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Summary

International, national and private law – hybridisation of legal systems
Interaction of legal sources freom a private law perspective

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I. Pluralisation and denationalisation

1. A pluralism of legal sources, non-state bodies of law and settlement of disputes by extrajudicial authorities are not new phenomena in the field of private law. However, it is the dimension of these phenomena that represents a new development: It is global and has led to a pluralistic, intricate network of legal orders and legal sources on various levels.

II. Diversity of legal sources

2. From a private law perspective, different legal sources interact on various levels. Traditionally, it is the rules on conflict of laws that coordinate the interplay of the private laws emanating from national legal orders. In the course of the approximation of private international law and international procedural law, this task is performed on an international, a European and a national level. Multilevel legal orders also prove to be of substantial significance with regard to the approximation of substantive law. Legal relations between private persons and entities are, moreover, increasingly influenced by fundamental and human rights.

3. Non-state bodies of law have long since existed in the national context. Beyond the nation state, the creation of such rules is closely linked with and fuelled by the process of globalisation. The acting parties and forms differ as much as areas of regulation and the degree of specificity. Notwithstanding the discussion about the existence of autonomous or transnational law, the term "non-state law" comprehends all sets of rules that are in some way connected to a national legal system or a supranational or international organisation.

III. Interaction in the process of approximation of private international law

4. With the shift of legislative competence to the European Union in the fields of private international law and international procedural law, juxtapositions of EU law and international treaties governing the conflict of laws become increasingly frequent. The universal character of the conflict of law provisions requires coordination. Rules determining which law takes precedence resolve conflicts of applicability, but divergent provisions of EU and international origin adversely affect the international harmony of decisions. However, the prerequisites for a coordination of treaty and EU provisions governing conflict of laws are actually present both in terms of competence and institutions. Discord can also be avoided by choosing a non-binding instrument instead of an international treaty.

5. The fragmented character of EU private international law and the lack of coordination between the individual instruments require the recourse to national law, thus compromising the international harmony of decisions. This fragmented character also calls

the coherence of national and EU law into question. The connecting factors determined by EU law generate spill-over effects and progressively oust national conflict of law rules.

6. The choice of a non-state law is limited to arbitration. At the same time, states recognise the application of this body of law by enforcing the arbitral award. Providing for the choice of a non-state law in state courts under certain conditions would strengthen the harmony of arbitration and litigation. But some restraint is called for with regard both to the set of rules that can be chosen and the areas of law concerned. The applicable body of law has to present a sufficient density of regulation and ensure a reasonable balance is struck between the interests at stake. At any rate, internationally mandatory rules and the protection of public policy (ordre public) have to be respected.

7. The public policy clause is the classic gateway through which fundamental and human rights can enter and engage with the conflict of laws. To date, the EU provisions on that matter are not able to dispense with a clause in favour of national public policy. These EU clauses are however shaped by supra- and international human rights and aim primarily at laws of third countries. Their significance increases in relation to the extent to which the particular area is determined by legal culture.

IV. Interaction in the process of approximation of substantive law

8. International treaties aimed at a universal unification of laws are increasingly complemented by non-binding instruments focussing merely on harmonisation at an international level. Developed on a comparative law basis, these model laws and principles are influenced by different legal orders. Conversely, they serve as models or guidelines for legislation on a national and supranational level and in consequence turn from a source for the creation of law into a source of authority of the law.

9. Union law is characterised by the coexistence of directives and optional uniform law. As a result of the implementation of directives in national law, EU law permeates national law and a hybridisation of national laws occurs to an extent dependent upon the respective degrees of flexibility. EU regulations as optional instruments on the other hand create original EU regimes that do not replace national rules, but merely complement them. As uniform law, these EU regulations need to mesh into the conflict of law rules. Questions regarding the meshing with national law arise when interpreting optional instruments and filling the gaps they leave.

V. Interaction and hybridisation

10. The sources of law that interact in the process of the approximation of private law are manifold, as are the facets of this interaction. In the area of conflict of laws the creation of uniform law is paramount. Discord must be avoided in this area by coordinating international and EU legislation. Both the ways and the aims of the approximation of substantive law are more diverse and the interaction of the sources of law more complex: Competing *and* complementary instruments aspire on an international *and* regional level towards harmonisation *and* unification. The coherence of the interaction must be ensured. Henceforth autonomous *private international law* will be displaced; national *substantive law* will be permeated and supplemented. Also in future the approximation of private international law will not be an alternative to the approxima-

tion of substantive law. Instead, both processes will complement one another. Uniform law and conflict of law rules are to be closely meshed in order to meet different and sometimes conflicting requirements.

11. Exactly what challenges the interaction of different sources of law entails, but also what potential it yields, cannot be answered uniformly for all fields of private law.

12. The different sources and bodies of law interact within the creation of law or the legislative process and at the level of the application of law as well as within its enforcement. The increasing production of uniform law leads to a hybridisation of legal systems. Uniform law is characterised by elements of different national and supranational laws and bodies of law, but, for its own part, also influences lawmaking on different levels. In the light of such an amalgamation the question arises as to whether there is a tendency for all laws and bodies of rules to become hybrid.

13. An increase in uniform law reduces the cost associated with the application of foreign law and makes the outcome more predictable. However, the amplification of sources of law and the hybridisation of bodies of law lead to problems for practitioners and for those who are subject to regulations. Coherence, transparency and information need to be ensured in order to guarantee access to justice.

14. The metamorphosis of private law is advancing. Whilst non-state bodies of law cannot become legally binding by their own appointment, they are increasingly awarded binding legal force in a supranational context in a variety of different ways – for example, already today through the choice of law before arbitration tribunals, whose judgments are being enforced by the states themselves. Binding legal force resulting from a reference to non-state bodies of law in conflict of law rules is also conceivable. Furthermore, we are seeing more and more processes of transformation through which "academic" law becomes state law and thus participates in the hybridisation of lawmaking.