LEGAL CULTURES AND LEGAL TRANSPLANTS IN GERMANY: PAST, PRESENT AND FUTURE

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I. INTRODUCTION

The concept of "legal transplants"[1] has seldom been used in Germany. This is not entirely unexpected, given that we are dealing here with a conceptual transplant from Anglo-Saxon jurisdictions. Only recently has an in-depth academic discussion relating to this concept commenced in Germany.[2]

The phenomenon commonly known as "legal transplants",[3] has been, and continues to be, discussed in Germany mainly in the context of the so-called "*Rezeption*" ("reception"),[4] a concept which has featured in the relevant legal literature for many years. Essentially, it serves to describe the academic study and practical application of Roman law which began in the

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[1] For an introduction to the term "legal transplant", see Fedtke, Legal transplants, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, Cheltenham, 2006, pp. 343 et seq.; Graziadei, "Comparative Law as the Study of Transplants and Receptions", *The Oxford Handbook of Comparative Law*, in Reimann and Zimmermann (eds.), Oxford, 2006, p. 441 et seq. For a highly critical view, however, see Legrand, "The Impossibility of *Legal Transplants*", *Maastricht Journal of European and Comparative Law*, num. 4, 1997, pp. 111 et seq.

[2] Cf. Fleischer, "Legal Transplants im deutschen Aktienrecht", *Neue Zeitschrift für Gesellschaftsrecht* (*NZG*), 2005, pp. 1129 et seq.; Fleischer, "Legal Transplants in European Company Law – The Case of Fiduciary Duties", *European Company and Financial Law Review* (*ECFR*), num. 2, 2005, pp. 378 et seq.; Rehm, "Rechtstransplantate als Instrument der Rechtsreform und –transformation", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (*RabelsZ*), num. 72, 2008, pp. 1 et seq.

[3] Cf. Berkowitz, *et al.*, "The Transplant Effect", *American Journal of Comparative Law* (*Am. J. Comp. L.*), num. 51, 2003, pp. 163 et seq.; Watson, *Legal Origins and Legal Change*, London 1991; Watson, *Legal Transplants: An Approach to Comparative Law*, London, 1993.

[4] Cf. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed., Göttingen, 1967, pp. 127 et seq.

high Middle Ages at the law faculties of Bologna and other cities in northern Italy, and spread to many parts of Europe, including its German-speaking areas.[5] Legal historians also use the term "reception" to describe subsequent encounters with various legal traditions, as well as other developments which occur where legal concepts are transplanted from one legal culture[6] to another. Particular mention should be made in this regard of certain developments during the 19th and 20th centuries, such as the adoption of German legal theories and concepts (especially the notion of "*Pandektistik*" ("pandectism")) by other countries and, vice versa, the "reception" by Germany of rules and theories emanating from other countries.[7] German comparative law often uses the term "reception" in a similar way to denote recent and current transplants of foreign legal principles or perceptions into German law.[8]

However, when considering German writings on legal history or comparative law, it is possible to discern, along with the concept of "reception", a number of approaches and terms which could, to a certain extent, be described as legal transplants. The concepts of "*Einfluss*" and "*Einflussnahme*", which refer to the influence exerted by one legal culture on another, and the notions of "transfer" or "circulation" of legal perceptions and models, are just two examples of this trend.[9] Some authors have criticised the monolithic use of this term in comparative law, and have at the same time proposed differentiated descriptions of the developments and effects which result from encounters with different legal cultures.[10]

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[5] Cf. "Rezeption", *Handwörterbuch zur deutschen Rechtsgeschichte*, in Erler and Kaufmann (eds.), vol. 4, Berlin, 1990, pp. 970 et seq.; Wieacker, *A history of private law in Europe: with particular reference to Germany*, Oxford, 2003, pp. 69 et seq.

[6] For the various uses of the term "legal culture" see Cotterrell, "The Concept of Legal Culture", *Comparing Legal Cultures*, in Nelken (ed.), Aldershot, 1997, pp. 13 et seq.; Cotterrell, *Comparative Law and Legal Culture*, Reimann and Zimmermann (eds.), *op. cit.*, note 1, pp. 441 et seq.; Nelken, *Legal culture*, Smits (ed.), *op. cit.*, note 1, pp. 372 et seq.; Nelken, "Using the Concept of Legal Culture", *Australian Journal of Legal Philosophy*, num. 29, 2004, pp. 1 et seq.; Nelken, *Rethinking Legal Culture, Law and Sociology*, Freeman (ed.), Oxford, 2006; Van Hoecke and Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", *International and Comparative Law Quarterly*, num. 47, 1998, pp. 495 et seq.; Varga, *Comparative Legal Cultures*, Aldershot, 1992. On the subject of European legal culture see Hesselink, *The New European Legal Culture*, Deventer, 2001.

[7] In particular from French law, see B.II.2.

[8] See, e.g., Zajtay, "Die Rezeption fremder Rechte und die Rechtsvergleichung", *Archiv für civilistische Praxis* (*AcP*), num. 157, 1957, pp. 361 et seq.; Zajtay, "Zum Begriff der Gesamtrezeption fremder Rechte", *AcP*, num. 170, 1970, pp. 251 et seq. More recently, von Hein, *Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland*, Tübingen, 2008.

[9] The terms *Rechtsexport* (legal export) and *Rechtsimport* (legal import) are also sometimes used, see e.g., von Münch, "Rechtsexport und Rechtsimport", *Neue Juristische Wochenschrift* (*NJW*), 1994, pp. 745 et seq.

[10] Cf. for example, Vano, "Hypothesen zur Interpretation der", *Vergleichenden Methoden Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19*, Schulze (ed.), Jahrhunderts, Berlin, 1990, p. 242.

By contrast, when it comes to legal transplants in a national legal culture, German authors have but little to say on the part played by international, transnational and supranational law. On the one hand, this concerns the transfer of legal content from one national legal culture to another via these new legal fora which apply across numerous national legal cultures; on the other hand we are dealing here with the effects on German law of new legal concepts, models and rules that arise within the scope of these new fora. Particular attention should be drawn to the central importance assumed by the supranational law of the European Union (EU) in many areas, and its implications for legal developments in Germany. This aspect also requires an acknowledgement not only of the horizontal legal transplants which occur between national laws, but also of the vertical legal transplants which arise in the relationship between supranational and national law.

The following section sets out the historical background to legal transplants in Germany. Thereafter the article will concentrate on current legal transplants and legal culture in German legislative practice, case law and legal practice. Because of the broad scope of this contribution it was necessary to make certain concessions. First, we had to leave aside the long tradition of comparative legal scholars in Germany even though there can be no doubt that they have played, and continue to play, a crucial role in this area of research.[11] Secondly, it was unavoidable to limit our focus primarily to the relevant aspects of German *Private* Law. In so doing, attention will be paid not only to the transplants originating directly from foreign national law, but also to the role played by international harmonising law and EU law in the process of legal transplantation. Prior to drawing our conclusion we will also consider and comment upon the problems of legal hybridisation in German law caused by legal transplantation.

I. HISTORICAL BACKGROUND

1. *The Renewed Adoption of Roman Law*

A. *The "Reception" of Roman Law*

Ever since the Middle Ages, the development of the law in the German-speaking world has been characterised by its encounters with Roman law and the latter's assimilation into domestic law. Whether and how this "reception" of Roman law can be described as "legal transplants" and

[11] For the impact produced by foreign legal traditions and cultures on German comparative scholarship see Schwenzer, *Development of Comparative Law in Germany, Switzerland and Austria*, Reimann and Zimmermann (eds.), *op. cit.*, note 1, pp. 69 et seq.

the "*acculturation du droit*" is an issue which has rarely been discussed in Germany.

The character, intensity and consequences of combining domestic with Roman law have been subject to different assessments, both during this period of development and, at a later stage, in the course of historical research into this era. Recent research has often differentiated between two (overlapping) stages in the dissemination of Roman law: on the one hand its "academic reception", during which Roman law was studied as "learned law" at universities whilst on the other hand its "reception in practice", during which Roman law increasingly found its way into court decisions, law-making and the drafting of legal documents.[12] One particularly noteworthy result of this "reception" was a wide-ranging change in legal thought and culture, a process frequently described as "*Verwissenschaftlichung*" ("scientification").[13]

B. *Roman Law as "German Private Law"*

Since the 17th century, legal writing has become increasingly focused on the "reception" of Roman law as a historical development, and has examined the origins of German law, both as to its domestic and as to its Roman traditions.[14] In relation to this era, considerable attention was given to the extent to which both these traditions were capable of contributing towards the construction of a "German Private Law". The terms "German Private Law" and "Common German Private Law" are meant to indicate that, in the field of private law, common rules applied throughout Germany which went beyond the local laws applicable in the individual German states and in the regions within these states.[15] It should be borne in mind that, at this time, Germany had no law-making authority capable of enacting such law for Germany as a whole (especially since the "Holy Roman Empire" had ceased to exist after 1806, and only a number of individual, sovereign German states existed, rather than "Germany" as a nation state).

During the first half of the 19th century, the notion that Germany has common legal traditions became a major factor in the formation of its national identity – especially because the German nation could not be defined through the existence of a unitary state. For the "*Historische Schule*" ("Historical School", i.e. the dominant movement at that time in Germany),

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[12] Hattenhauer, *Europäische Rechtsgeschichte*, 4th ed. Heidelberg, 2004, pp. 284 et seq.; Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte*, 10th ed., Heidelberg, 2005, pp. 36 et seq.

[13] Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed., Göttingen, 1967, pp. 131 et seq.

[14] For the fundamental features of this development see Conring, *De origine iuris Germanici*, Helmstedt, 1643.

[15] Schlosser, *op. cit.*, note 12, p. 3.

the law – above all the private law – had developed over time and formed a building block in the construction of a national identity.

However, one particular tendency within the Historical School placed greater emphasis on the apparent existence of a common Germanic legal tradition before the "reception" of Roman law took place. As such there was a continuity in its domestic traditions which took place independently of this "reception". In order to identify this common German private law, this "Germanic" tendency focused primarily on the sources of domestic law during the Middle Ages and the early modern era as a basis.

Yet many of these claims that there existed a common private law with pure Germanic or German content, drawn from medieval sources and free from any Roman influence, and that this legal tradition was sustained until the 19th century, had already been thrown into doubt at this stage, and were later criticised as an emanation of historical interpretation based on nationalistic ideology.[16] Furthermore, the specifically German or Germanic sources on which this tendency relied provided an insufficient basis for the creation of a comprehensive system of private law for the 19th century. The development of a common German law during the modern era could only be based on individual areas such as commercial law and, in part, property law.[17]

By contrast, a different tendency within the Historical School during the 19th century acquired greater significance as a basis for the development of a modern private law in Germany.[18] It drew primarily on the Roman law that had become common German private law because of its "reception". During the first half of the 19th century the main advocates of this "Romanistic" tendency were *Friedrich Carl von Savigny*[19] and *Georg Friedrich Puchta*.[20] For *Savigny*, lawyers are primarily the representatives of the people where the law is concerned.[21] Roman law – along with ecclesiastical canon law – was the main basis for a lawyer's training and working methods, which since the late Middle Ages in Germany had come to require increasing levels of competence in the legal field and which had to a large extent removed the "laymen" from judicial activity in the early modern era. Thus Roman law

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[16] Schlosser, *op. cit.*, note 12, pp. 156 et seq.; Wieacker, *op. cit.*, note 4, pp. 406 et seq.
[17] Kroeschell, "Deutsche Rechtsgeschichte", Köln, vol. 3, 2008, pp. 128 et seq.; Schlosser, *op. cit.*, note. 12, pp. 156 et seq.; Wieacker, *op. cit.*, note. 4, pp. 422 et seq.
[18] Schlosser, *op. cit.*, note 12, p. 157; Wieacker, *op. cit.*, note 4, pp. 377 et seq.
[19] For a biography of Friedrich Carl von Savigny and information on his work see Kleinheyer and Schröder (eds.), *Deutsche und Europäische Juristen aus neun Jahrhunderten*, Heidelberg, 1996, pp. 366 et seq.
[20] For a biography of Georg Friedrich Puchta and information on his work see Kleinheyer and Schröder (eds.), *op. cit.*, note 19, pp. 341 et seq.
[21] Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, 1814.

had become a central component of German legal culture, and the "reception" of Roman law was viewed as a development that was of key importance for the existence of a German national law and culture.

C. *The Development of "contemporary Roman law"*

However, as a basis for German private law in the 19th century, Roman law was unsuitable in the shape in which it found itself at the time of its "reception" during the Middle Ages and in the early modern era. German law therefore required the renewed adoption of Roman law. In this respect it was based upon the "reception" which had occurred earlier, in that it validated the scientific authority of ancient Roman legal texts, emphasised the quality of the training of lawyers under Roman law, and confirmed the validity of Roman law as "*ius commune*" ("common law") in Germany. In this respect, the legal transplant, which had been carried out at the since the Middle Ages, persisted throughout the 19th century. However, the methods by which Roman law was adapted, as well as its content, had been entirely reassessed in the light of the economic and social conditions of the *Ancien Règime* and the corresponding domestic law.

The Historical School of the 19th century regarded the principles which had been developed since medieval times, on the basis of the legal literature and court decisions developed under Roman law, as being no longer binding, and preferred to focus on the traditional Roman law of the ancient era (or at least Roman law viewed seen through the prism of 19th century academics).[22] This "classicism" freed 19th century legal science from those aspects of the earlier adaptation of the Roman law that were no longer appropriate for the period in question and allowed a process of adoption to take place which corresponded to the needs of the modern era.

This renewed exercise in transplanting Roman law in Germany was inspired by *Savigny's* work "*System des heutigen römischen Rechts*".[23] It developed with reference to the new doctrine relating to the sources of Roman law, concerning both the underlying questions of private law and the system on which the civil law is based (*inter alia* with regard to the individual freedom to act, the concept of "legal relationships", the general principles of civil law and the abstractness of legal transactions *in rem*) as well as to specific legal concepts and areas (for example regarding not only bilateral contracts and

[22] Cf. Kleinheyer and Schröder (eds.), *op. cit.*, note 19, p. 352 et seq.; Schlosser, *op. cit.*, note 12, pp. 6, 149 et seq.; Wieacker, *op. cit.*, note 4, pp. 416 et seq.
[23] Eight volumes, 1840-1849; Savigny, *Das Obligationenrecht als Teil des heutigen römischen Rechts*, two volumes, Berlin, 1851/1853.

the issue of mistake, but also in relation to methods of interpretation and international private law).[24]

In its entirety, this proposal for a modern code of civil law, drawing upon Roman law, became the basic model for German pandectism, which contributed considerably towards the development of German Private Law in the 19th century.[25] Towards the end of this century, legal thought in Germany had been determined largely by the doctrine that had been transmitted through these legal scholars and by virtue of the training which successive generations of practitioners in the pandectist mould had received at their universities. Following Germany's political unification, which resulted from the creation of the German Empire in 1871 under the first "*Reichskanzler*" ("Imperial Chancellor"), *Otto von Bismarck*, pandectism proved to be a decisive influence on the *Bürgerliches Gesetzbuch* (German Civil Code; BGB), which entered into effect on 1/1/1900 and remains applicable, albeit with numerous intervening changes. The pandectistic influence can be discerned in relation to the entire scheme of this code, as well as in many of its leading principles and the content of many of its individual provisions.

2. *Legal Transplants from Other Countries*

A. *The Age of Comparison*

Alongside this renewed adoption of Roman law, encounters with other contemporary legal cultures contributed greatly to the development of a German national legal culture in the course of the 19th century. Thus legal transplants from other countries, above all from France, served to expand and qualify the transplantation of concepts and models from Roman sources into German Private Law.

Accordingly, the age in which modern German law was created was also characterised by multifaceted indirect and direct influences from foreign law and by the growing significance of comparisons between various national legal cultures. Contrary to the belief held by many German legal scholars at the time, the 19th century was an era of intensive mutual influences and multiple transfers of legal knowledge between the various national legal

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[24] Hammen, *Die Bedeutung Friedrich Carl vs. Savignys für die allgemeinen dogmatischen Grundlagen des deutschen Bürgerlichen Gesetzbuches*, Berlin 1983; Huber, "Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht", *Juristen Zeitung* (*JZ*), 2003, pp. 1 et seq.; Luig, "Savignys Irrtumslehre", *Ius Commune*, num. 8, 1979, pp. 36 et seq.; Noda, "Zur Entstehung der Irrtumslehre Savignys", *Ius Commune*, num. 16, 1989, pp. 81 et seq.; "Sturm, Savigny und das Internationale Privatrecht seiner Zeit", *Ius Commune*, num. 8, 1979, pp. 92 et seq.

[25] In particular via the work of *Georg Friedrich Puchta* and *Bernhard Windscheid*.

cultures which existed in Europe.[26] A major factor in this development was provided by the problems which the development of the law encountered, in Germany and other European countries, in their attempts to overcome a host of feudal and class relationships and in facing up to the challenges of industrialisation. This process of mutual exchange was facilitated by the survival, in these countries, of the time-honoured scholarly heritage of the *ius commune*.[27] The age in which national law flourished was therefore also the "*Zeitalter der Vergleichung*" ("age of comparison").[28]

B. *French Law in Germany*

a. French Law as Common European Law

By the end of the 18th century already, post-revolutionary French law had influenced those German-speaking regions which, at that time, were part of the Holy Roman Empire. In 1794, the French armies occupied those parts of the empire which were situated on the Eastern side of the Rhine (with cities such as Cologne, Trier and Mainz); in 1801 these areas were annexed by France. In these areas, the French administration progressively introduced the principles of post-revolutionary French law. The French Code Civil from 1804 and the other codifications introduced under Napoleon were adopted in these regions in their original version. Following the end of the Holy Roman Empire in 1806, French legislation was introduced in other areas which formerly belonged to this empire, which was due not only to these areas having been annexed to France, but also to the adoption by the rulers of these regions who had a link to France.

In Baden, the French Code Civil was translated into German and, after several changes, introduced as "*Badisches Landrecht*".[29]

The spread of French law – not only in Germany but also in other parts of Europe – enabled several German legal scholars of this time to convey the impression that French law (in particular civil law) would lead to the development of a common law for Europe. To a certain extent this new system appeared to succeed the older *ius commune*. Typical of this trend is the

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[26] Cf. Schulze, "Vom ius commune bis zum Gemeinschaftsrecht – das Forschungsfeld der Europäischen Rechtsgeschichte", *Europäische Rechts- und Verfassungsgeschichte*, Schulze (ed.), Berlin, 1991, pp. 3 et seq.

[27] Cf. Coing, "Das Recht als Element der europäischen Kultur", *Historische Zeitschrift* (*HZ*), num. 238, 1984, pp. 1 et seq., at p. 5.

[28] Nietzsche, "Menschliches, Allzumenschliches", *Nietzsche Werke. Kritische Gesamtausgabe*, Colli and Montinari (eds.), vol. 2, Berlin 1967, pp. 40 et seq.

[29] Schlosser, *op. cit.*, note 12, p. 133; Schulze, "Französisches Recht und Europäische Rechtsgeschichte im 19", *Französisches Zivilrecht in Europa während des 19 Jahrhunderts*, Schulze (ed.), Berlin 1994, pp. 9 et seq.

title of a publication by *Johann Friedrich Reitemeier* "*Das Napoléons-Recht als allgemeines Recht in Europa, insbesondere in Deutschland betrachtet*" (1808). The following statement, which stems from a "law of reason" perspective, follows a similar line:

> *The Code Napoléon is suitable for each rationally established state since, in accordance with its purpose and constitution, it contains nothing other than a statement of reason regarding the relationship amongst a nation's citizens. What is not suitable for the Code Napoléon can also not survive before the judgement of reason (…).*[30]

b. French Law as German Provincial Law

Following Napoleon's defeat in 1814/15, French Civil law remained in force after the aforementioned areas on the Eastern side of the Rhine had, for the most part, been integrated into Prussia. Much of the French court structure and court procedures also continued to apply. Following massive protests from the population of the Rhine region, the Prussian government was compelled to abandon its plans to abandon this French legacy. French civil law was therefore the basis for the legal relations between the citizens of western Germany for almost 100 years, until the *Bürgerliches Gesetzbuch* came into force in 1900.[31] In the legal disputes which emanated from these regions, the courts officiating in German states such as Prussia, Bavaria or Baden based their decisions on the Code Civil or on the similar "*Badisches Landrecht*". As far as possible, legal writing avoided expressing the French origins of the law. It was described as "*rheinisches Recht*" ("law of the Rhineland") and thus appeared to be German provincial law. However, this term did not change the practice whereby many German courts (including the *Reichsgericht* (Imperial Supreme Court)) as well as academics, lawyers, notaries and other German practitioners, frequently applied rules of French origin as being the law of their own country. However, in so doing they included perceptions of the law as influenced by the pandects, as well as the experience with other laws in force in Germany; using "*rheinisches Recht*" in practice thus caused pandectism and post-revolution French law to interact, and a German theory of French law arose in works by *Karl Salomo Zachariae von Lingenthal*, *Anton Friedrich Justus Thibaut* and others.

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[30] See also Schmid, *Kritische Einleitung in das bürgerliche Recht des französischen Reiches*, Hildburghausen, vol. 1, 1808/1809, p. 289.

[31] On this subject, as well as the following, see, for example, Fehrenbach, *Traditionale Gesellschaft und revolutionäres Recht*, 3rd ed., Göttingen 1983; Schubert, *Französisches Recht in Deutschland zu Beginn des 19 Jahrhundert*, Köln, 1977; Schulze (ed.), *Rheinisches Recht und Europäische Rechtsgeschichte*, Berlin, 1998.

c. "Circulation" of Legal Models

The relevant legal literature reflected upon and enhanced the practical application of the "*rheinisches Recht*" and spread to France, the motherland of this law, *inter alia* through the French translation by *Charles Aubry* and *Charles Rau* of a German commentary by *Zachariae von Lingenthal*.[32] In this respect one could refer to a "circulation" of legal models:[33] French law became "Rhineland" law in Germany. German legal science, particularly in the shape of its pandectists, modified the presentation of this scholarship (above all through the literary form of the legal commentary, which was not common in France at first) and changed its content on the basis of this development. This resulted in legal scholarship giving more freedom to the law-making authority than the French "*école d'exegese*" had. Through these German modifications, the French law transplanted to Germany influenced its form and content. Thereafter it influenced the law of its country of origin, with the consequence that the "commentary" format became established in France and legal science gained a new impetus as regards methodology and content. This transplant of German legal thinking concerning French law subsequently spread from France to Italy, which at this time was strongly influenced by French legal culture and accordingly incorporated these German stimuli.

d. Other Areas under French Influence

It is not possible to go into further detail as to how French law influenced the development of German law in the 19th century – directly via the law of the Rhineland or indirectly via comparisons with the law in France. Alongside earlier research into these influences,[34] more recent studies have also focused upon and identified these influences, for example in relation to core elements of civil and commercial law (such as tort law and unfair competition law).[35] With regard to the *res incorporales*, to which scant attention was paid during the preparation of the BGB, *Josef Kohler* introduced French legislation and doctrine to German academic discussion on the

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[32] Cf. the contributions by *Motte*, *Halpérin* and *Olszak*, in Schulze (ed.), *op. cit.*, note 31, pp. 111 et seq., 215 et seq. and 239 et seq. respectively; Bürge, "Der Einfluß der Pandektenwissenschaft auf das französische Privatrecht im 19 Jahrhundert: Vom Vermögen zum patrimoine", in Schulze (ed.), *op. cit.*, note 26, pp. 221 et seq. For the indirect effect this has had on Italy, see Beneduce, "Germanisme, la terrible accusation", in Schulze (ed.), *op. cit.*, *note* 10, pp. 105-106, 114 et seq.

[33] For other examples see Vano, *op. cit.*, note 10.

[34] Cf. Schubert, *op. cit.*, note 31; *Becker*, "Das rheinische Recht und seine Bedeutung für die Rechtsentwicklung in Deutschland", *Juristische Schulung* (*JuS*), 1985, pp. 338 et seq.

[35] Cf. Wadle, "Das rheinisch-französisch Deliktsrecht und die Judikatur des Reichsgerichts zum unlauteren Wettbewerb", in Schulze (ed.), *op. cit.*, note 31, pp. 79 et seq.; or on legal education, for example, Müller-Hogrebe, "Die Errichtung des Lehrstuhls für rheinisches Recht an der Universität Bonn", in Schulze (ed.), *op. cit.*, note 31, pp. 61 et seq.

subject.[36] Even though several of his suggestions were not established at that time, they now find more and more acceptance such as e.g. the concept of "*geistiges Eigentum*" ("intellectual property"). [37] In the public law field, French administrative scholarship also had its impact. Thus *Otto Mayer* wrote "*Theorie des französischen Verwaltungsrechts*" (1886) in the first instance, and only then, based on the latter, did he author his "*Deutsches Verwaltungsrecht*".[38] These works became the traditional literature of modern administrative law and influenced all subsequent literature in this field of the law.[39]

C. *The Variety of Legal Transplants*

French law had enormous significance for the implementation of new rules and legal perceptions in Germany. However, France was not the only country to give impetus to the legal development in Germany during the 19th and 20th centuries. The variety of the transplants in the areas of law-making, legal literature and practice cannot be expanded upon in detail here – also, in many respects this subject has not been adequately researched. In addition to civil and commercial law, the spectrum of these transplants and stimuli also includes, for example, the development of international private law.[40] It spreads out across specialised fields such as the law of co-operative societies[41] and to core areas such as the criminal law. Thus on the one hand we find the English model of jury trial featured in the German debate on the reform of criminal procedure in the 19th century;[42] on the other hand, the discussion on the reform of the criminal law found some inspiration in the "*scuola positive*" and the Italian Criminal Code of 1890.[43] Accordingly, the search for a national identity and the efforts made towards improving German national law in competition with other nations did not exclude a

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[36] Kohler, *Deutsches Patentrecht: systematisch bearbeitet unter vergleichender Berücksichtigung des französischen Patentrechts*, Aalen, 1984; Adrian et al. (eds.), *Josef Kohler und der Schutz des geistigen Eigentums in Europa*, Berlin 1996.

[37] Hattenhauer, *op. cit.*, note 12, pp. 753 et seq.; Wesel, *Geschichte des Rechts*, 2nd ed., München, 2001, p. 456.

[38] Two volumes, 1895/96.

[39] Cf. Heyen and Meyer, "Frankreich und das Deutsche Reich", *Der Staat*, num. 19, 1980, pp. 444 et seq.; Mayer, *Studien zu den geistigen Grundlagen seiner Verwaltungsrechtswissenschaft*, Berlin 1981; Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, München 1992, pp. 403 et seq.

[40] Cf. the contributions by *Mansell* and *Anzilotti* in Schulze (ed.), *op. cit.*, note 10, pp. 245 et seq. and p. 297 et seq.; Halpérin, *Histoire des droits en Europe*, Paris 2004, pp. 323 et seq.

[41] Cf. Schulze, "Genossenschaft – Zur Entwicklung eines Rechtsbegriffes", *Stadt – Gemeinde – Genossenschaft, Festschrift für Gerhard Dilcher*, in Cordes *et al.* (eds.), Berlin, 2003, pp. 225 et seq., p. 23 andp. 236.

[42] Kroeschell, *op. cit.*, note 17, pp. 162 et seq.; Wesel, *op. cit.*, note 37, p. 254.

[43] Cf. Schulze, "Il contributo italiano al diritto penale nel tardo Ottocento", *Materialien der Tagung "Problemi istituzionali e riforme nell'età Crispina* (*LV Congresso di Storia del Risorgimento in Sorrento 1990*), Rome, 1992, pp. 111 et seq.

multifaceted exchange of legal norms and perceptions beyond national borders – in fact, they were frequently even dependent on it.[44]

III. CURRENT LEGAL TRANSPLANTS

Following our examination of the historical background to legal transplants in Germany, let us now turn to the present day. Legal transplants primarily find their way into present German law through three distinct "players" (in addition, naturally, to legal scholars), which shall henceforth be focused on the law-making authority, the courts and legal practice. Our perception of these subjects is undoubtedly subjective and selective, which is understandable given the broad scope of this topic.

1. *The legislature*

Subsequent to the development in the 19th and early 20th century of the basic structure of modern German law, many further legal transplants have since continued to influence its development up to the present day. However, new developments, which are often described as "internationalisation" and "Europeanisation", have considerably changed the conditions in which German law has developed, as well as the nature of the law in force, especially during the latter half of the last century. To an increasing extent, the German legislature no longer drafts "indigenous" German law, for in so doing it includes, where it so wishes, legal transplants from other countries. Moreover, Germany, like other nations, frequently becomes enmeshed in overarching international legal developments: thus, for example, its involvement in the drafting of international conventions that are then ratified, thereby making international uniform law valid in Germany. To an even greater extent, the supranational law of the EU has greatly influenced the applicable law in Germany today.[45] Both international uniform law and supranational EU law have introduced rules, principles and legal concepts which did not emerge from German legal culture, but are in themselves a form of legal transplant. This is partly the result of a transfer of legal perceptions from one or more national legal cultures. However, it is also related to legal models that have been recently created at the international or supranational level. Furthermore, with respect to the latter, other and more recent sources of inspiration have been the various forms of soft law, such as the "Principles" and "Model Laws" from UNIDROIT or UNCITRAL.

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[44] For more detail see Schulze, "Einleitung", in Schulze (ed.), *op. cit.*, note 31, pp. 11 et seq., pp. 17.

[45] For the influence of European law on German Private Law see Langenbucher (ed.), *Europarechtliche Bezüge des Privatrechts*, Baden-Baden, 2008.

A. *Foreign National Law*

The study of, and reference to, foreign national law aimed at enabling the legislature to develop the national law over which it presides continues to represent, regardless of modern developments, one of the "classic" areas of comparative law. The advantages of adopting foreign laws which present themselves to the legislature, which has a broad basis for its decision-making where legal transplants are concerned,[46] are clear: on the one hand, adopting foreign rules saves the legislature both time and money that it would have otherwise invested in the development of the relevant legal rules. Smaller countries may not even possess the necessary expertise in certain areas, and as such have difficulties in drafting their own rules; here, legal transplants could assist in finding a solution. On the other hand, a central role in the drafting process is frequently played by the legislature's ability to draw upon foreign experience with a particular law. This factor is all the more relevant as between countries that share a number of cultural and economic similarities.

When considering recent legal transplants in German law more closely, one can identify at least three situations – although they cannot always be clearly distinguished from each other – in which the legislature refers to other legal systems. These concern situations in which fundamental technical changes (such as the development of the Internet) or social developments compel the legislature to reform the law, or even to create a new legal field. As an illustration for this, one could cite the legislation in new fields such as the recognition of registered partnerships for unmarried heterosexual or homosexual partners. In preparing for the new legislation in this field, the German Federal Ministry of Justice commissioned a broad study in this area, which was completed by a research institute. The experience which other countries gained from their legislation in these matters thus formed the basis for the German Parliament's legislation.[47]

The legislature may also refer to foreign experience for "static" questions of law, i.e. questions that exist independently of technological or social developments, where traditionally fundamental legal problems have yet to be solved satisfactorily. Here one can give the examples of two

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[46] By contrast, the courts are considerably more restricted as regards the possibility of relying on foreign law. See C. II.

[47] See, for example, the recommendations made by Dopffell *et al.*, *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, Dopffell *et al.* (eds.), Tübingen, 2000, pp. 391 et seq. In addition, see the express references made to the experience in other countries in: Entwurf eines Gesetzes zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze im Bereich des Adoptionsrecht, BT-Drucksache, 17/1429, p. 3.

important reforms: the reform of the law on damages[48] and the reform of the law of obligations[49] (which both came into force in 2002). In its legislative justification for introducing a general claim for pain and suffering (the so-called "*Schmerzensgeld*") in situations covered by strict liability and in contractual relationships – a question that has been festering in Germany for many decades – the legislature referred to the legal position in other European countries.[50] The reform of the law of obligations, which coincided with the transposition of the Consumer Sales Directive,[51] is the most widespread reform of the BGB ever undertaken.[52] However, this Directive would for the most part have been adequately implemented through a change to the outdated sales law (the so-called "*Kleine Lösung*" ("small solution")). The legislature opted for the so-called "*Große Lösung*" ("grand solution"), and reformed the law of obligations (as well as several sections of the General Part of the BGB, such as the law on limitations) root and branch, and far beyond the Consumer Sales Directive's scope of application. For this "*Große Lösung*", the legislature referred to numerous national legal systems alongside the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law ("PECL" or "Lando Principles") and the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"),[53] as can be seen in the legislative justification for the reform of the law of obligations. Thus we can cite the "*culpa in contrahendo*" ("pre-contractual liability"), which was not codified prior to the reform and is now contained in § 311 BGB. Here, the legislature referred to French, Swiss, Italian and US law in its preamble.[54] With regard to the codification of the "*Wegfall der Geschäftsgrundlage*" ("collapse of the basis of a contractual agreement") doctrine, now featured in § 313 BGB, the German Parliament took into consideration the legal situation in England, France, Italy, Greece, the Netherlands, Switzerland and the USA.[55]

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[48] Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften vom 19. Juli 2002, BGBl. I, p. 2674.

[49] Gesetz zur Modernisierung des Schuldrechts vom 26, November, 2001, BGBl. I, p. 3138.

[50] Cf. Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 15.

[51] Cf. Schulze and Schulte-Nölke, "Schuldrechtsreform und Gemeinschaftsrecht", *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, in Schulze and Schulte-Nölke (eds.), Tübingen, 2001, pp. 1 et seq.

[52] See C. I.

[53] See C. I.

[54] Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 161 et seq.

[55] Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 174 et seq. See also Markesinis and Fedtke, *Engaging with Foreign Law*, Oxford 2009, p. 179, which notes, with regard to the codification of the notions of "fundamental change of circumstances" and "culpa in contrahendo", that the applicable statutory provision (i.e. § 311 and § 313 BGB) is ultimately based on German judge-made law. A further example of the recourse to foreign law by the German legislature is the introduction of a rule dealing with the termination of long-term contracts (*Dauerschuldverhältnisse*) in § 314 BGB, which refers, alongside the CISG

Finally, some legal transplants are not the result of a system-based law-making process, but tend to be a "*legislatorisches Zufallsprodukt*" ("legislative by-product"),[56] in which comparative law serves as a "coincidental" solution to particular, individual problems. As an example thereof mention could be made of § 661a BGB, introduced in 2000, by which the legislature sought to combat a widespread practice that breached competition law, namely that businesses were sending consumers messages saying that they had allegedly won a prize in order to encourage the consumer to order goods from the business, but without actually giving them the prize.[57] In drafting this rule, the legislature adopted, almost verbatim, the corresponding provision in Austrian law (§ 5j *Konsumentenschutzgesetz* (KSchG); Austrian Consumer Protection Act), without, however, providing any greater detail on this point in the preparatory work. This omission is all the more regrettable because the adoption of the Austrian rule is clear and is itself undisputed, both by the leading authors, who frequently draw upon Austrian law to interpret § 661a BGB,[58] and by the *Bundesgerichtshof* (Federal Court of Justice).[59]

These brief examples[60] show that comparative considerations have a place in German legislative procedure, even though their ultimate legal value cannot always be clearly ascertained. It is notable that the legislature almost exclusively refers to legal systems from its own cultural environment, i.e. specifically to the national laws of Europe and of the USA. It is rare to find references to legal cultures other than those mentioned above. In addition, it is obvious that the German legislature gives particular consideration to those countries that have a very close cultural and linguistic connection with Germany, such as Austria and Switzerland. Overall, the linguistic barrier appears to be a serious problem to overcome in order to secure vital comparative information. In order to transcend these linguistic borders, the

(Article 73 CISG), to Italian law (Articles 1559-1570 Codice Civile); see Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 176 et seq.

[56] As expressed, with regard to § 661a BGB, by Seiler, *Münchener Kommentar zum BGB*, 5th ed., München 2009, § 661a BGB, marginal no. 2.

[57] Cf. Begründung zu dem Entwurf eines Gesetzes über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro, BT-Drucksache 14/2658, p. 48. See also § 661a BGB *Schäfer*, Gewinnzusage nach § 661a BGB im System des Bürgerlichen Rechts, (2005) JZ, p. 981 et seq.; Tamm and Gaedtke, "Gewinnzusagen nach § 661a BGB - materiell- und prozessrechtliche Probleme im europarechtlichen Kontext", *Verbraucher und Recht* (*VuR*), 2006, pp. 169 et seq. See also the decision of the *Bundesgerichtshof* in BGHZ 153, p. 82 (90).

[58] Bergmann and Staudinger, "Kommentar zum BGB", Neubearbeitung 2006, Berlin, § 661a BGB, marginal no. 1, 21; Seiler, "Münchener Kommentar zum BGB", 5th ed., München 2009, § 661a BGB, marginal no. 2.

[59] As expressly stated by the Bundesgerichtshof in *BGHZ* 153, p. 82 and 90.

[60] For further examples see e.g. Fleischer, Legal Transplants im deutschen Aktienrecht, *op. cit.*, note 2, pp. 1129 et seq.

German legislature frequently refers to the standard German literature on comparative law such as *Konrad Zweigert/Hein Kötz*, "Einführung in die Rechtsvergleichung"[61] or *Christian von Bar*, "Gemeineuropäisches Deliktsrecht".[62] By contrast, foreign sources are seldom utilised in the law-making process.

B. *International Uniform Law*

International Uniform Law also frequently serves as a role model for the German legislature. Two examples showing how vitally important international uniform law is for present-day German law can be cited here: the European Convention on Human Rights (ECHR) and the CISG.

The ECHR is predominantly based on the common constitutional traditions and legal perceptions of the signatory European states. It is therefore not a transplant of law that – from a German perspective – is completely alien, even though its enactment in Germany in 1952 followed shortly after the fall of the National Socialist regime and, in this respect, constituted an important new legal element in Germany which carried considerable practical and symbolic significance. However, the ECHR's individual principles and provisions are based upon a composite of traditions and experiences from various European states. As such one could describe certain individual aspects of the Convention as legal transplants penetrating the German legal culture at that time. This is all the more true when one considers the extent to which the decisions of the European Court of Human Rights (ECtHR) in Strasbourg have led to changes in German law and continue to do so, for example the conflict, as regards the unmarried father's custodial rights over a child, between § 1626a BGB and Articles 14 (discrimination) and 8 (privacy) ECHR[63], as well as current German legislation concerning the so-called preventative detention of offenders following completion of their maximum permitted prison sentence, which breaches Article 5(1) (right to liberty and security) and 7(1) (retrospectively) ECHR.[64]

At the time when the CISG was enacted in 1 March 1990 in East Germany, and in West Germany on 1 January 1991, it departed considerably from the German national law which applied at the time. For the most part, CISG is based upon concepts and principles that can be

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61 For instance with regard to the reform of the Law of Obligations (cf. for example Deutscher Bundestag, Drucksache 14/6040, p. 131 and 175).
62 For instance with regard to the reform of the Law of Obligations (cf. for example Deutscher Bundestag, Drucksache 14/7752, p. 15, 17 and 31).
63 Z. *vs.* Germany, no. 22028/04 from 3 December 2009.
64 M. *vs.* Germany, no. 19359/04 from 17 December 2009.

traced back to work by *Ernst Rabel*[65] dating from the 1920s and represents, to a certain extent, a compromise between common law traditions and civil law legal systems.[66] Its application thus transplanted to the German legal system a number of perceptions originating from other legal cultures by way of a new composite of international uniform law. This legal transplant had wide-reaching effects, going beyond the CISG's scope of application: it gave new impetus to the discussion on reforming German sales law and the entire law of obligations in the BGB. The proposals for the reform of the law of obligations which arose during the 1980s drew mainly on the CISG (in particular, the concept of conformity respectively the lack of conformity, and breach of contract etc.), thus greatly contributing to the new law of obligations as it was adopted in 2002.

C. *EU Law*

To a great extent, legislation from the EU primarily leads to legal transplants, into German legal culture, of rules and principles which are non-German in origin. These transplants take place both with regard to EU law directly in force in Germany as well as the EU's legal acts that are to be transposed into German law.[67] In Germany as in other EU Member States, directly applicable law refers not only to primary EU law,[68] but also to regulations, which – as is the case with national law – become directly binding. Such directly applicable law has to be applied by courts and public authorities in Germany on the same level as the national law. Thus, alongside national law, it influences German legal culture in judicial and administrative practice.[69] In short, in the long term German legal culture is developing as a member of a European legal community which operates under a dual system of national and supranational law. Within this legal culture, which is marked by national and supranational elements, it will become increasingly difficult to distinguish between the original German rules and the transplants from European law.

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[65] On *Ernst Rabel* see also Kegel, "Ernst Rabel", *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler*, in Grundmann and Riesenhuber (eds.), München, 2007, pp. 16 et seq.; Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926-1945*, Göttingen, 2008; Lando, "Ernst Rabel (1874-1955)", *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin*, Grundmann et al. (eds.), Berlin, 2010, p. 605 et seq.; Wolff, "Ernst Rabel", *Savignyzeitschrift*, num. 73, 1956, pp. XI et seq.

[66] This type of compromise is in evidence in the CISG, for instance in the field of specific performance (Article 28 CISG).

[67] See C. I.

[68] OJ C 83, 30.3.2010, pp. 1 et seq.

[69] See C. II.

a. Assimilation of German Law with Directly Applicable EU law

As is mentioned in the previous section, no action is necessary on the part of the German legislator to ensure that directly applicable EU law come into force. Nevertheless, this form of EU law often has an impact on German legislation and in so doing induces legal transplants by the German legislature, in that regulations often contain a number of gaps that are to be filled by the national legislature by means of supplementary and implementing provisions. In so doing, the German legislature refers to the guidelines that are contained in the relevant EU regulation and are based upon the experience and models emanating from other European countries. An example from the field of commercial law can be used to illustrate this point, namely the Regulation on a Statute for a European Company.[70] This Regulation contains elements from the German tradition, however alongside which are numerous aspects from other European legal traditions (above all from France and the United Kingdom) which, until now, were not customary in Germany; these new elements henceforth form the basis of the German supplementary provisions.[71]

However, it is also often the case that the effects of directly applicable EU law on legal transplants by the German legislator are much greater. This is particularly the case with the introduction of a concept or model, which has its roots in another legal tradition and is new to Germany, as supranational EU law can provoke the German legislator to create a parallel or similar rule in national law. For example, shortly after the introduction of the European Company Regulation the EU introduced a Regulation on the Statute for a European Co-operative Society.[72] This Regulation also contains many legal concepts and principles which emanate from other countries (in particular the "Roman law" countries) and which had not been introduced into the German legislation on co-operative societies up to this point. Examples of this are the rule which allows social, as well as economic, objectives, the rule which only allows investing members to participate, and the monistic structure of the company's organs. The German Parliament not only acknowledged these legal transplants in its supplementary and implementing provisions,[73] but also made a number of

[70] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE); OJ L 294, 10 November 2001, p. 1-21.
[71] Gesetz zur Einführung der Europäischen Gesellschaft (SEEG) vom 22. Dezember 2004, BGBl. 2005 I p. 3675 et seq.; Gesetz zur Ausführung der Verordnung (EG) Nr. 2157/2001 vom 8. Oktober 2001 über das Statut der Europäischen Gesellschaft (SE) (SE-Ausführungsgesetz – SEAG) vom 22 Dezember 2004 (BGBl. I p. 3675).
[72] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE); OJ L 207, 18 August 2003, p. 1-24.
[73] Gesetz zur Einführung der Europäischen Genossenschaft und zur Änderung des Genossenschaftsrechts (EGSCE) vom 14. August 2006 (BGBl. I p. 1911).

in-depth changes to the national law governing the traditional German concept of the co-operative society,[74] as amended by Article 10 of the statute of 25 May 2009.[75] Such changes included the introduction of new concepts and models which were applied to the European co-operative society, and which exist alongside the existing German law on co-operative societies, the latter still being in force. This assimilation of national provisions with supranational rules for the European co-operative society should serve the purpose of maintaining a degree of competition between the two models. However, the price paid for this assimilation was the transplantation to German law of a number of "foreign" principles which were enshrined in the EU Regulation (*inter alia*, the aforementioned principles governing the European co-operative society). The approach adopted by the German legislator appears to have been successful: up to this point there are very few European co-operative societies which have been created in Germany in accordance with supranational law, whereas the number of co-operatives founded under the revised German law (including the legal transplants from other nations) has grown.[76]

b. Harmonised Law based on EU Directives

Alongside the directly applicable EU law, EU directives also frequently lead to legal transplants. In principle, EU directives are not directly binding on the ordinary citizen; rather they compel the Member States to transpose the law contained in the respective directive into their national law. It is often the case that directives have their origins in the legal system of another Member State and thus have no basis in German law. In such cases, the national legislature indirectly integrates the legal transplants from other countries (given that it first passes through the prism of the European legislature) into the German legal system (e.g. third party liability for advertising statements, which was already present in Dutch and Scandinavian law[77] and which found its way into German law (§ 434(1) 3rd sentence BGB) through the Consumer Sales Directive).[78]

However, the legal transplants achieved via European directives often extend beyond the relevant directive's scope of application. When

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[74] "*Eingetragene Genossenschaft*", e.G.; "registered co-operative society" under German law; Genossenschaftsgesetz as as amended on 16 October 2006 (BGBl. I p. 2230).
[75] BGBl. I p. 1102.
[76] Cf. Schulze and Wiese, "Attraktivität des Rechtsrahmens der eG in Deutschland", *Zeitschrift für das gesamte Genossenschaftswesen (ZfgG)*, 2009, pp. 134 et seq.
[77] Cf. Grundmann, *EU-Kaufrechts-Richtlinie*, Grundmann/Bianca (ed.), Köln 2002, Article 2, marginal no. 34.
[78] Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 177, 07.07.1999, pp. 12 et seq.

transposing a directive into domestic law, the national legislature frequently extends the scope of the directive's provisions beyond that foreseen by the European legislation. In these cases the legal transplants which the German legislator has adopted via the European directive acquire greater importance for German law than was originally envisaged by the directive (the so-called "*überobligatorische Umsetzung*" or "gold-plating" of directives). For instance, the transposition of the Consumer Sales Directive during the reform of the law of obligations caused the actual scope of the directive to be expanded – e.g. in relation to sales contracts between a consumer and a business – to all types of contract, thus including business-to-business and private-to-private transactions. The intention here was to prevent a legislative split amongst the rules applying to sales contracts due to their characteristics, and thus contribute to harmonisation and clarity of the law of sales. The effect of EU directives and the legal transplants contained therein sometimes goes beyond such an "extended transposition". This additional effect of directives is not aided by the highly systematic approach on which German civil law is based. Any change that has to be made in one part of the system, in order to allow transposition to take place, requires changes in other areas of the entire body of law, as well as in the general provisions, on which the individual parts are based, in order to maintain the coherence of the system as a whole. For example, the effects of the provisions of the aforementioned Consumer Sales Directive did not merely cause the entire body of German sales law to comply with some of the standards set by this directive for consumer sales contracts. The directive in fact raised the question of the extent to which liability incurred under other forms of contract (in particular, the contract for the production of a work – the "*Werkvertrag*") should be aligned on these standards and, ultimately, the extent to which this should change the general standards contained in the general law of obligations in Germany for all forms of contract as well as for the relevant statutory obligations. As has been mentioned above, German legislation opted for the "grand solution" and accompanied the transposition of the Consumer Sales Directive with a reform of the entire law of obligations. This modernisation changed the traditional German law of obligations above all with regard to the general requirements for the withdrawal of a contract and for the award of compensation largely in accordance with the rationale underlying the Consumer Sales Directive (and the CISG).[79] This particular modernisation thus adopted legal notions arising from a synthesis of different legal cultures, which had penetrated Germany law via international uniform law and European law by way of new structural principles for the law of obligations.

[79] Both sources are often cited in the Begründung zur, Schuldrechtsmodernisierung, BT-Drucksache 14/6040, see, for example, pp. 79 et seq., pp. 86 et seq., pp. 95 et seq., pp. 133 et seq., pp. 185 et seq.

Furthermore, the transposition of EU directives can also lead to a harmonisation and approximation in specific areas of the Member States' legislative techniques. During the 2002 reform of the law of obligations, for example, the legislature had to decide whether to introduce individual statutes for consumer law (as was usually done in Germany) or to integrate these laws into the BGB. Ultimately, the latter, integrated, solution was chosen. The decision to do so was made, *inter alia*, by reference to Dutch law,[80] which in the *Burgerlijk Wetboek* of 1992 has one of the most modern European Civil Codes and which has integrated (EU-based) consumer law (such as e.g. the Unfair Terms Directive[81]) into the Dutch Civil Code. Consumer law therefore became integrated into the BGB because the Germans were prepared to "look over the neighbour's fence" and take inspiration from the latter's legislative techniques.

D. *Soft Law and Model Rules*

In Germany, soft law[82] is acquiring increasing importance for the enactment of legislation, and thus for the introduction of legal transplants into German law. Thus the PECL and the UNIDROIT Principles were also extensively referred to – alongside foreign law and the CISG[83] – during the reform of the law of obligations.[84] For example, the introduction of the unitary notion of "*Pflichtverletzung*" ("breach of duty") in the new § 280 BGB – one of the most fundamental changes in German Civil Law – has been justified by references to, *inter alia*, the work of the Lando Commission.[85] Both the PECL and the UNIDROIT Principles were examined and referred to in attempting to solve the issues raised by the frustration of contracts.[86] In addition, the PECL (as well as the aforementioned Dutch law) also played an important role regarding the inclusion of consumer law in the BGB (even though they are not dealing explicitly with consumer law), fault liability under § 276 BGB and, in particular, the reform of limitation periods, which are, to a large extent, based upon the PECL.[87]

Alongside these Principles, the legislature has also drawn upon so-called "Model Rules" when drafting legislation. As an example, one can refer

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[80] Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 92.
[81] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21.04.1993, p. 29 et seq.
[82] For an explanation of this term see Senden, *Soft law in European Community law*, Oxford 2004, p. 111.
[83] See C. I. 2.
[84] See also Meyer, *Principles of Contract Law und nationales Vertragsrecht: Chancen und Wege für eine Internationalisierung der Rechtsanwendung*, Baden-Baden, 2007, pp. 155 et seq, 163 et seq.
[85] Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 133 et seq. For more detail see *Markesinis/Fedtke*, n. 55, p. 180.
[86] Cf. Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, p. 129.
[87] Cf. Begründung zur Schuldrechtsmodernisierung, BT-Drucksache 14/6040, pp. 92, 96, and 131.

to the tenth book of the German Rules on Civil Procedure (*Zivilprozessordnung*; *ZPO*), adopted in 1998, which deals with arbitration proceedings (§§ 1025 et seq. ZPO) and which is extensively based upon the UNCITRAL Model Law on International Commercial Arbitration (1985).[88]

2. *The Courts*

The use of foreign legal experience – and certainly of selective legal transplants – is also available, on a comparative basis, to the courts when interpreting legislation. In principle, the courts are faced with a similar task to that which is incumbent on the lawmaking authority when enacting legislation.[89] However, the courts are much more restricted in their use of comparative law than is the case with the legislature, given that they are constitutionally bound to respect the rule of law ("*Gesetz und Recht*") (see Article 20(3) of the German Basic Law). Nonetheless, *Konrad Zweigert*, the renowned German comparative lawyer, stated in a celebrated paper published over 60 years ago that the judge ought to act *de lege lata* (within the constitutional borders) as the legislator proceeds *de lega ferenda*.[90] In the section featured below, we intend to review the question whether this much discussed method of interpretation – described by *Zweigert* as a "*Arbeitsprogramm*" ("work programme") – has, in the meantime, found its way into the German courts. In doing so, one should distinguish between the areas governed by national law, international uniform law and EU law.

A. National Law

There is a general reluctance on the part of German courts to make use of foreign legal experience when interpreting "pure" German law.[91] This approach, adopted by many German judges, is well-summarised by a recent decision from the Higher Regional Court of Celle (*Oberlandesgericht* Celle) on the legality of freely negotiated fees for attorneys:[92]

> *Comparative law can reveal similarities and differences between legal systems. As a "fifth interpretative method", it can also be of assistance to the judge. The practical*

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[88] For its influence on German law see *Berger*, Das neue Recht der Schiedsgerichtsbarkeit/The New German Arbitration Law, Köln 1998.

[89] Cf. *Schulze*, Vergleichende Gesetzesauslegung und Rechtsangleichung, (1997) Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV), p. 183 et seq., p. 192 et seq.

[90] *Zweigert*, Rechtsvergleichung als universelle Interpretationsmethode, (1949/50) 15 RabelsZ, p. 1 et seq., p. 8.

[91] See also *Drobnig*, The Use of Comparative Law by German Courts, in: Drobnig/van Erp (eds.), The Use of Foreign Law by Courts, The Hague et al. 1999, 127, 140 ("*On the whole, the use of foreign law is extremely poor.*").

[92] Decision from 26 November 2004, (2005) NJW, p. 2160.

> *relevance of such an approach has, however, been very limited. Conflict of laws rules aside, any knowledge gained through comparative work can only have an impact where local law is 'open' and thus leaves room for interpretation. Judges are, moreover, constitutionally bound by the law (Article 20(3) Grundgesetz □ Basic Law). This principle cannot be put in question. Finally, it must be emphasised that transplanting legal ideas from a foreign system, especially if this system belongs to a different legal family, must be done with great caution.*[93]

This is in line with a decision from the *Bundesgerichtshof* with regard to "wrongful birth" where it is stated that foreign experience can only be of limited value to the national law because of the different foundations of the law in other countries.[94] This critical approach to comparative methodology is also apparent in a judgment of the *Bundesverwaltungsgericht* (Federal Administrative Court), which stressed that "*the law is a national science*".[95]

However, these aforementioned statements do not imply that comparisons play no role whatsoever in the interpretation of national law.[96] Thus between 1909 and 1928 the *Reichsgericht* made use of comparisons with other national laws in 17 of its decisions.[97] The majority of these are concerned with the legal aspects of limited liability companies (LLC). According to a new study by *Aura Maria Cárdenas Paulsen*,[98] the published *Bundesverfassungsgericht* (Federal Constitutional Court) decisions during the period 1951 to 2007 featured 59 decisions (not all of which, however, were concerned with the interpretation of national law) that contained express references to foreign or international decisions. However, this in turn only represents a mere 2 per cent of all decisions of the *Bundesverfassungsgericht*.[99]

The *Bundesgerichtshof* has also drawn on comparisons with foreign law – thus *Hein Kötz* has identified at least 14 decisions in which such comparisons were made up to the year 2000.[100] For example, the Court

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[93] Translation to be found in Markesinis and Fedtke, *op. cit.*, note 55, p. 167 (footnotes omitted).
[94] BGHZ 86, p. 240, p. 250.
[95] Bundesverwaltungsgericht, (1993) NJW, p. 276.
[96] See however Merryman and Pérez-Perdomo, *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed., Palo Alto 2007, p. 38 ("*The judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative.*").
[97] Cf. the study undertaken by Aubin, "Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtssprechung", *RabelsZ*, num. 34, 1970, pp. 458 et seq.
[98] Cárdenas Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts – Analyse der Heranziehung ausländischer Judikatur*, Hamburg, 2009.
[99] Cf. the study undertaken by Cárdenas Paulsen, *op. cit.*, note 98, pp. 174 et seq. In its decisions, the *Bundesverfassungsgericht* has referred to American law (27 instances), to Swiss law (16 instances) and to Austrian law (13 instances).
[100] Kötz, "Der Bundesgerichtshof und die Rechtsvergleichung", *50 Jahre Bundesgerichtshof*, vol. II, Canaris et al. (eds.), München, 2000, pp. 825 et seq., pp. 832 et seq.

referred to the Swiss law of obligations in order to assist with the interpretation of § 616 BGB (temporary prevention from performing services) in deciding whether the injuring party is also bound to pay compensation for loss of assets where the injured party continues to obtain payment for services.[101] In interpreting § 89b of the German Commercial Code (*Handelsgesetzbuch*; HGB), which concerns claims for compensation by commercial agents, the Court drew upon corresponding rules in Italian, French and, in particular, Swiss law in order to determine whether a claim for compensation by a commercial agent could be transferred to his widow.[102] Similarly, the *Bundesgerichtshof* used the Swiss law of obligations as a guide to fill a gap in the German GmbH-Statute (*Gesellschaft mit beschränkter Haftung*; Company with limited liability) on the question whether a shareholder may be excluded on serious grounds.[103] Comparisons with foreign law are more often made in tort law, as this is more "open" to foreign legal developments and these are easier to integrate into the reasoning of a court decision. The most important decisions on compensation for immaterial loss resulting from the violation of general privacy rights are in no way based solely on grounds emanating from the German legal order alone (above all the basis of assessment under Article 1 (human dignity) and Article 2(1) (personal freedoms) of the Basic Law and § 847(1) of the BGB pre-reform in 2002). Moreover, in the "*Ginsengwurzel*-case",[104] the *Bundesgerichtshof* also referred to Swiss law "which pays greater heed to the legal protection of privacy than the BGB".[105] The applicable provision in this case was Article 49(1) of the Swiss law of obligations. Not many years after this case the Court, in the "*Fernsehsagerin*-case", applied the same result to a further-reaching and more general comparative element: the Court ruled that "the compensation of immaterial losses is recognised as the adequate private law sanction for a breach of privacy in almost all legal orders in which – as corresponding to our view – the worth of an individual is given central importance in the legal system".[106] In the aforementioned "*wrongful birth* decision",[107] the *Bundesgerichtshof* did make extensive references to relevant American case law, and in particular to the decision of the English Court of Appeal in *McKay v. Essex Health Authority*[108] despite the statement that foreign experience can only be of limited value to national law because of the different foundations of the law which apply in other countries. The

[101] BGHZ 21, p. 112, 119.
[102] BGHZ 24, p. 214, p. 218 et seq.
[103] BGHZ 9, p. 157, p. 174.
[104] BGHZ 35, p. 363 et seq.
[105] BGHZ 35, p. 363, 369.
[106] BGHZ 39, p.124, 132.
[107] BGHZ 86, p. 240 et seq.
[108] [1982] 2 WLR 890.

references to the respective US and UK decisions were, in this German decision, even rendered in the original English.[109]

Ultimately, two important conclusions arise from the analysis of decisions from the *Bundesgerichtshof*. On the one hand the Court hardly ever makes use of foreign legal literature and seldom refers to German comparative studies; this has to be surprising for a country which makes such extensive use of comparative law in legal science.[110] However, with regard to foreign legal sources it has to be admitted that it would be unrealistic to demand from the German courts the far-reaching language skills which this would require (except, maybe, for English writing). In general, it should also be borne in mind that the courts operate under intense pressures of time, and normally lack the comparative knowledge and material required. In these circumstances, it is not surprising to learn that, where the German courts make use of the comparative methods they very much tend to refer to Austria and Switzerland.[111]

On the other hand, a closer analysis of such cases (i.e. cases in which comparisons with foreign law have been made) shows that the use of comparisons for the relevant case tends to be of secondary importance. For the majority of the examined *Bundesgerichtshof* decisions under review, it appears that the Court had arrived at its decision by other means, and only subsequently inserted the references to foreign law in order to give greater credibility to its decision.[112] The German courts' infrequent references to foreign law when interpreting national law seldom play a genuinely decisive role for the decisions in question.[113] However, this does not mean that, ultimately, the voluntary use of comparative law serves no useful purpose whatsoever, because at least it acts as a safeguard (the so-called "*Kontrollfunktion*") which enables the courts to ascertain whether a decision is in line with foreign law.[114]

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[109] BGHZ 86, p. 240, 250 et seq.: however, for clear criticism of this method as applied in this decision see Kötz, *op. cit.*, note 100, p. 829. This decision is criticised in Markesinis and Fedtke, *op. cit.*, note 55, p. 168 (footnotes omitted): "*When the Bundesgerichtshof (…) turned its attention to US law, the judges were, arguably, less accurate in their use of foreign law when citing Curlender v Bio-Science as a decision awarding compensation to the child but failing to mention the subsequent decision of Turpin v Sortini, which had overruled Curlender and given the child 'special' damages only.*"

[110] For the possible reasons for this reluctance, see Markesinis and Fedtke, *op. cit.*, note 55, pp. 174 et seq.

[111] The same observation can be found by Drobnig, *op. cit.*, note 91, pp. 127, 143 et seq.

[112] Like here Drobnig, *op. cit.*, note 91, p. 127 143; Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen, 2004, pp. 197; Kötz, *op. cit.*, note 100, p. 835.

[113] As is concluded with regard to the *Bundesverfassungsgericht*, cf. Cárdenas Paulsen, *op. cit.*, note 98, pp. 170 et seq.

[114] See also Zweigert, *op. cit.*, note 90, pp. 1 et seq., 5, 17; Meyer, *op. cit.*, note 84, pp. 211 et seq.

B. *International Uniform Law*

In his book "Internationales Einheitsrecht", *Jan Kropholler* gave the following response to the question of the interpretation of international uniform law:

> *Account must be taken of the foreign case law and legal literature which relate to the applicable provision of international uniform law, because the uniform development of the law, which is the desired objective, is impossible to achieve without this approach which looks beyond national borders.*[115]

For the most part at least, the German courts follow this advice when interpreting international uniform law, so that here, a more positive picture emerges when it comes to drawing on foreign court decisions and legal literature than is the case with the interpretation of purely national law as mentioned above. This is especially the case in relation to the interpretation of international transport and maritime law. In a decision on Article 12(3) of the Convention for the Unification of Certain Rules Relating to International Carriage (so-called Warsaw Convention), the *Bundesgerichtshof* warned against the application of national legal concepts and advocated an interpretation "in line with uniform law".[116] In a decision concerning the question of gross negligence in the international carriage of goods, as governed by Article 29 of the Convention on the Contract for the International Carriage of Goods by Road (CMR), the *Bundesgerichtshof* cited both foreign literature as well as Austrian, Swiss, French and Belgian courts[117] when tackling the question whether fault is tantamount to intent. Without going into any great detail, the German court decisions concerning maritime law also frequently draw upon the law as it applies in other countries.[118] Surprisingly, a different picture – at least at first glance – is given following decisions from the *Bundesgerichtshof* on the CISG, although Article 7(1) CISG expressly requires the uniform application of this convention: one can search without avail for references to foreign literature and jurisprudence are seldom, e.g. a decision from the *Bundesgerichtshof* from 30 June 2004[119] expressly drew upon numerous decisions from the Netherlands, Canada and courts of arbitration to solve the question of the burden of proof which arises under Article 40 CISG. However, at no stage have the German courts ever discussed the – albeit controversial – use of the Lando Principles and UNIDROIT Principles in order to interpret and fill any gaps in the CISG, this being a practice which is occasionally adopted by

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115 Kropholler, *Internationales Einheitsrecht,* Tübingen, 1975, p. 280.
116 BGH, (1976) NJW, p. 1584.
117 BGHZ 88, p. 157, 160 et seq.
118 *Drobnig*, n. 91, p. 127, 135 et seq.
119 BGH, (2004) NJW, p. 3181 et seq.

the judiciary in several other countries, by courts of arbitration and by legal scholars.[120] However, this apparent absence of any comparative angle can be put into some perspective because of the *Bundesgerichtshof's* frequent use of German commentaries on the CISG, which, for their part, make extensive use of comparative law. However, this widespread practice of failing to disclose the use of comparative and/or foreign law and decisions by the *Bundesgerichtshof* as regards the international sale of goods has been criticised by several German authors.[121] Nevertheless, the strong criticism of this partial "silence" concerning the use of comparative or foreign literature and decisions is not confined to the aforementioned area, but also applies more generally to other types of court, such the *Bundesverfassungsgericht*. An open disclosure of these materials is required – at least from the highest Federal courts – in order to develop further the use of comparative law by the courts.[122]

C. *EU Law*

The so-called "*richtlinienkonforme Auslegung*" ("directive-compliant interpretation") of EU directives requires the courts to observe not only the intention behind the relevant directive and its transposition in the Member States, but also the Member States' court decisions and literature which relate to this directive.[123] Any directive-compliant interpretation therefore requires a comparison with the other domestic laws. The courts' duty to observe foreign case law and literature also arises with respect to directly effective EU Law;[124] however, this method is seldom used.[125] Here, the German courts normally limit themselves to citing German-language legal literature. Nevertheless, it should be observed that – as is noted above with regard to international uniform law (with the same criticism of this approach) – the German courts often refer to German commentaries on European law,

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[120] For more detail see Perales Viscasillas, "The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-filling of CISG", *CISG Methodology*, Janssen and Meyer (eds.), München, 2009, pp. 287 et seq.; Janssen and Kiene, "The CISG and Its General Principles", *CISG Methodology*, , Janssen and Meyer (eds.), München, 2009, p. 261 et seq.

[121] Kötz, *op. cit.*, note 100, p. 829; see also Drobnig, "Rechtsvergleichung in der deutschen Rechtsprechung", *RabelsZ*, num. 50, 1986, pp. 610 et seq., 614 et seq.; Markesinis and Fedtke, *op. cit.*, note 55, p. 165 et seq.

[122] With regard to the Bundesverfassungsgericht, see Cárdenas Paulsen, *op. cit.*, note 98, pp. 178 et seq.

[123] See e.g. Drobnig, *op. cit.*, note 91, p. 133; Lutter, "Die Auslegung angeglichenen Rechts", *JZ*, 1992, pp. 593 et seq., 604; Kötz, "Alte und neue Aufgaben der Rechtsvergleichung", *JZ*, 2002, pp. 257 et seq., 258. For criticism of this approach see Twigg-Flesner, *The Europeanisation of Contract Law*, Abingdon 2008, p. 111.

[124] See C.I.3 a.

[125] See Kötz, *op. cit.*, note 100, p. 831; Lutter, *op. cit.*, note 123, pp. 593 et seq., 604 and Cárdenas Paulsen, *op. cit.*, note 98, pp. 85 et seq. on jurisprudence from the *Bundesverfassungsgericht*.

which in turn frequently contain references to foreign legal writing and court decisions.

3. *Legal Practice*

The influence of foreign legal systems, international uniform law, EU law and soft law on German legislation and jurisprudence has already been examined above. Yet these statements would be incomplete if one failed to extend the question of legal transplants and legal culture to German legal practice – a problem area that has only rarely been discussed in great detail.[126]

In German legal practice – at least in German-based international law firms – the use of English in international cases has become increasingly prevalent, not only as the language of negotiation, but also as the language in which the contracts are drafted. This has far-reaching consequences for legal practice as this involves the reception not only of Anglo-American terminology, but also of the underlying concepts. The consequence of this reception is that, especially for more "globalised" sectors, the German equivalent of English terms are difficult to find or are certainly used to a much lesser extent. To illustrate this point, let us take an example from the law on mergers and acquisitions in which the German word "*Unternehmenskauf*" is now seldom used. It also frequently occurs that German legal language does not possess a word or phrase which corresponds to an Anglo-American term (for instance, "due diligence"), with the result that those applying the law have no choice but to adopt the English term, together with the underlying concept. However, the influence of Anglo-American law can be discerned not only in the use of legal terms and concepts, but also in the manner in which contracts are drafted. "Common law" contracts are, in principle, more precise, yet are also considerably longer and less clearly worded than would normally be the case with a contract drafted by a German lawyer.[127] This increasing "Americanisation" of the law is creating – at least in global terms – a clear tendency to draft contracts which contain considerable detail, and are consequently lengthier.

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[126] Cf. Wen Lin, "Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example", *Am. J. Com. L.*, num. 57, 2009, pp. 711 et seq.; Markesinis and Fedtke, *op. cit.*, note 55, pp. 323 et seq., Treibel, "Anglo-amerikanischer Einfluß auf Unternehmenskaufverträge in Deutschland – eine Gefahr für die Rechtsklarheit?", *Recht der Internationalen Wirtschaft* (*RIW*), num. 44, 1998, pp. 1 et seq., and very recently Hentzen, "Hegemonie oder Symbiose: Zur Rezeption des US-amerikanischen Rechts in der Vertragspraxis des M&A-Geschäfts", *Das deutsche Wirtschaftsrecht unter dem Einfluss des US-amerikanischen Rechts*, Ebke et al. (eds.), Frankfurt, 2010, pp. 97 et seq.

[127] For the underlying reasons, see Treibel, *op. cit.*, note 126, p. 4 et seq.

In addition, the German courts are increasingly prone to recognise the growing significance of English legal culture and the English language in legal practice. As from 1 January 2010, a project has been initiated by the Higher Regional Court of Cologne (*Oberlandesgericht Köln*) and the Regional Courts in its jurisdiction (Aachen, Bonn and Cologne) which has seen the introduction of special courts and court divisions where, by prior arrangement, English may be selected as the language in which the proceedings are to be conducted. However, this only applies to the oral stage, which means that both the written submissions and the decision still need to be drafted in German. The reason for this limitation is § 184 of the German Act on Court Procedure (*Gerichtsverfahrensgesetz; GVG*), which stipulates that the only permissible language for court proceedings is German (with the exception of Sorbian). However, the states of North-Rhine Westphalia and Hamburg have submitted a proposed Law to the German Upper House (*Bundesrat)* which seeks to change the status quo.[128] This proposed legislation, which has been hotly debated in the relevant circles, envisages the establishment of special courts at selected Regional Courts for matters concerning international trading, in which the proceedings could, with the parties' agreement, be held entirely in English. Such cases would include court applications, transcripts and the verdict. The courts would be manned by linguistically capable judges and would be composed – as is currently the case with the German commercial courts (*Kammer für Handelssachen*) – of a qualified judge and two laymen from the business sector, who also act as judges.[129]

A further influence exerted by foreign law on German legal practice also arises from the activities undertaken by internationally active, foreign companies that seek to market their products and services consistently worldwide.[130] In order to achieve this goal, the company will draft and employ standardised contracts, uniform terms and conditions etc., which comply with the law of the country in which the company is based. It is often the case that the same reasons are invoked, not only for these "streamlining" measures (i.e. measures regarding the interaction between commercial entities and the outside world as represented by regulators, commercial partners or consumers), but also for the internal organisation of companies with a worldwide infrastructure. Multinational enterprises also frequently attempt to develop a homogenous set of rules that regulate internal procedures, codes of conduct and terms of employment regardless of the

[128] Gesetzesantrag der Länder Nordrhein-Westfalen, Hamburg, Entwurf eines Gesetzes zur Einführung von Kammern für Internationale Handelssachen (KfiHG), BR-Drucksache 42/10.

[129] For more detail see Kötz, Deutsches Recht und Common Law im Wettbewerb, *Anwaltsblatt* (*AnwBl*), 2010, pp. 1 et seq.; Maier-Reimer, "Englische Vertragssprache bei Geltung deutschen Rechts", AnwBl, 2010, pp. 13 et seq.

[130] For more details see e.g. Wen Lin, *op. cit.*, note 126, pp. 711 et seq.

geographical location of a particular subsidiary. These methods of standardisation, as well as the internal regulations referred to, which reflect – as far as the relevant national law allows – the legal perspective of an internationally active company, also influence German legal practice.[131]

IV. LEGAL HYBRIDISATION CAUSED BY LEGAL TRANSPLANTATION

Finally we shall turn to a phenomenon that has received very little attention in Germany, namely the development of so-called "*rechtliche Hybriden*" ("legal hybrids"). More often than not, one will search in vain to locate this concept in German law – and even if one succeeds in identifying "hybrids" in a legal context, it will be in the shape of "*hybride Steuerungsinstrumente*" ("hybrid policy instruments") – e.g. in the writings of *Gerhard Wagner*[132] in the field of environmental law. However, even here one tends to find little more than a mixture of traditional regulatory models of private and public law without any indication as to whether German law has been combined with foreign law to create a new "legal hybrid".

Nonetheless it is possible to distinguish at least between two types of "legal hybrids", in which foreign and German legal perceptions have been combined. On the one hand, there are developments that enable an entire area of law to become a legal hybrid, such as German anti-trust law. Since its inception, this particular area of the law has, in accordance with traditional German understanding, clearly focused upon public law in the shape of the so-called "public enforcement" (i.e. through a public authority). However, for a number of years German anti-trust law has been gradually entering the arena of "private enforcement", in which anti-trust law is (also) to be enforced by means of claims for damages. The private enforcement of anti-trust law has increasingly gained currency in the United States and is encouraged by the European Commission,[133] and has led to the "legal hybridisation" of the entire body of German anti-trust law. The form which "legal hybridisation" has assumed is to add "private enforcement" to the traditional "public enforcement" by giving clear added strength to the rules governing claims for damages.[134] In so doing, anti-trust law, which was previously dominated by public law, has become noticeably "privatised".

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131 Cf. Markesinis/Fedtke, *op. cit.*, note 55, pp. 325 et seq., 329 et seq.

132 Wagner, "Prävention und Verhaltenssteuerung durch Privatrecht", *AcP*, num. 206, 2006, pp. 353 et seq. 435.

133 See, for example, the "White Paper on Damages actions for breach of the EC antitrust rules", *COM*, 165, 2008.

134 See, for example Section 33(3) Gesetz gegen Wettbewerbsbeschränkungen (GWB) (Act against Restraints on Competition).

Here too it is possible to note the effect of foreign legal developments, especially those of the United States.[135]

On the other hand, the process of "legal hybridisation" can also create new "legal hybrids" by combining German and foreign legal perceptions in one legal instrument or article. By way of example, let us take the manner in which the German law on compensation claims has developed in recent years. Prior to the reform of the law of obligations in 2002, a claim for compensation made by the buyer to whom a defective item had been supplied would (under § 463 in its pre-2002 version) only succeed where the said item lacked a guaranteed characteristic or where the seller had fraudulently remained silent. However, the influence of the CISG and of the common law has ensured that, henceforth, non-compliance in the strictest sense will suffice for such a claim to succeed under German law. Nevertheless, as was the case under German law prior to the modernisation of the law of obligations – and in contrast with the CISG and the common law (which essentially lay down the principle of guaranteed liability) – the BGB still requires an element of fault on the part of the seller, even if such fault is now presumed (§§ 437 no. 3, 280(1) 2 BGB). This combination of German legal perceptions (the fault requirement to obtain compensation) and elements of international sales law and common law (under which non-compliance by itself suffices) allows the rules on claims for compensation to appear as a "legal hybrid".

V. CONCLUSION

From the foregoing, it can safely be concluded that Germany has always been influenced by foreign legal cultures and has frequently been marked in the past by legal transplants, so that there was never a "pure"[136] German law which was entirely free of foreign influences.[137] If one looks at the current situation in Germany as such then a distinction has to be drawn. When it comes to taking into consideration foreign law and legal culture, the German legislature appears in a rather positive light. It may be the case that the latter does not always systematically apply comparative notions, and it is difficult to identify any comparative elements in the legislation which it enacts – nevertheless, comparative law has definitely come to occupy a

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[135] See Buxbaum, German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement, *Berkeley Journal of International Law* (*Berkeley J. Int'l L.*), num. 23, 2005, pp. 101 et seq.; Janssen, "Auf dem Weg zu einer europäischen Sammelklage?", *Auf dem Weg zu einer europäischen Sammelklage*?, Casper *et al.* (eds.), München, 2009, pp. 3 et seq.

[136] Cf. for the concept of "Reinheit des Rechts" ("purity of the law")see Depenhauer, "Reinheit und Recht. Einführung", *Die Reinheit des Rechts*, Depenhauer (ed.), Wiesbaden, 2010, pp. 7 et seq.

[137] Cf. Markesinis and Fedtke, *op cit.*, note 55, p. 182.

permanent place. Instead, the German legislature, as well as relying on various national laws, makes increasing use of international uniform law and "soft laws", in particular in the form of so-called "Principles". As a member of the EU, whose law is becoming increasingly dominant, Germany's legal culture will continue to evolve towards a dual system of national and supranational law, in which it will become ever more difficult to differentiate between "original" German law and legal transplants with European roots. This is especially true for EU directives, which require implementation and in which legal models from different countries are often combined and are hard to identify as a legal transplant when transposed into national law.

Furthermore, the aforementioned examples have shown that German legal practice is clearly influenced by foreign legal perceptions and foreign legal cultures. Here, the pace is set primarily by international law firms and companies, which are progressively integrating Anglo-American elements into German legal practice and culture. This process of "Americanisation" has been criticised in the past. However, this aspect has hitherto received little acknowledgement on the part of German legal scholars, so that a reliable comprehensive analysis of this field is overdue.[138]

The position of the German courts is crucial here. When interpreting legislation, the courts are to abide by the recognised interpretation methods of the *historische*, *grammatikalische*, *systematische,* and *teleologische Auslegung*.[139] Despite being constitutionally bound to observe the rule of law, the courts only sporadically and selectively avail themselves of the opportunity to apply a comparative perspective. Germany remains far away from a truly systematic use of comparative law for statutory interpretation at the highest level – although their approach towards certain areas of international uniform law may be an exception – in the sense of a "*universelle Interpretationsmethode*" ("universal method of interpretation"), as promoted by *Zweigert* shortly after the Second World War.[140] Even where the courts actually make a comparative approach they frequently fail to indicate this adequately. The German courts should change their approach in this regard and disclose their comparative sources. Furthermore, it appears that the majority of the comparative references used by German courts simply serve the purpose of giving greater authority to their decision. In principle this is a policy which is both legitimate and desirable, given that the voluntary use of comparative material is, at the very least, a way of "safeguarding" the courts'

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[138] See however Ebke *et al.* (eds.), *Das deutsche Wirtschaftrecht unter dem Einfluss des US-Amerikanischen Rechts*, Frankfurt 2010.

[139] For more detail on these methods of interpretation see Canaris/Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed., Berlin, 2009, pp. 133 et seq.

[140] Zweigert, *op cit.*, note 90, pp. 1 et seq. However, *Zweigert's* postulate needs further specifications (see, in greater detail, Drobnig, *op cit.*, note 91, pp. 127, 145 et seq.).

decisions ("*Kontrollfunktion*"). However, it is also a policy which serves to devalue those German decisions which have been analysed on the basis of their comparative approach.

However, it would be unfair to lay the blame for this situation exclusively at the door of the German courts. The latter frequently have to operate under considerable time pressures and are usually deficient both in comparative knowledge and easy accessible comparative material. It is thus unrealistic to believe that they could acquire the required material on their own account. Even if they were able to do so it is likely, given that the judges will not be competent comparatists, that the quality of their comparative research will be poor. It is instead the "*Bringschuld der rechtsvergleichend arbeitenden Wissenschaft*"[141] ("an obligation incumbent on comparative scholars") to provide the courts with "*up-to-date comparative material, carefully compiled by specialists and packaged to meet the needs of practitioners*".[142] And even if Germany has a strong base of comparative scholars, with high output levels to match, there still appears to be a shortage of this kind of comparative material which meets the needs of the German courts.[143] The future will thus show whether German academics are able to fully fulfil their "Bringschuld" in order to help and inspire the courts to make greater use of comparative law as a means of interpretation, and to recognise it as an interpretive method in its own right. In doing so, *Zweigert's* vision may be fulfilled and comparative law may thus gain a permanent place in the case law of the German courts.

[141] Kötz, *op cit.*, note 100, 841.
[142] Markesinis/Fedtke, *op cit.*, note 55, p. 170.
[143] *Idem.*