G. Contributions of Swiss Law to Foreign, International and European Law

I. Preliminary remarks

The present report deals with the challenges posed to Swiss economic law by international and European law. However, Swiss law also has an impact on foreign legal orders, whether national, international or European, both on the legislative as well as on the judicial level. The following considerations are dedicated to some of the most significant Swiss contributions.

It must also be mentioned that for over 100 years Switzerland, has been home to international organizations. To the present, it has signed 24 headquarters agreements. Geneva is a Mecca for international organizations, the entities of the UN and the WTO constituting the most important examples. Moreover, there are some 250 NGOs which have been granted consultative status by the UN. It is particularly remarkable that Switzerland was the second seat of the UN after New York as well as the seat of the GATT long before the country itself became a member of these organizations.

II. Import of Swiss economic law by other jurisdictions

1. Civil Code

The most famous example of foreign countries borrowing from Swiss law is the reception of the Civil Code (including the law of obligations) by Turkey under the regime of Kemal Atatürk in 1926. It appears that there were mainly five reasons for Turkey to take this revolutionary step: Modernization of private law was required by the League of Nations; leading Turkish politicians believed

that only a secular and westernized country would be successful politically and economically; the Swiss Civil Code was chosen over the codes of France and of Germany because it was deemed to be more modern and more flexible; the Swiss Code was available in French which rendered it accessible to Turkish legal elites; the Turkish Prime Minister of the time had obtained his higher education in Switzerland. It was clear from the beginning that the adoption of a modern Western code by a state which until 1839 had been theocratic and until 1924 semi-theocratic would lead to frictions. But it is hardly surprising that «[i]n the sphere of contracts, the introduction of the Swiss Code of Obligations has not caused any great difficulties.» For the sake of order, it may be added that elements of Swiss civil law have also been taken over by other countries such as democratic China (and therefore: Taiwan), Peru, Italy and Greece as well as by Middle Eastern and North African countries.

2. Unfair Competition Act

As mentioned, the Swiss legislature implemented a present-day conditions-functional approach in the 1986 Unfair Competition Act which aims at the protection of competition itself. This was done on the basis of academic publications by representatives of the St. Gall school of economic law who in turn had been inspired by German legal thinking. The Swiss courts have, however, barely tapped the full potential of this reorientation of unfair competition law. But that did not hinder the German legislature from taking over the functional approach from Switzerland when it amended the German Unfair Competition Act in 2004.

It may be added that in unfair competition law, the Swiss legislature and the Swiss Federal Supreme Court were also ahead of foreign and European developments regarding the treatment of comparative advertising and the model of the informed consumer.

992 See, for example, Arzu Özguç, The Role of Comparative Law in the Development of Turkish Civil Law, 17 Pace Int’l L. Rev., 31-3; 318; A dosan Göüz, Sources of Turkish Law, in: Pur Filzal Ansari/Don Wallace (eds.), Introduction to Turkish Law, The Hague 2005, 1, 9.
3. Exclusive distributor’s right to compensation for clientele

One of the hotly debated issues of the law of distribution intermediaries after World War I concerned the question whether such operators are entitled to a compensation for clientele. The law in Europe was shaped by legal transplants carried out by legislators, but also by the case law of courts of last resort. Swiss law played a prominent role in this development. In 1949, a new chapter on the commercial agents contract was inserted into the Swiss CO. It has certainly been a coincidence that in the same year, Arthel Miller published his famous play ‘Death of a Salesman’ which describes the suicide of Willy Loman, a failing sales representative.1994 But the play has made it clear that distribution personnel was low on the social ladder at that time.1995 Having said that, it must be emphasized that a salesmen or sales representative is not the same as a commercial agent.

Concerning commercial agents, Article 418a CO states under the title ‘compensation for clientele’:

1. Where the agent’s activities have resulted in a substantial expansion of the principal’s clientele and considerable benefits accrue even after the end of the agency relationship to the principal or his legal successor from his business relations with clients acquired by the agent, the agent or his heirs have an inalienable claim for adequate compensation, provided this is not inequitable.

2. The amount of such claim must not exceed the agent’s net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract.

3. No claim exists where the agency relationship has been dissolved for a reason attributable to the agent.

Article 418a CO was largely a replication of § 24 of the 1921 Austrian Commercial Agents Act.1996 In 1953, a similar provision was introduced into the German Commercial Code in § 898. Other countries enacted comparable legislation.1997 The German Federal Supreme Court held in 1958 that § 898 of the Commerce Code may apply to independent dealers by analogy.1998 In 1989, the Austrian Supreme Court followed suit basing itself on German case law and academic literature.1999 In Switzerland, however, the right of an independent dealer who acts in his own name and for his own account to compensation for clientele was only recognized by the Federal Supreme Court in 2008.2000

In 1962, the Federal Supreme Court (Civil Division) annulled a decision of the Cantonal Court of Vaud’s award compensation for clientele to an exclusive distributor holding that Article 418a CO, which grants such a claim to agents, could not be applied to independent dealers by analogy. The court took a rather formalistic approach and found that – unlike the agent whose task it is to conclude business contracts in the name and for the account of the principal – the exclusive distributor is an independent dealer who runs his business as he sees fit and simply buys products from the other party which he then sells on his own account. The payment for clientele was said to be due because clients of the agent become clients of the principal. This, the Court held, was not the case under the exclusive distribution contract at issue which concerned the sale of pest control machines. The Court furthermore found that a rule such as that found in Article 418a CO, which imposes an obligation on a party which has fulfilled all its obligations to make payments to the other party after the termination of the contract, was new and exceptional. This controversial innovation could not be extended to exclusive distribution contracts. The Court briefly touched upon the German legal situation, but refrained from going into it in depth. It held that under special circumstances, payment for clientele could be due, but that the case at hand did not contain such elements.2001 The judgment was an outflow of the liberal contract theory which in general has often informed the Federal Supreme Court’s case law.2002

The Federal Supreme Court’s judgment not only prompted Swiss lawyers to advise their clients that the agency law of the CO did not apply to other distributors. In view of the case law of the German Federal Supreme Court concerning § 898 of the Commerce Code, German principals adopted a policy of subjecting exclusive dealership agreements to Swiss law.

Swiss academic literature called on the Federal Supreme Court to change its attitude.2003 46 years later, the Court (First Civil Division) overruled the 1962 decision. In a judgment of 22 May 2006,2004 it admitted that the analysis made in 1962 was a very formalistic one and emphasized that whether the clientele would stay with the principal depended on the attractiveness of the trademark which was the result of the distributor’s efforts both under an agency contract as well as under an exclusive dealership contract. The contract in said case concerned the wholesale and retail of cosmetic products. The Court found that an exclusive dealer assumes a higher economic risk than an agent. In several sectors of the sale of goods, a legally and economically independent merchant who acts on his own behalf and for his own account gives way to a distributor who is

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permanently linked to the supplier and who is often reduced to obey the conditions dictated by the latter concerning the sale of the goods delivered. The Court went on to state that Article 418u CO was the model for a similar provision in German law, namely § 89b of the German Commercial Code, and based its finding, *inter alia*, on the case law of the German Federal Supreme Court which had long granted the exclusive dealer a right to compensation for clientele by analogous application of said provision. The Federal Supreme Court concluded that the question could not be treated in a dogmatic way. The exceptional character of Article 418u CO therefore did not exclude its analogous application to the exclusive dealership contract.1011

The interaction of said three legal orders also had an impact on the law of the European Union: § 89b of the German Commercial Code was the model for Article 17(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, which reads:

«(a) The commercial agent shall be entitled to an indemnity if and to the extent that: he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and - the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20. (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question; (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.» 1012

4. Debt brake

On 2 December 2001, the Swiss people overwhelmingly voted in favor of a Federal Decision which introduced a new fiscal expenditure rule for the Federal Government, the so-called debt brake. The rule aims, one the one hand, «at a structurally balanced budget in the short-run by annually setting a cyclically adjusted expenditure ceiling». On the other hand, «it arrests the accumulation of public debt via corrections of future expenditure targets for past deviations from projected fiscal balances.» 1013 The Swiss Debt brake was carefully studied by the Austrian Government in 2005.1014 In the course of the financial crisis of the last years, numerous foreign governments and central banks including the U.S. Federal Reserve appear to have drawn their inspiration from the Swiss initiative. The Chairman of the U.S. Federal Reserve, Ben Bernanke, is reported to have said that the Swiss debt brake is particularly effective because it was approved by 85% of the voters, such broad support undoubtedly contributing to its success. If such a rule is merely adopted by the Parliament, there is a risk that the same Parliament will at the next opportunity abolish it again.1015

All this prompted Federal Councillor Didier Burkhalter, then Head of the Department of Home Affairs (presently Head of the Department of Foreign Affairs), to proudly state in a speech given at the University of Zurich on 10 October 2011:

«The instrument of debt brake is currently becoming a worldwide export hit. From Berlin to Madrid to Washington, it has been installed or is at least seriously debated. What sounds very technical - debt brake - is the essence of our economic culture: Disciplined use of scarce resources, pragmatism instead of demand inflation, a basic reflex that always puts the realistic and achievable over the maximal and ultimately utopian.» 1016

5. Public procurement law

The quality-based multifactorial approach of the Swiss legislature in the definition of the award criteria appears to have an impact on the development of the law of the European Union. In a resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)), the European Parliament took the view «that, in order to develop the full potential of public procurement, the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits - taking into account the entire life-cycle costs of the relevant goods, services or works» and stressed «that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services.» 1017

1012 See the EUC's judgment of 28 October 2010 in Case C-203/09 Volvo Car Germany GmbH v Autofahrdienst Hof GmbH, not yet reported.


1016 <http://www.edi.admin.ch/dokumentation/00334/00858/index.html?lang=de&rmg-id=41653> visited 14 March 2012, author's translation. - The last sentence could be added to the description of the Swiss character by MAX FRISCH, see supra, B.II.A.

1017 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0454&lang=en> visited 14 March 2012, Marc Steinrucker, Judge of the Swiss Federal Administrative Court, was heard as an expert by the Parliament's Committee on the Internal Market and...
6. Contingent capital instruments (CoCos)

In 2011, Switzerland, when addressing the "too big to fail" problem, took the lead in prescribing large banks the hold a certain percentage of their risk weighted assets in contingent capital instruments (CoCos). The CoCos are intended to serve as a buffer in a financial crisis. The Basel Committee on Banking Supervision refrained from setting such requirements on a global scale. One will not overlook in this context that unlike in the EU and the EBA, systematically relevant banks in Switzerland are not subject to state aid control.

III. International Arbitration

Switzerland has, both in domestic and in international matters, by tradition favored arbitration over court adjudication. Arbitration does not aim at deciding for or against the plaintiff. Rather, it aims at creating peace. Switzerland has a reputation for being one of the most favored places of international arbitration. This may be attributed to a variety of reasons such as the country's geographic location in the heart of Europe, its neutrality and political stability, its mercantile culture and the arbitration friendliness of the Swiss legal system. Numerous important arbitral proceedings have taken place in Switzerland. As far as public arbitration is concerned, the following cases may be mentioned: Alabama Claims Arbitration, Beagle Channel Arbitration, Tabor Arbitration, Rainbow Warrior Arbitration, Important private arbitration cases are, for example, the Transco Arbitration, the JAMCO Arbitration, the Westacre Arbitration, the Areva v Siemens Arbitration.

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Costa Rican arbitration. It is worth noting that both the Federal Council and the Supreme Court were also involved in arbitration proceedings.

Not less important is the prevalence of Swiss law in international arbitration procedures. As already noted, Swiss law is often chosen as the substantive law, governing the arbitration. The attractiveness of Swiss law to some extent rests on the rather intuitive perception that Switzerland’s political neutrality translates into the neutrality of its legal system guaranteeing an equal distance from the parties’ domestic legal systems. Besides this, Swiss private law and in particular the Swiss Code of Obligation is widely considered as a concise and comprehensive legal instrument and appreciated for its liberalism when it comes to “anti-B” relations and its deference to party autonomy. Moreover, the fact that Swiss law is available in the official languages of French, German and Italian as well as its civil law ancestry should not be overlooked as factors rendering it particularly suitable for cross-border dispute resolution.

With respect to the lex arbitri, Chapter 12 of the Private International Law Act (CPL) constitutes a particularly arbitration-friendly legal framework recognizing, inter alia, the separability doctrine, the arbitrators’ competence-competence, a broad concept of arbitrability, as well as the parties’ freedom to agree upon the applicable procedural and substantive law. Furthermore, Swiss courts largely refrain from interfering with the arbitration process, limiting their role to judicial cooperation in the granting of interim measures, the taking of evidence and the appointment of the arbitral tribunal or the review of challenges to the tribunal’s composition. The right to seek judicial control of arbitral awards rendered in Switzerland is confined to restrictive statutory grounds, and may altogether be waived if neither party is domiciled in Switzerland.

Swiss international arbitration law has inspired other jurisdictions, with some provisions becoming successful legal transplants. The impact of Switzerland on international arbitration can also be established from an institutional perspective. As an example, one may mention the Swiss Chambers’ Court of Arbitration and Mediation (SCCAM), founded by the Swiss Chambers of Commerce. Through its seven secretariats, the SCCAM administers and monitors international arbitration proceedings under the Swiss Rules of International Arbitration. Other noteworthy arbitral bodies based in Switzerland are the Court of Arbitration for Sports (CAS) and the Arbitration Centre of the World Intellectual Property Organization (WIPO). Finally, while not an arbitral institution itself, the Swiss Arbitration Association (ASA) may be named, which successfully promotes the development of arbitration law and practice far beyond the borders of Switzerland. Although other countries have undertaken great efforts to promote themselves as places of arbitration and their law as appropriate lex causae and lex arbitri, Switzerland still claims a predominant position in international arbitration. Besides its favorable economic implications, this first and foremost provides an invaluable gateway for Swiss legal thinking to be articulated and premoligated on an international stage.

IV. Investment Law

As a consequence of the diminutive size of Switzerland’s domestic market, the competitiveness of Swiss companies and, thus, the prosperity of the Swiss

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the conclusion of the Switzerland-Tunisia BIT in 1961,\(^\text{1073}\) As a result of its long-standing and extensive treaty practice, Switzerland, while originally influenced by Germany,\(^\text{1073}\) has provided an important impetus to the emergence of international investment law and profoundly shaped its further development.\(^\text{1073}\) In particular, the Swiss standard clauses for BITs,\(^\text{1073}\) frequently cited in academic literature, are often reflective of a certain state practice\(^\text{1073}\) or even the prevailing opinion iuris and as such have inspired various Model BITs of other states. It is fair to say that Switzerland has established itself as a main contributor to the promotion and protection of foreign investment.

V. The role of humanitaritarian international law

Switzerland is one of the most important contributors to the development of humanitarian international law. It all started with the formation of the International Committee of the Red Cross (ICRC) in 1864 in Geneva. The emblem of the Red Cross is the reversed shape and colors of the Swiss flag. Further details are not important in the given context.\(^\text{1073}\) This is an accomplishment which speaks for itself. It is, as such, not diminished by the fact that there is another side to the medal: Switzerland was only able to stick to its policy of splendid isolation in international and European

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1078 See S. D. III, a further MULTIVARIATE STATISTICAL ANALYSIS, The Investment Law on Foreign Investment, Cambridge, 2010, 172; On the reasons underlying the conclusion of BITs, see Thomas P. PhD, Legal Framework for the Adoption of FDI, Umeå 2004, 35 ff.
1079 However, various investment-oriented procedures are included into other bilateral instruments such as the OECD Code of Liberalisation of Capital Movements and Current Invisible Operations, the WTO Agreements (in particular GATS, TRIPS, TRIPS, CERs and ASCM) and investment chapters of FTAs, see see E. K. Kausman, Investitionsrechtspolitik - aktuelle denkmale, Die Wirtschaftskraft 2006, 57; OECD Working Papers on International Investment, Relationships between International Investment Agreements, Number: 2006/1, 11; KNECHT, J. VANDENBO, bilateral Investment Treaties; History, Policy, and Interpretation, Oxford 2010, 32 ff.
1071 A continuously updated list of Swiss BITs currently in force is available at: <http://www.sico.unicredit.ch> (visited 3 July 2012).
VI. Direct democracy as an export hit?

1. General

In any democracy, the people are the sovereign, but in a direct democracy, the people not only have the right to elect their representatives who then enact the laws. They are actively involved in legislation as well as in the approval of international treaties and in the election of judges. The Federal Council tends to make reference to the fact that Switzerland is a direct democracy in several ways, be it that the argument is used as an excuse that the country cannot accept certain treaty obligations or that others are being lectured about the alleged superiority of the Swiss constitutional system. When Switzerland joined the United Nations in 2002, the government proudly pointed out that it was the first country whose UN membership had been determined by the people. It thereby obviously aimed at camouflaging the fact that Switzerland had been an extreme latecomer.

2. Lecturing the European Union?

Some Swiss politicians do everything to hold up the mirror of direct democracy to the representatives of the European Union. To give an example, when former Federal Minister MICHELLE CALMY-REY delivered her speech on the occasion of the 50th anniversary of the Swiss Mission in Brussels on 17 November 2010, she contrasted the Swiss model — which in her view is based on direct democracy and bilaterialism — with the European model. Even though she did not elaborate on what the European model is in her view, it became clear to all those listening that it came off badly.

Publications on the so-called democracy deficit of the European Union are legion. When Swiss politicians and academicians criticize this deficit and offer their own system as an alternative, they should be aware of the following:

(1) The Member States are the masters of the treaties, but these Member States are all constitutional democracies. In many of them, the rule of law reaches further than in Switzerland. A country must not be a direct democracy in order to be a democracy. (2) The EU is characterized by a democracy deficit if compared with a democratic state like Germany, the U.S. or Switzerland. Its main defect lies in the fact that competences of the European Parliament are too small. In that respect, Switzerland can be a role model, but so can other democratic nation states. (3) It may well be that Switzerland’s trademark, direct democracy, will also be of a certain relevance for the further shaping of the EU’s model of governance. In fact, the Lisbon Treaty has introduced elements of direct democracy. One of the major steps forward in the Lisbon Treaty is the European Citizen’s Initiative (ECI). But it is clear that a Union of the size and with the ambitions of the EU will never be able to function with the mechanisms of the small state Switzerland. There cannot be any doubt that the Union would not stand where it stands now had it been based on the same or a similar governance model as Switzerland. In other words, the restriction of democracy has been the price for the fast progress of integration. Still, it cannot be denied that politically, the direct democracy in Switzerland remains a thorn in the side of the EU. The sheer fact that popular votes take place on a regular basis in Switzerland on all levels of the state, i.e. federal, cantonal and communal, reminds EU citizens of the lack of such rights.

1079 H. KELLER, Repräsentation des Volkes in der Schweiz (1830), 293ff.
1080 KVVMW (Kuratorium Netzwerk Schweiz), Die Position der Schweiz im Rahmen der Verhandlungen mit dem EU-Parlament zur Erweiterung der Union, 2007, 7.
3. Export of direct democracy to other nation states?

Another question is whether direct democracy may be an attractive model for other European countries. It seems that there is an increasing respective interest in particular in Germany and Austria.\textsuperscript{1085} However, the Swiss direct democracy is not free from problems. As far as domestic politics are concerned, women have been denied the right to vote for generations, and this based on arguments that were hard to beat in terms of simplicity and naivety.\textsuperscript{1086} Some of the recent popular votes, e.g., the ones on the ban of the construction of minarets and on the deportation of criminal foreigners caused considerable frowns in foreign countries and in the European Union.\textsuperscript{1087} It seems, however, that such verdicts are limited to social issues such as the widespread fear that the country could be flooded with immigrants. Much would be gained if legislation on party and campaign financing would be introduced.\textsuperscript{1088}

In economic law matters, the people have in a high number of cases followed the solution approved by Parliament.\textsuperscript{1089} To give an example, the recent rejection of an initiative to increase employees' annual minimum entitlement to paid holiday from four to six weeks has been commented on very favorably in the international press.\textsuperscript{1090} As to the rest, much depends on how well a project is being explained to the voters. To give a historic example: One of the explanations of the 1882 rejection of the constitutional amendment, which would have given the Confederation the competence to legislate on the protection of inventions in the field of industry and agriculture as well as on the protection of designs and models, was that numerous voters had no direct interest in patent protection and had not at all understood what patents were about.\textsuperscript{1091} Whether complex international treaties should be subject to popular vote is debatable, in particular because such projects are easy targets for populists. But the biggest fiasco of the more recent past, the rejection of the EEA Agreement, cannot be blamed on the people. It was caused by a misguided policy of the Federal Council.\textsuperscript{1092}

\textsuperscript{1086} Supra, C.X.1.
\textsuperscript{1087} See Supra, supra.\textsuperscript{1086}.
\textsuperscript{1088} See Supra, supra, B, V, 2.
\textsuperscript{1089} See also supra, B, V, 1.
\textsuperscript{1091} GILLIS-BRUGGER/TAURO HAFERLI (in ZSR 2012 II 531, with reference to BBI 1986 II 521;