the neutral, impersonal style of German judgments, which – in contrast e.g. to English judgments – does not easily lend itself to general remarks on the state of the law in a particular area. It is another question whether courts are always sufficiently able to cope with overlapping layers of national law, international conventions and European regulations.[25] It would however be highly unusual to express problems encountered in practice in a court decision.

State officials and members of the Bar would typically raise their concerns about complexity and/or the superfluousness of a specific piece of transnational law either during its elaboration or in the framework of a consultation process leading to a decision on the ratification of a particular convention. Such deliberations and consultations, however, mostly remain unpublished. Yet, *Jörg Pirrung* who has formerly headed the private international law department in the German Justice Ministry and *Rolf Wagner* who is currently the head of the same department have both – albeit in their personal, academic capacity – voiced their concern about the

[24] See fn. 1 and also *Wagner, Rolf:* Die Haager Konferenz für Internationales Privatrecht zehn Jahre nach der Vergemeinschaftung der Gesetzgebungskompetenz in der justiziellen Zusammenarbeit in Zivilsachen, RabelsZ 73 (2009) 215 at 227 et seq.; *Basedow, Jürgen*: Was wird aus der Haager Konferenz für Internationales Privatrecht?, Festschrift für Werner Lorenz (2001) p. 463.

[25] See for example, the critical case note by *Mankowski, Peter*: Im Dschungel der für die Vollstreckbarerklärung ausländischer Unterhaltsentscheidungen einschlägigen Abkommen und ihrer Ausführungsgesetze, IPRax 2000, 188. *Jayme* (fn. 4) at 12/13 criticises that courts sometimes do not take international agreements into consideration and gives examples of cases of local courts as well as Higher Regional Courts (*Oberlandesgerichte* – OLG) and the German Supreme Court (*Bundesgerichtshof* – BGH), that have been decided without applying a convention that would have been applicable either in the first place or following a renvoi of first or second degree.

growing complexity of transnational sources especially in their field of work, i.e. private international law and international civil procedure.[26]

Question 2. Which proposals have been put forward in your legal system to cope with the problem, and by whom?

Academics as well as practitioners have presented a wide range of possible means, rules and mechanisms to cope with the problem of the increasing complexity of transnational law.

Coordination at the stage of law-making

Perhaps the most promising strategy to avoid complexity is awareness of conflicting supranational, or international, rules at the stage of law-making. On the issue of potential conflicts between the Hague conventions and European regulations in the realm of private international law and international civil procedure, *Rolf Wagner*[27] suggests the following measures:

(1) Overlapping instruments should regulate their conflict themselves by explicit rules. For example, Hague instruments should embody a disconnection clause granting priority to the parallel Brussels instruments. The realm of application of Hague instruments on civil procedure could thus be reduced to proceedings between parties (or judgments in the case of recognition and enforcement) of member states and third states (or among third states) leaving intracommunity cases to be regulated by the Brussels instruments.[28]

(2) Possibly, European instruments could limit their application to intracommunity cases but *Wagner* concedes that in the past, this has rarely been done.[29]

(3) In the area of private international law, *Wagner* sees no room for additional Hague conventions on matters where the EU has already legislated (see the Rome I and Rome II regulations)

[26] See fn. 1, fn. 24 and *Pirrung, Jörg*, Festschrift für Murad Ferid (1988), p. 339.
[27] See fn. 24. *Rolf Wagner* is the head of the private international law department in the German Ministry of Justice but emphasises that in his publications, he presents his personal views.
[28] *Wagner* fn. 24 at 228
[29] *Wagner* fn. 24 at 229 *et seq.*

because these regulations are equally applicable to cases involving third states (see Art. 2 Rome I and Rome II).[30] In other instruments, however, the EU may refrain from creating its own private international law and simply refer to the rules elaborated under the auspices of the Hague Conference as has already happened in the EU regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations which, in its Art. 15, embodies the rules of the 2007 Hague Protocol on the law applicable to maintenance obligations.

In general terms, it has been suggested by German doctrine that the Hague Conference should in its future work, concentrate on topics that are of world-wide interest such as international civil procedure, cyber-law, or a consolidation of conflicting substantive law conventions on transport by sea, and refrain from projects which in the past have primarily attracted the attention of European jurisdictions.[31]

Already in the late 1970ies, *Rolf Herber* has expressed a need for closer cooperation of international law-making agencies, specifically in relation to the unification of international law of maritime trade.[32] *Van Loon*, speaking at a conference in Würzburg in 2004 has demonstrated the need, and described the mechanisms for an enhanced coordination between the Hague Conference, UNIDROIT, UNCITRAL and the EU in matters such as indirectly held securities, assignment of receivables, insolvency and secured transactions.[33]

---

[30] *Wagner* fn. 24 at 230 *et seq.*

[31] *Basedow, Jürgen:* Was wird aus der Haager Konferenz für Internationales Privatrecht?, Festschrift für Werner Lorenz, 2001, p. 463 at 480 *et seq.*

[32] *Herber, Rolf:* Gedanken zur internationalen Vereinheitlichung des Seehandelsrechts, in: Recht über See, Festschrift für Rolf Stödter (1979) 55 at 64 *et se*q.

[33] *Van Loon*, *Hans*: Unification of private international law in a multi-forum context, in: Kieninger, Eva-Maria (ed.), Denationalisierung des Privatrechts?, Symposium anlässlich des 70. Geburtstages von Karl Kreuzer (2005) p. 33 *et seq.*

Uniform definitions and "trans-conventional" interpretation

In general, uniform definitions, which are interpreted autonomously and applied in an internationally uniform manner, are considered as being helpful in combatting unnecessary complexity. In the 1970ies, *Landfermann* suggested an independent international terminology being used when drafting and applying internationally unified provisions.[34] *Magnus* in a contribution celebrating the 75th anniversary of the Max-Planck-Institute in Hamburg used the example of the notion "consumer" which is used in a great number of international conventions and EC regulations on substantive law, private international law and international jurisdiction to illustrate the problem of a separated interpretation of each instrument.[35] He suggests the idea that general notions such as "contract", "damage", "causation" or "fault" should be understood in the same way, no matter in which international instrument they are used. In the absence of a supranational jurisdiction he discusses as possible means common definitions, as well as rules, which allow for an interpretation that reaches beyond the individual convention and pays attention to the meaning of the same notion in other, related conventions or conventions which have been elaborated by the same legislating agency (trans-conventional interpretation). He already sees a "common law of private law conventions" emerging. Soft law such as the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law are seen as possible tools for a uniform interpretation.[36]

---

[34] *Landfermann, Hans-Georg:* Für eine eigenständige Begriffsbildung bei der internationalen Vereinheitlichung des Privatrechts, in: Rödig (ed.), Studien zu einer Theorie der Gesetzgebung (1976) 359, referring to a.o. the notions of Wohnsitz/domicile, Lieferung/delivery, Kind/child, Verschulden/fault or Guter Glaube/good faith which might be interpreted differently within domestic law and internationally unified law.

[35] *Magnus, Ulrich:* Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts, in: Basedow, Jürgen *et al.*, Aufbruch nach Europa, 75 Jahre Max-Planck-Institut (2001) 571.

[36] *Magnus* (fn. 35) at p. 577; *Magnus* in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (13th edition 2005) Art. 7 CISG para. 14. Also pleading for a common interpretation of the CISG and the 1988 Factoring Convention *Ferrari, Franco*

General rules on conflicts between different sources of transnational law

Where different international conventions seem to be equally applicable in a certain case ("conflict of treaties" instead of "conflict of laws"), it is suggested to apply general rules like the principles of *lex posterior* or *lex specialis* in order to determine the one that would prevail over the other, if such a conflict is not already provided for in the final provisions of the respective conventions.[37] However, as far as the relationship between (prior) international sources and (later) national law is concerned, the *lex posterior* rule (*lex posterior derogat lege anteriori*) cannot be applied without qualification. For example, it is not to be assumed that the German legislator when reforming its autonomous law necessarily wants to breach a prior international treaty. Therefore, the two general principles of *lex specialis derogat lege generali* and *lex posterior derogat lege anteriori* although generally applicable both for conflicts between different transnational sources of law and conflicts of domestic law and transnational law, have to be applied with care.[38]

Nevertheless, it has been pointed out that adherence to general principles such as *lex specialis* and *lex posterior* can reduce complexity and is – as far as possible – to be preferred to final provisions which give a new international treaty overall priority even in relation to more specific international provisions.[39]

---

in: Schlechtriem, Peter/Schwenzer, Ingeborg (eds.), Kommentar zum Einheitlichen UN-Kaufrecht (5th ed. 2008) Art. 7 CISG para. 38.

[37] *Thorn, Karsten,* in: Palandt, Kommentar zum Bürgerlichen Gesetzbuch, 69th edition, (2010), Art. 3 EGBGB, para. 13. *Majoros* has suggested an even more specified principle of "lex specialis ratione materiae derogat lege generali rationae materiae" in cases of conflicting international treaties, see fn. 8, at p. 98 *et seq*.

[38] *Sonnenberger, Hans Jürgen* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (5th ed. 2010), art. 3 EGBGB, para. 4 *et seq*. As to the application of the principle of *lex posterior* for conflicting international conventions see *Majoros* (fn. 8) at 100 *et seq*. For a comparative overview of a multitude of states on the question of the relationship between domestic law and international treaties including the application of the principle of *lex specialis* see *Linhart* (fn. 3) at 254 *et seq*.

[39] See *Janzen, Dorothee:* Der UNICITRAL-Konventionenentwurf zum Recht der Internationalen Finanzierungsabtretung – Symposium in Hamburg am 18. und 19. September 1998, RabelsZ 63 (1999) 368 at 370.

Among other methodological approaches, *Majoros* has suggested a "principle of highest possible effectiveness" (*Regel der maximalen Wirksamkeit*). In cases, where a judge has to decide a conflict between two conventions which equally call for applicability, the judge shall apply the one that would lead to a positive rather than a negative result. For example, the court should apply the convention that would lead to the successful recognition of a foreign company, or would provide for a less complicated procedure in cases of judicial cooperation such as service of documents abroad or taking of evidence abroad.[40]

Recognition instead of Private International Law?

The complexity of cross-border cases involving different provisions of substantive law and ununified conflicts provisions, especially in questions of personal and family status could be greatly reduced by a simple rule of mutual recognition. Whether recognition of status (name, marriage, divorce, adoption etc.) was to be preferred to the traditional conflicts approach was hotly debated in German private PIL doctrine[41] in the aftermath of ECJ decisions such as *Garcia Avello*[42] and *Grunkin Paul*[43]. Today, however, the predominant opinion holds that the jurisprudence of the court does not go beyond a mere recognition of documents and should not be extended to questions of personal status in general.[44] Authors stress that a mere recognition of a foreign

[40] *Majoros* (fn. 8) at 94 *et seq*.

[41] First remarks on this subject can already be found in *Jayme, Eric:* Internationales Privatrecht und postmoderne Kultur, ZfRV 1997, 230 at 234/5; see further *Jayme, Eric/Kohler, Christian:* Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?, IPRax 2001, 501; *Henrich, Dieter:* Anerkennung statt IPR: Eine Grundsatzfrage, IPRax 2005, 422; *Coester-Waltjen, Dagmar:* Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht, IPRax 2006, 392; *Mansel, Heinz-Peter:* Anerkennung als Grundprinzip des Europäischen Rechtsraums, RabelsZ 70 (2006) 651.

[42] EuGH 2.10.2003, *Garcia Avello*, Case 148/02.

[43] EuGH 27.4.06, *Standesamt Niebüll*, Case C 96/04 und EuGH 14.10.2008, *Grunkin Paul*, Case C-353/06.

[44] See *Sonnenberger, Hans Jürgen* in: Münchener Kommentar Bürgerliches Gesetzbuch, vol. 10 (5th ed. 2010) Einleitung IPR, para. 9 *et seq*.; *Mansel, Heinz-Peter/Thorn, Karsten /Wagner, Rolf*: Europäisches Kollisionsrecht 2010:

status might undermine the sovereignty of the state now recognising the outcome of measures of another state, instead of determining the applicable law and assessing the respective situation on its own terms.

Legal education and enhancing awareness of the complex structure of transnational law

It goes without saying that European Private and Commercial Law today is characterised by a complex multi-level structure (*Mehrstufigkeit*).[45] This means that in order to work in the field of European Private and Commercial Law one has to master all relevant disciplines such as comparative law, European law, conflict of laws, domestic and internationally uniform private and commercial law.[46]

Remien concludes that, in order to properly apply European Private and Commercial Law, it is not only the national practitioner who needs to raise his/her awareness for the interplay between comparative law, European Law, Conflict of Laws, and Private and Commercial Law. It is also the European Court of Justice that needs to take all four disciplines, and in particular comparative law, into thorough consideration, instead of focusing predominantly on European Law aspects and interests.[47] In this task the European Court of Justice could be supported in two ways: First, when deciding about the compliance of a national provision with European Law in the course of preliminary proceedings according to Art. 234 EC (now. Art. 267 of the Treaty on the Functioning of the European Union) the national court referring the question to the ECJ could deliver an outline on how its own domestic law would handle the legal issue in question. The other Member States could then also file memoranda on the question according to their domestic law. In addition, an expert in comparative law could

Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?, IPRax 2011, 1 at 3.

[45] *Remien* (fn. 3) at 627-647. Of course, this state of affairs is not limited to Europe but applies *mutatis mutandis* to all areas of the world. Yet in this country, it has been discussed predominantly with respect to Europe.

[46] *Remien* (fn. 3) at 628.

[47] *Remien* (fn. 3) at 646.

submit an *amicus curiae* to the Court, already indicating a potential solution from a comparative law viewpoint.[48]

Finally, another reason for transnational law being less accessible than national law is the fact, that, with a few exceptions, legal doctrine is still thinking, writing and teaching along national, domestic lines. This is often due to insufficient language skills and difficulties in getting access to foreign publications.[49] For this reason, transnational law has to become more visible in law schools and publications. It should not only remain a subject for a few, but be taught to every law student instead.

Question 3. Has the executive power in your country kept a strict monitoring of all international engagements which were undertaken and made use of clauses of exemption/reservation (to preserve previous international engagements) when signing new instruments?

International legal instruments that have been entered into by the German government are listed and published in the second part of the Official German Gazette (*Bundesgesetzblatt*). Here, everybody has access to information regarding the text of the respective international source of law, its authentic languages as well as an official German translation, the day of its entry into force and, if applicable, exemptions or reservations made.

As far as official institutions and their instructions regarding aspects on international sources of law are concerned, there are three sets of rules that have to be considered: The Common Rules for the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien – GGO*), the Guidelines for the Administration of International Treaties (*Richtlinien für die Behandlung völkerrechtlicher Verträge – RvV*) and the Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations (*Richtlinien für die Fassung von Vertragsgesetzen und vertragsbezogenen Verordnungen - RiVeVo).*

[48] *Remien* (fn. 3) at 646.

[49] *Remien, Oliver:* Denationalisierung des Privatrechts in der Europäischen Union?, ZfRV 1995, 116 at 125.

Common Rules for the Federal Ministries (GGO)

Section 8 of the Common Rules for the Federal Ministries (GGO)[50] contains provisions on international treaties and measures related to the European Union (*Völkerrechtliche Verträge und Vorhaben im Rahmen der Europäischen Union*). § 72 subsec. 1 GGO states that, before the first steps into a new international treaty are taken, the respective Federal Ministry in charge of the new project has the obligation to verify, that there is no other way of achieving the goal envisaged but by means of an international treaty (*Notwendigkeitsprüfung*).[51] If this test has proven the effectiveness of, and the need for, a new international agreement, § 72 subsec. 2 GGO prescribes for every department in any Federal Ministry to get then the consent of the Federal Foreign Ministry to enter into negotiations, or to take part in international conferences that are intended to result into the ratification of an international treaty.[52] This way, the German Federal Foreign Ministry serves as the centre of international treaty activities conducted by German Federal Ministries and can therefore monitor and coordinate them.

Appendix 7 on § 74 subsec. 1 GGO lays down administrative principles for the principle of subsidiarity and the principle of proportionality test conducted by Federal Agencies.[53] Based on this common frame every part of the German Government, before and while taking part in the elaboration of new international rules

[50] See at http ://www.bmi.bund.de/cae/servlet/contentblob/139852/publicationFile/26296/ggo.pdf (last visited: February 7, 2010).

[51] § 72 subsec. 1 GGO states: "Vor der Ausarbeitung und dem Abschluss völkerrechtlicher Verträge (Staatsverträge, Regierungsübereinkünfte, Ressorta bkommen, Noten-, Verbalnoten- und Briefwechsel) hat das federführende Bundesministerium stets zu prüfen, ob eine völkervertragliche Regelung unabweisbar ist oder ob der verfolgte Zweck auch mit anderen Mitteln erreicht werden kann, insbesondere auch mit Absprachen unterhalb der Schwelle eines völkerrechtlichen Vertrags ".

[52] § 72 subsec. 2 GGO states: "Vor der Aufnahme von Verhandlungen und Teilnahme an Konferenzen über völkerrechtliche Verträge mit auswärtigen Staaten, ihren Organen und mit internationalen Organisationen hat das federführende Bundesministerium das Auswärtige Amt rechtzeitig zu unterrichten und seine Zustimmung einzuholen, soweit keine abweichende Regelung getroffen wurde."

[53] Verfahrensgrundsätze für die Subsidiaritäts- und Verhältnismäßigkeits prüfung durch die Bundesressorts.

within the European Union, has to verify that the prospective EU measure complies with the principle of subsidiarity and the principle of proportionality enshrined in EU Law. That way, a uniform application of these principles within the different departments and Ministries of the German Government shall be provided for.[54] If the Government concludes that the measure envisaged by the EU does not comply with the principle of subsidiarity, it will represent this opinion within the respective EU institution.[55] Proposals, or measures, taken by the European Union, that have caused doubts as to their compliance with the principle of subsidiarity, will be put on a permanent list (*Subsidiaritätsliste*).[56]

Appendix 8 on § 74 subsec. 1 GGO contains a list of questions serving as a guideline for the assessment whether a future EU measure is compliant with the principle of subsidiarity.

Guidelines for the Administration of International Treaties (RvV)

§ 72 subsec. 6 of the Common Rules for the Federal Ministries (GGO) refer to the internal binding authority of the Guidelines for the Administration of International Treaties (*Richtlinien für die Behandlung völkerrechtlicher Verträge – RvV*), published by the Federal Foreign Ministry (*Auswärtiges Amt*). They provide for a set of practical and comprehensible rules for all government authorities that work in the field of preparing and ratifying international treaties of all kinds.[57] They have as goals a high level of legal clarity and legal certainty within the law and practice of international treaties.[58] Within their Introductory Remarks is it pointed out that, when entering into negotiations or when taking part in international conferences, EU Member States have to take into account that the external competence of the EU to enter into international agreements with third states or other

[54] Point 2.(6) of appendix 7 on § 74 subsec. 1 GGO.
[55] Point 2.(9) of appendix 7 on § 74 subsec. 1 GGO.
[56] Point 3 of appendix 7 on § 74 subsec. 1 GGO.
[57] See preface of the Guidelines for the Administration of International Treaties.
[58] See preface of the Guidelines for the Administration of International Treaties.

regional organisations develops with the ongoing growth of internal competences of the EU vis-à-vis its Member States. Therefore, even at the time when an international agreement is elaborated with the participation of one, or more, EU Member States, these ones have to take the necessary arrangements concerning the revocation, or amendment of the international treaty, or the subsequent succession of the European Union, once the respective competence has passed from the Member States to the Union.[59]

The subsequent provisions of the Guidelines for the Administration of International Treaties (RvV) encompass elements like the structure of an international treaty (§ 5) in order to increase its clarity and applicability, or the respective terms to be used depending on the type of international agreement (§ 6)[60]. § 12 RvV gives further instructions on the so-called necessity-test (*Notwendigkeitsprüfung*) according to § 72 subsec. 1 GGO. As to reservations the Guidelines for the Administration of International Treaties (RvV) refer to the Vienna Convention on the Law of Treaties of 1969. § 21 subsec. 4 RvV states that reservations in international treaties should only be made restrictively. Referring to § 76 subsec. 2 No. 1 GGO, § 26 subsec. 1 RvV restates the obligation to publish every international treaty that Germany became a party of in the official gazette, the *Bundesgesetzblatt*, part 2. This duty also applies to reservations (*Vorbehalte*), declarations (*Erklärungen*), objections (*Einsprüche*), amendments (*Vertragsänderungen*) and revisions (*Vertragsneufassungen*).

[59] See the Introductory Remarks (*Einführende Bemerkungen*) of the Guidelines for the Administration of International Treaties.

[60] *Völkerrechtliche Übereinkunft* for example, is the German umbrella term for any kind of international agreement between two or more states, or governments, or departments. More specific terms are stated with their English and French counter-part. Bilateral agreement between states are called *Abkommen*/ Agreement/Accord , multilateral agreements between states are called *Übereinkommen* or " *Vereinbarung*/Convention or Agreement/Accord"

Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations (RiVeVo)

Another set of rules underlying the internal (German) procedure for the implementation of international treaties are Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations (*Richtlinien für die Fassung von Vertragsgesetzen und vertragsbezogenen Verordnungen - RiVeVo)*[61] published by the Federal Ministry of Justice (*Bundesministerium der Justiz*). Section 1.2.5.2 RiVeVo lays down that every German statute implementing an international agreement, whose authentic languages are other languages but German, have to provide for an official German translation and by doing so have to state, that the "international agreement is published together with an official German translation".[62] This phrase can be seen as a "warning" not to take the German text as the basis for an application and interpretation of the respective international agreement, but only as a first aid to read and understand its content.

The relationship between a new international agreement and pre-existing international sources of law is usually explained along with the submission of the bill to the German *Bundestag* by the government (*Regierungsvorlage*). After stating the reasons (*Begründung*) for the statute implementing the international agreement into German law the international agreement is further explained in detail within the so-called *Denkschrift*. This part of the *Regierungsvorlage* is usually divided into two parts: In the first part (general part) the background of the international agreement, its international and national significance, its development and its objectives, as well as the reasons for its conclusion and necessary subsequent amendments of existing domestic law are explained. Within the second part (specific part) the articles of the international agreement are annotated in chronological order.[63]

---

61 See German text at http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_12112007_IVA7926057412802007.htm (last visited: Febraury 7, 2010).

62 "Das Übereinkommen [o.ä.] wird nachstehend mit einer amtlichen deutschen Übersetzung veröffentlicht."

63 See 1.5 Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations.

Considerations as to the relationship of the new international agreement and pre-existing international sources of law can be found in the first part of such a *Denkschrift*.

Question 4. Has the judiciary in your country provided special training for judges to increase their ease and proficiency in dealing with sources of law which were not generated in their legal system?

As far as continued legal training of judges in Germany is concerned, there is an institution, called *Deutsche Richterakademie* (DRA), located in Trier, that is providing for continuous current information on the application of international, or foreign, legal provisions. In addition, the European Law Academy, also located in Trier, Germany, offers mostly courses on European Union Law for judges and other legal practitioners.

Deutsche Richterakademie

Most of the courses of the *Deutsche Richterakademie*[64] mentioned below take place on a regular basis, mostly every year. The courses can be divided according to the subject areas they focus on: Courses on foreign law, courses on the interaction between domestic and inter-/supranational law, courses on international law, courses on international judicial cooperation and courses that include more than one of these aspects (courses according to areas of law).

Courses on foreign law

Courses in 2009 and 2010 include, for example, three one-week courses on French Law in French. Participating judges also attend a French court trial at a court in Metz to get an insight into the French judicial system.

Similarly, two one-week courses are held on English Law. Participants get an overview on English Public, Private and Criminal Law. The seminar is held in the English language.

[64] For further and current information see their homepage at http://www.deutsche-richterakademie.de (last visited: February 1, 2010).

A German-Chinese seminar for judges intends to create a better understanding on the respective perception of fundamental principles like the rule of law.

The one-week course on "Justice and Islam" intended to provide German judges basic understanding of Islam culture, religion, philosophy and legal history.

Another course in 2009, "Russian Judiciary and the Russian Court System", gave an introduction to Russian law and court system as well as political implications in this field. It also focused on the current situation for judges and prosecutors in Russia.

A comparative view on different European legal systems was given on a seminar on criminal law enforcement.

Courses on the interaction between domestic and inter-/supranational law

One of the most general subjects within the German Academy for Judges (*Deutsche Richterakademie*) is called "Europe and Civil Law" (*Europa und Zivilrecht*). It covers the basic principles of European harmonisation of law and the interaction between the European Courts and national courts. It is complemented by a course titled "European Law within the practice of civil courts" (*Europarecht in der zivilrichterlichen Praxis*). Another course at the Academie is called *Koordinierung und Umsetzung von Europarecht in das nationale Sozialrecht der EU-Mitgliedsländer* (coordination and implementation of European Law into the domestic social security law of the EU Member States). The German-US-American Seminar on the rights of children had as its goal to exchange information on the respective legal system in this area, and to further mutual understanding of their differences. Participants also discussed recent developments in the application of the Hague Child Convention and other international sources in this area. The seminar was held in German and English. Simultaneous translations were provided. "Influences of European Law on domestic criminal law" was the title of another seminar held by the *Deutsche Richterakademie* in 2009. Here the focus was not only on European Union Law, but also on the European Convention on Human Rights and the case law of the European Court of Human Rights. Other seminars outside the area of private law are a course

titled "Influence of EU Law on domestic direct taxation" as well as "European Law within the practice of administrative courts".

Courses on international law

Courses on international law include a seminar on the European Human Rights Convention and an introduction to European Union Law. These courses usually also refer to the effects of international sources on domestic (German) law. Another seminar (*Internationale Gerichtshöfe*) gives an introduction into a multitude of international courts, such as the International Criminal Court, the International Court of Justice, both in The Hague, the International Maritime Court in Hamburg, the European Court on Human Rights in Strasbourg and the European Court of Justice in Luxemburg. In addition, it covers the administration of justice within the WTO system.

Courses on international judicial cooperation

Courses on international judicial cooperation encompass predominantly judicial cooperation in criminal matters. A one-week course in 2009 included subjects like basics of international judicial cooperation in extradition and enforcement, developments due to measures taken by the Council of Europe, or the European Union, or international criminal justice. This is followed by another course on practical issues of judicial cooperation in criminal law in Europe. Others discuss the legal framework of subjects like international human trafficking.

Courses on specific subject matters, including international aspects

Other courses and seminars of the *Deutsche Richterakademie* cover all layers of the law, whether national, or foreign domestic law, or international or supra-national (EU) sources of law, always pertaining to a particular subject-matter. Such courses included for example "Recent developments of patent law in Germany and Europe" or "International family law".

European Law Academy

Another possibility for judges to attend courses on foreign or international law is given by the European Law Academy[65], also located in Trier, Germany. This institution is open to all legal professions and offers a wide range of courses predominantly on European Union Law.

Länder-Academies for members of the judiciary (Justizakademien)

Since in Germany, the judiciary belongs to the jurisdiction of the *Länder*, there exist 16 *Länder*-Academies for members of the judiciary (*Justizakademie)* in addition to the federal *Richterakademie*. Rather as an exception, than as a rule, seminars for judges within the *Länder*-Academies focus on international or foreign sources of law. The *Justizakademie des Landes Brandenburg* in Königs Wusterhausen, e.g. offers a seminar on Polish, which is designed to provide German judges with the language skills they need in order to communicate with their Polish colleagues within official meetings between German and Polish courts and other judicial institutions, and a seminar on the subject "Europe within the Practice of a Civil Court" (*Europa in der zivilgerichtlichen Praxis*).[66] In 2010 a seminar for German and Austrian judges, a meeting between German and Polish authorities on the subject of trans-border organised crime and two seminars on European Law (*Gewerblicher Rechtsschutz und Europarecht* and *Rechtsfindung im Europarecht*) has taken place.[67]

Other Länder-Institutions

Also, other *Länder*-institutions, such as the 16 *Länder*-Ministries of Justice provide for several measures to get acquainted with international or foreign sources of law.

---

[65] For further and current information see their homepage at http://www.era.int (last visited: February 1, 2010).

[66] See the program of 2009 at http://www.justizakademie.brandenburg.de/sixcms/media.php/3117/10-H%C3%B6herer%20Justizdienst.pdf (last visited: February 1, 2010).

[67] See the program of 2009 at http://www.justizakademie.brandenburg.de/sixcms/media.php/3117/H%C3%B6herer%20Justizdienst%20Internet.pdf (last visited: February 1, 2010).

Berlin/Brandenburg

The Ministry of Justice of the *Land* Berlin (*Senatsverwaltung für Justiz*) offers courses on subject of European Law that are relevant for the judiciary and entertains bilateral partnerships (*Patenschaften*) with East-European courts, or court districts. Within this framework, the Ministry of Justice of the *Land* Berlin organises seminars to achieve a better mutual understanding for each other's court structure, functioning and legal system, such as e.g. a seminar on the administrative court system and the current state of mediation in Germany and Poland in 2005.[68]

The Common examination authority of the *Länder* Berlin and Brandenburg (*Gemeinsames Juristisches Prüfungsamt der Länder Berlin und Brandenburg - GJPA*) also organises an exchange of judges from Germany and other European countries to sit court trials within the other country as well as seminars on foreign law, such as, e.g. a course on English Law and Legal Language[69].

Question 5. Does the fact that in some countries a specialised judicial institution deals with international commercial cases affect the functioning of justice under this profile? Would you assess the records of these judicial institutions as an improvement?

In Germany, there is not (yet)[70] one specialised institution, which deals with international commercial cases. There is, however, a rather limited specialisation of court divisions concerning international or transnational law.

Specialization within German Higher Regional Courts

The court schedules (*Geschäftsverteilungspläne*) of the German Higher Regional Courts (*Oberlandesgerichte* – OLG) often show a

[68] See at http://www.berlin.de/sen/justiz/europa/aktiv.html (last visited: February 1, 2010).
[69] See at http://www.berlin.de/sen/justiz/europa/ausbildung.html (last visited: February 1, 2010).
[70] See below as to the plans to introduce "Chambers for International Commercial Matters" (*Kammern für internationale Handelssachen*) in North Rhine-Westphalia and Hamburg.

specialization outside international commercial law in the areas of International Family Law, here in particular the recognition and enforcement of foreign maintenance decisions (OLG Berlin, OLG Celle), the recognition of foreign decisions on marriage/divorce (OLG Brandenburg, OLG Celle, OLG Jena, OLG Koblenz, OLG München, OLG Oldenburg) and foreign matters concerning the status of children (*ausländische Kindschaftssachen;* OLG Stuttgart), or the declaration of enforceability (*Exequatur*) of family decisions as such (OLG Hamburg, OLG München). In some cases the specialization even goes down to the implementation of one particular international Convention, such as the Hague Convention on International Child Abduction of 1980 (OLG Köln) or the European Custody Convention (OLG Schleswig-Holstein). Also, the transfer of appeals to a Higher Regional Court (instead of the Regional Court – *Landgericht*) of decisions of a German Local Court (*Amtsgericht*) that has applied foreign family law, can be found (OLG Dresden).

The recognition and enforcement of foreign judgments in general (therefore including decisions in commercial matters), or the declaration of their enforceability (*Exequatur*) is given to one specific chamber, or division, of a Higher Regional Court (OLG Berlin, OLG Braunschweig, OLG Celle, OLG Dresden, OLG Frankfurt, OLG Hamburg, OLG Hamm, OLG Jena, OLG Karlsruhe, OLG Köln, OLG München, OLG Rostock, OLG Saarbrücken), as well as cases where international judicial assistance is required (OLG Brandenburg). In addition, appeals against a decision of a local court (*Amtsgericht*) that has applied foreign law (including foreign commercial law) are sometimes referred to a specialised division of a Higher Regional Court, by-passing the respective Regional Court (*Landgericht;* OLG Düsseldorf, OLG Köln). Another specialization can be found, where international or foreign arbitral awards are involved (OLG Karlsruhe).

Other Higher Regional Court do not provide for a distribution of transnational, or international, matters to a specific body within the court (OLG Bremen).

Plans for the introduction of "Chambers for International Commercial Matters"

At least since the middle of 2009 a new discussion has started in Germany regarding the competitiveness of German Law in an international context.

Context and development

Titled "Law – made in Germany" the Federal Ministry of Justice together with German lawyers' and judges' associations has launched a campaign to improve the reputation and perception of German law as a tool to govern international (commercial) transactions. In the course of this discussion more and more scholars and practitioners have voted for the introduction of specialised chambers within German courts (*Kammern für Internationale Handelssachen*),[71] that would serve as a platform for solving international commercial disputes. This would be a first step in getting in line with other possibilities for the adjudication of commercial disputes such as international commercial arbitration or the choice of a forum in well known places like England, or Sweden. The conditions for a successful acceptance of German courts within the international commercial community look quite good already. The costs for judicial services (court and lawyers) are comparatively low. Moreover, the time it takes from introducing proceedings in a German court to the final judgment can be considered rather short.

English as the court's language

One feature in the discussion about the introduction of chambers for international commercial matters is the question,

[71] *Callies, Gralf-Peter/Hoffmann, Hermann:* Effektive Justizdienstleistungen für den globalen Handel, ZRP 2009, 1; *Hoffmann, Hermann/Handschell, Tobias:* Englisch als Gerichtssprache?, ZRP 2010, 103; *Kleine, Lucas:* Englisch als Gerichtssprache vor deutschen Zivilgerichten?, BKR 2010, 87; *Linhart* (fn. 3) at 272 *et seq.*; *Mankowski, Peter:* Kammern für Internationale Handelssachen – ein erster richtiger Schritt, RIW 2009, 1; *Müller-Piepenkötter, Roswitha:* Englisch als Gerichtssprache – Der Entwurf eines Gesetzes zur Einführung von Kammern für Internationale Handelssachen, DRiZ 2010, 2; *Prütting, Hanns:* In Englisch vor deutschen Gerichten verhandeln?, AnwBl 2010, 113.

whether or not English shall be permitted as another official language before this court. Here distinctions are drawn between different aspects and stages where English might be an option next to German, especially in cases where all the non-judicial documentation like contracts, or negotiable instruments, are already drafted in the English language. These stages are: the pleadings, the pre-trial proceedings and the trial itself, as well as the question, whether the final decision may be written in English. Besides the argument that Germany would improve its reputation as another important global player within an increasingly globalised world, there is another aspect which speaks in favour of English as an opt-in possibility: Costs for translations of documents from English to German could be avoided and the risk of inaccurate translations that would then serve as the basis for the (inevitably inaccurate) decision could be eliminated. The recent discussion includes potential constitutional impediments such as the principle that trials are to be held in public (*Öffentlichkeitsgrundsatz*) and the narrowly tailored German principle of access to justice (*gesetzlicher Richter*).

Serving as the first German pilot courts, the Regional Courts (*Landgerichte*) Köln, Bonn and Aachen, as well as the Higher Regional Court (*Oberlandesgericht*) of Köln all situated in North Rhine-Westphalia, have already nominated Chambers or Senates, where the trial can be conducted in the English language in the beginning of 2010.[72]

On February 12, 2010 the Minister of Justice of Hamburg (*Justizsenator*) has introduced a joint bill of Hamburg and North Rhine-Westsphalia, supported by Lower Saxony and Hesse to the German *Bundesrat* (Upper House of the Federal Parliament) amending § 184 Federal Judiciary Act (*Gerichtsverfassungsgesetz*) in a way that would allow English as another language before German courts.[73]

[72] Press release of the Higher Regional Court of Köln of January 15, 2010, see at http://www.olg-koeln.nrw.de/presse/archiv/archiv_2010/004_01-13-15_handout_gerichtsspracheenglisch_vita.pdf (last visited May 19, 2010).
[73] See Beck-online, becklink No. 298314.

Question 7. Do you think that the efficiency of judges in dealing with cases raising complex interaction of sources may be affected by the fact that the judge himself/herself has to find the applicable law (iura novit curia) in opposition to the situation in which the parties themselves have to plead and prove the law to the court?

In our opinion the problems arising out of the complexity of transnational sources of law affect cases alike, no matter whether they are brought before a court that belongs to the adversarial system, or before a court that belongs to the inquisitorial system. Within the adversarial system the assessment of the law might be more result-driven, since the law is provided for by the parties, instead of the neutral judge. So here, whenever the parties of a lawsuit see a cause of action, or defence that is favourable to them within a foreign legal system, the incentive of arguing towards conflict of laws rules that would determine as applicable law the law that is favourable to them is very high. If necessary, the parties within the adversarial tradition will as well get the expertise of a specialist in the respective field.

Likewise, courts within the inquisitorial system, such as Germany, ask for written opinions (*Gutachten*) either by university professors, specialised in Private International Law, or Comparative Law, or by the specialists of the Max-Planck-Institute for Comparative and Private International Law. According to § 293 of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) the judge has to know his or her own law, including the conflict of laws rules. Often, however, the judge asks the expert for a verification of the result of his determination of the applicable law before the actual explanation of the foreign law. This tradition has proven useful and efficient. Unnecessary costs can be avoided in cases, where the judge was mistaken in his assumption that the law of a foreign country is applicable in his case, by for example failing to follow a simple renvoi back to the judge's own law.

As far as international judicial cooperation is concerned, judges in Germany are given some guidance by specific legislation and a database[74] accessible through the Internet. The federal legislator has passed a statute on legal cooperation in civil matters

[74] See at http://www.datenbanken.justiz.nrw.de/pls/jmi/ir_index_start (last visited: February 8, 2010).

(*Rechtshilfeordnung für Zivilsachen* – ZRHO)[75]. It is composed of a general part and a specific part. The general part contains provisions on the procedure that has to be followed for incoming requests for judicial cooperation as well as for requests of German judges abroad. The specific part consists of an alphabetical list of countries and specific country information. The database "IR-Online" (*Internationale Rechtshilfe online*) provides an overview on the international sources of law existing in the fields of service of documents abroad, taking of evidence abroad, abolishing the requirement of legalisation, or on information of foreign law, created by the European Union, the Council of Europe, or under the auspices of the Hague Conference on Private International Law as well as bi- and multilateral international agreements Germany is a party of. This collection is accompanied by the German primary and secondary sources of law such as statutes implementing the international sources (*Ausführungsgesetze*) or the so-called *Denkschriften*[76].

[75] German text see at http://www.datenbanken.justiz.nrw.de/pls/jmi//ir_start (last visited: February 8, 2010).
[76] See supra at page 11.