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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

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COMPLEXITY OF TRANSNATIONAL SOURCES
PORTUGAL

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Introduction

The Portuguese legal order has international, European Union, transnational and internal sources.

International and European Union sources may be considered supranational sources.

In the first place transnational sources mean international trade custom, custom based upon arbitral case law and rules created by professional organizations to govern international trade relationships between their members. Trade usages are considered an "indirect source" since their binding force depend on the relevance granted by "direct sources" such as the statutes, or the custom. Portuguese law accords limited relevance to the trade usages: they only have binding force in special matters in which a statute refers to them (see Article 3(1) of the Civil Code)[1].

According to the prevailing view, a reference to transnational sources is also allowed by the special choice-of-law rule of Article 33 of the Statute on Voluntary Arbitration (Lei no 31/86, of 29 August) regarding the law applicable to merits in international commercial arbitration[2]. In the view of the reporter, the rule that the arbitrators shall always take into account the relevant trade usages, contained in international conventions, as well as in the rules of the main international commercial arbitration centres and in some national arbitration statutes, has become part of a Transnational Arbitration Law. Therefore, it binds the arbitrators

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1 - See also Articles 236 and 239 of the Civil Code regarding interpretation and filling of gaps of legal acts.

2 - See Luís de LIMA PINHEIRO – *Direito Comercial Internacional*, Coimbra, 2005, p. 535 *et seq.*, with more references.

in arbitrations with seat in Portugal, even in the omission by the relevant Portuguese statute and of the rules of the arbitration centre, where it is an institutional arbitration.

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)?

To the knowledge of the reporter the concern with the fragmentation of sources has only been expressed *en passant* by only one academic author concerning Private International Law [3].

In this field, the problem of the fragmentation of sources arises namely regarding the protection of minors. Within the Portuguese legal order there are in force three international conventions (the Hague Convention Relating to the Settlement of Guardianship of Minors, of 1902, the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, of 1961, and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, of 1980) and a fourth convention will soon enter into force (Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 1996). Furthermore, are into force the Regulation (EC) no 2201/2003, of 27 November, concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Regulation Brussels II *bis*), as well as other international conventions dealing

[3] - See Rui MOURA RAMOS – "Linhas gerais da evolução do Direito Internacional Privado português posteriormente ao Código Civil de 1966", *in Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, 501-547, Coimbra, 2006, p. 546-547, and "Perspectiva do Direito Internacional Privado no limiar do novo século", *in Internacionalização do Direito no Novo Século*, org. por Figueiredo Dias, 127-144, Coimbra, 2009, p. 130-131. See also Luís de LIMA PINHEIRO – "A triangularidade do Direito Internacional Privado – Ensaio sobre a articulação entre o Direito de Conflitos, o Direito da Competência Internacional e o Direito de Reconhecimento", *in Est. Isabel de Magalhães Collaço*, vol. I, 311-378, Coimbra, 2002, p. 372-373.

mainly with the co-operation of authorities (the Hague Conference on the Civil Aspects of Children International Abduction, of 1980, the Convention of Judicial Co-operation Concerning the Protection of Children between Portugal and France, of 1983, and the Convention Concerning the Judicial Assistance in Matters of Right of Custody and Right of Visit between Portugal and Luxembourg, of 1992).

As a result, there is a complex picture of sources and a plurality of regimes that causes difficulties of delimitation and application.

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

It cannot be expected to have concrete proposals to cope with it, since the problem has been addressed *en passant*.

In the context of Private International Law it has been suggested that a coordinated endeavor at the different levels of normative creation and an attitude of restraint in the exercise of the respective powers[4] is needed. It has also been proposed that a new codification of Private International Law encompassing choice of law, jurisdiction and recognition of judgments[5] is necessary. Regarding the matter of protection of minors, the reporter shares the opinion that the fragmentation of sources and plurality of regimes could, to a large extent, be prevented if the matter had been left to the Hague Conventions[6].

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[4] - See MOURA RAMOS 8 (n. 3[2006]) p. 546-547.

[5] - See LIMA PINHEIRO (n. 3) p. 373; MOURA RAMOS, loc. cit.; Maria HELENA BRITO – "O Direito Internacional Privado no Código Civil – perspectivas de reforma", *in Estudos Comemorativos dos 10 Anos da Faculdade de Direito da Universidade Nova de Lisboa*, vol. II, 355-380, Coimbra, 2008, pp. 379-380.

[6] - See, Ulrich SPELLENBERG – "IntVerfREhe", *in J. von Staudingers Komme ntar zum Bürgerlichen Gesetzbuch*, *Einführungsgesetz zum Bürgerlichen Gesetzbuch/IPR*, Berlim, 2005, Vorbem zu Art 1, n.º 20, and Bertrand ANCEL e Horatia MUIR WATT – "L'intérêt supérieur de l'enfant dans le concert des juridictions : le Règlement Bruxelles II *bis*", *R. crit.* 94 (2005) 569-605, p. 574. For a convergent view, see Erik JAYME – "Zum Jahrtausendwechsel: Das Kollisionsrecht zwischen Postmoderne und Futurismus", *IPRax* 20 (2000) 168-171, p. 169. Against, see MARIANNE ANDRAE – "Zur Abgrenzung des räumlichen

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?

When signing new instruments, the Portuguese Government assures the preservation of previous international engagements both at the national level and at the European Union level.

At the national level, the most significant measure is the compulsory impact assessment prior to the decision on the signing of each new legal instrument. Such an assessment has two components – *teste SIMPLEX* and *nota justificativa* – and it is attached to the legal opinion and to the proposal for a decision on the signing of that instrument. Among other information, that assessment comprises exhaustive identification of all legal acts related with the subject of the instrument at stake. Such an analysis is carried out by the Ministries competent according to the subject matter, in cooperation with the Ministry of Foreign Affairs, which is responsible for the overall coordination of foreign policy. The documents referred to above are part of the internal process leading up to ratification, or to accession, and are made available to the Council of Ministers.

At the European Union level, it must be mentioned the community coordination, prior to the negotiation, signing and ratification of every international instrument which may affect the European Union legislation. Whenever a situation of conflict with the European legislation emerges, measures are taken in order to eliminate that conflict, e.g. the renegotiation of the text or the inclusion of a disconnection clause, which usually meets that objective. Such procedure is used particularly in the case of mixed agreements (agreements in matters of shared external competence of the European Union and of the Member States). A number of multilateral conventions are thus negotiated according to a process of community coordination. Regarding, for instance, the cooperation in civil and commercial matters, this coordination takes place in the Committee on Civil Law Matters of the Council,

Anwendungsbereichs von EheVO, MSA, KSÜ und autonomem IZPR/IPR", *IPRax* 26 (2006) 82-88, pp. 88-89.

as well as in *ad hoc* Community coordination meetings prior to the meetings in international *fora* (such as the Hague Conference on Private International Law).

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?

The training of judges and state's attorneys takes place in the "Centro de Estudos Judiciários" through specialized courses that complement the law degree obtained in the University. This includes a course on "European and International Law" that is aimed at familiarizing the aforementioned professions with international and European Union instruments. This course is annual for judges and state's attorneys of judicial courts and lasts a trimester for judges and state's attorneys of administrative and tax courts.
Furthermore, the "Centro de Estudos Judiciários" has been organizing several events addressed to acting judges and state's attorneys in order to increase their proficiency in dealing with international and European Union sources.

Question 5. Does the fact that in some countries a specialized 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 Portugal there is no specialized judicial institution to deal with international commercial cases.

Question 6. Is there a difference in attitude towards transnational sources among administrative courts (where they exist), courts dealing with civil law matters, criminal law and commercial courts in your country?

In Portugal there is a division between judicial courts (dealing with civil law, criminal law and commercial law matters), on the one hand, and administrative and tax courts, on the other. Judicial courts are more concerned with the application of international sources than administrative and tax courts. Nevertheless, all of these are often concerned with the application of European Union

law. It cannot be said that there is a difference of attitude towards international and European Union sources.

The most remarkable shortcoming in the application of supranational sources by Portuguese courts is the reluctance to ask the Court of Justice of the European Union for preliminary rulings on European Union law.

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 the Portuguese legal system the principle *iura novit curia* applies both to internal sources and to supranational sources. The court is also under a duty to ascertain the content of foreign law *ex officio* (Article 348(1) and (2) of the Civil Code). In practice there is a judicial trend to maximize the scope of application of the *lex fori*, and the courts often ignore the supranational or foreign sources where they are not pleaded by the parties.

Question 8 Are there detectable common strategies that the judges seem to use to elude complexity (e.g. by the presumption that the foreign law is the same as the local law/by a presumed waiver of foreign sources if the party has not pleaded their applicability immediately)?

In part this question has already been answered above (see above, answer to question 7). It may be added that when interpreting, and filling gaps, of international sources the Portuguese courts normally resort to domestic law instead of following the criteria applicable to the interpretation and the filling of the gaps of international conventions. Instead of aiming for a uniform interpretation and gap filling, through an autonomous interpretation and the resort to the principles underlying the rules of the convention, they simply apply the rules of internal source.

Question 9. Is it possible to measure the efficiency of courts in dealing with such issues?

In the view of the reporter, the practice of the Portuguese courts in the interpretation and application of supranational and transnational sources is unsatisfactory. This is the result of different factors: insufficient training of judges, insufficient attention paid by the scholars to the problem and lessening of the importance of the Private International Law course in the law *curricula*. The situation will only change if these problems are adequately addressed.