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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

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COMPLEXITY OF TRANSNATIONAL SOURCES VENEZUELA

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COMPLEXITY OF TRANSNATIONAL SOURCES VENEZUELA

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A vast array of literature has in recent years addressed the problem of the fragmentation of international sources of law.

There have been both positive and critical appreciations of this phenomenon, with various reconstructions of the reasons why such proliferation of international legal instruments has occurred. In some cases, courts belonging to different international coalitions have been hung by the fact that a controversy, especially in the field of human rights, was simultaneously being considered by another international judicial institution.

A hypothetical competence in giving advice about cases where several international sources intertwine has been proposed in favour of the International Court of Justice.

The problem affects the private law field as well.

Judges and practitioners dealing with cases that cross national borders, for some of their features, often have to disentangle a complex web of local rules on conflict of laws, international conventions on the law applicable to transnational relationships, conventions providing material uniform rules on certain contracts (or torts), domestic rules of a mandatory character limiting or affecting the applicability of international provisions, and a large variety of private codes of conduct, guidelines for members of a certain section of the trade (often referred to by the qualification of *lex mercatoria*), restatements of trade usages and practices, as well as collections of principles by non-governmental organizations that might be chosen by the parties as the law governing their relations.

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Each layer of norms may vary in its formality and may be more or less accessible: in some countries the rules on conflict of laws are codified within one of the main codes, but they may also be expressed in separate, special, legislation or be left to the interplay of a long series of judicial cases. Arbitration rulings may disclose the extent and implications of some rule governing the relationships of merchants trading in a certain field, but such decisions may not be open to the public to read. Moreover, private codes of conduct may be subject to updating which is not immediately accessible to people who are not insiders of the inner circle; collections of international principles governing a certain field may, or may not, be illustrated by broadly published judicial decisions that may be material to understand the scope of some of their rules.

Investigations conducted by several observers interested in this increasing complexity of sources have concerned, for instance, the fields of transport law, of intellectual property, of the commerce of artistic or historical items, the discipline autonomously subscribed by operators on the Internet, or by associations involved in the execution of large building projects.

If one wants to focus one's attention on an obvious instance, the example of the international sale of goods might be useful: many, but not all, States have incorporated the CISG.

In Africa, only a limited number of States belonging to the OHADA have ratified the 1980 Vienna convention, while a draft OHADA Act on contract law is under negotiation.

Within the European context, the UK has not ratified the Vienna convention: sales contracts with British partners must still be dealt with by way of conflict of laws rules. Yet, the UK has implemented directive 99/44/EC on certain guarantees in the sale of goods to consumers.

Symmetrically, limiting our observation to Europe, Norway has ratified the Vienna convention (with a significant reservation excluding the application of Part II on formation of the contract), but it is not a member of the EU and is therefore unaffected by the 99/44/EC directive. On the other hand, Norway had previously ratified the Nordic Council uniform law for the sales of goods.

Furthermore, not all European States have entered into the EU at the same time and this may affect the order in which the

Vienna convention and the EC directive have become binding for their citizens (for the purposes of *jus superveniens* questions).

Even though the two instruments (the Vienna convention and the EC directive) do not have the same scope (CISG concerns BtoB contracts, while the EC directive concerns sales to consumers) there may be cases in which they interact: for instance when a final seller wants to avail himself/herself of the right of redress against a previous provider.

A judge or legal practitioner will have to be quite clever in combining the different sources, adding the domestic legislation that might govern a certain market (pharmaceuticals, artistic or archeological items, etc.) and corporative rules of customary nature (by some merchant association) that might affect the trading of some goods. In some cases the parties may attempt to set aside national laws by referring to international restatements of principles for contracts and the judge will have to consider how far the autonomy of the parties can move in such a direction.

Against this backdrop, we are prompted to consider the following questions (among a wealth of possible investigations):

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)?

Yes, it is. This concern is expressed in Venezuela by literature, Law Schools[1] and private associations mainly[2].

[1] During the 2008 annual meeting, Venezuelan Private International Law Professors changed the syllabus of the subject. Among other major changes it considered and approved to give more weight to the commercial aspects of the subject and decided to create a six month seminar dedicated to Commercial Law, in which transnational law and its interaction with other sources of law will have an important presence.

[2] Law Schools and Private Associations continuously organize educational activities addressing this subject. Just to give an example, on November of 2009, the Centre for Studies in Private International and Comparative Law in Venezuela (*Centro de Estudios de Derecho Internacional Privado y Comparado de Venezuela* - CEDE) hosted the III ASADIP (American Association of International Private Law) meeting. Such meeting was dedicated to Business Law in times of change. The agenda of the event included: banking contracts

On the other hand, case-law is scarce. This is due to a series of circumstances:

(1) If the parties to a contract have elected a forum, it is not likely to be Venezuela. This is a consequence of many factors, like the political instability of the country, the corruption in the judicial system, the lack of speediness, etc.

(2) If Venezuela is the elected forum, most likely the parties will choose to solve their disputes through arbitration. As it is widely known, the awards produced in these tribunals are not necessarily published, so the academia is not always aware of its contents.

(3) Another reason for the low number of decisions applying transnational sources is that most judges are not at ease with them. Even though the Venezuelan Private International Law Statute compels them to apply *lex mercatoria*[3], the judges simply look for an escape mechanism to apply a better known law (at least to them).

(4) Venezuela's international commercial activity has diminished noticeably on the last years.

However, in some cases the *lex mercatoria* or transnational law has been well used[4].

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and securities; practical issues of international business contracting; the enterprise facing international business and dispute settlement in international business. Transnational law had the leading role through the whole event.

[3] See the content of articles 29, 30 and 31 of the Venezuelan Private International Law Statute:

Article 29. Conventional obligations are governed by the Law agreed to by the parties.

Article 30. Lacking a valid indication, conventional obligations are governed by the Law to which they are most directly linked. The Court shall consider all the objective and subjective elements arising from the contract in order to determine such Law. It shall bear in mind also the General Principles of Business Law accepted by international organizations.

Article 31. In addition to the provisions of the former articles, whenever it should be the result, application shall be made of norms, customs and principles of International Business Law, as well of generally accepted trade uses and practices, with the purpose of reifying the requirements imposed by justice and fairness in the solution of a concrete case.

[4] In this regard we propose to see: Embotelladora Caracas y otras v. Pepsi Cola Panamericana S.A., sentence given on October 9th, 1997, elaborated by the Corte Suprema de Justicia, Politic Administrative Chamber, file N°13.354.

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

On 1996, the National Private International Law Professor's Annual Reunion decided to recommence the initiative of bringing to the Congress a Private International Law Statute. Their project pretty much reproduced a previous initiative elaborated during 1963-65.

Nevertheless, the new 1996 project included some changes. Among these, there was the inclusion of *lex mercatoria* as a source of law, in the already quoted articles 29th, 30th and 31st (see footnote 4). The Statute was discussed and approved by the Congress and came into force on 1999 after a short *vacatio legis*.

It is necessary to stress that a couple of years earlier, in the Organization of American States, the Inter-American convention on the law applicable to international contracts was discussed and approved. The Venezuelan delegation had a tremendous impact in its negotiation, particularly in the *lex mercatoria* field[5].

These two instruments are the key stones to the Venezuelan application of transnational law.

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?

No, it hasn't. In this particular moment these topics are not a priority for the Venezuelan Executive power.

[5] The following OAS Secretariat documents were revised for this point: Estudio sobre los contratos internacionales (Preparado por un especialista en la materia a solicitud de la Secretaría General). Documento identificado como OEA/Ser.K/XXI.4, del 23 de septiembre de 1988; Derecho aplicable y jurisdicción en materia de contratos internacionales. Documento identificado como OEA/Ser.K/XXI.4, de fecha 29 de marzo de 1989; Proyecto de Convención en materia de contratación internacional (presentada por la Delegación de México). Documento identificado como OEA/ser.K/XXI.4, del 8 de junio de 1989; Respuestas de los gobiernos de los estados miembros al cuestionario sobre contratación internacional. Venezuela. Documento identificado como: OEA/Ser.g, del 29 de enero de 1992; Doc. OEA/Ser. K/XXI.5/CIDIP V/14/93, 30/12/1993 and Doc. OEA/Ser. K/KXXI.5/CIDIP V/doc.32/94rev2.

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 judiciary has not done so, but the Professor's Associations maintain a continuous effort to dictate forums, courses, conferences, symposiums, workshops, directed to the judiciary, in order to keep them trained in such matters. Despite these efforts, they rarely attend to these events.

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 my opinion having a specialized judicial institution would have a positive impact on the international commercial case-law. Having specialized, updated judges on this area would be a great improvement for the subject.

Yet, if this institution is to exist, it is important to maintain its judges linked to the rest of the judiciary's reality. Having a separate instance should not mean having compartmentalized judges, elaborating decisions incoherent and not homogeneous with the rest of the legal system.

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?

Yes, it is. Civil and Commercial courts are more inclined to apply transnational law than the rest of the courts. The difference between courts applying Public Law and Private Law, regarding transnational sources of law, is noticeable.

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?

It might be. However, the fact that the parties usually include their proposal of applicable law facilitates the judge's job. The developments in international cooperation also help with this task. Today it is easier to ask for information about transnational sources than in the past.

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)?

The elusion is more noticeable regarding the application of *lex mercatoria* than in the application of foreign national laws. According to what was previously stated, Venezuelan judges do not have much training or knowledge in the area; therefore it is easier to apply the forum law, a national law, or even to assume that the case is domestic rather than international. Striking as it is, this last situation is very common: neither the judge nor the parties realize that the contract in front of them is international.

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

Not at the moment, there are too few cases solved by the judiciary to have an accurate measure.

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