CRIO WORKSHOP

CENTRE OF RESEARCH ON INTERNATIONAL ORGANIZATIONS

CRIO PAPERS

N°. 55

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WHAT IS TRANSNATIONAL LAW?

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CRIO Papers A Student-Led Interdisciplinary Paper Series
ISSN: 2037-6006
The School of Laws
University of Catania
Villa Cerami I – 95124 Catania Italy

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Manuel Mallweger (University of Vienna) contributed this paper to the 2020#IORESTOACASA Course on Transnational Law while in Erasmus at the School of Laws at the University of Catania.

WHAT IS TRANSNATIONAL LAW

and

HOW IT IMPACTS CORPORATE LAW, CONTRACT LAW AND DISPUTE RESOLUTION IN THE 21ST CENTURY

by

MANUEL MALLWEGER

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I. Abstract

The aim of this paper is to answer the question "what is transnational law and what is the role of the state?" by including the papers provided within the framework of the transnational law course and the further explanations of Prof. Rosario Sapienza. First, it tries to answer the main question "what is transnational law?" in a general and abstract way. Secondly, the paper will use this general definition of transnational law as a starting point and it will give a closer and more detailed look to transnational law in the 21st century and especially its role in company law, contract law and the law of dispute resolution. The course "Transnational Law" by Prof. Rosario Sapienza is mainly, but not only, pointed at Erasmus students, therefore this paper should be read from an European point of view. Because of the huge impact all over the world, the development of transnational law in the United States will also be discussed. The focus on corporate law, contract law and the law of dispute resolution is caused by my personal interest and the specialization I chose in my studies at the University of Vienna.

II. Introduction

We live in an age of transnationalism; we always have but its intensity has increased a lot. The origins of the United States law, for example, come in large part from the empire. Most remotely, they come from Rome. Closer in time, they come from England and its common law heritage. Most recently, they come from the intensification of transnational economic and cultural interaction, catalyzing a proliferation of international, regional and bilateral agreements, regulatory networks and institutions which foment and promote legal and institutional change.[1] This is just one example of transnationalism and transnational law and its development through the years. It is not just a phenomenon of the 21st century and the digitalization process, it is the value and importance of transnational law that changed dramatically. Although the term transnational law is increasingly used - almost every day-by-day situation has a transnational or international context and background - it needs a further clarification.

III. What is Transnational Law?

In order to answer this question, it is necessary to go back a few centuries to find the origin of transnational law. Since the rise of sovereign states in the seventeenth century, law has been associated with state law and national legal systems. Law, as John Glenn

[1] Shaffer, Gregory. "Transnational Legal Process and State Change." *Law & Social Inquiry*, vol. 37, no. 2, 2012, pp. 229–264.

writes, was "an essential element…of national construction".[2] Public international law was based on and came into existence with the creation of states, governing their relations and providing for their mutual recognition. Private international law provides complementary rules and standards to govern situations where more than one state asserts jurisdiction over a transaction or event. The concepts of public and private international law are thus both state-centric, addressing relations between nation states and between national legal systems, as reflected in the term "inter-national."[3]. With the fall of the Berlin Wall and the spread of economic globalization, scholarly work has increasingly applied new concepts of "global" and "transnational law," but often without clear conceptualizations of either. The concept of transnational law has been developed, in parallel, to address legal norms that do not clearly fall within traditional conceptions of national and international law but are not necessarily global in nature. The concept of transnational law can be narrower or broader, depending on the concept's user, but it generally comprises legal norms that apply across borders to parties located in more than one jurisdiction. An example of the trans-nationalization of law that fall outside traditional conceptions of international law is the formation by private actors of substantive law that applies across borders (such as the "new lex mercatoria"). From a broader conception, transnational legal orders can comprise both hard and soft rules, can be bilateral, regional or multilateral in nature, can be constructed by states or non-state actors, and can be directed at states, corporations or individuals.

In his famous 1956 Storrs Lectures, Judge Philip Jessup defined "transnational law" in the first "situational" sense as "all law which regulates actions or events that transcend national frontiers."[4]. He stressed that "both public and private international law are included, as are other rules which do not wholly fit into such standard categories." This concept is a functional and practical one, reflecting a professional concern that, since both international and national law are inadequate to address the flow of actions and the impact of events across borders, we need a more accurate and useful concept to govern these situations.[5] The growing use of the concept of "transnational law" Jessup's sense reflects a functional legal response to increasing economic interconnections, sometimes involving new international treaties and regimes and sometimes involving the application of national law to events that occur outside a state's borders but have effects within it.[6]

On the other hand, there are – as always – voices of dissent, for example Karsten Nowrot's. He questions if we could blame Jessup's work "for the currently often comparatively

[2] Glenn 2003, 839.
[3] Jessup 1956.
[4] Jessup 1956, 2.
[5] Jessup 1956, 7
[6] Shaffer, Gregory. "Transnational Legal Process and State Change", 2012, 9.

undifferentiated recourse to a purportedly widespread rise of transnational law".[7] Nowrot holds Jessup accountable for today's unprecise understanding of transnational law because of his broad and intentionally undertheorized description[8] as well as application of this term and concept in transnational law.

A different approach, compared to Jessup's definition of transnational law, was chosen by Craig Scott – a Canadian scholar and politician - and Harold Koh – former dean of Yale Law School and Legal Adviser of the Department of State (U.S.). They represent the concept of transnational law as transnational construction and flow of legal norms. The focus is on the transnational production of legal norms and institutional forms in particular fields and their migration across borders, regardless of whether they address transnational activities or purely national ones. This conceptualization of transnational law comprehensively includes public and private international law (with their traditional state-based focus), global law (with its universalist pretensions), and non-globalized law that applies to more than one state.[9]

Harold Koh captures this conception of transnational law in a more illustrating and refreshing way, when he combines the vertical and horizontal dimensions of the transnational flow of legal norms:

> *Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is "downloaded" from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or "horizontally transplanted" from one national system to another: for example, the "unclean hands" doctrine, which migrated from the British law of equity to many other legal systems.*[10]

There has, however, been a parallel revolution in public international law since Jessups`s lectures, which needs to be theorized in transnational terms. It is best done through shifting attention from the concept of transnational law to the concepts of transnational legal

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[7] Nowrot, Karsten. Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order: A Darker Legacy of Jessup's Transnational Law? 2018, Heft 17, 17.
[8] Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 57 et seq.; Scott, German Law Journal 10 (2009), 859 et seq.
[9] Shaffer, Gregory. "Transnational Legal Process and State Change", 2012, 9.
[10] Koh, 2006, 745-46.

ordering and transnational legal orders.[11] The revolution, starting in 1956, has reflected in a proliferation of international institutions, international courts, treaties, and so-called "soft law" technologies of governance. Shaffer and Coye try to show the development from transnational law to transnational legal orders on the basis of the TRIPS Agreement. Under the 1889 Paris Convention for the Protection of Industrial Property, countries were given great discretion regarding the content of patent law as long as they applied it on a non-discriminatory basis.[12] In the 19080s, a group of private entrepreneurs formed a national association to enroll the United States to press other countries to link intellectual property law to trade agreements. The movement successfully gave rise to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO) in 1995.[13] The TRIPS Agreement is transnational law in Jessup's definition, because it resolves a transnational problem. TRIPS is also transnational in a deeper sense as reflected in the socio-legal concepts of "transnational legal ordering" and "transnational legal orders." These concepts help unpack how the problem was framed (as a private property right implicating trade), by whom (by U.S. and European private parties and their governments), and where the legal response derived (from norms developed in U.S. and European law).[14]

These contrary examples show that, because of the almost infinite variety of transnational situations that can arise, it is nearly impossible to give a precise definition of transnational law. Roger Cotterell states that, it needs a reconceptualization of the idea of "law" to make possible an analysis of the whole range of types of doctrine (guidelines, principles, concepts, codes, norms, standards, etc.) that are now being associated with transnational law.[15]

[11] Shaffer, Gregory C. and Coye, Carlos, From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders (2017), 1.

[12] Laurence Helfer, Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines, in: Halliday & Shaffer, Transnational Legal Orders, 311; Gregory Shaffer & Susan K. Sell, Transnational Legal Ordering and Access to Medicines, in: Ruth L. Okediji & Margo A. Bagley (eds.), Patent Law in Global Perspective (Oxford University Press, 2014), 97-126.

[13] Shaffer, Gregory C. and Coye, Carlos, From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders (2017), 4.

[14] Shaffer, Gregory C. and Coye, Carlos, From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders (2017), 4.

[15] Cotterell, R. (2012), What Is Transnational Law? Law & Social Inquiry, 37: 500-524.

IV. THE IMPACT OF TRANSNATIONAL LAW IN CORPORATE LAW, COMPANY LAW AND DISPUTE RESOLUTION IN THE 21ST CENTURY

In the market of goods and services, competition is a central feature of market economy systems. The market decides which products are offered and at what prices. Law does not appear to belong in this category, it is not considered to be a product.[16]

Nevertheless, law has become a commodity in many parts of the world and in relation to many different topics. Individuals and companies seek attractive legal regulations, and countries compete for customers of their legal wares. For example, an Italian entrepreneur residing in Bremen could set up an English limited company for his business, finance the enterprise with bonds and loans under New York law, choose arbitration in Switzerland for all disputes that arise, and, should he find himself ruined by his creditor's claims, file for private bankruptcy in France. All of this may be organized from a villa in Liechtenstein with the aim of gaining maximum financial and strategic advantage.

Jurisdictions advertise their "legal products" and react sensitively to changes in demand. If the statues of a country do well in business, the tax-paying legal services industry does well too. For this reason the English Law Society publish a brochure entitled "England and Wales: the jurisdiction of choice."[17] The professional representatives of legal professional in Germany published also a brochure "Law made in Germany"[18] It is obvious that there is a market for "legal products", thus it is necessary to analyze the emergence of a transnational law market in a more detailed way.

Market activity only arises if there is supply and demand for a particular product or service. The fact that law has become a product across broad subjects and regions is linked to structural changes on the supply-and-demand side of law as a commodity.[19]

On the demand side, the ability to choose which law shall apply (i.e. conflict of laws options) in global transactions has made the law market possible. Nowadays, natural and legal persons are able to escape the regulatory dictates of the country in which they have their domicile. Choosing freely in private international law is, instead, regarded as an instrument to increase legal certainty with respect to the applicable law and, at the same time, to strengthen private autonomy.[20] There are still some fields of law, namely taxation and marriage, where it is not possible to choose a foreign law because of the mandatory

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[16] Eidenmüller, Horst (2011) "The Transnational Law Market, Regulatory Competition, and Transnational Corporations," Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 2 , Article 5.
[17] The Law Society of England & Wales: The Jurisdiction of Choice, 2011.
[18] Bundesministerin der Justiz, Law – Made in Germany, 2011.
[19] Eidenmüller, Horst (2011) "The Transnational Law Market, Regulatory Competition, and Transnational Corporations," Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 2 , Article 5.
[20] Jan Kropholler, Internationales Privatrecht §§ 21(II), 40(III)

application of the law in which the natural or legal person has its residence. Also technical progress, especially the Internet, has lowered information and transaction costs considerably, thereby creating the possibility of choosing the best law for individual purposes swiftly and efficiently.

When there is a so-called market for "legal products", it is also important to look at the supply side. The incentives are obvious; if companies locate their investments in a country's territory, the state profits in terms of higher taxes, employment and contribution to their GDP. In the United States, for example, the small East Coast state Delaware plays a leading role in company law because of its massive incentives. If the law of a country is used in various territories worldwide, then it means that the country's specialized service providers (e.g., lawyers, tax advisors, and accountants) also do well[21].

To summarize it, it is possible to say that, the transnational law market developed as a result of the considerable increase of choice of law opportunities on the demand side, and the marketing of substantive law (i.e., the "law products") by individual countries on the supply side. It can no longer be disputed that such a law market exists today in numerous regions and in many substantive fields of law.

a. COMPANY LAW

As already mentioned, U.S. company law is dominated by Delaware. The reasons why it is more attractive are many, the efficiency of the state and the tax incentives are just two of them.

In Europe, regulatory competition in company law did not play a significant role for a long time due to the real seat principle in the conflict of laws of many different Member States. The real seat principle states that the law applicable to a company is the law of the state in which the company has its real seat (i.e., where its central place of administration is located)[22]. This changed dramatically with the three major decision form the European Court of Justice: *Centros*, *Überseering* and *Inspire Art*, which all concerned the freedom of establishment These decisions resulted in Member States having to recognize a company formed in another Member State according to its law of formation, even if the company has never operated in the country of formation. The English private company limited by shares (Ltd.), which is a closed corporation, proved to be very popular in the German market, especially in the ears before the financial crisis of 2008. Almost every fourth newly

[21] Eva-Maria Kieninger, Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt, 190, 2002.

[22] Eidenmüller, Horst (2011) "The Transnational Law Market, Regulatory Competition, and Transnational Corporations," Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 2 , Article 5.

formed closed corporation in Germany was an Ltd[23]. The Sociedad Limitada Nueva Empresa had also immense popularity in the European Union. It was launched in Spain in 2003 and allowed a company to be formed with a minimum capital of € 3,012 and within only twenty-four hours.

There is also a law market for public corporations, obviously the English law is for public corporation extremely attractive too. The German airline Air Berlin, at its peak the second largest airline of Germany – filed insolvency in 2017, operated in the legal form of a public limited company by shares. The European *Societas Europea* (SE) also enjoys a certain popularity, again, especially in Germany. Corporations such as Allianz, Porsche, BASF, Fresenius and MAN have decided in favor of this form.

b. CONTRACT LAW

If we take a look at the United States first, it is recognizable that the contract law market is dominated by the law of New York and not by the law of Delaware. New York law is chosen for commercial contracts in 46% of all cases in which a choice of law provision is included in the agreement.[24] This popularity cannot be explained merely by the place of business of the parties, it is more the efficiency of court proceedings, along with the subjectively perceived sensitivity of New York law to the interests of financial institutions.

In Europe too, jurisdictions that have the reputation of being sensitive to the needs of commerce and businesses are often the jurisdictions selected as governing law in business agreements.[25] A representative survey by the University of Oxford of European companies with cross-border activity showed that English law was the most popular choice and was selected by 23%, followed by Swiss law with 19%.[26] The main reason for the choice of foreign contract law is the quality of English and Swiss law. Especially from a German point of view this can be stated more specifically: parties to a contract wish to avoid the perceived inappropriateness of judicial review of preformulated, standard contract terms with respect to principles of fairness.[27] In the meantime the German Contract law has been reformed with substantial improvements to close the "quality gap" between German and foreign Contract Law.

[23] Horst Eidenmüller, Die GmbH im Wettbewerb der Rechtsformen, Zeitschrift für Unternehmens- und gesellschaftsrecht [ZGR], 172-174, 2007.
[24] Theodore Eisenberg & Geoffrey P. Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts, 30 Cardozo L. Rev. 1475, 1478 (2009).
[25] Eidenmüller, Horst (2011) "The Transnational Law Market, Regulatory Competition, and Transnational Corporations," Indiana Journal of Global Legal Studies 18, 2, 5.
[26] Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law; A Business Survey-Final Results, Inst. Eur. & Comp. L.: U. Oxford Fac. L.
[27] *See* Michael Abels, Gerichte zerstören Vertrauen, Frankfurter Allgemeine Zeitung [FAZ], 19, 2007.

c. Law of Dispute Resolution

The dominance of English and Swiss law continues in the field of dispute resolution. The quality of the judges and courts is the primary reason, as well as the United Kingdom having the "most favorable" civil justice system in Europe. Today, however, large commercial disputes are predominantly resolved within arbitration proceedings (63% of the companies studied prefer arbitration to court proceedings when conducting cross-border transactions).[28] The advantages of arbitration proceedings are obvious: the parties can choose expert arbitrators, the proceedings are confidential and, therefore, less of a burden on the existing relationship. Arbitral awards must be recognized by all signatory countries, according to the New York Convention. The most favored venues for arbitration in Europe are Switzerland (Chambers of Commerce in Basel, Geneva, Lausanne and Zurich), Paris (International Chamber of Commerce) and London (ICC International Court of Arbitration). A big factor for choosing arbitration proceedings is the neutrality of individual places of arbitration, which applies to Switzerland in particular, and the expertise of the arbitrators.

[28] *See* Oxford study, supra note 48, id. at 45.