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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

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SWITZERLAND

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COMPLEXITY OF TRANSNATIONAL SOURCES SWITZERLAND

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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)?

In Switzerland, the concern about fragmentation of international sources seems *not* to be addressed in general or from the *perspective of transnational or international law* (as such). However, the concern is addressed in connection to *particular branches* of the law or in respect to *particular instruments*. These concerns are found in *literature*. Here some examples.

Already in 1977, Prof. *Paul Volken* (a Swiss law Professor) thoroughly examined *conflicts of conventions.*[1] His work is mostly devoted to *Private International Law* (PIL). He describes numerous particular conflicts between specific conventions (PIL and also some substantive private law conventions; conflicts between bilateral and multilateral conventions). He created a sort of system of conflicts and of possible solutions. The solutions are the adequate and *self-disciplined* determination of the sphere of application of a convention, specific provisions in conventions about possible conflicts and, as a last resort, the principles of international law on the concurrence of conventions (to the solutions in detail see below answer to question nr. 2).

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[1] Paul Volken, Konventionskonflikte im internationalen Privatrecht, Schweizer Studien zum Internationalen Recht, Schulthess, Zürich, 1977.

The author of this report, *Andreas Fötschl* has written about possible conflicts between conventions and soft-law-instruments, in particular the UNIDROIT -Convention on International Financial Leasing and the Draft Common Frame of Reference (DCFR).[2] In the particular case of Financial Leasing the problem is solved by rules in the UNIDROIT-Convention stating that other instruments would prevail (similar to the rules in CISG). Nevertheless, the author claims that the DCFR should have more regard and should stick closer to the substantial rules of the UNIDROIT-convention. A similar problem is found in the relationship of the DCFR rules on interest on claims in money and the late payment *directive* of the EU.[3] It might be appropriate to have more regard to some of the policy-decisions made in the mentioned directive and, therefore, to change the interest-system in the DCFR.

The problem of fragmentation of *regional* and worldwide harmonization is not so much addressed in Switzerland**.** One reason might be that Switzerland is *not an EU-member* and is therefore not directly concerned by the most important form of regional harmonization in Europe. It might be possible in the future that a substantive conflict will arise between several *Hague-conventions* concerning minors (that Switzerland has ratified and they have entered into force) and the *Rome III-proposal* as far as it will concern Switzerland, (and its possible equivalent on the "Lugano-level" including, in this case, the questions of applicable law and jurisdiction).

More interest is devoted to the problem of fragmentation of European harmonization and its influence on (Swiss) national law. *Andreas Furrer*[4] (a Swiss professor who worked for a rather long time in Germany) has examined the relationship between *European Commercial Law* and *national civil law*. He underlines the complexity

[2] ERPL (European Review of Private Law) 2009, S. 659-673. "Financial Leasing unter dem DCFR und der UNIDROIT-Convention".

[3] ERPL (European Review of Private Law) 2009, S. 89-111. "Zinsen auf ausservertragliche Geldforderungen im Rechtsvergleich und eine Analyse der Zinsnormen des Draft Common Frame of Reference (DCFR) ".

[4] Andreas Furrer, Zivilrecht im gemeinschaftsrechlichen Kontext, Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbidnung des Zivilrechts in das europäische Wirtschaftsrecht, Stämpfli, Bern, 2002.

and fragmentation of legal sources within the EU and that legal practice astonishingly was not (in 2002) aware of the problems connected to this complexity.[5] He speaks of a pluralism of legal sources and their *interaction* and of the *integration* of national civil law into European Commercial law.

In concern to the *Rome IV* proposal on successions, a potential conflict might occur in case of the introduction of a European Certificate of Succession (ECS): The proposal does not make clear if the ECS does replace the international effects of national certificates, with other words, if the ECS leaves national and bilateral solutions of recognition of foreign instruments within the Member States (and with third countries) untouched. If the ECS would indeed technically replace the national certificates on the international level, then the liberal Swiss policy of recognition of national certificates might not be in accordance with European policy. But probably such a conflict could be solved by recognition of the national and the European certificate in Switzerland. And the more likely solution on the European level is anyway that the ECS will not replace the international effects of the national certificates. Then the Swiss policy of recognition is in line with European policy and the ECS is just one more possible object for recognition.[6]

There are numerous other examples along these lines for *particular instruments*.

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

In Switzerland the so called " *Dynamical integration-theories*" are discussed.

The basic elements of these sometimes very complex theories are always to *build bridges* between the different levels; either already in the preparation or/and in the interpretation /application of international instruments and national law.

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[5] Furrer, *loc. cit.*, S. 5, Nr. 11.

[6] Andreas Fötschl, The relationship of the European Certificate of Succession to National Certificates, in: A. Bonomi/C. Schmid (eds.), Successions internationals, Publications de l'Institut suisse de droit comparé, no. 68, Schulthess 2010, pp. 99-115.

Andreas Furrer developed a theory for the interaction of *national civil* and *European Commercial law*. This sort of interaction can also exist between other levels of law. He speaks of a *polycentric multilevel system*. First the relevant levels have to be identified. The levels of rules are *not in a hierarchy*. The rules from these levels are interpreted according to the methodological rules of the level they belong to. In a *second step* the relevant rules are put together into an overreaching system. This second step shall overcome the fragmentation of the different levels. The rules are *interpreted* as to fit into the whole system of norms that governs *a case*. The rules about the interaction of norms from the different levels are to be found in the "European conflict of law-rules". These rules can be regarded as an *analogy to* the rules of *private international law*.

In cases where a national rule has its reason for existence in an international source *Andreas Furrer* advocates a duty to *disclose* the relationship.[7]

Prof. *Paul Volken* examined in 1977 *conflicts of conventions in International Private Law*.[8] The solutions should be the correct determination of the *sphere* of application of a convention, *provisions* in conventions about possible conflicts and the principles of *international law* on the concurrence of conventions. *A la longue*, as stated by *Volken*, the possible solution is a long sighted, concertized *cooperation*, which covers several levels of international legal traffic.[9] These are the *organisational*, the *legislative* and the *judicial* level. On the organisational level *Volken* supports (obligatory) exchange of information, conferences on coordination and institutional forms of cooperation (UNCITRAL should fulfil its tasks on the field of cooperation). On the legislative level he suggests the following points: a self-disciplined sphere of application of conventions, provisions on concurrences in conventions and provisions on *interpretation* (for example when a bilateral convention is followed by a multilateral agreement). Finally, on a judicial level, the judge has to *apply* conventions in a

[7] Andreas Furrer, Zivilrecht im gemeinschaftsrechlichen Kontext, S. 8, Nr. 22 f.
[8] Paul Volken, Konventionskonflikte im internationalen Privatrecht, Schweizer Studien zum Internationalen Recht, Schulthess, Zürich, 1977.
[9] Volken, p. 307.

way that concurrences are avoided. The judge has to find a gap-filling supplement.

On the Swiss academic level, some discussions were started on the necessity to adapt *special methods* for dealing with sources of an international or regional nature. The Swiss Prof. *Amstutz* states an erosion of legislation by a singular national state.[10] In the future we will be more and more confronted with normative sentences produced by the interaction of legal systems. The *methods* conceived by *Savigny* are not apt to cope with these new forms of normative sentences. To describe this development, he uses the term of multiple interpretations (*interpretatio multiplex*). This expression describes the quest for rules governing the finding of law in an environment of inter-dependent legal systems. He works with the term *interlegalism* which means that the *juridical operations* from different legal systems are connected to each other. He searches for a cognitive opening of national private law with the goal to find *normative compatibility* in the relevant spheres of action and without the necessity of major changes in the civil law structures. Therefore we should proceed from the idea of *adapting legal cultures*. There is no coercion between the cultures but a proactive cooperation. Finding this normative compatibility is, according to *Amstutz*, a further task for the judges searching the law. But for this goal it is essential that we leave aside the traditional sentence that a judge may not innovate the law. Interlegality leads to the building of new law. And this leads naturally to the Swiss order for the judges to find law that should be in conformity with the European rules. This order is comparable to a *method-theoretical collision-rule*. This leads to the solution that the *national judge may find law contra legem* if no political will to the contrary was expressed by the legislator.

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[10] *Amstutz* "Interpretatio multiplex: Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335". In: *Heinrich Honsell et al.* (ed.): Privatrecht und Methode: Festschrift für Ernst A. Kramer, Basel: Helbing & Lichtenhahn 2004, S. 67-91 (also published in: *Astrid Epiney/Florence Rivière* ed. , Auslegung und Anwendung von "Integrationsverträgen" - Zur Uebernahme des gemeinschaftlichen Besitzstandes durch Drittstaaten, insbesondere die Schweiz; Zürich: Schulthess 2006, S. 93-119).

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?

There exists a voluminous *database* for all the conventions and agreements entered into by Switzerland.[11]

Before the ratification of a convention, or agreement, the relevant executive departments verify if the *convention* is in conflict with *other international obligations* of Switzerland. Sometimes older conventions have been *cancelled* for this reason. But it seems that there exists no legal rule that would command such verification.

Prof. *Paul Volken* wrote in 1977 that the national legislator, asked for ratifications of a new convention, *wants* to be informed about possible conflicts of the new convention with other ones already entered into. He states that most of the *Botschaften* (explanations by the legislator) inform about possible conflicts.[12]

In the field of private international law, Switzerland is directly affected by one fragmented area . The issues that are addressed in the Brussels I regulation for EU-members are regulated in roughly the same manner by the *Lugano Convention* (concluded in 1988 between the EU and the EFTA member states). In order to achieve a high degree of consistency between the two instruments, an *official system* of *collection and exchange of judgments* as well as *reports* and regular meetings have been put in place.[13]

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?

In Switzerland there exists no specific education requirement for judges. At all levels, judges are generally appointed or *elected*

[11] http://www.eda.admin.ch/eda/de/home/topics/intla/intrea/dbstv.html

[12] Paul Volken, Konventionskonflikte im internationalen Privatrecht, Schweizer Studien zum Internationalen Recht, Schulthess, Zürich, 1977, p. 3.

[13] See Art. 1 and 2 of Protocol Nr. 2 of the Lugano-Convention. The reports can be downloaded in several languages on the following site:http://www.ejpd.admin.ch/ejpd/de/home/themen/wirtschaft/ref_internationales_privatrecht/ref_lugano_uebereinkommen.html.

through popular or parliamentary vote, often also by political consensus.

Except for federal judges, rules on the inauguration of judges are governed by the laws of the Swiss cantons (district-states).

In spite of the lack of specific education for judges, an *academy* for judges exists. It organizes continued education. In this framework, courses are offered on International *legal assistance* and the relevant international instruments in this field. Other than that, there is no specific training for dealing with sources created outside the legal system.

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 Switzerland there is no specialized judicial institution for 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?

According to Swiss experts, there seems to be *no difference* in attitude towards transnational sources amongst different types of courts. It is probably rather the *frequency* of being confronted with transnational sources that might lead to a different attitude. In that context, dealing with the *European Convention on Human Rights* has become a habit for *criminal* and *administrative* courts – they have thus developed a certain practice and are open to take into account this transnational source.

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 Switzerland, the principle of *iura novit curia* prevails. The judge is thus bound to find the applicable law. This is true even

when it comes to the application of foreign law. In private international law, Switzerland follows a system that might be characterized by its *mixed* nature: The content of the applicable law has to be determined by the Swiss court *ex-officio*. However, the court may demand the *cooperation* of the parties. For *patrimonial* claims the burden of proof for the content of foreign law can be *transferred* to the parties. But also in these cases the courts have a duty to cooperate and to control the materials presented by the parties. If the content of the foreign law cannot be determined, Swiss law is applicable.[14]

According to Swiss literature these questions have big impact on the practice of PIL, that is to say they govern the choice of law, the choice of the forum, and they have influence on the costs for the parties.[15] Nevertheless all this might not answer the question of *efficiency*.

The general questions of Private International Law are currently under scientific and political discussion. The European Commission has mandated the Swiss Institute of Comparative Law to elaborate a detailed legal opinion to this subject until the middle of 2011. An overview of the problems and developments can be found in recent Swiss literature.[16] However, the literature contains merely legal analysis but does not address questions of *efficiency*.

My personal view would be that it is rather obvious that there is a difference in *efficiency* for the judges. If the judge has to investigate himself, if there are international instruments governing the case, it takes time. It might be more efficient that the parties have to do the research. But many of the parties or their lawyers may not have the competence to work with the international instruments and their interpretation. Every step towards efficiency might increase the risk to overlook, or to misunderstand international sources. In the end, one has to answer the question who shall bear the risk of overlooked, or incorrect information on

[14] Art. 16 Swiss Act on Private International Law.

[15] *Furrer/Girsberger/Siehr*, Internationales Privatrecht, Helbing Lichtenhahn, Basel 2008, p. 243.

[16] Yearbook of Private International Law, Vol. XI (2009), Sellier.ELP, Munich 2010. See the contribution of Prof. Dr. *Urs Peter Gruber*, Dr. *Ivo Bach*, "The Application of Foreign Law - A progress report on a new European project", pp. 157-169.

international instruments. The different arguments for one or the other solution shall not be discussed here.

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)?

There are no (obvious) common strategies that the Swiss judges would use to elude complexity of transnational sources (or foreign law). As described above, a possibility for elusion would be provided by Art. 16 of the Swiss Act on PIL: If the foreign law cannot be determined, Swiss law is applicable (see above the answer to question nr. 7). *Conventions* entered into force in Switzerland are not regarded as foreign law.

In spite of possibility for elusion, there seems to be relatively few cases where Swiss law is applied by default. It is not unusual that the *Swiss Institute of Comparative Law* is mandated by Swiss courts (or by parties to a dispute) to write legal opinions about existing transnational instruments, or its application in a particular state. Having such an Institute could perhaps be seen as a common strategy.

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

In my opinion the only way to approach the question of efficiency in this respect would be a long time survey amongst judges and practicing lawyers. Maybe court-statistics could ask specifically for the application of international sources. But we have to keep in mind that such measures are only weak steps to approach a comparable result. Efficiency is connected to quantification and measuring by objective standards. It seems doubtful if the application of law can be measured with the necessary precision.