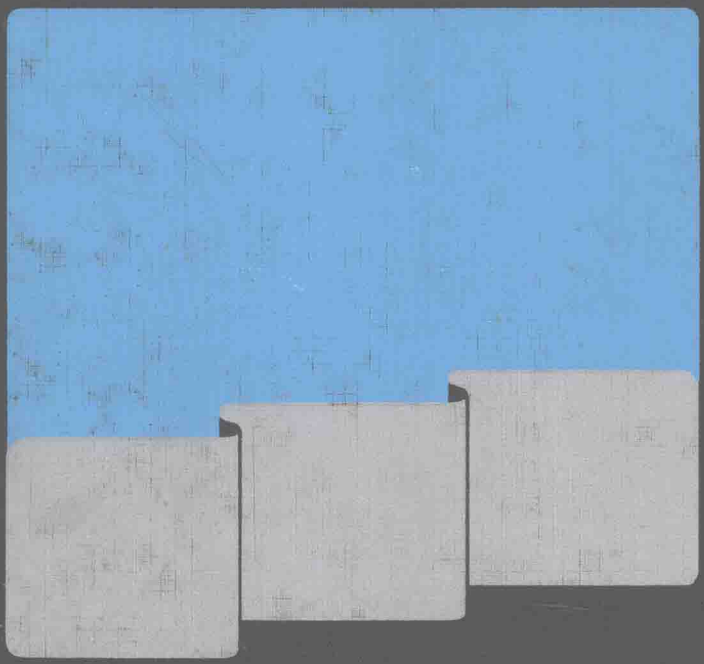
COMPARATIVE LAW YEARBOOK



CENTER FOR INTERNATIONAL LEGAL STUDIES

Comparative Law Yearbook

Issued by
The Center for International Legal Studies

Volume 2, 1978

SIJTHOFF & NOORDHOFF 1979
Alphen aan den Rijn, The Netherlands
Germantown, Maryland, USA

ISBN 90 286 0029 9

Printed in The Netherlands.

The Center for International Legal Studies is a non-profit and non-stock organization incorporated under the laws of the State of California and with headquarters in Salzburg, Austria. The Center is devoted to the promotion of international legal education, research, information exchange and understanding. It coordinates and supervises various law seminars in Europe and sponsors research in areas of Comparative and International Law.

The editor of the *Comparative Law Yearbook* is Prof. Dennis Campbell, Director, Center for International Legal Studies. Associate Editor of the 1978 volume has been Dr. Beverly Baker-Kelly. The *Comparative Law Yearbook* prints matter it deems worthy of publication. Views expressed in material appearing herein are those of the authors and do not necessarily reflect the policies or opinions of the *Comparative Law Yearbook*, its editors or the Center for International Legal Studies.

Manuscripts should be sent to the editor, *Comparative Law Yearbook*, Center for International Legal Studies, Box 59, A-5033 Salzburg, Austria.

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A Comparative Law Synthesis Theory v. Private Transnational Law as a New Concept in Private International Law

Ferenc Mádl, Professor of Law, Eötvös Loránd University, Budapest, Hungary

Preliminary Remarks

A new concept of private international law is gathering strength and spreading, that of private transnational law.[1] This writing has been provoked to a great extent by the ideas, new thoughts, convincing and provoking arguments, confrontations of obsolete legal categories and the demands of recent developments in the field of international economic relations, which drive the wheels of this new concept.

Are new concepts or theories still needed? This was my question when I ventured a new theory on comparative private international law.[2] Are there peaks still unclimbed in this field of law?[3] When issues are raised concerning the considerations on which one state applies the law of another within its territory or concerning the solution of an international case, many theories are offered. One theory has been called *neo-comity*. This theory permits the foreign legal system to implement its claims in the other country on comity considerations. Savigny called this a *freundliche Zulassung* (friendly admission). The same idea finds expression among modern authors, in Eck's "international cooperation", in Kahn-Freund's "growth of internationalism", or in Schmitthoff's writings, according to which there are vested foreign rights which

deserve protection, or in Szászy's efforts to elevate coexistence to a principle of conflicts of law. There also are the theories of the new "law merchant", or Rabel's *Entscheidungseinklang* (harmony of settlement), induced by intensive comparative law analyses to result in a gradual harmonization of decisions. When we turn to the American theories, we find Currie's "legitimate governmental interest", the "principles of preference" of Cavers, Lefler's "choice-influencing considerations", and the *Restatement 2d* with its "most significant relationships". But these theories have been under heavy criticism in recent times. In *Struggle with Reality in Private International Law*,[4] a survey was undertaken as to what these theories offer and what they are unable to do once reduced to the level of realities. One negative conclusion was that these theories are open to so many constructions that they provide no assistance in the solution of concrete legal questions (especially as long as they are not settled by statute law), unless some sort of *super* or *meta* law is assumed which would, in each case, refer us to a specific foreign system. Even then there is no guarantee that this "nationalization" of an international case is the best solution. In other words, any concept which fails to provide concrete rules for law-making or concrete decisions is mere intellectual play.

Thesis: The New Concept Summarized

The categories "thesis", "antithesis", and "synthesis" are borrowed from dialectics and, in this legal application, from the organization used by another author in treating this subject matter.[5]

The most general approach of law to any international case is what is called *the classical doctrine*, and what Langen demonstrates in the *Serbian Loans Judgment* of the Permanent Court of International Justice: "The classical private international law of all countries proceeds on the assumption that any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[6]

Thus, the judge must link the contract to one municipal legal system. And this is where the classical doctrine fails, Langen's critical review states, because those principles or connecting factors by which classical doctrine links a contract to one or another municipal law become more and more arguable and, because of their ambiguity, correspond little to the recent requirements. Against Savigny's *Sitz des Rechtsverhältnisses*, the counter-argu-

ment was raised that a legal relation has no situs or that this does not offer much guidance to the judge. The "center or gravity of a contractual relationship" carries the same flaws, since the center of gravity may rotate from one part of the whole to the other because, "as in physics, situations arise in law where there are two centers or one fluctuating center of gravity ... thus, this is not a doctrine that will provide an overall solution of the problem" (p. 5).

Little has been done for the international unification of conflict rules, too, so it is the diverging variety of solutions which national conflict rules offer in the same international case. This gave rise to the problem of the acceptance of the other country's conflict rules by way of *renvoi*, or reciprocity and "neighborly regard (*comitas gentium*)", but with not very practical results. *Comitas gentium* creates "a situation comparable to that of two excessively courteous gentlemen who are unable to pass through a doorway because each insists on yielding precedence to the other" (p. 6). The *lex loci contractus*, the law of the place of conclusion applicable to a contract, has also given rise to doubt, and it was put aside by renowned courts of international commercial practice "for in modern conditions of air travel, the place of conclusion has become a purely fortuitous detail, open to easy manipulation" (p. 4). The once unequivocal domination of the principle of domicile in these countries, and that of nationality in others, gave place to many exceptions on both sides, so ambiguity resulted again when it came to concrete decisions. The law of the place of performance (*lex loci solutionis*), backed specially by German practice, is not given a better grade either because "each party has to honor his commitment in a different place, so that this criterion offers no solution, moreover, the identity of the place of performance is in itself a preliminary question, which can scarcely be settled without deciding which law is applicable; hence, although there have been numerous judgements in favour of the place of performance and these represent an increasing practice, this too offers anything but reliable or predictable solutions (p. 4, 5).

In summary, the judgement against the classical doctrine reads as follows: "In this quandry, many courts have resorted to a veritable judgement of Solomon and split the contract in two", although "this theory of 'bisection' has been condemned" (p. 5).

This is one side of the coin. On the other, we see all the difficulties and disadvantages (following from the courts' assumed obligation to resolve the particular cases along the line of the mentioned theories and connecting factors leading, in the end, to the application of this or the other municipal law), such as the

disproportionate length of time needed, the speculative ways resorted to, the emergence of a "homing instinct", and the forcing of international cases into the Procustes bed of a single municipal system, the "nationalization" of the "international" (p. 203).

The *law merchant* doctrine is not much better off in the Langen survey. Rules developed in international practice did not find sympathy in the supreme courts of Germany, France, the United Kingdom and the United States. In the 1930s, the supreme courts of these countries are said to have suppressed the trial courts' "virtual revolt" against the exclusively municipal-law doctrine, following the model of the *Serbian Loans Judgement*. To mention just one of the inferior courts' decisions in this "revolt", the Hansaetic court of appeal (Oberlandesgericht) in Hamburg held that there was no reason to subject a given case to one of the municipal laws in question "because the case concerns a clause which has become firmly established over the years in international traffic" (p. 8).

But the Reichsgericht cracked down on this interpretation, refusing to consider the said internationally-established clause except as a component part of the German legal order. This is said to be the attitude also of more recent supreme court practice, an attitude not much changed by pro-*law merchant* scholarly efforts of the post-World War II period.

Although not a *lex mercatoria* question, Langen deliberates on international legislation (unification), too, only to have its shortcomings emerge: the needed protracted procedure, the diverging interpretation coming from the national legal background, the difficulty of bringing treaties into harmony with underlying national legal systems, and their limitedness to certain regions. All this is, of course, not much overvalued in Langen's preference for case law, since "the vigorous development of case law can be expected to produce better effects more rapidly" (p. 22).

After having presented the old solutions of the law's reaction to the challenge of modern demands in international trade and after having cited their failures, Langen proceeds to develop the modern thesis of transnational commercial law. In this course we are shown the birth and notion of this phenomenon, followed by a detailed analysis of the internal structure of transnational commercial law.

First, Langen examines the birth process of transnational commercial law from the first stirrings to its developed notion. These "first stirrings", as he puts it, are found in the courts' practice. For this he identifies the *Cassia Case* of 1908 in which the Reichsgericht, although applying German law in the dispute be-

tween German and English shipowners, first recognized the existence and particularity of the "international case", demanding more than the application of simply one or the other domestic law. In its reasoning, the Reichsgericht said that "an equitable balance should be struck ... by making sure that the faculties and responsibilities attributed to one side are approximately matched on the other" (p. 14). Should, in fact, the law of either side favor one party more than the other, the acceptance of such a disproportionate solution cannot be considered to have been assumed by the parties, unless there was a stipulation to this end; but, if there was none, the justifiable assumption can only be this mentioned "equitable balance", a synthesis of the faculties and responsibilities of the two individual systems of law involved. "The idea of competing legal systems and the necessity of striking a just balance between them hangs in the air", says Langen, and brings new evidence thereto. In a Swiss-German prescription case in 1922, the Reichsgericht held that even if by *ordre public* the Swiss imprescriptibility rule were displaced and German rule applied, the German court "was under obligation to ascertain which particular provision of the German law came closest to the way of thinking of the foreign law" (p. 16). What is hinted at – more than hinted at – here is that the common substance of the involved laws must be sought, and this would be the transnational-law solution.

Langen cites a series of decisions from various countries (United States, France, United Kingdom, Czechoslovakia) from 1937 to 1965 in which this transnational-law approach materializes. The Franco-German treaty and the articles of the *Sarlor AG* are also cited as more recent documents in which traces of the new thinking are visible. These documents provide that the applicable law, in addition to the founding documents (the treaty and the statute of the company), "shall include the common principles of German and French law, and that in the absence of such principles a decision should be taken in accordance with the spirit of cooperation which presided over the formation of the company" (p. 17). Here we have, as the argument of Langen goes, a factually materialized transnational law philosophy.

Then Langen turns to the question of who first gave expressed and conscious formulation to this approach. It was Gutzwiller who wrote in 1931 that the post-World War I Mixed Arbitral Tribunals, while not "so free ... that they would have been allowed to slight 'international justice' with its ingrained traditions and the claims of its temper and spirit ..." were the mechanism by which the participating States, because of a common historical evolution, developed such special *transnational norms* (author's italics) (pp.

17-18). Langen develops the proposition that it was, especially after World War II, comparative law that gave decided impetus to the transnational doctrine, particularly by its intrinsic trend to find the common core of various compared national laws or institutions, to focus primarily on substantive law to construe uniform or harmonized *Denkmodelle* and to induce unified or harmonized law, i.e. unification as much as possible.

Given this ideal function of comparative law and legal scholarship, it is the more deplorable, as Langen says, that not much has been accomplished, that tittle has been done to decrease the fragmentation of private international law.

The most ambitious harmonization venture, the *Hague Sales Rules*, has had little success so far, and "the practical success of any further harmonization depends on whether the *Hague Sales Rules* and the *Uniform Commercial Code* can be brought into line with each other ..., the first (the Hague Convention of 1964) being a code predominantly based on continental European Thinking (p. 23)".

American case-law practice does not come off much better. As to the great reformers – Currie, Cavers and Ehrenzweig – the question is raised whether they were on the right path given the circumstance that case law offers easy positions and invites, almost by its nature, transnational law thinking. But Langen shares the misgivings of Europeans that not much has come from this source, at least not for the development of a transnational law philosophy.

The "forum policy" of Ehrenzweig is mentioned with little credit, Langen noting that "the idiosyncratic terminology of an Ehrenzweig, for example, multiplied the problems of the German scholars in coming to grips with developments in America" (p. 29). In my judgment, what Ehrenzweig really has done along this line is somewhat more, to which we shall come back later. Cavers' "result-selective approach" gets the most credit from Langen because only he among the Americans sufficiently "has taken steps to profit from advances in the field of comparative law". But at the end, as far as the Americans are concerned, Langen "ventures to suggest that they would do well to adopt the auxiliary technique of comparative law ... so as to remove the burden of uncertainty still weighing upon recent endeavors, and thereby promote the universally-desired unification of international law, more particularly in the field of commerce" (p. 30). By their inter-state law laboratory, the Americans could especially contribute much to the desirable harmonization of judicial decisions of international scope which, in theory, could more easily emanate from a case-oriented and hopefully more comparative-law-influenced Ameri-

can practice than from statute-law countries. And for Langen, "the harmonization of judicial decisions in cases of international scope brings us to the third stage of the advance towards transnational commercial law" (p. 30).

Comparative law, as is seen, is a focal point in the development of transnational law solutions. On this understanding, and this is a very valuable thesis in Langen's theory, comparative law is much more than a purely analytical or formal comparison of laws. He joins those who "handle national laws as the raw material from which, by a technique analogous to fusion, refining or distillation, the shared quintessence of both municipal systems are extracted, and is recognized and applied as something common. Comparative law has nowadays to be functional" (p. 31).

So this is the way we arrive at the thesis of transnational law (Langen remarking, by the way, that "at the moment we must regard transnational law as little more than an inscription on a signpost", and that "transnational law denotes much rather a working method than a new legal order ..." [pp. 30 and 32]). Transnational law, summarizing Langen's findings in his words, is really the common substratum of the substantive law solutions of the domestic laws involved. "By transnational commercial law we mean", he concludes, "the aggregation of all those rules which held good in the same or very similar way for given concrete legal situations in two or more spheres of national jurisdiction" (p. 33). This transnational law can apply by virtue of the parties' stipulation "or if it appears *prima facie* that transnational commercial law can apply." In these cases there are roughly three ways for the judicial assessment.

First, when two domestic laws are for that concrete legal situation substantially compatible, the judge applies his domestic law but refers to its compatibility in order that its judgment may carry due conviction.

Second, in absence of compatibility "the judge must endeavor to pinpoint the difference and to strike a balance ... within the limits of non-mandatory rules of both laws concerned." Such a decision, too, remains within the domain of the non-mandatory domestic rules.

Third, in the rare cases when these two solutions are precluded by *ordre public* or a mandatory rule of the legal systems concerned, the "judge is compelled to make a choice of national law and to proceed accordingly" (p. 23).

Langen, having developed the notion of transnational commercial law (really no theoretical delimitation is made in the book unless we consider the circumstance that his cases and legal institu-

tions are taken mostly from the commercial practice, although by their legal forms many of the rules are private-law rules too), provides a detailed analysis on the structure of the transnational-law rulings. This is done after three chapters on specific subject matters – license agreements, sale of goods, limitation of claims – are used to demonstrate the transnational commercial law thesis of the book. In the last chapter, the Practice of Transnational Adjudication ("Binominal Adjudication"), a differentiation or substantiation of the thesis of transnational commercial law follows. Here the internal structure of the notion is analyzed, its application process developed and demonstrated.

The aim of transnational commercial law is the binominal decision, a term the author henceforth uses for the desired decision compatible with the national laws of both parties, referring also to the original or literal meaning of "binominal" – the Greek derivation of "two-law" (bi-nomos). But the binominal decision must find its way through the different language of the substantive laws concerned. The meaning of the same term often is different in even the same language of various countries (e.g., Federal Republic of Germany, German Democratic Republic, Austria and Switzerland). Of this there are good examples, such as the difficulties of the translation of the General Agreement on Trade and Tariffs texts, or the German Bundesgerichthof's decision in 1959 which warned a tribunal that apparent linguistic similarity was an insufficient ground for construing an Austrian statute by the light of German rules. Accordingly, the court first must clarify that, in accordance or in spite of the actual words used, the same rule or the same legal institution applies to the concrete international situation or case in question.

Very closely linked to the language problem is the question of interpretation. The substantially identical rule can be and often is interpreted in diverging directions. And the diverging directions generally are defined by the value systems (national legal systems, policies, international systems) in the background. According to Langen, for the binominal decisions transnational interpretation principles are to be prefered. And the transnational interpretation principles, says Langen, are "those methods ... which are the same in all legal systems of the world" (p. 209). In a particular contract, it is the complex of these generally-accepted interpretation principles which should be given preference over other, eventually contradicting, national principles. For example, the *Hague Sales Rules* declare their own principles to be the guideline for purposes of interpretation and do not invite the forum's interpretation rules.

The inquiry next reaches the core of transnational law: how

to find the substantial identity or similarity of the law or rules concerned. The answer: by comparison or through comparative law!

This comparison has to be a thorough one and not just an adjunct to a conflicts law adjudication. By a thorough comparison and well-founded conclusion, the binominal decision will carry particular conviction. Langen, in this connection, cites 30 decisions "founded on comparative law, ranging over the jurisprudence of all the major trading countries and international arbitral tribunals" (pp. 214-215).

But what if there is only a resemblance between the competing laws concerned. Or as Rabel put it in 1927, "At one point or another we come to an abyss which is spanned by no bridge" (p. 215). The answer is two-fold. First, the abyss has since 1927 been bridged at many points, though certainly not everywhere. Second, "One of the two competing rules may be held up as a model to the other and will therefore deserve preference (a sort of 'better rule' as termed in the American practice)" (p. 216).

But by what criteria is one rule "better" or more "model-like" than another? Langen's answer: For this the court must appeal to the judgment of a number of experienced and knowledgeable persons, to the established legal orders carrying such a rule with the assumption that an established legal order "expresses the experience of many," and to great conventions. A rule also may be exemplary because it is "more well-tried," more modern, not so obsolete. This may sound very arbitrary or subjective, Langen admits, but in the last resort it is the judge's function to work out the best solution. This responsibility may be traced to the oath of ancient Roman jurists (*debet enim iudicare secundum melius ei visum fuerit*), and the function prevails today when, as Langen notes, "the solution ... may lay claim to respect by *virtue of its quality* (author's italics), and not only by virtue of its institutional authority" (p. 219).

The striking of a balance between irreducible differences in national rules of law is evidently the way out if the differences really are irreducible. To this end, Langen offers the principle *ex aequo et bono* (not "equity"!, which stays within the borders of existing law, whereas a decision *ex aequo et bono* is not based on a settled positive law rule but rather on the justice-idea of the judge). This means that, in absence of a mandatory rule, the judge does not apply one or the other incompatible rule but endeavors to reach a solution while having recourse to his justice-idea, deciding *ex aequo et bono*. When there is no applicable law stipulated by the parties, they carry the risks of the different laws

commonly. Consequently, the court "must ascertain the appropriate mid-term between two rules of law" (p. 223). Langen refers also to the *Nicomachean Ethics* of Aristotle to strengthen the conception of the judge as a mediator as part of our cultural heritage: "And the judge is sought as the man who stands in the middle," says Aristotle, "and in many places he is called 'mediator' in order to indicate the expectation that one will be justly dealt with if one receives the means" (p. 224). And in international commercial cases this is, adds Langen, par excellence the case.

Ex aequo et bono is but one principle used to strike a balance between irreducible differences. Langen presents more. What we see is a comparative law survey on the transnationality of such concepts as the "principles of civilized nations" (with not much explanation of who is civilized and who not), *pacta sunt servanda*, "good faith", and others. Although it is stressed by the author that these principles are to be derived inductively "from the circumstances of the case and not only deductively, placing summary reliance on an allegedly over-riding general principle" (p. 229), one still cannot avoid the feeling that in the dilemma concerning the borderline between law and arbitrary judgment these general principles may and often do play into the hands of arbitrary tendencies.

Somewhat more concrete and reliable are those rules which demonstrate that in particular countries these principles are equally shared. In the more limited field of commerce, they include the rule that fraud merits no protection; the principle that no one may cause loss of or damage to another, whether intentionally or by negligence, without incurring an obligation to indemnify the damaged party; the prohibition of racial discrimination; and that the novation itself does not release the debtor from the original liability.

The last internal structural problem of the transnational law doctrine is the procedural dilemma, namely, that the judges or courts (*iura novit curia*) are expected to be thoroughly familiar with a large number of national legal systems. Langen offers the comfort that there are the parties to the action who are expected to "help" with the exposition of foreign law. He adds that the courts must focus on "individual rules for determining transnational law not on the foreign law in its entirety", and this makes the judge's position easier. This is really all before the last sentence of the book, where his answer to his critics concludes (a citation from J. Esser): "That is the tribute of legal uncertainty which every jurisprudential innovation has to pay in its early days" (p. 245).

Antithesis: where Transnational Commercial Law fails

The new concept of transnational commercial law is presented by the author in a very intensive interaction with the various concepts and notions existing today in the field of private international law. This direct relation to everything timely and modern is an interaction also in the sense that the readers, sharing or rejecting these various concepts and notions prevailing in this discipline, feel addressed personally. Further, one feels compelled to follow the author's analyses and ideas, but also to contradict here and there, to confront his ideas, to merge certain propositions with new ones. This thinking process is surely one of the most evident results of a good book.

Let me begin an assessment of Langen's work with a special and at the same time general comment, originating from the circumstance that this review-article comes from the socialist legal orbit. It is, I feel justified to say, hardly imaginable that a book on this subject matter, if published by an author of this legal orbit, would have been so void of almost everything of the other side (in other words, the legal developments of the non-socialist world), as this book is void of the socialist side of international trade, "transnationality" or transnational commercial law. One could say that a book should not be judged by things not dealt with by the author, but rather from things about which the author has written. This is generally true. In this subject, however, the other side of the world is badly missed. Not only because especially in international trade the West is in daily contact with the East, and all or most of the legal problems the author discussed emerge – *mutatis mutandis* – in these relations too. Not only because the East-West scholarly dialogue has a substantial function in both a practical and psychological sense to build bridges, or, to use the favored formulation of Langen's theory, to "strike a balance" between East and West wherever possible. And here there were possibilities! But also because Langen's theory – the very central element of his theory – should have faced the problem of how to create or derive binominal rules for international cases with socialist and non-socialist parties when, as generally held, the laws and legal philosophy are the reflection and protective means of the underlying economic and social structures, and these structures are in such a case "fairly" antagonistic. But there is no answer from Langen.

The only reference to socialist law Langen may claim says, at least to me, that he bypassed the challenge to see how the socialist legal orbit functions in the transnational law conception. This is reflected in his approach to the *Hague Rules*. The *Hague Rules* are