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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

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COMPLEXITY OF TRANSNATIONAL SOURCES
GENERAL REPORT

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COMPLEXITY OF TRANSNATIONAL SOURCES GENERAL REPORT

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1 The subject. - 2 By way of exclusion. A preliminary remark. - 3 A tapestry woven with many normative threads. - 4 Transnational, international or extra-national sources? - 5 A closer look at the questions. - 6 Suggestions as to "what can be done about the problem?"

1. The subject

The title assigned to the IC session on Comparative Law and Unification of laws *(Droit comparé et unification du droit)* at first seemed rather enigmatic, a very broad topic, with great potential for development in a variety of directions, and suggesting many different lines of research. I had been informed that the reports to be collected by me concerned the *"Complexity of Transnational Sources/Complexité des sources transnationales"*: without an explanatory subtitle this could mean several different things and I had to make up my mind about the approach to take in such a broad field of investigation. I needed to define a line to propose to our reporters: the problem crosses borders between the competences of different disciplines such as Conflict of Laws/Private International Law (including procedural issues such as enforcement of foreign judgments), International Law (treaty law), European Union law, Uniformation of the Law and Private Law, to name but a few.

Indeed, the Austrian Reporter points out that conflict of laws aspects are sometimes underestimated since "… Private International Law is still regarded by practice and in legal education as a special branch, which only touches upon some cases. Further, Private International Law is conceived as a difficult branch of law, which is true, and where there is a high degree of uncertainty as to what interests – party autonomy versus fundamental rights – ought to prevail, which is understandable"[1]. One factor contributing to the complexity is the increasing existence of mandatory rules: the

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[1] B. VERSCHRAEGEN, *Austrian report.*

mechanisms of conflict of laws are complicated by the interplay between both locally and internationally mandatory rules[2]. Some observers also emphasize the increasing number of provisions on conflict of laws that are incorporated in instruments concerning the substantive aspects of an issue: control over changes in conflict of laws questions is lost in a multitude of specific documents that omit to harmonize their solutions with treaties of wider scope, such as the Rome Convention of 1980 on the law applicable to contractual obligations (now European regulation Rome I)[3].

The research project was organized on the basis of national affiliation: a solution that may seem paradoxical since we were invited to reflect on *"transnational" data,* as was pointed out by our Canadian reporters who argued that there was a contradiction in looking at sources acting across borders from a perspective within

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[2] B. VERSCHRAEGEN and Jan SMITS, *Netherlands' report* "courts often have to find their way in a complex web of rules on conflict of laws, international conventions on the law applicable to transnational relationships, domestic rules of a mandatory character limiting or affecting the applicability of international provisions, and a large variety of private codes of conduct …" . Indeed mandatory rules may prevent the application of uniform acts, if they are deemed in conflict with policies that are qualified as "mandatory": see, for example, KAZUAKI SONO, *The Rise of Anational Contract in the Age of Globalization*, 75 *Tulane L. Rev.*, 2001, 1185 ff.

[3] E.-M. KIENINGER, K. LINHART, *German Report* (reference to O. REMIEN, *Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht*, *RabelsZ* 1998, p. 627, at p. 633: the author argues the need to "coordinate single conflict of laws provisions within substantive legal instruments with pre-existing sources of conflict of laws, such as e.g. getting provisions in EU directives in line with the – at the time - Rome Convention of 1980); E.M. KIENINGER, *Der grenzüberschreitende Verbrauchvertrag zwischen Richtilinienkollisionsrecht und Rome I-Verordnung, in Die richtige Ordnung, Festschrift für Jan Kropholler*, 2008, p. 499. The German reporters also point to the specific experience of R. Wagner who acted as Head of the Department of Private International Law at the German Justice Ministry (*Die Haager Konferenz für Internationales Privatrecht zehn Jahre nach der Vergemeinschaftung der Gesetzgebungskomptenz in der justiziellen Zusammenarbeit in Zivilsachen*, *RabelsZ,* 73, 2009, p. 215 ff.): the increase in competences of the EU has affected the individual States' capacity to participate (in some fields) in negotiations taking place within the Hague Conference.

national boundaries[4]. However the traditional academic approach is based on contributions by observers residing in different States, and that is the starting point [5], although we also had the opportunity to read responses by some institutional actors such as UNCITRAL [6] and OHADA [7], working at international or supranational level[8].

We are thus in a position to benefit also from the views of lawyers involved in projects aiming to limit diversity, and to increase coordination and simplification of the law at international level.

I should add that investigating the response of local judges and practitioners to these issues seemed to make sense since "judges still swear to observe their constitution and State's legislation", as I was once told by a French colleague who was presenting the response of legal practitioners regarding

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[4] H. DEDEK, A. CARBONE, "Transnational law, however, is, even and particularly in a private law context, by its definition "beyond", some might even say "after" or "without", the state. Does it make sense to approach through a national lens a discourse whose subject is, by its very nature, meta-jurisdictional?": see *Canadian report*.

[5] The reports submitted were presented by: 14 AFRICAN Member States of the OHADA, summarized by S. MANCUSO (University of Macau; Centre for African Laws and Society, Xiangtan University); AUSTRIA (Bea VERSCHRAEGEN, Law Faculty of the University of Vienna); CANADA (H. DEDEK, A. CARBONE, Faculty of Law, McGill University, Montreal); GERMANY (E. KIENINGER and K. LINHART, Würzburg); HUNGARY (G. SUTO BURGER); JAPAN (TETSUO MORISHITA, Sophia University, Tokyo); NETHERLANDS (J. M. SMITS, Tilburg University); PORTUGAL (L. de LIMA PINHEIRO, University of Lisbon); SERBIA (J. PEROVIC, University of Belgrade, Faculty of Economics); SPAIN (G. GARCÍA CANTERO, Zaragoza University); SWITZERLAND (A. FÖTSCHL, Swiss Institute of Comparative Law, Lausanne); USA (W. EWALD, University of Pennsylvania Law School); VENEZUELA (Z. MARIN) .

[6] UNCITRAL, report by Luca CASTELLANI.

[7] OHADA, report by Salvatore MANCUSO.

[8] "Supranational" may be appropriately used to indicate aggregations of States where the power to legislate in some matters is delegated to specific institutions and a central court is empowered to interpret the normative instruments adopted within this framework and to deliver judgments that are enforceable in the member States (as is the case with the EU).

"transnational" issues. Taking account of the views of legal practitioners touches, then, on a sensitive point.

Our Canadian reporters in the end also agreed to an investigation of the subject based on national reports: after all "globalization cannot exist without the state"[9].

2. By way of exclusion. A preliminary remark

I started my investigation by first excluding one aspect: I thought it would not be very productive or useful to cover once more an area which we had already investigated in relation to our Utrecht congress (*Contract with no governing law in private international and non-State law*): in 2006 we had been invited to reflect on the effectiveness of "non-State law", that is, on sources of law that are not supported by the coercive power of the State.

A number of reporters on that occasion explained what weight would be given in their legal systems to *International Restatements* of Legal Principles in the field of contract law such as UNIDROIT or PECL compilations, collections of rules drawn from cross-border commercial practice, to INCOTERMS, model contracts, usages of international trade such as those set out in the *Uniform Customs and Practice for Documentary Credits* (UCP), and to guidelines drawn up by multinational corporations.

In Utrecht we had already noted the fact that the classical range of normative tools traditionally managed by lawyers was not limited to legislation or case-law enforced by the State, but that many more means were available to govern transactions thanks to the work of bodies such as the International Chamber of Commerce, UNCITRAL, UNIDROIT, and FIDIC: their influence being more obvious where arbitration proceedings are involved rather than the state courts' jurisdiction since state judges exhibit a higher level of caution, of reserve, towards normative products not implemented by the State.

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[9] Quotation of Harry W. ARTHURS (Toronto, Ontario)(*Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields* (1997) 12 *Can. J. L. & Soc.* 219 at 221): with Roderick A. MACDONALD (teaching in Montreal, Quebec) mentioned as one of the Canadian "pioneers of legal pluralism theory".

In the meantime the EU has also implemented a scheme to explore the possibility of codifying the European law of contract: if not immediately, at least in the future through the controversial "tool box" of the *Common frame of reference* (DCFR). This fact adds a further element to the plan to move, in some areas, from the State level of legislation to a higher level, be it regional, international or transnational[10]. We are not now in a position to foresee what will be the final result of this project because it is meeting with some resistance and concerns expressed by even the more open-minded observers[11].

Obviously we do not imply that the field of *lex mercatoria* is outdated: it continues to be relevant and important.

The reporter from Japan mentioned that in his country a study in "soft law" was recently carried out on "norms that, although not part of the formal law provided by the state and whose enforceability is not guaranteed in the courts, are perceived by both state and private parties as having some binding force and are, in fact, obeyed"[12] :the study resulted in a 5-volume publication**,** including one book specifically dedicated to "Soft Law on International Issues".

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[10] Jan SMITS, reporting on the subject from the Netherlands, comments on this point by referring to the fact that "The Dutch government supports the use of this DCFR as a non-binding instrument to make existing directives more consistent, but does not regard it as a step towards a European Civil Code": we learn this in a letter sent by "the Dutch Minister of Justice […] after Parliament raised questions about an article in a Dutch newspaper", claiming that the European Commission was trying to introduce a European Civil Code «through the backdoor».

[11] Jan SMITS acutely observes that even a codification of European contract law would not resolve the problem of fragmentation in Europe since "even if the European competence to introduce a binding European Civil Code would exist, this would not end present fragmentation. One only needs to think of closely connected areas of procedural and administrative law (that will remain national) and competition law (that is largely European), leaving aside that a European Civil Code in whatever form will probably not contain rules on immovable property, family law and the law of succession".

[12] See "Summary of the Project" by Nobuhiro Nakayama available at http://www.j.u-tokyo.ac.jp/coelaw/: Japan report by TETSUO MORISHITA, footnote 10.

Thus, although all the concerns expressed in a well-known article by Lord Mustill in the late 1980s[13] may not have been resolved, in fact the field of lex *mercatoria* and *soft law* continues to grow.

Rather than reconsidering and updating the question of how the State's rules can be integrated by paradigms created outside the classical *fora* of legislative production, it seemed more productive to turn the focus of our investigation to the difficulties that lawyers belonging to a specific national legal system meet when they have to deal with such multilayered normative material. This pragmatic level of observation, rather than the classical theoretical approach, shall be my starting point.

It is no easy task to find a path through local conflict of law rules, the foreign law identified by those rules, and the special instruments overriding that legislation because of some international undertaking stipulated by the State of *renvoi*, especially if there is a need to interpret the international instrument in the light of the specific case-law of the State involved. This case-law is usually accessible only in the local language, not the same as the language of the judge involved with the original case that started the whole machinery off[14].

If we turn our minds back a number of years, for instance, to consider the UNIDROIT Congress of Rome in 1987 on *International Uniform Law in Practice* (Oceana, 1988) it is obvious that progress has certainly been made. Today any legal practitioner, even a solo practitioner working in a small State mostly with domestic litigation, is aware that the relationship between law and State is looser than in the past. It is clear to all that in e-commerce any electronic transaction that may occur from any ordinary personal computer is rather loosely bound by the national law;

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[13] Lord Justice Michael MUSTILL*, The New Law Mercatoria: The First Twenty-five Years*, in *Arb.Int'l*, 1988, at 86.

[14] Martin Wolff once famously said "a conscientious judge will be glad if the rules of Private International Law allow him to apply the law of his own country. Even if he knows the foreign language he is never sure that his interpretation of, say, a foreign code is correct. He is acting as a judge, but he knows no more and often less about the foreign law than first-year students in the country in question": *Private International Law*, Oxford, 1950, pp. 17-18.

other sources of law become relevant. Even the more conservative, traditional lawyers must accept the obvious fact that national legislations are permeable to other sources of law. Not only because of our growing inclination to globe-trotting (attending congresses in Utrecht, then in Washington, then who knows where; producing and buying products at the four corners of the world) [15], but also because many relationships occur in an "unsubstantial" way, in a meta-physical area, not really attached to any place in particular. The internet explosion has certainly encouraged transactions detached from any local law[16]. A certain porosity in national systems of law is undeniable.

It may still be true that "the legal profession, typical of most professions, is most comfortable with and inclines towards the familiar (and) faced with the option of drafting clients' contractual obligations with reference to existing and long-established domestic law, the practitioner will choose to shun the application of a novel uniform law if at all possible"[17].

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[15] A Canadian judge of the Supreme Court of Canada (Justice La Forest), speaking about enforcement of foreign judgments is quoted saying: "Modern means of travel and communications have made many … 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal" (in *Morguard Investments Ltd.* v. *De Savoye* [1990] 3 S.C.R. 1077 (at pp.1095-96), 76 D.L.R. (4th) 256, quoted by DEDEK and CARBONE). This opening towards complexity may seem just a little overstated – Lord Denning would say the "heroics" of this statement might seem disproportionate - considering "that the judgment did not deal with an international, but with an inter-provincial conflict, the enforcement of an Alberta judgment in British Columbia". But we also learn that "La Forest's call for the acceptance of a "world community" and a more cosmopolitan understanding of the law [was] later repeated in different contexts".

[16] A. FISCHER-LESCANO, G. TEUBNER, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, *Michigan Journal of International Law* 25 (2004), 999 ff. 8 available on line at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=873908.

[17] CARTER J.P., *The Experience of the Legal Profession*, in UNIDROIT, *International Uniform Law in Practice*, proceedings of the 3rd Congress on Private Law held by

There is evidence of this attitude in the national reports. The Canadian report indicates that "… the treatment and application of the CISG in Canadian courts has been lamentable, the courts always deferring back to a homeward trend. It has either been the case that the CISG has been overlooked altogether, or that, when it has been considered, it has been interpreted in light of common law principles, thus undermining the international character and goal of uniformity the Convention seeks to achieve" [18] ("a homeward trend" is what John Honnold diagnosed some years ago [19]). The Serbian report [20], the report from Hungary [21], the

UNIDROIT, Rome (September 1987), Oceana, Dobbs Ferry, NY, 1988, p. 411 ff. (at 415).

[18] Canadian Report: "In the case of the CISG, judges have not only been eschewing complexity; they might not even be aware of it. If any positive changes in Canadian CISG jurisprudence are to take place, there must be an increase in awareness of the Convention among both counsel and judges".

[19] HONNOLD*, Documentary History of the Uniform law for the International Sale of Goods*, 1989; ID., *The Sales Convention in Action – Uniform International Words: Uniform Application?,* 8 *J.L. & Com.* 207 (1988) (at the Symposium organized by the University of Pittsburgh School of Law for entry into force of the CISG in 1988).

[20] Serbian Report (J. PEROVIC) "Although the application of the CISG as a ratified international convention has the priority over national laws, the courts of Serbia are not very familiar with its application even in simple cases of direct application specified in article 1.1.a CISG. Generally speaking, the first instance courts in most cases do not apply the CISG at all; instead, the judges determine the applicable law by virtue of the rules of private international law which usually means the application of Serbian substantive law under which they consider the Serbian Code on Obligations and not the CISG, although all the conditions for the application of the CISG are met. On the other hand, in the appeal proceedings the High Commercial Court expressed different views regarding the application of the CISG. … Contrary to the regular court practice, the CISG is well known and widely implemented in the Serbian arbitration practice".

[21] G. SUTO BURGER (p. 7-8): according to "one of the most well known handbooks «in the Hungarian judicial practice unfortunately, there are cases where the court forgot about the obvious application duty of the CISG (Legf. B. Pf. III. 20.998/1995.) In a dispute over a sale and purchase agreement between a Hungarian and an Austrian party the court applied the rules of the Austrian ABGB at a time when the CISG has already entered into force in both Hungary (January 1st, 1988) and Austria (January 1st, 1989)» … There are some problems with the wording of the cases. The Metropolitan Court of Appeals

report from Portugal[22], and from Venezuela [23] all agree that the binding nature of the Vienna convention is still underestimated in court practice. In choosing between the option of treading traditional paths, well-known to the local lawyer, and engaging in applying international instruments (some even 20 years old), the appeal of the well-worn route is still strong[24]. In Germany, E. Jayme, in an article of 1975, showed examples of cases in which not only local courts but also higher Regional Courts (*Oberlandesgerichte* – OLG) and the German Supreme Court (BGH)

issued a decision stating "*Because both Germany and Hungary have ratified the CISG, based on the conflict of laws rules, German law is applicable"*. After this misleading explanation, the court applied the CISG in the given dispute."

[22] Portugal report, Luís de LIMA PINHEIRO: «when interpreting and filling gaps of international sources the Portuguese courts resort normally to domestic law instead of following the criteria applicable to the interpretation and filling of gaps of international conventions. Instead of aiming to 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".

[23] Venezuelan Report (Zhandra MARIN, answer to question 8) "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".

[24] In Japan a specific difficulty is mentioned by TETSUO MORISHITA: "under Japanese Court Law, all proceedings in Japanese courts shall be conducted in Japanese. All documents, including foreign laws, cases and expert opinions, which may be necessary to identify foreign laws, as well as transactional documents such as contracts, need to be translated into Japanese before they are submitted to Japanese courts"; and, in relation to "Japan's accession to CISG", it should be remembered that: "Many foreign cases on CISG are available in English. Most Japanese academics consider that judges, not parties, have to find laws and to research cases by themselves. If so, when Japanese judges apply CISG, judges need good English ability to research foreign cases. Because it is difficult to require all judges to have such English ability, it could be an idea to set up [a] special department of courts in the future" (answer to question 5).

"have decided … without applying a convention that would have been applicable" [25].

But there are now fields of law where the transnational rules have overtaken any national legislation, areas where the domestic legislator is running after innovation rather than breaking ground. In these fields even the most traditional lawyer is drawn to see the relevance of extra-national sources.

3. A tapestry woven with many normative threads

The normative resources that are to be managed, in many cases, and in various situations (also when advising clients), can be visualised as a complex tapestry woven with many threads intertwined in an intricate pattern[26].

Several levels of specialization are overlaid, one on top of the other: private international law leads us to a foreign law, but that may be displaced by a convention ruling in a uniform way on the matter; then, in turn, the foreign State may have ratified the international instrument with some reservation and ruled on some exception; the local case-law may differ from that of other States; administrative restrictions may limit the effect of the would-be uniform legislation; and trade usages may interfere with its application. The roads to be followed to reach the solution have

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[25] E.-M. KIENINGER, K. LINHART, *German Report* (quoting JAYME, *Staatsverträge zum Internationalen Privatrecht*, *Berichte der Deutschen Gesellschaft für Völkerrecht* (*BerGesVölkR*) 16, 1975, p. 12-13).

[26] J. SMITS, Netherlands' *Report*: "courts often have to find their way in a complex web of rules on conflict of laws, international conventions on the law applicable to transnational relationships, domestic rules of a mandatory character limiting or affecting the applicability of international provisions, and a large variety of private codes of conduct, guidelines, restatements of trade usages and practices, as well as collections of principles by non-governmental organisations". According to the German Report (by KIENINGER, LINHART): "In an article on European Private and Commercial Law *Remien* has pointed out that this particular area of law is characterized by a complex multi-level structure (*Mehrstufigkeit*)"(O. REMIEN, *Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht*, *RabelsZ* 1998, p. 627 ff., at pp. 627-647). A title suggesting the complexity of the matter introduces a work by M. REIMANN, *Conflict of Laws in Western Europe, A Guide through the Jungle*, Irvington (1995).

many sharp turns, and bridges and tunnels and overpasses and subways and crossways.

However, this does not necessarily mean that we should complain about complexity. Simplicity is not obviously a value in itself; the illusion that the law could simply be reduced to what the national Parliament had established (as some 19th century lawyers believed) lasted only for a brief moment in history: most western legal systems have known the complexity of interaction between jus civile and *jus praetorium/jus honorarium*, between *canon law* and civil law, between *mercantile* and *maritime* laws and the ordinary practice of state courts, or between jus commune and *local statutes (placita principorum).*

The notion that, even within a single State, the law has more than one matrix and that several jurisdictions may co-exist with distinct repositories of rules to be applied is not in any way new. The reduction of the law to "one main source", the positivistic approach of the first half of the 19th century, had a very short life after Napoleon and it may have been an illusion in itself to begin with, as many scholars have found, identifying customs that were consistently followed in certain sections of society, despite all the talk of the "paramount" character of Parliament-made legislation.

The effort to justify the effectiveness of other, non-State sources, by allowing their silent incorporation into contracts, by tacit inclusion in some State pieces of legislation and by other covert devices, was early recognized as a thin veil, too thin to mask the underlying reality.

Comparativists predicted quite some time ago that the compact image of one State-coherent legal system would break down: observing legal phenomena across national borders inevitably led the researcher to see that the various legal formants were often in disagreement within one State, and that similarities occurred more often between similar formants in different States than between the various components in the same State[27]: the

[27] For instance, students in Rodolfo Sacco's classes were exposed to the theory of *legal formants* in the 1970s; in 1979 the theory of legal formants was fully propounded, and in 1980 it was published in a systematic form in the Italian *Introduzione al diritto comparato,* later translated into English for the *American*

"dogma" of the "unitary" character of the law in one State was early dissolved in the eyes of comparative law scholars.

In a number of countries – we are reminded by our Canadian reporters - legal pluralism was associated with anthropological studies on colonialism, with the situation of imported Western "law" clashing with indigenous systems of normativity: law, custom, and religion[28]. Legal pluralism, however, has "long moved beyond … this field of application and has developed into a discourse that inquires into the general phenomenon of the multiplicity of normative orders in societies. In an age of global migration, legal pluralism has been connected with concepts of multiculturalism and diversity" [29] : socio-legal theories have investigated the subject for some time[30].

In international law, since 2006, many authors have commented on the report by the study group of the International

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Journal of Comparative Law as *Legal Formants: A Dynamic Approach to Comparative Law*, in 39 *American Journal of Comparative Law* (1991), (1), 1-34. Previously Sacco had introduced the subject in articles published in French: see R. SACCO, *Définitions savantes et droit appliqué dans les systèmes romanistes*, in *Rev. int. dr. comp.*, 1965, vol. 47, p. 827 ff.), and *Droit commun de l' Europe et composantes du droit*, in CAPPELLETTI (ed.), *Nouvelles perspectives d'un droit commun de l' Europe*, Sijthoff-Leyden, 1978.

[28] Paul Schiff BERMAN, "*Global Legal Pluralism*" (2006) 80 *S. Cal. L. Rev.* 1155 (at 1158); in the report by OHADA (by S. Mancuso) we read "that stratigraphical analysis of African law applied to the present situation of development of African law [shows] a new layer … in African law. It is the law made by the Westerners (mostly Europeans) for the Africans. … The OHADA law represents the most advanced example of this new layer of African law".

[29] DEDEK and CARBONE, *Canadian Report:* "Canada has experienced the clash between Western law and the laws of the Canadian aboriginal peoples. With a long history of liberal immigration policies, modern Canadian society is one of the most diverse in the world, which brings up numerous questions of—from the perspective of state law—the necessary and permissible degree of "accommodation": studies on legal pluralism as the "paradigm of legal science" date since the late 1970s": references are to Roderick A. MACDONALD, *Pour la reconnaissance d'une normativité juridique implicite et «inférentielle»* (1986) 18 *Sociologie et Sociétés* 47; Roderick A. MACDONALD, Martha-Marie KLEINHANS, *What is Critical Legal Pluralism?* (1997) 12 *Can. J.L & Soc.* 25.

[30] In Canada we are referred to Jean-Guy Belley, *Conflit Social et Pluralisme Juridique en Sociologie du Droit* (LL.D. Thesis, Université de droit, d'économie et de sciences sociales de Paris (Paris 2), 1977).

Law Commission concerning the *Fragmentation of International Law* [31]. But fragmentation is not at all new in this field[32]. As early as 1975, Erik Jayme had pointed out that some agreements among States are drawn up and ratified without prior consideration to the work carried out by other organisations or conferences in the same area[33].

Some theorists – especially in the field of social studies – have emphasized this aspect of the law, i.e. the evidence that the State does not have full control of production of norms. *Globalization* is the password, to the point that it can be considered as a distinguishing feature of our times: positive evaluation is made of *legal pluralism* and its *enriching effect* on the State's system[34]. A whole wave of academic production has explored this view, which is diametrically opposed to the older illusion of the unity of the legal system.

We read in the Canadian report that we may "use the insights of legal pluralism to help us understand the complex and ubiquitous phenomenon we call globalization as a proliferation of contending legal orders"[35].

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[31] *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, report by the Study Group of the International Law Commission finalised by Martti KOSKENNIEMI, UN A/CN.4/L.682 (13 April 2006).

[32] Jan SMITS, Netherlands' report, with reference to Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, *Leiden Journal of International Law* 22 (2009), 1.

[33] E.-M. KIENINGER, K. LINHART, *German Report* quoting E. JAYME, *Staatsverträge zum Internationalen Privatrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, BerGes VoelkR* 16 (1975), p. 7.

[34] G. TEUBNER has written extensively on the effects of globalization: several of his articles have gained large popularity (*Breaking Frames: the Global Interplay of Legal and Social Systems*, in 45 *Am. J. comp. L.*, 1997, p. 149 ff.; Andreas FISCHER-LESCANO & Gunther TEUBNER, "*Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*" 25 *Michigan J. Int. L.* (2004) 999 at 1004).

[35] Harry W. ARTHURS, "*Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*" (1997) 12 *Can. J. L. & Soc.* 219 at 221. Robert Wai (Toronto) sees "global legal pluralism" as offering "an excellent conceptual framework for understanding normative contestation among the different state and non-state normative orders of contemporary global society"(*The Interlegality*

Yet, some feeling of frustration, of disappointment, of a missed goal, or a sense of anxiety may filter through in some legal spheres: if judicial decisions must reach the same results under similar circumstances ("like cases are to be decided alike"), the multiplicity of sources of law may render this result less certain, and the combining of many prescriptions deriving from a variety of normative bodies may bring greater risk. The chances of getting lost are greater, and predictability becomes more unlikely.

The fact that simplification of the applicable rules was once envisaged (one compact *corpus* of coherent written rules, emanating from one legitimate authority) makes the prospect of coping with fragmented pieces of rules, expressed through various different specific languages, a great deal less appealing, at least at the level of practice[36].

We are not seeing ecclesiastics or aristocrats being governed by different rules from the bourgeois, as under ancient constitutions, but we have contracts governed by rules that differ according to which parties are involved (business or consumers), according to the choice of applicable law and *depeçage*, and according to the subject matters involved: a fragmented picture supersedes the idea of a general contract law.

A number of institutions have strived for some kind of uniformity, either in the field of conflict of laws (such as the Hague Conference of Private International Law) or in the area of substantive provisions of civil and commercial law (through the offices of various U.N. agencies such as UNCITRAL, or by non-Governmental bodies such as UNIDROIT). But their work has not been rewarded by real simplification: in reality the many efforts

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of Transnational Private Law, (2008) 71 *Law & Contemp. Probs.* 107 at 110). Peer Zumbansen (Toronto) has called the phenomenon "a radical challenge to all theorizing about law as it reminds us of very fragility and unattainedness of law" (Peer ZUMBANSEN, *Transnational Law*, in Jan SMITS ed., *Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar, 2006, 738 ff., at 739).

[36] Jan SMITS, (Netherlands' report): apart from systematic purity, "consistency serves the important goal of establishing equality before the law (and thereby legal certainty): only if rules and principles are applied in a uniform way, similar cases are treated alike".

by numerous players have produced the paradox of an increase in number of instruments.

This discovery is not completely unexpected: in 1988 J. Putzeys (a colleague from Belgium specialized in transport law) had already reported in Rome on the "Droit uniforme désuniformisé". In relation to the field of transport law, he listed an increasing number of instruments of uniformation since 1946. In his words : "à partir de 1946 c'est le délire sans avoir la prétention d'être exhaustif nous avons relevé 85 conventions dans le seul domaine des transports, sans parler évidemment des innombrables traités bilatéraux ou régionaux dans les matières les plus diverses, mais toujours liés aux transports (fiscaux, sociaux, administratifs)»[37]. Labelling the Warsaw system as a "patch-work législatif" was in itself illustrative.

The growth in number of international instruments has continued, even in fields such as Human Rights where one might expect a certain stability to have been reached[38]. The creation of courts charged with guaranteeing, at a supranational level, respect for international obligations makes cases of disagreement between them obnoxious .

A number of reporters mentioned (with some dismay, perhaps even a feeling of being overcome) the number of EU directives enacted in the last 20 years: the overwhelming impression is not expressed only by lawyers belonging to States that have recently joined the Union (and who may be shocked by the effort required to comply with such a huge *acquis communautaire*)[39], but also by older members of the club.

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[37] J. PUTZEYS, *Le droit uniforme désuniformisé*, in UNIDROIT, *International Uniform Law in Practice*, proceedings of the 3rd Congress on Private Law held by UNIDROIT, Rome (september 1987), Oceana, Dobbs Ferry, NY, 1988, p. 440 (at 442).

[38] OHADA report, S. MANCUSO, mentions: " the African Chart for the protection of human rights, directly derived from the 1948 Universal Declaration of Human Rights".

[39] Report by GARCIA CANTERO, Spain ("l'existence d'environ 20.000 directives … représente l'argument décisif à propos de l'interêt préminent en Espagne pour le droit de l'Union Européenne »); Jan SMITS (Netherlands), mentions "directives implemented in the 27 member States and sets of soft law

What was the reaction in everyday experience?

In some judicial settings, a certain contradiction can be detected between lip-service acknowledgments to the *enrichment* deriving from legal pluralism, and actual judicial practice that sometimes ignores complexity simply by oversight, by leaving aside solutions deriving from the international source rules that ought be applied - according to the relationship between sources of law.

The reporters from Canada (Helge Dedek and Alexandra Carbone) were explicit in commenting on this duplicity: on several occasions, the courts in the different provinces of Canada have declared their openness towards legal pluralism, but in everyday practice their actual record as to the application of foreign law, or even international law written in binding treaties, is not wholly commendable[40].

The reporters distinguish between "cultural attitude" (both of academic studies and courts) and technical application. While culturally Canadians are fairly open to other experiences, when they have to deal pragmatically with sources belonging to foreign States

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prepared with the support of the European Commission (while regulations are enforced in the field of private international law on insolvency, judicial and extra-judicial documents, evidence, enforcement of foreign decisions, on the law applicable to non contractual and contractual obligations)". Also the Serbian reporter refers to the daunting duty of gradually transposing EU directives in view of future membership of the EU (Jelena PEROVIC report); in Hungary (G. SUTO BURGER): "the government has set out the training of judges for community law. The National Judicial Council has paid also special attention to trainings of community laws especially in respect of administrative leaders in the last years, with special attention to this decision and the new, important tasks the judges were to receive with the EU accession".

[40] Looking at judicial practice in Canada there seems to be a divergence between general declarations and actual application of the ideas professed: while the Canadian judiciary exhibits an open mind towards legal pluralism and the interaction of several sources of law, it is also possible to detect cases – at the level of appeal courts - where the CISG should have been applied as governing law, and neither the parties nor the judge seem to have realized that such was the case, so that the decision is based only on Canadian law even if the sale was actually international (and, of course, Canada has ratified the CISG): a case of contradiction between good intentions and poor performance.

or with international conventions (and less formal normative instruments) some obstacles prevent a satisfying performance. Helge Dedek and Alexandra Carbone mention a certain difficulty even in identifying the treaties that have been actually incorporated into Canadian law (because of the dualist approach Canada has adopted towards international texts), and they mention some disregard of foreign sources both by litigants and judges.

It should be clear that the issue of a discrepancy between good intentions and modest effects is considered also by other reporters: but the Canadian reporters seem to have expressed the point in the most striking and effective manner. The reporter from Hungary (Suto Burger) was also fairly outspoken about the under-representation of the Vienna Convention in Hungarian case-law on the sale of goods [41]. Similar critical remarks were made by the Serbian reporter (Jelena Perovic). The USA report states that trial courts have little experience in dealing with transnational cases [42].

We are informed that in Austria "lower courts […] do not always recognise the Private International Law-implications of cases or do not always solve the conflict problems properly […] problems caused by fragmentation and proliferation are to a great extent located by many in European Union law and International Public law. This may be due to the fact that there are only few experts on Private International Law in Austria."[43]. The remark is all the more noteworthy as it applies to countries professing high fidelity to international commitments and not pleading – as is the case for some African Countries[44] – unusual difficulty in accessing

[41] Quoting from a textbook on International Sale of goods by SANDOR and VÉKÁS, 2005.

[42] USA Report (EWALD), par. III: "the sheer geographical size of the United States means that, even when cases involving foreign law arise, they constitute only a minor fraction of the business of the judiciary. The state courts deal with some forty million cases annually; and the federal courts with a further 300,000. It follows that the caseload of a typical American judge is overwhelmingly domestic".

[43] " […] Most lawyers dealing with civil law claim that they deal with conflict cases only rarely, with the exception of international family and succession law": Beata VERSCHRAEGEN, *Austrian Report*.

[44] OHADA Report, S. MANCUSO (answer to question 7): " […] most of the reporters refer to the problem – well known in Africa – of the lack of

documents incorporating the international treaties, or in consulting the existing case-law applying these treaties to actual litigation.

It is perhaps worth mentioning that the Vienna Convention of 1980, the CISG, is considered a very successful document: the fact that it is fairly often ignored in the very country where it was signed is all the more significant.

4. Transnational, international or extra-national sources?

The title of our session used the adjective "transnational" which is often associated with customs and practices spontaneously followed across borders by some sections of society, apart from a State's endorsement (the obvious example being mercantile usages enforced in arbitral awards). However, it seemed necessary not to limit our attention only to *lex mercatoria* or to mechanisms of *soft law,* and wiser to also consider the classical tools that govern transnational cases: that is, international treaties and conventions.

Even these more institutional means and more classical instruments are liable to cause uncertainty at the level of application: a look at the practice of trials before ordinary State courts may reveal contradictory solutions being reached because of the wealth of instruments adopted in the field of commercial law or transport law or even in relation to human rights. Judges often omit to use the proper international instrument: either by ignoring (or being unaware of) the international text which is applicable to the case in hand, or by reducing its content to the local law (reading the international provision as if it meant the same thing as the national legislation that the judge is familiar with)[45]. We should not

information about the law in force. In countries like Central African Republic, Comoros or Guinea-Bissau there is a serious difficulty even in the information and knowledge of the national law […]".

[45] Luís de LIMA PINHEIRO (Portugal Report), answer to question 7: « In the Portuguese 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".

forget that often judges do not have immediate access to international texts, but only to the local statutes that incorporate them into the national legislation. They often rely on translations that may often remind the local judge of local concepts, institutions, and lines of reasoning. Some procedures of incorporation which convert the international text into a national piece of legislation hide the origin of the document and encourage a municipal approach to the rules in force[46].

Academic studies have increasingly insisted on the fragmentation of international sources. In addition to the UN and its agencies, regional organizations also promote the drafting of treaties; these treaties reproduce, or sometimes anticipate, agreements which are broader in scope, sometimes *universal conventions* which are meant to be ratified by a large number of participants. An example of this is found in human rights conventions, where there are large numbers of both regional and world instruments.

This point was raised specifically by the reporter for Africa, who described the situation of the OHADA member countries and mentioned the coming into force of the African Chart for the *Protection of Human Rights* (1981, in force since 1986) together with

[46] Several reporters commented on this issue: some uncertainty about treaties in force is observed in Canada because of the dualistic system that requires – as in many other countries, such as Italy for instance – a domestic act of legislation to incorporate the international text in the national legal system. This domestic legislation often omits to mention the origin of the provision so that the reader may be quite unaware of the original international nature of the document, sometimes implementation may "also be inferred by the fact that new legislation is approved which is compliance with the international courses, without explicitly declaring that international obligations are carried out. These circumstances cause uncertainty in the judiciary about the real status of international commitments so that courts sometimes refer to international law as "relevant and persuasive" in order to avoid to state whether they are actually bound by it". The same report makes the point that the Vienna convention on the sale of goods (CISG) was included in Canadian law by a Uniform Act that "merely adopted the CISG as domestic law with the Convention text appended as a Schedule", giving jurists little guidance or assistance in understanding the CISG. Also in Hungary (SUTO BURGER), "Hungarian law is based on a dualistic system; therefore, all international and similar conventions must be published by a Hungarian statute having full binding force".

the UN Universal *Declaration of Human Rights* of 1948 (in competition also with various regional instruments such as the European *Convention on Human Rights* of 1950). Many provisions coincide, but there are also some discrepancies between the two documents. A specific court (the African Court on Human and People's Rights) [47] has been empowered since 2005 to revise decisions by appeal courts from the various States in order to guarantee uniform application.

Increasing numbers of international commitments may strengthen the bonds between a group of States. To duplicate a universal declaration by means of a treaty between a more limited circle of participants may bring the commitment closer to the minds of people, and reinforce the will to respect the obligations undertaken. But it may also cause uncertainty. It may happen that a State signs a regional convention without denouncing a previous more comprehensive treaty; or a State may be a party to several regional coalitions, or different courts may be in charge of guaranteeing respect for conventions which have almost the same aim.

As an example, to focus our attention in preparing the report, reference was made – once more - to a well-known experience in the field of the sale of goods. A long list of international texts have aimed to regulate the field of international commerce in the Nordic countries[48], the socialist countries[49], and western Europe, by means

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[47] Protocol of the *African Chart of Human and People's Rights*, creating the African Court on Human and People's Rights, adopted in 1998, in Ouagadougou (Burkina Faso), in force since 2004.

[48] The Scandinavian Sale of Goods Act has been implemented in Finland, Norway and Sweden in the late 1980s, replacing the previous legislation of the beginning of the century and modelled on the Swedish Sale of Goods Act of 1905 (also reproduced in Denmark, 1906): J. RAMBERG, *The New Swedish Sales Law*, in BONELL, *Saggi, Conferenze e Seminari*, Centro Studi e Ricerche di diritto comparato e straniero, vol. 28, Roma, 1997; J. LOOKOFSKY, *Understanding the CISG in Scandinavia*, Copenhagen , 1996; ID., *Alive and Well in Scandinavia: CISG Part II*, 18 *Journal of Law and Commerce* (1999) 289-299, http://www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html.

[49] The *Bilateral Terms for Delivery of Goods* of 1948 between member States of the CMEA (Council for Mutual Economic Assistance, COMECON) was followed

of the Hague Convention of 1964, then by the United Nations Vienna Convention of 1980 (CISG) which has been approved by almost everyone, with the exception of the United Kingdom (as often happens), Ireland and Portugal.

There were problems, when the Vienna Convention followed the Hague Convention, between States that had signed both instruments, but at different times; for example, between Italy and Germany that exited from the older treaty at different dates, to accede to the new one. The Nordic countries joined the Vienna Convention, making some reservations in order to preserve the previous agreement between them: but their uniformity was affected at first by the fact that Denmark did not adopt the new version of the Scandinavian sale of goods and later by the fact that some of the Northern States have become part of the EU and others have not (as in the case of Norway). As a consequence, the 99/44 EC directive on certain guarantees in the sale of goods to consumers is applicable to some transactions between Nordic buyers and sellers, but not to all of them.

Although it is tempting to consider this "patchwork" of rules as a temporary phenomenon, it is nevertheless true that not all conventions can move from the level of regional agreement to become documents of universal application. Ernst Rabel started his effort to unify the law of sale in the 1930s and we are still involved in the struggle to combine several international commitments in the same area. The Vienna convention has been extremely successful (at least in terms of the number of States where it is in force), but it still lacks the UK's ratification, and is subject to reservation by other States. This process lasted from the 1950s (at least) to 1980 and has still not cleared the field of uncertainty.

The US reporter[50] very appropriately specified that, from his point of view, that of a federal State, we should distinguish between *transnational* and *transborder* relations. In the USA lawyers

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by the *Multilateral Terms for Delivery of Goods* of 1958 and then further replaced by a new version in 1968 (STALEV Z., The *Uniform CMEA Law and its Uniform Application*, in UNIDROIT, *International Uniform Law in Practice*, *cit.*, Oceana, 1988, p. 231 ff.).

[50] EWALD's report (USA).

are well trained to deal with the combination of sources belonging to different States of the federation, and to cope with the interaction of federal and State laws. However dealing with international instruments or foreign substantive laws is still an exercise which can cause difficulty. The records concerning the application of CISG in US courts are not very satisfactory: the low numbers of cases decided lead the observers to suspect that in many cases the parties opt out of the convention and in some cases they may ignore the binding force of the convention. Greater difficulty derives from the fact that means to cope with diversity at national level are not quite as effective across different cultures: no Restatements, no UCC, no national law schools, and no common legal background are available beyond national borders.

The same distinction made by the US reporter can probably be shared by others who practice law in federal jurisdictions. The reporter from Japan quite reasonably points out the fact that Japan does not belong to any regional circuit: and this circumstance at least simplifies the normative background [51].

5. A closer look at the questions

The questions I proposed to our reporters were meant to clarify two main points: "How bad is the problem?"; and then "What can be done about it?".

First of all, in an attempt to understand how the problem is perceived, we considered (question 1) whether concern about fragmentation of international sources (such as regional v. universal conventions, codes of conduct and trade usages) is expressed in the various countries, and if so, by whom.

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[51] TETSUO MORISHITA (Japan's report): "Comparing to European countries, the fragmentation of law is not so material and has not caused serious problems in Japan. … First, Japan doesn't belong to a regional framework such as [the] European Union. There is no international body which creates rules that Japanese government has to automatically accept its binding force. The lack of such regional framework makes the layer of norms which may be applied in Japanese courts relatively simple.".

a) Academic literature

Concern about difficulty with combination of texts, stratification of documents having similar content, and the interaction of courts created to guarantee the implementation and interpretation of international treaties, has been widely addressed in academic studies. Therefore the first question aimed to check whether other components of the legal community shared this concern. Overall, the answers seem to incline towards the negative.

Apart from replies by institutional actors such as UNCITRAL [52] and OHADA [53] where the problem is well understood and efforts of cooperation are ongoing, the views of national reporters show a certain scepticism about the degree of awareness that various actors have of the problem[54].

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[52] Report by L. CASTELLANI, answer to question 1: "UNCITRAL has a mandate to coordinate global and regional activities relating to the unification and harmonization of international trade law (United Nations General Assembly Resolution 2205 (XXI), para. 8, line a) which aims at preventing the fragmentation of international sources in this area […] A report on coordination of work is prepared yearly by the Secretariat and submitted to the Commission. Moreover, activities of promotion of UNCITRAL texts and of dissemination of related information may impact on the fragmentation of sources of international trade law".

[53] Report for OHADA (S. MANCUSO): "As it is well known Africa is the continent with the highest number of regional organizations. … There is a general concern in the OHADA member countries about the issue of fragmentation of international sources, even if some of them (Chad, Gabon, Guinea Bissau and Senegal) seem not having directly experimented the problem in their daily practice. … A particular case of potential conflict between regional organizations and their legal instruments could affect DRC [Democratic Republic of Congo] once its process of membership to OHADA will be completed, since DRC is also member of the Southern African Development Community (SADC) ".

[54] Report for Japan (TETSUO MORISHITA): " […] a lot of academic literature about the fragmentation of international sources, but as far as this Reporter knows, no significant concern has been expressed in executive branches or practitioners..."; Report for Portugal (Luís de LIMA PINHEIRO): " To the knowledge of the reporter the concern with the fragmentation of sources has only been expressed *en passant* by one academic author concerning Private International Law"; Report from Spain (Garcia Cantero): "d'une manière progressive l'interêt suscité chez les cercles les plus spécialisés, se répand surtout dans la doctrine juridique. Peut-être il faudra faire une

The general impression conveyed by many reporters is that practicing lawyers are more concerned with local issues: they might also consider questions raised by contacts with legal sources not belonging to their State, but rather episodically, on a case-by-case basis, in connection with some limited issue[55]. Responsibility for describing the whole network of possible interactions between local and transnational sources is not taken by any other leading actors of the legal world.

For many European reporters the problems connected with enforcement of EU law are in the forefront of worries as far as

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distinction: en effet, l'interêt pour le droit étranger se concentre d'abord autour du droit communautaire et moins sur les autres traités internationaux … " ; Report for Hungary (SUTO BURGER, p. 1): "The topic receives more attention in legal literature but no complete monograph was published in the last decade in Hungary that would focus on this problem"; Venezuela's Report (Zhandra MARIN, p. 1): "the concern is expressed by literature, law schools and private associations mainly. The case-law is scarce. […] if the parties have elected a forum it is not likely to be Venezuela. This is the consequence of many factors […] If Venezuela is the elected forum, it is probable that the parties will choose an arbitration forum instead of the judicial one […] judges are not at ease with transnational law. Even though our private international law statute compels them to apply it, they simply look for an escape and they end up using a better known law "; Austrian Report (Beata VERSCHRAEGEN, p. 2): "In *Austria*, the complexity of various transnational (legal) sources gives cause for concern. The main dilemma probably is that Private International Law is still regarded by practice and in legal education as a special branch, which only touches upon some cases "; African member States of OHADA (MANCUSO): "Almost all the national reporters agree to assign a fundamental role to the doctrine in detecting and evidencing the cases of fragmentation and conflict of the sources of law. […] A remarkably lower role seems to be played by the State administrations, who are only marginally involved in the application of the transnational sources of law".

[55] Jan SMITS, Netherlands' Report, par. 3: "fragmentation is almost always perceived in the Netherlands […] not as a general phenomenon cutting across several areas […], but as something that is only observed in separate areas of the law[…]"; Andreas FÖTSCHL, Switzerland's Report: "the concern is addressed in connection to particular branches of the law or in respect to particular instruments […] Already in 1977 Prof. Paul Volken […] thoroughly examined conflicts of conventions […]" mostly in the area of private international law.

extra-national sources are concerned[56]. The Reporter from the Netherlands points out the dilemma that many governments have had to face: whether to incorporate directives in their civil codes (in order to preserve the unity of approach that is the *raison d'être* of the code) or to implement them as separate legislation, because they have a different conceptual origin, are phrased in a different language and provide distinct remedies[57]: unfortunately both of the two options have disadvantages[58].

b) Support by the Executive

If we look separately at the different formants involved in defining the situation of the various States (in relation to the fragmented complex of sources), it appears that the administration, the executive power, is often reported as being in charge of the task of keeping records of all treaties and international agreements

[56] Report for Spain, GARCIA CANTERO: « l'interêt pour le droit étranger se concentre d'abord autour du droit communautaire et moins sur les autres traités internationaux … » (answer to question 1).

[57] Jan SMITS: "The Dutch legislature, well aware of the risk of fragmentation, made the reasoned choice to incorporate European directives into the Civil Code. Implementation inside the Civil Code allows one to scrutinise the consequences of the directive for national law, including 'where national law, in view of the coherence of the national legal system, is to be adjusted in a more far reaching way than the directive would possibly oblige it to.' Only by giving directives such a greater field of application (so-called 'supererogatory implementation) than strictly necessary, a 'coherent system' can be maintained".

[58] Jan SMITS: "The solution to implement directives outside of the Civil Code would lead to 'patchwork' policies […] Thus, provisions that the European legislature only intended to affect consumer contracts, were sometimes given a more extensive application and now also cover other types of contracts. […] This implementation strategy has the important advantage of allowing the national Civil Code to retain its role as the major codification of private law. However, one can still question whether this strategy really enhances overall consistency. […] It was therefore observed in Dutch doctrine that with the fundamental choice for implementation inside the Civil Code, the Code has become a sandcastle, with European law as an incoming tide. […]Other doubtful consequence of the present approach is that the Civil Code needs permanent updating and that it is often unclear which provisions are of European origin".

and of updating the list of commitments binding the State[59]. But it may seem surprising that the replies suggest that a clear picture of instruments in force is not always readily available.

For a number of reasons connected with the mechanism of incorporation of international engagements, based on the dualistic system adopted, we learn for instance that in Canada "[T]he question of whether or not an international treaty has been implemented into domestic legislation is a source of confusion for Canadian courts, as there are different *degrees* of implementation. […] At one end of the spectrum is explicit implementation […]whereby the international agreement is incorporated directly into the legislation either in the body or as a schedule. Alternatively, implementing legislation may contain a preamble signalling that its purpose is to fulfil a treaty obligation. However, "there is no rule that Parliament or legislature must expressly refer to a treaty in legislation implementing it" and other, less obvious forms of implementation are possible […] It should be further noted that Canada's federal system requires that each province implement a treaty individually when the subject matter falls within the province's jurisdiction. In these cases, the federal government may enter into an international agreement, but cannot guarantee that it will properly be implemented into domestic law by the provinces".

In some countries the support guaranteed to legal practitioners by the executive power is considered as rather poor: such is the situation in Venezuela [60]. For the area of the OHADA states, the reporter[61] indicates differences between the various members of the organisation but he points out that: "The Constitution of Benin reserves the task of monitoring all

[59] Question 3 was :"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?"

[60] Venezuela report (Zhandra MARIN, answering to the question whether the executive keeps updated records of treaties): "In this particular moment I believe this kind of topics are not a priority for the Venezuelan Executive power".

[61] S. MANCUSO, report (emphasis added).

international engagements which were undertaken to the executive power [as in Niger and Congo] but there is no evidence that this work has been really done, and also in Gabon and Togo the executive power does not seem to make use of this power. […] In Burkina Faso, Comoros, Equatorial Guinea and Guinea-Bissau the position of the executive power is not known, and in this last country also because most of the international agreements that are signed by the country are not published in the *Boletim Oficial* (Official Journal); while in the Comoros the lack of any systematic knowledge of the conventions to which the country is part prevents the executive to exercise its prerogatives".

Elsewhere assistance in ascertaining the status of international texts is fairly reliable. In particular, an important change has occurred in Hungary in comparison with the past experience of the socialist period: the new legislation replacing the previous "the Treaties Act [Act No L of 2005] obliges the minister responsible for foreign policy to maintain a register of international treaties and conventions to which Hungary has acceded and keep the original copies thereof. The register of treaties contains all data specified in the Treaties Act. […] It is an important rule of the Treaties Act that the minister responsible for foreign policy is *obliged to publish the register on the homepage of its ministry*"[62].

In Austria, a distinction is made between different situations, as "the Austrian Federal Ministries, especially the Federal Ministry of Justice are very well informed on the international engagements, they observe exemption clauses and reservations", but "[…] whether other authorities keep track of the developments depends on several factors: work load, lacking staff, priorities set, urgencies and frequency of dealing with conflict issues"[63]. In Japan, "the engagement of international treaties are under strict monitoring by the Cabinet and the Diet" [64]: how far these data are accessible by legal practitioners is not specified. The

[62] G. SUTO BURGER (reference to http://www.kulugyminiszterium.hu/szerzodes/main.aspx). Also "Hungarian law is based on a dualistic system; therefore, all international and similar conventions must be published by a Hungarian statute having full binding force" (p. 7) (emphasis added).
[63] Beata VERSCHRAEGEN, report.
[64] TETSUO MORISHITA, report.

same is true in Portugal: "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 [...] Among other information, that assessment comprises exhaustive identification of all legal acts related with the subject of the instrument at stake"[65].

The task of keeping a clear record of all the binding international rules on a certain subject, of updating it with new provisions and deleting old rules, is not always carried out in accordance with a general standard: it depends very much on each State. The most flattering report is perhaps that of the Netherlands: "The Dutch government has made a good start by providing information on all international agreements the Netherlands has concluded on a special website, including the exemptions and reservations it makes. It now refers to 6500 treaties ratified since 1961 and it considerably enhances the accessibility of relevant sources"[66]. The report from Switzerland is also fairly positive in terms of access generally granted to the database containing all the conventions and agreements entered into by the country[67]. The German Report is the most detailed as regards the internal procedures governing the signing and ratifying of international instruments: mechanisms are devised in order to guarantee that a

[65] "Such 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": Portugal Report, by Luís de LIMA PINHEIRO.

[66] J. SMITS, Netherlands Report, par. 3.3: "This *Verdragenbank* is available at http://www.minbuza.nl/nl/Onderwerpen/Verdragen. The database contains links to the full text consolidated versions of the treaties (in so far as published after 1981)".

[67] A. FÖTSCHL, answer 3: the reporter adds that "before ratification […] the relevant departments verify if the convention is in conflict with other international obligations […] But it seems that there exists no legal rule that would command such verification". A complicate mechanism is involved in the field of conflict of laws as Switzerland is bound by the Lugano Convention of 1988 and its provisions are to be combined with the instruments binding the European member states next door, within the UE: a system of "collection and exchange of judgments" and reports between EFTA and UE have become necessary.

reasonable level of compatibility between various commitments is kept [68].

One possibly unexpected fact that deserves some mention is that "in Guinea-Bissau the Faculty of Law of the University of Bissau proposed to create a database of the International Law Treaties and Conventions signed by the country and in force therein, also in order to investigate the existing overlaps among the different international legal instruments to which the country is part, being them at international, regional or sub-regional level"[69].

c) The judiciary

If we look at the situation at the level of judicial power[70], we learn that sometimes meetings and seminars are organized to inform judges on the application of European law[71], especially in

[68] KIENINGER, LINHART, German Report: information is offered concerning the three sets of rules relevant in this area: Common Rules for the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien – GGO*), Guidelines for the Administration of International Treaties *(Richtlinien für die Behandlung völkerrechtlicher Verträge – RvV),* Guidelines for the Drafting of Statutes Ratifying International Treaties and Treaty-related Regulations (*Richtlinien für die Fassung von Vertragsgesetzen und vertragsbezogenen Verordnungen - RiVeVo)*. The whole complex of provisions reflect a significant effort to keep a clear image of international commitments and a uniform approach of the institutions involved in the procedure.

[69] OHADA report, by S. MANCUSO.

[70] Question 4 of the questionnaire was: "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?"

[71] Cp. Austrian report, Beata VERSCHRAEGEN: "The legal training of judges focuses on knowledge of law in various fields of law, with regard to cross border-issues especially on EU-law. Special knowledge on conflict rules is realised on the basis of "learning by doing" when facing specific problems in specific cases and additional focussed learning". In Portugal (de LIMA PINHEIRO): "The training of judges and state's attorneys takes place in the "Centro de Estudos Judiciários" through specialized courses . This includes a course on "European and International Law" that is aimed at familiarizing them with international and European Community instruments.. … Furthermore, the "Centro de Estudos Judiciários" has been organizing several events addressed to acting judges and state's attorneys in order to increase their

countries that have recently acceded to the EU[72] : but no reporter mentioned any event especially dedicated to the problem of combining together many international sources (and less official normative *corpora* such as *lex mercatoria*), to illustrate all the levels of relevant provisions that may come into play. The main concern seems to be classification of international instruments in relation to national ones (questions of hierarchical positions between State constitution and treaties, subordinate legislation, etc.): without describing the network of various sources that can be found outside national borders and the problems arising from their different level of specificity, their range of applicability, the

proficiency in dealing with international and EC Community sources". According to the Netherlands' report (Jan SMITS, footnote 53): "At the 2006 annual meeting of the most important professional association of Dutch lawyers (the *Nederlandse Juristen-Vereniging*), the influence of European law on national law was widely discussed, but the participants were not unanimous in their view on how to deal with the fragmentation it causes". In Germany (KIENINGER, LINHART's Report): "the European Law Academy, also located in Trier, Germany, offers mostly courses on European Union Law for judges and other legal practitioners" (while for the general training of judges "the *Deutsche Richterakademie* (DRA), located in Trier, is providing for continuous current information on the application of international or foreign legal provisions": the most interesting aspect may lie in the courses that deal with the international courts, since there the problem of interaction between several instruments may be highlighted, http://www.deutsche-richterakademie.de).

[72] Hungary's Report (G. SUTO BURGER), answer 4: "Except for the law of the European Union and human rights conventions, there is currently no special training for judges for international legal sources […] the government of the Republic of Hungary […] has set out the training of judges for community law. The National Judicial Council has paid also special attention to trainings of community laws especially in respect of administrative leaders in the last years .As of 1998, community law trainings were organized for the leaders of the courts to underline the importance of such trainings and to assist in providing an efficient education to the judges. Until the end of January 2003, all judges have participated on trainings regarding the basis of community laws. In Follow up to that supporting trainings were organized, in which numerous (1296) judges have participated. […] The National Judicial Council decided that simultaneously with these fundamental measures a legal educational-advisor team must also be trained. This institution that was established in the summer 2002 currently employs 57 judges. ".

duration of their enforceability, and the existence of different international courts whose competences may overlap.

Comfort at least can be taken from the fact that EU law is widely recognized as an important source[73] and the case-law is translated into all the 23 official languages of the Member States. Several reporters mentioned the training program for judges that started in 2002 within the European Judicial Network (EJN)[74]: it is designed to enable judges from various European countries to interact in civil and commercial matters.

But if we look beyond European sources, information becomes less systematic.

The reporter from Venezuela is rather outspoken: "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. Disregarding these efforts, they [the judges] **seldom assist** to these events"[75].

An interesting insight is offered by the reporter for Japan: apart from the initial effort to send young judges abroad[76], and to assist them by providing research material concerning foreign

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[73] Hungary's Report (SUTO BURGER): the problem of fragmentation "is currently less important than others relating to the obligatory harmonization of laws … partial steps were made in relation to norms of international source, such as international conventions […] and the implementation of the law of the European Union".

[74] Council Decision 2001/470 establishing a European Judicial Network in Civil and Commercial matters, *OJ EC* L 174/25. The network has been particularly active in the field of private international law.

[75] Zhandra MARIN, report for Venezuela, answer to question 4 (emphasis added).

[76] TETSUO MORISHITA: "The Supreme Court of Japan, who is in charge of personnel matters of judges, sends tens of judges in relatively younger generation to study abroad. Such experience of studying abroad helps the judges to deal with sources of law which are not generated in Japan. However, it should be pointed out that there is no other training system which is available to all judges to increase their proficiency in dealing with laws other than Japanese laws. Unfortunately, in the Reporter's view, it should be admitted that some judges don't have sufficient ability to deal with cases containing the issues relating to conflict of laws and foreign laws".

sources[77], "the Justice Reform Council […] has published its recommendation in 2001" suggesting in particular that: "The arbitration system (including international commercial arbitration) should be coordinated quickly, paying heed to international trends"[78]. According to our reporter, therefore, "arbitration is considered as an option to increase the proficiency of Japanese legal system to deal with international cases. Also, law schools … expected to play some role to increase the proficiencies of legal professionals to deal with transnational legal matters. Unfortunately, however, Japanese law schools tend to pay more attention to teach basic laws and technique to pass the bar exam, because the passing rate of the bar exam is limited to about 30% and law schools are in severe competitions to get a higher passing rate".

In the USA, the situation of judges is not satisfactory either: "Although newly-appointed federal judges receive some basic instruction (from the United States Judicial Conference) in how to deal with issues of foreign law, and although some federal courts (e.g. the Southern District of New York), because they deal with a significant number of cases involving multinational corporations, have become familiar with the application of foreign law, still this falls short of their skill in dealing with the law of one of the American states. As for judges in the state court systems, their formal training in the application of foreign legal materials is minimal"[79].

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[77] TETSUO MORISHITA, *ibidem:* "the administrative office of the Supreme Court may give some assistance for research of foreign laws to each judge when necessary. Some academics pointed out that an institution which would have a good ability to help judges to research foreign laws and the global framework of nations to cooperate with such research should be established [Akira Mikazuki, *Application of Foreign Law and Courts* (written in Japanese: *Gaikokuho no Tekiyo to Saibansyo*) in Takao Sawaki and Yoshimitsu Aoyama ed., *Theory of International Civil Procedure* (*Kokusai Minjisosyoho no Riron*) (Yuhikaku, 1987) 239, at 280. In this article, Prof. Mikazuki introduced the Max Planck Institute as a good example]. No such institution or global framework has existed in relation to Japan".

[78] The English version of the Recommendation is available at: http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

[79] US Report, W. EWALD, par. III (*The diversity of transnational sources*).

When we look at the African countries belonging to OHADA, we find various situations: from the case of Burkina Faso, DRC (Dem. Rep. Congo), Gabon, Guinea-Bissau, Ivory Coast, Senegal and Togo which "do not have any kind of training activity for the judges with regard to this kind of sources of law", to the situation of a "training school dedicated to judges called Ecole Nationale de la Magistrature in Benin and Niger …, and the Institut National de Formation Judiciaire in Mali, or through courses organized directly by the government in the case of Chad, Congo and Equatorial Guinea"[80].

More systematic assistance is offered by the training school for judges created by the OHADA treaty (*École Régionale Supérieure de la Magistrature* – ERSUMA)[81]. In the area where the organization is involved, where uniform acts have been adopted (general business law, company law and pooling of economic interest, securities law, bankruptcy law, credit collection and enforcement law, accounting law, arbitration law and contracts for the carriage of goods by road), the idea inspiring the creation of the ERSUMA is "to make up for the insufficient level of specialization of the judges, and also to the absence of a system of continuous formation and to the lack of sufficient legal formation in the member countries"[82]. The school is dedicated to training legal professionals in OHADA law.

No governing body of the legal profession seems to have taken up the concerns expressed by the academic world; they all seem rather absorbed by local issues, and by national concerns.

In our exploration of the current situation, to detect differences that may occur, it seemed useful to check whether a higher level of awareness existed in countries that have specialized judges dealing with international commerce: this was done in

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[80] OHADA report, by S. MANCUSO (in Mali the Supreme Court has an agreement with the French Cour de Cassation to provide to Malian judges a continuous training that can provide them also a comparative perspective).

[81] OHADA Treaty, Art. 41.

[82] See Alhousseini MOULOUL, *Comprendre l'OHADA*, 2nd edition, (2009) Conakry, at 42. Thimotée SOMÉ, *A formação dos magistrados africanos pela OHADA*, in 6 *Boletim da Faculdade de Direito de Bissau*, (supplement) (2004), at 9.

question 5 in the list put to our reporters[83]. The reply seems to be that in the large majority of cases no specialized jurisdiction in commercial matters exists, and that the real difference lies between state judges and arbitration: arbitrators have more familiarity with international documents and especially with usages and practices of the business world that only rarely find their way into the ordinary practice of courts[84].

The Venezuelan reporter expressed concern about the fact that a specialized court in international commercial law may develop an independent trend and lose contact with the rest of the judiciary[85]: that may be the reason why only a few instances are reported of courts that are particularly qualified in international transactions. They may be a further element of fragmentation, within the domestic judiciary.

In Hungary, however, where the tradition of a special institution for international arbitration of the socialist period has left its mark, we learn from the Hungarian reporter that "There is no state administrated special judicial institution in Hungary to deal with international commercial cases. […] In the first place however, international commercial cases are decided on the basis of an arbitration clause by an arbitration body. The Permanent Arbitration Court attached to the Hungarian Chamber of

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[83] "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?".

[84] Sometimes an indirect process of reception occurs through the medium of a decision by a state court: when it recognizes (by the exequatur) an arbitration decision in a certain field. The recognition opens a trend of aknowledgment for usages that were incorporated in the arbitral award (GOLDMAN, *Nouvelles réflexions sur la Lex mercatoria*, in *Etudes P. Lalive*, Basel, 1993, p. 241).

[85] Zhandra MARIN, answer to question 5: "… having a specialized judicial institution would positively affect the international commercial cases. Having specialized, updated judges on this area would be a great improvement for our subject. On the other hand, 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 does not mean having judges isolated from the rest of the judicial power, elaborating decisions incoherent and not homogeneous with the rest of the legal system".

Commerce and Industry is the most frequently used and most well-known arbitration court in Hungary[86]".

The US reporter confirmed that "most American courts are *generalist* courts, expected to handle a full range of criminal and civil cases. In particular, there do not exist courts specifically designed to deal with questions of trans-national law" [87]; in Spain, no specialized judicial court is in charge of international commercial law[88]; "in Japan, there is no specialized judicial institution which deals with international commercial cases"[89]. The same is true of Portugal [90] and Switzerland [91]. In Germany "there is not one specialized institution, that deals with international commercial cases. There is, however, a rather limited specialization of court divisions concerning international or transnational law": this specialization is more evident in the field of family law, for the recognition and enforcement of foreign judgments, where international awards are involved[92].

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[86] SUTO BURGER (Hungary's report adding that "Although its proceedings and awards are not public, … some of its decisions are published in the legal literature in forms of summaries without names. Accordingly, the most important decisions of this arbitration court are available in form of summaries and have an effect on legal professionals. Parties of a state court trial would cite such decisions in their filings as legal argumentation").

[87] EWALD's Report, par. 3.

[88] GARCÍA CANTERO : "Cet organe n'est pas prévu en droit espagnol ".

[89] Considering the cost and difficulties of translation in Japanese the reporter adds that "In the Reporter's opinion, Japan should consider to set up special division of the court in which case could be heard in English" (TETSUO MORISHITA).

[90] Luís de LIMA PINHEIRO: "In Portugal there is no specialized judicial institution to deal with international commercial cases".

[91] A. FÖTSCHL, answer 5 ("there is no specialized judicial institution for international commercial cases").

[92] KIENINGER, LINHART, *German Report*, p. 13: for implementation of the Hague Convention on International Child Abduction of 1980 (OLG Köln) or the European Custody Convention (OLG Schleswig-Holstein), for international arbitral awards (OLG Karlsruhe). An experiment has been started in some Laender at the beginning of 2010, within the project "Law – made in Germany": the Regional Courts (*Landgerichte*) of Köln, Bonn and Aachen, the Higher Regional Court (*Oberlandesgericht*) of Köln have nominated Chambers or Senates where the trial can be conducted in the English language.

In Austria we find the Commercial Court of Vienna[93]: one of the competences of this court is to receive the results of investigations on trade customs by the Austrian Federal Economic Chamber (AFEC)[94]. The president of the Commercial Court "used to publish the trade customs in a separate monograph. For quite some years now, the administration of the index has been delegated to specific judges [95]". The importance of the fact that trade customs are included in the publication is obvious at the litigation level since: "Whenever a party refers to a trade custom which is not entailed in the index, the court requests the AFEC to make a poll by a questionnaire with a statement of facts made anonymous to all relevant trade businesses"[96].

As far as African countries are concerned, generally there is not "a specific jurisdiction in the OHADA member countries which deals with international commercial cases. When they should arise they are solved by the ordinary courts or by the commercial courts where existing (Congo, DRC, Guinea-Bissau[97], Mali)". On the other hand, the OHADA treaty has set up a rather ambitious system at the supranational level of the organisation, with a Court that has broader jurisdiction than the European Court of Justice within the EU (that is only accessible by the courts on a

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[93] Handelsgericht Wien (*Report* for Austria: B. VERSCHRAEGEN).

[94] Wirtschaftskammer Österreichs (Wkö; http://wko.at/awo/chamberinfo.htm): it is, by law, the representative of the entire *Austrian* business community.

[95] "However, due to the high rate of crew change among judges these judges first try to deal with the files and by the time they could spend some attention to the updating of the index on the trade customs, they are upgraded, start working at another court or are absent for other reasons (e.g. maternity or paternity leave)" (B. VERSCHRAEGEN, reference to E.M. WEISS, *Handelsbräuche in Österreich*, supplement 7a, 1991).

[96] B. VERSCHRAEGEN, p. 13: "The entire procedure turns out to be very time-consuming for all the persons concerned. However, according to judges that were questioned for the purpose of this contribution, parties at stake seem to be quite pleased with this procedure. A questionnaire is only sent on the occasion of a concrete court procedure during which the judge at stake requests the AFEC whether a trade custom exists".

[97] In Guinea Bissau the commercial court was created in July 2008, but there is no record yet about its activity.

preliminary ruling). "The Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* – CCJA) has jurisdiction as judge of last instance in all matters related to commercial law in which the application of any OHADA norm is involved, with the only exception related to the application of criminal sanctions. The national jurisdictions remain therefore competent to judge at first and at second instance on cases related to application of uniform acts[98]. Consequently, the CCJA exercises the function of judge of appeal against the judgments of the courts of appeal of the member States, as well as against the judgments of first instance of the national courts which are not subject to appeal at national level"[99].

The mechanism which was set up in Africa embodies a project which was often considered in the harmonization /uniformation process also in other geographical contexts: the idea of an international court competent to guarantee uniform interpretation of uniform acts was advocated at the UNCITRAL New York Congress of 1992 (UNCITRAL 25th anniversary) by L. SOHN (George Washington University), under the title of "Uniform laws require uniform interpretation. Proposals for an international tribunal to interpret uniform legal texts"[100].

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[98] OHADA Treaty, Art. 13: in the Report by S. MANCUSO.

[99] OHADA Treaty, Art. 14, par. 3 and 4. Cp. MANCUSO: "In the exercise of its jurisdictional function the CCJA is a supranational court whose decisions are considered as *res judicata* and can be enforced in the territory of every Member State. It is a sort of "transnational court" created through the agreement of the OHADA member States to function as supreme court in all the cases involving the application of the Treaty and the uniform acts; consequently all the supreme courts of the member States are deprived of their judicial power whenever the application of OHADA law is involved. The CCJA judgments are final and close the case definitely. They are not subject to any appeal". The Court functions also as an international arbitration centre dealing with arbitration under its own rules (basically modelled on the ICC rules).

[100] UNCITRAL Colloquia, "*Uniform Commercial Law in the Twenty-first Century*", 18-22 May 1992, New York, http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf, p. 50 ff.

The origin of the proposal goes back a long way, to Hans WEHBERG at the beginning of the 20th century[101], and it was advanced again when the Permanent Court of International Justice was created (1920)[102]. A first experiment was carried out in 1931 through a Protocol (signed at the Sixth session of the Conference on Private International Law) recognizing the jurisdiction of the Permanent Court of International Justice (over disputes regarding the interpretation of conventions prepared by the Hague Conferences on Private International Law); the Protocol "was ratified by only a few States, and was never resorted to by any State"[103].

The solution put forward in New York in 1992 was based on the model of the Hague International Court of Justice: according to the proposal, States would accept the jurisdiction of a "tribunal, parallel to the International Court of Justice, to deal with the problems created by inconsistent interpretations of international agreements containing a variety of uniform laws, codes of conduct and declarations". The jurisdiction of the tribunal "would be specified in a protocol which would contain an amendable list of multilateral conventions, and a State ratifying the protocol would accept the jurisdiction of the tribunal with respect to at least one or, if possible, more conventions, and would be encouraged to make additional acceptances from time to time". In cases where States were reluctant to reach such a solution, they would at least agree to devolve the interpretation of a uniform text to the international court when national courts reached conflicting

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[101] According to L. SOHN the 1911 proposal was for an international tribunal that would deal with "disputes relating to questions of private international law (on appeal from national courts); and private claims based on international treaties establishing uniform laws (on appeal from national courts)".

[102] *Première rencontre des Organisations s'occupant de l'unification du droit*, in UNIDROIT, *Annuaire de droit uniforme*, 1956: the idea was to assign competence to the court in the field of conflict of laws, copyright, patents, commercial and maritime law.

[103] L. SOHN, *Proposals for an International Tribunal to Interpret Uniform Legal Texts*, *cit.*, p. 51.

interpretations [104]. The power to invest the tribunal with an advisory opinion on the interpretation of a convention would lie in the national court "on request of one of the private parties to the dispute allowed to present their views to the tribunal".

The project, at world level, repeatedly met with objections connected with the failed experiences of some previous UN conventions, such as the CMR, Conv. *Marchandises par route* (a text drawn up within the ECE, the UN *Econ. Comm. for Europe*). Some of these older documents did in fact lay down the competence of the Court of International Justice to interpret uniform acts, but the States never used the opportunity to ask for the uniform interpretation of the Court, so that the rule fell into oblivion[105]. Implementation of the proposal at world level has in the past been qualified as "entirely unrealistic"[106].

The OHADA experience is thus particularly interesting because of its special character and the scope of its competence[107].

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[104] According to L. Sohn, the advantage of the solution proposed would have been avoiding the creation of a number of courts, each competent for specific subjects, with a consequent constant increase in their number, subject after subject. "The authors of the statute of the proposed international tribunal would be able to draw on the experience of the Court of Justice of the European Community, of the International Centre for Settlement of Investment Disputes of the arbitral panels established under the Canada-United States Claims tribunal, and of the several less-known tribunals functioning in various areas of the world" (ID., p. 52).

[105] Cp. the discussion between J. PUTZEYS and R. LOEWE in *International Uniform Law in Practice*, Proceedings of the UNIDROIT Congress on *International Uniform Law in Practice*, Rome (1987), Oceana, 1988, p. 529.

[106] F. ENDERLEIN, *Uniform Law and its Application by Judges and Arbitrators*, *ibidem*, 1988, p. 329 ff., at p. 352., while L. RÉCZEI in 1992 judged Sohn's idea in New York to be "difficult but not impossible".

[107] The court was created by the founding treaty, but "the formation of this institution was made through the application of the political agreements called "N'Djamena agreements" of 18 April 1996, that distributed the different positions among some States (the presidency of the court was assigned to Senegal, the first vice-presidency to the Central African Republic). The new text of the Treaty in October 2008, by Art. 31 has restored the full force of the criteria provided in the Rules of Procedure adopted under Art. 19 of the Treaty" (OHADA report by S. MANCUSO).

Still in regard to courts, one of the questions proposed to national reporters[108] concerned a further possible divergence in practice between administrative courts and ordinary courts, bearing in mind the rather "reserved" attitude in the past of the French *Conseil d'Etat* towards European legislation[109]. In general, the reporters did not point out any significant difference in this respect[110]: a more cautious attitude by the administrative courts

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[108] Question (6) asked: "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?"

[109] The well-known "Acte clair" doctrine discouraged administrative courts in France, for a fair period of time, from proposing preliminary rulings to the ECJ : e.g. Conseil d'Etat, Cohn/Bendit case, decision of 22 December 1978 (in *Rev. trim. dr. eur.*, 1979, p. 157. In general terms: P. PESCATORE, *Interpretation of Community Law and the Doctrine of "Acte Clair"*, in *Legal Problems of an Enlarged Community*, London, 1972, p. 27).

[110] In Switzerland (A. FÖTSCHL, answer 6): "there seems to be no difference in attitude towards transnational sources amongst different types of courts. It is rather the frequency of being confronted with transnational sources that might lead to a different attitude. … dealing with the European Convention for Human Rights has become a habit for criminal and administrative courts…". In Hungary (SUTO BURGER): "Only labour courts are separated from the general courts […] we cannot identify any discrepancy in transnational sources among courts. […] courts dealing with a criminal case would be reluctant to make use of transnational sources (such as human rights) unless they are forced to do so by a domestic material or procedural rule. Courts dealing with criminal cases tend to cite international (human rights) principles more often, but their decisions are not based on these. A study has been conducted in support of this theory in relation to the European Court of Human Rights (Strasbourg), because its most important case law is available in Hungarian. […] There is a visible reluctance to apply this case law; in certain cases, judges refuse the application. […] judges dealing with commercial matters face transnational sources more often, which makes them more open towards such sources. But also among these judges, one may identify a special legal culture, a legal formalism that is typical for post-communist states. Because of this, one can hardly find cases and only relating to certain international conventions where a judge bases its decision only on an international norm, although these conventions are made national law by their publication in Hungary ". In Spain (GARCIA CANTERO, answer to question 6): "il y a des Tribunaux *contencioso-administrativos*, cependant ils ne font pas partie de l'Administration, mais du Pouvoir Judiciaire. En tout cas, ces dernières Cours à l'heure actuelle sont de plus en plus sensibles aussi à l'application du Droit communautaire (par ex.

might have been predicted, but this was not confirmed in the data provided by national reporters[111].

Some writers made mention of the fact that administrative courts may be less likely to meet problems involving extra-national sources[112]. This expectation is perhaps reflected in the training of judges: administrative judges receive a shorter period of education in the field of international law, in some countries[113].

Droit des contrats publiques, responsabilité par contamination etc)". In the Report for the OHADA member states S. MANCUSO mentions the fact that "Most of the francophone countries member of the OHADA have administrative jurisdictions. They are not present in DRC, Guinea-Bissau, Equatorial Guinea and Niger, while in the Comoros it has never really worked. No one of the national reporters referred about any difference in attitude towards transnational sources among administrative courts, courts dealing with civil law matters, criminal law and commercial courts". But in Venezuela (Zhandra MARIN, answer to question 6): "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 *lex mercatoria*, is noticeable".

[111] The reporter from Portugal (L. DE LIMA PINHEIRO) pointed out that "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 …. To my knowledge only a tax court has once asked for a preliminary ruling of the Court of Justice of the European Union".

[112] L. DE LIMA PINHEIRO: "In Portugal there is a division between judicial courts (dealing with civil law, criminal law and commercial law matters), on one hand, and administrative and tax courts, on the other hand. Judicial courts are more concerned with the application of international sources than administrative and tax courts. Nevertheless, all of them are often concerned with the application of European Community law. It cannot be said that there is a difference of attitude towards international and European Community sources".

[113] In Portugal (L. DE LIMA PINHEIRO), "The training of judges and state's attorneys takes place in the "Centro de Estudos Judiciários" …. This includes a course on "European and International Law"… . 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".

d) Jura novit curia?

Finally, in relation to question 7, the possibility that application of the rule *jura novit curia* (instead of the principle allocating to parties the burden of proof regarding the foreign or transnational rule applicable to their case) could make a difference with respect to the application of foreign law[114], did not obtain a clear answer: there seems to be no firm opinion about which solution facilitates application by the court of the relevant foreign sources.

Cooperation between the court and the parties involved in litigation is the more commonly found solution: if parties really care about the application of extra-national sources, they have to take an active role.

It is generally held that civil law countries favour the *iura novit curia* rule: the court must investigate applicable law, even if the sources involved are external to the national legal system; in the common law world, generally the issue of application of foreign law is treated as a matter of fact to be proved by the parties.

But the Canadian and the USA reports reveal that in both experiences there have been corrections of the approach that would generally be expected. We learn that in Canada: "in the common law jurisdictions, judicial notice is taken of international law, and thus it need not be directly pleaded. In Quebec, the matter is governed by article 2807 of the Civil Code of Quebec, which provides that international law must be pleaded. This rule exists as a way to facilitate matters for the judge by providing him or her with sources of law that are otherwise not readily available"[115].

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[114] Question 7 asked : "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?"

[115] Canadian *Report*, p. 45.

In the USA report[116] we read that: "the traditional approach was to treat the determination of foreign law as essentially a question of fact. This had several consequences. First, the foreign law needed to be proved in accordance with the rules of evidence […] Secondly, the determination of foreign law, being a question of fact, was for the jury to decide. And, thirdly, the scope of review by an appellate court was restricted, so that a mistaken determination of foreign law could be set aside only if it could be shown to be clearly erroneous.

In the USA, in 1966 the situation in the federal courts was changed by the adoption of Rule 44.1 of the Federal Rules of Civil Procedure. That rule states:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

In essence, this Rule 44.1 does two things: it gives the judge (rather than the jury) the ultimate responsibility for determining foreign law, and it gives the judge considerable discretion in deciding how that determination is to be made. [117] Importantly,

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USA Report *by EWALD, par. IV. "techniques for dealing with the complexity of trans-national law", last but one page.*

[117] "In the ordinary case, the judge will expect the attorneys to produce some sort of evidence supporting their view of the relevant foreign law. The evidence may come in the form of testimony in open court by an expert witness, or in an affidavit; it may come from an attorney accredited in the foreign legal system, or from a domestic scholar of comparative law. Some judges will press the parties to produce witnesses; others (using Rule 706(a) of the Federal Rules of Evidence) may appoint their own expert …. As Rule 44.1 makes clear, the evidence need not be presented in open court; the judge is moreover free to accept or to reject the evidence, and also to undertake independent research".

because the judge's finding is now classified as a question of law rather than of fact, it can be reviewed and argued on appeal".

Therefore here we find a move towards the *"jura novit curia"* position.

In addition to the peculiarity of the situation where a mixed law jurisdiction (Quebec) limits judicial notice in international matters, while a common law country (USA) moves towards a wider responsibility of the judge in cross-border cases, it is also worth mentioning that the switch has not brought about the results that might have been hoped for. The Canadian reporters[118] indicate that: "Taking these rules into consideration, one would assume that once counsel has raised the CISG in its pleadings, the courts would have no trouble ascertaining the situations in which it is in fact applicable law. As the jurisprudence shows, this is not the case. The CISG has been in Canada for over seventeen years, and yet, there is no evidence that it has had a significant impact on Canadian legal practice …."[119].

A sort of midway solution is recorded in other countries too: although it is the courts that have to seek the applicable law, the parties are not exempted from active participation, even if the law to be applied is not foreign, but international, that is: *binding* on the citizens of the signatory State.

Thus in Hungary[120]: "The court knows the law *ex officio (iura novit curia),* but in the practice this obligation of the court is likely only to cover written national law. Hungarian law is based on a dualistic system; therefore, all international and similar conventions must be published by a Hungarian statute having full binding force. Accordingly, courts must know these sources of law and apply them. […] International sources nevertheless, may have interpretations and/or precedents in foreign countries that were not discovered by Hungarian national courts. In this relation, parties may plead and prove the content and/or the interpretation

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[118] H. DEDEK, A. CARBONE, Canadian *Report.*

[119] Furthermore " English translations of foreign case law are readily available, and thus «the blame for any lack of international case law to assist in an interpretation of the Convention lies squarely with legal practitioners»".

[120] SUTO BURGER Hungary report.

of a statute to the court, but the court won't be bound by such interpretation".

In Switzerland[121] "the principle *jura novit curia* prevails […]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*. The court may demand the cooperation of the parties. For patrimonial claims the burden of proof on the foreign law can be transferred to the parties. But also in this case the court has a duty to cooperate […]".

In Germany, the judge, who is expected to know the law, including conflict of laws (according to §293 of the German Code of Civil Procedure), may "ask for written opinions *(Gutachten)* either by university professors, specialized in Private International Law or Comparative Law, or by members of the Max-Planck-Institute for Comparative and Private International Law in Hamburg"; this solution has proved to be "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 renvoi" [122].

In Portugal[123] "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".

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[121] A. FÖTSCHL, answer 7.

[122] KIENINGER, LINHART, *German report*: in addition "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 … (*Ausführungsgesetze*) or the so-called *Denkschriften*".

[123] L. de LIMA PINHEIRO.

In Spain the statute ruling on the matter deviates from the civil law tradition, but case-law mitigates the letter of the legislation: "La nouvelle Lec2000 n'a pas changé, à première vue, le droit antérieur en vigueur en Espagne: Art. 281. 2: «Le droit étranger sera l'objet de preuve [...] Le droit étranger devra être prouvé quant à son contenu et à sa vigueur, et le Tribunal pourra utiliser tous les moyens nécessaires à l'objet de sa connaissance et de son application». Mais si la règle c'est que le droit étranger doit être prouvé par la partie qui l'a invoqué dans le procès, l'art. 281.2 Lec2000 établit, encore, une modération ou plutôt une nuance: «Le Tribunal ou le Juge sont autorisés à faire toute sorte de démarches ou de recherches pour mieux arriver à connaître le droit étranger applicable; la connaissance personnelle du Juge n'est pas exclue». La jurisprudence sur cette règle est très abondante […] "[124].

The traditional civil approach is still followed in Japan: "Japanese academics consider that judges, not parties, have to find laws and to research cases by themselves. "[125].

Thus we find that cooperation between judge and parties is generally required, and this compromise is all the more necessary in Africa[126]: there we find that "all the OHADA member countries belong to the civil law legal tradition (with the only exception of the Anglophone part of Cameroun), therefore the *iura novit curia* principle has great influence in these legal systems.

There is a general understanding that the efficiency of judges in dealing with cases involving complex interaction of sources is affected by the fact that the judge has to find the law applicable to the case. The reasons vary, but most of the reporters refer to the problem – well known in Africa – of the lack of information about the law in force. In countries such as Central African Republic, Comoros or Guinea-Bissau it can also be extremely difficult to obtain information and knowledge about national law; but even where such information exists, the lack of documentation on the different sources of law (scarcity of libraries, no law journals or doctrinal commentaries to laws, poor access to

[124] GARCIA CANTERO.
[125] TETSUO MORISHITA.
[126] OHADA Report, by S. MANCUSO.

internet resources, difficulty in getting written sources from abroad, poor training of judges) means that it is simply impossible for the judge to have access to (or sometimes even to learn about, in time) legal materials that are different from those of the country.

A further consequence of this situation is that even the parties themselves – or their lawyers – are sometimes unaware of the existence of different rules from domestic rules, that may be applicable to their case[127]."

e) Judicial strategies.

In the final questions submitted to the national reporters, the focus was on the strategies that courts may adopt when faced with the use of a complex web of non-national rules[128].

The question on this point owes something to the experience of a number of lawyers who reported strategic "ways out" practiced by judges when faced with complicated issues of foreign law[129].

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[127] "Sometimes the burden of proof can help: in Benin (but the situation may also be similar in other countries) the application of the *iura novit curia* principle is limited to national law […]. At other times, day to day practice comes to the aid of the judge, since application of the *iura novit curia* principle does not prevent lawyers from supporting their arguments by inserting in their file a copy of the law whose application is claimed, for the benefit of the judge. In Congo there is an effort in improving the training of the judges who are appropriating more and more of the international legal sources, limiting therefore the burden of proof imposed to the parties to prove the law of other countries whose application is claimed in a Congolese case" (MANCUSO's Report).

[128] 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 or by a presumed waiver of foreign sources if the party has not pleaded their applicability immediately)?"

[129] See e.g.: R. MINER, *The Reception of Foreign Law in the U.S. Federal Courts*, in 43 *Am. J. Comp. L.*, 1995, p. 581 ss., p. 585 quoting the presumptions applied by some courts that "the foreign law is the same as the forum's common law, that the foreign law is identical to the forum law, that foreign law is based on generally recognized principles of civilized nations, and ... that the party by not proving the foreign law has essentially acquiesced to the forum law".

Another very striking result emerging from the reports is that judges tend to shun not only foreign sources (or a-national instruments such as trade usages and commercial practices), but also international sources, if they feel unfamiliar with them.

For instance, we learn that in Canada,"courts are criticized as having a narrow understanding of when an international treaty has been implemented into Canadian law, thereby restricting its role in Canadian domestic law. As a result of this narrow interpretation, Canadian courts continue to put Canada in conflict with public international law. When domestic courts are confronted with the task of applying an international agreement, they sometimes employ the "doctrine of legitimate expectations" or the "presumption of conformity" to temper the ambiguity that surrounds the domestic application of international law. …[130]. The general attitude in Canadian courts is that international human rights law should be treated as "relevant and persuasive" in deciding *Charter* cases. This is an approach compatible with the "presumption of conformity" whereby the courts interpret legislation so as not to put Canada in violation of its international agreements".

In Venezuela, "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".

In Portugal[131], "when interpreting and filling gaps of international sources the Portuguese courts resort normally to

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[130] "The "doctrine of legitimate expectations" is based on the idea that, when a state commits itself to an international treaty, it creates an expectation among its citizens that it will comply with the international undertaking. […] The "presumption of conformity" requires the courts to interpret domestic law in a manner that is consistent with Canadian treaty obligations. The presumption is based on the idea that Canada's legislature does not purposefully or lightly violate its international obligations. The presumption of conformity thus creates a framework in which Canadian courts can apply treaties that have not been implemented, but have been ratified […]".

[131] L. de LIMA PINHEIRO.

domestic law instead of following the criteria applicable to the interpretation and filling of 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".

An interesting comparison may be drawn with the situation in Hungary [132], although a warning should be given first. In Hungary, "prior to the judicial reform of 1997, it was practically impossible to perform any research relating to the courts' activity. Not only decisions were inaccessible[133], but no statistics or reviews were published […] . The Act N° XC of 2005 on the freedom of electronic information provides […] that the decisions of the *Supreme Court and the Appellate Courts* on the merits of the cases must be published in the Court Decisions Compilation, together with the first instance decisions serving as basis of these, in digital anonym version. […] Decisions made after July 1st, 2007 are available and researchable in a digital archive by anyone. Decisions prior to that date are not accessible. […] As of July 1st, 2007, published decisions may be analyzed in a limited manner inasmuch as a complete analysis is *only available relating to higher courts*."

Under these circumstances we observe that: "[…] judges in many cases tend towards an easier solution of cases and try to reduce the issues to some of the provisions of Hungarian law[…] . Moreover […] judges tend to apply the most relevant rules of domestic law without considering broader contexts. Of course, this is a tendency that may not be true to all judges. […] Even those international norms that are made part of the domestic law (especially in respect of legal principles) need time until courts apply these. Even more time is necessary until the interpretation of such norms is made in international context instead of by purely domestic rules. […] As a general formula, one can state that the

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[132] G. SUTO BURGER, emphasis added by general reporter.

[133] The most important decisions of the Supreme Court were published as a selection with simplified content prior to this date "for enabling the unified decision making": as had been common in the socialist praxis of several East European States.

longer the given rule is part of domestic law and the more often judges have to apply the international convention, [the more] judges tend to base their judgments only on these conventions. As an example, in a case the Supreme Court declared that in a dispute governed by the COTIF, domestic rules may only be applied to an extent the convention does not have any provisions in relation of the issue in question.[134] The same firmness is not identifiable in the case […] relating to the UNIDROIT Convention on International Financial Leasing."[135].

In the Netherlands "courts also have techniques available to elude complexity. Although Dutch law does not accept the basic rule of the *lex fori* as a general principle, there are several rules that come close. … De Boer has suggested to accept the theory of 'facultative choice of law' in Dutch law[136]. It means that the courts only need to apply conflict of laws if one of the parties asks for it. If this request is not made, the courts must apply the *lex fori*. The recent draft statute of 2009 […] explicitly rejects this view, meaning that the courts will have to apply foreign law at their own initiative wherever necessary. Their task is of course facilitated by the

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[134] Courts' Decisions BH1999.21, quoted by the Hungarian reporter. "The "*per se*" application of the provisions of the COTIF/CIM as well as the CMR is well identifiable in many decisions of the Supreme Court".

[135] As to the causes of the reluctant attitude of some judges faced with non-domestic sources of law SUTO BURGER, comments: "Those judges who became judges before the political system … changed may decide complex commercial cases without any obligatory additional training. An additional argument is usually that they have too many cases to deal with at the same time. Furthermore, it is a question how easily a judge may access foreign norms and adhering literature, which usually is only available in a foreign language, which older judges may not speak. One may conclude that judges with lower personal ambitions are reluctant to deal with complex cases with international elements …. This results in wrong or insufficient argumentation or non-discovery of all circumstances of the case and the applicable norms. A slight tendency may be identified which shows that courts identify and deal with such cases well. Nevertheless, there is no statistic on this tendency yet. This tendency however, may be identified in the first place relating to the European Human Rights Convention, because organizations exercise strong professional control and high quality legal literature is available".

[136] Th. M. de BOER, *Facultative Choice of Law*, in: *Recueil des cours de l'Académie de droit international*, vol. 257, Gravenhage, 1996, 225.

possibility to ask for information under the European Convention on Information on Foreign Law (1968). However, it is more likely that the parties (or their lawyers) provide the court with expert opinions or that the court looks into foreign law itself"[137].

In the USA[138]: "What if the court is unable to determine to its own satisfaction precisely what foreign law requires? Sometimes the foreign law will be unclear, and in some cases indeterminable. There is no universally agreed answer to what happens in this situation. One possibility is to dismiss the case altogether. But this can be a harsh outcome; so judges will sometimes resort to a presumption that the foreign law is identical to the law of the forum, or that the parties have agreed to waive the application of foreign law, or that general principles of equity are to be applied. … the system deals with the issue by using the traditional mechanism of adversarial proceedings, relying upon the attorneys to research and argue the issues of foreign law".

The difficulties met in well-equipped western or European countries are surpassed by those encountered by the OHADA member States. "[…] There is a general difficulty to answer to this question since it presupposes a detailed analysis of the related jurisprudence, while in Africa (including the OHADA member countries) there is a general lack of publication of the judgments […] In the Comoros the judge tends to apply the law that he knows better, due also to the serious problems about knowledge of legal materials present in that country.

In Niger there is a tendency of the judges to apply the national law over the international convention, mainly because they know their domestic law better than the international legal instruments.

The strategy of presuming a waiver of foreign sources if the party has not pleaded their applicability immediately is used in Congo, since under the Congolese jurisprudence the parties are

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[137] The Dutch government indicates that this possibility is facilitated by the internet: TK 2009-2010, 32137, nr. 3, p. 9. An example showing the difficulty in dealing with these issues refers to "the statute on the law of conflicts in case of divorce of 1981 […]".

[138] EWALD's report, last page.

requested to claim immediately the application of a foreign law otherwise the judge will not take it into consideration. More rarely the judges tend to consider the Congolese law similar to the foreign one, due to the differences that Congolese law has with others in many domains"[139].

6. Suggestions as to "what can be done about the problem?"

A specific question[140] about proposals to improve the problem of multiple sources of law, scattered at different levels of normativity, did not return a great deal of material. Not much guidance seems to derive from legal scholarship[141]. No easy solution appears available.

At the institutional level, within the international organizations involved in the production of law that will influence the lives of citizens of the different States, some efforts are underway to reach a higher level of coordination. Within UNCITRAL[142] we find "a mandate to coordinate global and regional activities relating to the unification and harmonization of

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[139] An instance of "presumption" allowing a homeward trend is also referred to by the Serbian reporter in connection with the CISG (Jelena PEROVIC, Report) considering "a decision of the High Commercial Court of 9 June 2004, where the Court decided to apply the national Code to the contract of international sale of goods concluded between the party with the place of business in Slovenia and the party with the place of business in Serbia. Since the contract did not contain a choice of law clause, the Court held that the parties *implicitly expressed that choice by choosing the court in Serbia.* … the Court appreciated as one of the main indicators of the parties' intention that the substantive law to their contract is to be the law of Serbia. Having that in mind, the Court concluded that the decision of the 1st instance court to apply the Code of Obligations of Serbia as a substantial law to the contract was correct".

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

[141] Jan SMITS, Netherlands' Report, Par. 3.3. "[…] Although the problems associated with [the rise of private regulation] - and with the multiplication of sources generally - are acknowledged in the Dutch literature, one **cannot say that the doctrine provides courts with strategies to deal with them**. This means that courts often have to find their way in a complex web of rules […]" (emphasis added).

[142] CASTELLANI's report, answer to question 1.

international trade law (United Nations General Assembly Resolution 2205 (XXI)) . A report on coordination of work is prepared yearly by the secretariat and submitted to the Commission". UNCITRAL also provides "activities of promotion of UNCITRAL texts and of dissemination of related information" that may impact on the fragmentation of sources of international trade law[143].

In relation to this point the German report reminds us of the need for at least three institutions to work in close connection: UNCITRAL, UNIDROIT and the Hague Conference of Private International Law. Since the past separation between conflict of laws profiles and substantive law issues is no longer observed (but conventions on specific subjects deal with all the aspects connected with them), Hans van Loon has insisted on the need for close cooperation[144], and this has already brought some improvement.

In Africa, Equatorial Guinea is promoting "the merger of the African organizations of legal and/or economic integration, also to reduce the economic efforts requested to each member country to keep alive all these organizations"[145].

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[143] *Ibidem*: "Thus, training is offered regularly and specific tools have been developed. While training is offered to all relevant stakeholders (lawyers, government officials, lecturers, etc.) specific activities for the judiciary are carried out in certain fields, such as cross-border insolvency, where this target group has been identified as particularly relevant by funding institutions (other inter-governmental or non-governmental organizations)".

[144] E.-M. KIENINGER, K. LINHART, *German Report*; H. van LOON, *Unification of private international law in a multi-forum context*, in KIENINGER (ed.), *Denationalisierung des Privatsrechts*?, *Symposium anlässlich des 70. Geburtstages von Karl Kreuzer*, Tübingen, 2005, 33, at p. 43: the Würzburg symposium of 2004 concerned the "Denationalization of Private Law".

[145] OHADA report, by S. MANCUSO. In addition, "OHADA and CEMAC (*Communauté Economique et Monétaire des Etats de l'Afrique Centrale)* recognized the need to have a close cooperation with reference to law-making policies to keep each other informed about projects of legislative acts in progress within each organization, with the objective of reducing the risks of conflicts of supranational laws", considering that "the domain belonging to the harmonization of business law in Africa under OHADA has been maintained voluntarily flexible …"

In the area of conflict of laws, one of the reporters [146] suggested that "[R]egarding the matter of protection of minors, […] 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: duplicating the professional field of an existing organization with a long tradition does not improve results".

The Swiss report joins in, under this heading, anticipating future conflicts between several Hague conventions concerning minors and the Rome III proposal: with the added complexity of the Lugano level for Switzerland. The same reporter reminds us that Paul Volken suggested as long ago as 1977 that techniques be adopted to avoid conflicts in conventions not only by cooperation between the institutions (with UNCITRAL in an eminent position), but also by providing a "self-disciplined sphere of application" in the conventions and by instructing judges "to apply conventions in a way that concurrences are avoided"[147].

At the level of individual States, we can detect both initiatives "from above" in the legislative field and "horizontal" initiatives, involving training and education.

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[146] Portugal Report, L. de LIMA PINHEIRO, p. 2 (references to Ulrich SPELLENBERG – "IntVerfREhe", *in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz zum Bürgerlichen Gesetzbuch/IP*R, Berlin, 2005, Vorbem zu Art 1, n.º 20, and Bertrand ANCEL and Horatia MUIR WATT – "L'intérêt supérieur de l'enfant dans le concert des juridictions : le Réglement 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. Opposing, see MARIANNE ANDRAE – "*Zur Abgrenzung des räumlichen Anwendungsbereichs von EheVO, MSA, KSÜ und autonomem IZPR/IPR*", *IPRax* 26 (2006) 82-88, pp. 88-89.

[147] This obvious precaution does not seem to be always observed: the German reporters (p. 3-4) mention similar recommendations conveyed by D. Janzen (the conventions should define clearly their scope and avoid too specific or short-lived subjects, they should give directions for their interpretation, they should be consistent in their definitions, etc.): D. JANZEN, *Der UNCITRAL-Konventionenentwurf zum Recht der Internationalen Finanzierungsabtretung, Symposium* in Hamburg 1998, *RabelsZ* 1999, p. 368 ff.

In several cases, the old solution of codification seems to be gaining popularity: in Portugal, in the form of a new codification of Private International Law encompassing choice of law, jurisdiction and recognition of judgments[148]. In the Netherlands: " […] debate was heavily influenced by the old plan (going back to 1947, when work on the new Dutch Civil Code started) to codify Dutch private international law in a separate book (Book 10) of the Dutch Civil Code codification was presented as an answer to the existing plurality of sources: this plurality would even provide an incentive to codify. This is also the view of the Dutch government that sent a draft statute for a new Book 10 to Parliament in September 2009[149]. The draft explicitly refers to the aim of bringing coherence among national, European and international rules and to facilitate the incorporation of future European rules. Reference in this context is made to Belgium, where private international law was codified in 2004"[150].

These efforts seem insufficient to provide a definitive answer to a much larger problem. For one thing, in Europe the field of conflict of laws is increasingly influenced by legislation written at the EU level. This means that national codes may have to be continuously updated (although the fact that these EU instruments are usually regulations rather then directives means that the contradictions we have already mentioned about incorporation of European directives in the domestic law are less evident)[151].

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[148] See de 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.

[149] J. SMITS, mentioning: TK 2009-2010, 32137 (*Vaststelling en invoering van Boek 10 van het Burgerlijk Wetboek*).

[150] See e.g. TK 2005-2006, Aanhangsel, nr. 892 and TK 2009-2010, 32137, nr. 3, p. 4.

[151] See above, comments e.g. by J. SMITS, p. 10: "European directives are implemented as much as possible inside the Dutch Civil Code […], even though this cannot take away the causes of increasing incoherence. Also the disperse rules on private international law are structured in a new part of the Civil Code, even though it is no longer in the power of the national legislature to create a coherent system. In my view, the strategy of the Dutch legislature is

Again, as regards codification efforts, we have been informed about projects to collect trade usages and practices in accessible forms, notably in the case of the ICC/CCI, but also in the case of the *Austrian* Federal Economic Chamber (AFEC)/ Wirtschaftskammer Österreichs (WKÖ)[152].

Concerning the area of training and education, several reporters mention ongoing efforts to improve the familiarity of legal practitioners with extra-national sources, by way of apprenticeships in foreign or international courts, with the assistance of the European Commission (European Judicial Training Network, EJTN)[153] or within networks of cooperation between States[154].

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therefore clearly wrong: it should accept it has no longer the power to create a coherent system through legislation and seek new strategies to deal with the various legal regimes that exist on its territory. These strategies will have to take into account the multilevel structure of present-day private law. It must be accepted that the responsibility for coherence and unity of the legal system is no longer in the hands of one institution".
See also, Jelena Perovic (Serbia): "the text of directives should not be introduced in the Code of Obligations, especially not integral texts. The influence of directives may be seen only in […] amending the Code of Obligations where necessary in order to adapt certain provisions of the Code to the adequate requirement of a relevant directive. The Code of Obligations which represents a permanent source of the law of obligations and a specific monument of legal culture should not be exposed to frequent changes, what is exactly the domain of directives which are prompt to adapt to the dynamics of commercial relations".

[152] B. VERSHRAEGEN, Austrian Report.

[153] Working sometimes in cooperation with the Council of the Bars and Law Societies of the European Union (CCBE) and the Council of the Notariats of the European Union (CNUE).

[154] In Austria (VERSCHRAEGEN's report): "The reaction by universities and professional legal associations has been to deepen the knowledge on EU – law, but also to advise students to study abroad and to strengthen cooperation of Austrian practitioners with those from other EU – countries". The German Report includes a paragraph on *Länder*-Academies *(Justizakademien)*: the lists of events involving judges from various European countries is rather impressive (especially in connection with the Eastern European area).

Another possible solution is "to enhance coordination among the various actors involved in the multilevel system".[155]

An occasional reference was made to the assistance provided in Germany by the Max Planck Institute as a possible influencing factor in more efficient application of foreign sources[156]. In Switzerland judges dealing with complex cases involving questions of international private law can seek assistance from the Swiss Institute of Comparative Law which might "write opinions about existing transnational instruments or a particular convention and its application"[157].

The German reporters also reminded us of a proposal already put forward in 2004 within the European setting: in order to improve the awareness of the European Court of Justice about the need for an "interplay between comparative law, European Law, Conflict of Laws and Private and Commercial Law" (instead of "focusing predominantly on European law aspects and interests"), O. Remien suggested that, firstly, in the course of deciding on a preliminary ruling (by means of art. 234 EC, now art. 267 TFUE), the ECJ could be assisted by the national court referring the question: the court might "deliver an outline of how its own domestic law would handle the legal issue in question"; and secondly, other States could file memoranda and experts in comparative law could submit *amici curiae* opinions, indicating possible solutions from a comparative law viewpoint[158].

Law schools have increased their classes on international subjects and on foreign law: in Canada the Law Faculty of McGill University (Montreal, Quebec) "since 1998, has offered an

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[155] Such as the Open Method of Coordination (OMC), accepted as a method of governance at the 2000 Lisbon European Council and since then applied in various areas.

[156] Japan's report: "Some academics pointed out that an institution which would have a good ability to help judges to research foreign laws and the global framework of nations to cooperate with such research should be established", quoting Akira Mikazuki, *Application of Foreign Law and Courts* (written in Japanese).

[157] A. FÖTSCHL, answer n. 8.

[158] REMIEN, *Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht*, in *RabelsZ*, 1998, pp. 627 ff. , at 633.

integrated, comparative, three-year curriculum, known as the McGill Programme, that teaches even first-year introductory courses, such as Contractual and Extra-contractual Obligations, from a comparative perspective. The ultimate aspiration of this programme is to transcend the fixation on the study of law as the study of "legal systems"—to overcome the traditional Western bias of conceptualizing law as nothing but a "system" to free the educational discourse about law from its positivistic constraints"[159]. Obviously the tendency to a comparative approach is most encouraged in a mixed jurisdiction[160].

In the end, we may agree that "most of all, however, we need to rethink our view of private law as a national and coherent system" [161]. The suggestion is to proceed "from the idea of adapting legal cultures. There is no coercion between the cultures but proactive cooperation. Finding this normative compatibility is a task for the judges searching the law. But for this goal we have to leave beside the traditional sentence that a judge may not innovate the law. Interlegality leads to the building of new law" [162].

For my part, the answer does not seem to have changed since 1987, when I proposed at the UNIDROIT congress in Rome that scholars and law schools should avoid maintaining and

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[159] Canadian Report: "The programme attempts to understand global legal diversity as a cultural plurality by, for example, using the heuristic tool of the "tradition", as most notably suggested by H. Patrick Glenn. Conceptualizing "law" as "tradition" allows, according to Glenn, for a "normative engagement" with otherness (as opposed to the hierarchic dominance of the positivist, "systemic" approach), while explaining, at the same time, the necessity to sustain diversity. ".

[160] Nicholas Kasirer "has underlined that the pluralist philosophy behind this experiment is very closely linked to the particular legal consciousness of *Quebec,* a mindset that Kasirer described as characterized by the experience of being "mixed", interstitial, and in flux": Nicholas KASIRER, *Legal Education as Métissage* 78 *Tul. L. Rev.* 481(2003).

[161] See SMITS, *Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?*, in: R. BROWNSWORD, H. MICKLITZ, L. NIGLIA & S. WEATHERILL (eds.), *The Foundations of European Private Law*, Oxford 2010.

[162] A. FÖTSCHL, answer 7 (the reporter mentions the "order for the judge to find law in Switzerland that is in conformity with the European Rules … the national judge may find law *contra legem* if no political will to the contrary was expressed by the legislator").

creating artificial divisions and distinctions where the actual solutions practiced in each jurisdiction were not different. We often present legal rules as conflicting, or far from one another, even if practical cases may in the end receive similar answers. The way we approach problems along traditional lines of teaching or of analysis may emphasize inconsistencies between different traditions rather than stress similarities that may occur at the operational level. "We must react against the habit of dramatising differences expressing legal rules through conceptual tools which make them unnecessarily rigid. It is for scholars to restate rules, stressing more the operative side so that artificial barriers are not built up by theoretical classifications"[163].

Comparative lawyers have the opportunity of lifting the veil hiding reality. They can introduce students to the general features of different legal systems, so that lawyers are not misled by the different classifications that are sometimes used to qualify facts (for example, in common law and civil law jurisdictions, with the tortious rather than proprietary approach to some remedies to recover personal property); they can also illustrate certain areas of the law, where similar needs suggest similar answers.

The suggestion to intervene early in the process of education, made in 1987, was welcomed (by J. Honnold), but also attracted some sceptical comments: in particular by practitioners involved in the process of making the law uniform. They had the impression that starting early in teaching foreign law, or rather the foreign way of thinking about law, would not overcome the usual set of difficulties in persuading States to ratify and enforce international instruments of uniform law[164]. Gerold HERRMANN (senior legal officer of UNCITRAL) was especially sceptical, particularly about the proposal to "start very early with education and professional training". In an ironic reply he mentioned his six-year-old son to whom he said he was "reading every night two

[163] That was my suggestion in Rome, at the UNIDROIT congress (*International Uniform in Practice*, *cit*., p. 292). I was obviously not the only one to encourage a comparative approach, see: G. REINHART (Heidelberg University), *Le droit comparé et le perfectionnement juridique dans le domaine du droit privé* , *ibidem*, p. 264 ff.

[164] G. HERRMANN, in UNIDROIT, *International Uniform Law in Practice*, *cit.,* pp. 543-544.

pages of summary records of the *travaux préparatoires* of one of the important unification projects […]". He concluded by saying that "My anticipation is that in about twenty-five years we will still be discussing the same problems and that unification will still be as important as it is today". He was right. Education takes a long time to bear results, and requires a consistent approach[165].

In the meantime, teaching has changed: many more exchange programmes have been established between universities, and classes include increasing numbers of foreign students.

In the span of time dividing my experience in 1987 and today's experience, I can add that working in international teams such as the European *Acquis Group on Principles of European Contract law* has increased my comprehension of how scholars from different backgrounds approach problems: I cannot say that I can actually predict what their answers are going to be to issues presented to them, but I can follow their reasoning, and also make myself understood when I raise an objection or I present a different way of seeing the problem. I also see that this kind of communication is easier and more obvious for younger colleagues in our (élite) group.

I should only add that one of the reporters mentioned a fact that has always attracted my attention: in case-law on the CISG "in one case, a court cited 40 foreign court decisions and arbitral awards. Two decisions have each cited two foreign cases, and

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[165] Discussions concerning the harmonization of the European law of contract often turn on the alternative between, on the one hand, speeding up unification by outright codification and, on the other side, educating lawyers of the different European States to each other's perspective. A classical example: O. Lando supports the first solution (O. LANDO, *Principles of European Contract Law, An alternative or Precursor of European Legislation,* in *Am. J. Comp. L.*, 1992; O. LANDO, *Why Codify the European Law of Contract?*, 5 *Eur. Rev. Priv. L.* 525, 526–27 (1997)), while A. FLESSNER seems to lean towards the second option (see the *Rechtseinheitlichung durch Rechtswissenschaft und Juristenausbildung,* in the Congress proceedings of the 1991 Hamburg meeting on *Alternativen zur Legislatorischen Rechtsvereinheitlichung*, in *RabelsZ. für ausl. und int. Privatrecht*, 1992, p. 217 ss., at p. 243). The German report mentions opposition by K. KREUZER to a project of codification of civil law across borders (*Entnationalisierung des Privatrechts durch globale Rechtsintegration?,* in *Festschrift 600 Jahre Würzburger Juristenfakultät*, 2002, 247 ff., at 286).

several cases have cited a single foreign decision. More recently, a court referred to 37 foreign court decisions and arbitral awards"[166]. When foreign decisions are easily accessible and translated into one of the languages that most lawyers have struggled to learn, judges and parties do refer to them[167]. In this sense the work done by UNCITRAL through CLOUT *(Case Law on UNCITRAL Texts)* and the *Digest of Case Law*, which summarizes existing judicial and arbitral cases, is probably the best effort made to date, to encourage readers to keep abreast with change.

[166] TETSUO MORISHITA, arguing about the need in Japan to have a specialized court in international commercial law, whose judges may feel confident in English, and referring to http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html#a.

[167] I noticed the enthusiasm in quoting foreign decisions (written in German) also in Italian judgments published in the UNILEX collection (unilex.org) and I was somewhat puzzled (since the knowledge of the German language is not so common in our courts), as I mentioned at the UNCITRAL Congress on the 25th anniversary of the CISG, in Vienna, March 2005, *Some Remarks Concerning the Implementation of the CISG by the Courts (the Seller's Performance*), in *Pittsburgh Journal of Law and Commerce*, vol. 25 (2005-2006), issue 2, pp. 223-240.