

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.⁹⁹⁰ Moreover, there are some 250 NGOs which have been granted consultative status by the UN.⁹⁹¹ 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 1926.⁹⁹² 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

990 <<http://www.eda.admin.ch/eda/de/home/topics/intorg/inorch.html>> visited 3 July 2012.

991 <<http://www.uno.admin.ch/eda/de/home/topics/intorg/inorch.html>> visited 2 January 2012.

992 See, for example, ARZU OGUZ, The Role of Comparative Law in the Development of Turkish Civil Law, 17 *Pace Int'l L. Rev.*, 373, 380 ff.; ADNAN GÜRİZ, Sources of Turkish Law, in: Par Tuğrul Ansay/Don Wallace (eds.), *Introduction to Turkish Law*, The Hague 2005, 1, 9.

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.⁹⁹³ 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.⁹⁹⁴ 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.»⁹⁹⁵ 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.⁹⁹⁶

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.⁹⁹⁷ 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 2004.⁹⁹⁸

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**.⁹⁹⁹

993 ARZU OGUZ (fn 992), 381 f.

994 HIFZI VELDET VELIDEDEOGLU, The Reception of the Swiss Civil Code in Turkey, 9 *International Social Science Bulletin* 60, 62 (1957).

995 HIFZI VELDET VELIDEDEOGLU (fn 994), 65.

996 See most recently PETER V. KUNZ, Dealing with International Law and European Law: Overview of the «Swiss Approach», *jusletter* of 2 July 2012, 1, 3.

997 *Supra*, C. VI, 2, a.

998 See HELMUT KÖHLER/JOACHIM BORNKAMM/ADOLF BAUMBACH/WOLFGANG HEFERMEHL, *Gesetz gegen den unlauteren Wettbewerb*, Commentary, 30th ed., Munich 2012, Einl UWG, paragraph 2.17.

999 See *supra*, C. VI, 2, b., c.

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 legislatures, 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, ARTHUR MILLER published his famous play «Death of a Salesman» which describes the suicide of *Willy Loman*, a failing sales representative.¹⁰⁰⁰ But the play has made it clear that distribution personnel was low on the social ladder at that time.¹⁰⁰¹ Having said that, it must be emphasized that a salesman or sales representative is not the same as a commercial agent.

Concerning **commercial agents**, Article 418u 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 418u CO was largely a replication of § 24 of the 1921 **Austrian Commercial Agents Act**.¹⁰⁰² In 1953, a similar provision was introduced into the **German Commercial Code** in § 89b. Other countries enacted comparable legislation.¹⁰⁰³ The German Federal Supreme Court held in 1958 that § 89b of the Commerce Code may apply to **independent dealers** by analogy.¹⁰⁰⁴ In 1989, the Austrian Supreme Court followed suit basing itself on German case law and academic literature.¹⁰⁰⁵ 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 2008.¹⁰⁰⁶

¹⁰⁰⁰ First edition, New York 1949.

¹⁰⁰¹ See Botschaft des Bundesrates an die Bundesversammlung zum Entwurf eines Bundesgesetzes über den Agenturvertrag of 27 November 1947, BBl 1947 III 661 ff.

¹⁰⁰² Botschaft des Bundesrates (fn 1001), 864.

¹⁰⁰³ See HANS JAKOB MAIER/HANS JOACHIM MEYER-MARSILIUS/RUDOLF REGUL (eds.), *Der Handelsvertreter in den Ländern der EWG und der EFTA*, Baden-Baden 1976.

¹⁰⁰⁴ BGHZ 29, 83, 85 ff., judgment of 11 December 1958.

¹⁰⁰⁵ I Ob 692/89.

¹⁰⁰⁶ ATF 134 III 497.

In 1962, the Federal Supreme Court (Civil Division) annulled a decision of the Cantonal Court of *Valais* to award compensation for clientele to an **exclusive distributor** holding that Article 418u 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 set forth in Article 418u 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.¹⁰⁰⁷ The judgment was an outflow of the **liberal contract theory** which in general has often informed the Federal Supreme Court's case law.¹⁰⁰⁸

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 § 89b 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.¹⁰⁰⁹ 46 years later, the Court (First Civil Division) **overruled** the 1962 decision. In a judgment of 22 May 2008,¹⁰¹⁰ 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

¹⁰⁰⁷ ATF 88 II 169 consideration 7.

¹⁰⁰⁸ See *supra*, C. IV, 2.

¹⁰⁰⁹ See CARL BAUDENBACHER, *Anspruch auf Kundschaftsentschädigung bei gesetzlich nicht geregelten Absatzmittlungsverträgen?, Rechtsvergleichende Betrachtungen unter Berücksichtigung des deutschen Rechts*, JZ 1989, 919 ff., with further references.

¹⁰¹⁰ ATF 134 III 497.

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, on 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

1011 ATF 134 III 497, consideration 4.2.

1012 See the ECJ's judgment of 28 October 2010 in Case C-203/09 *Volvo Car Germany GmbH v Autohof Weidensdorf GmbH*, not yet reported.

1013 STEPHAN DANNINGER, A New Rule: «The Swiss Debt Brake», IMF Working Paper 02/18, International Monetary Fund 2002, <<http://www.imf.org/external/pubs/ft/wp/2002/wp0218.pdf>> visited 10 July 2012.

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:

«[Th]e 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.

1014 See PETER BRANDNER/HELMUT FRISCH/BERNHARD GROSSMANN/EVA HAUTH, The Swiss Debt Brake: An Implementation Proposal for Austria, Working Paper Vienna, September 2005, <http://www.staatsschuldenausschuss.at/en/img/debt_brake_tcm164-43446.pdf> visited 14 March 2012.

1015 <<http://www.direktedemokratie.com/2010/10/11/schuldenbremse-als-export/>> visited 14 March 2012.

1016 <<http://www.edi.admin.ch/dokumentation/00334/00858/index.html?lang=de&msg-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.III.4.

1017 <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0454&language=EN>> visited 14 March 2012. MARC STEINER, 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 holding of 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.¹⁰¹⁸ One will not overlook in this context that unlike in the EU and the EEA, systematically relevant banks in Switzerland are not subject to state aid control.¹⁰¹⁹

III. International arbitration

Switzerland has, both in domestic and in international matters, by tradition favored arbitration over court adjudication.¹⁰²⁰ 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.¹⁰²¹ 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.¹⁰²² 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*¹⁰²³; *Beagle Channel Arbitration*¹⁰²⁴; *Taba Arbitration*¹⁰²⁵; *Rainbow Warrior Arbitration I*¹⁰²⁶. Important **private arbitration** cases are, for example, the *Texaco Arbitration*¹⁰²⁷; the *LIAMCO Arbitration*¹⁰²⁸; the *Westacre Arbitration*¹⁰²⁹; the *Areva v Siemens Ar-*

bitration.^{1030,1031} As evidence of the above, the ICC Statistical Report 2009 confirmed Switzerland as the most popular place of ICC arbitration. Switzerland was chosen 119 times as a venue of arbitration (Geneva: 62, Zurich: 50, other Swiss cities: 7), narrowly edging out Paris in second place (113) with London already a distant third (73).¹⁰³² However, Switzerland's role in international arbitration is not properly understood if it is merely conceived as a suitable *locus arbitri*. The country also features prominently in the selection of arbitrators and the choice of law. Due to their sound legal education and their perceived objectivity, Swiss arbitrators are much sought after. Swiss arbitrators accounted for 15.48 percent of all appointments and confirmations ahead of UK arbitrators with 15.02 percent and German arbitrators with 7.97 percent in ICC arbitrations in 2009.¹⁰³³

In this sense, Switzerland may be described as a «reservoir of arbitrators». ¹⁰³⁴ In fact, some of the **most influential arbitrators** in international law have been of Swiss nationality. Professor MAX HUBER acted as sole arbitrator in the often cited *British Claims in the Spanish Zone of Morocco arbitration* and the *Island of Palmas arbitration*.¹⁰³⁵ Other Swiss sole arbitrators in well-known cases were Professor EUGÈNE BOREL in the *Ottoman Debt arbitration*¹⁰³⁶, CHARLES EDOUARD LARDY in the *Timor arbitration*,¹⁰³⁷ Professor GEORGES SAUSER-HAL in the *Monetary Gold arbitration*¹⁰³⁸, Federal Supreme Court Judge PIERRE CAVIN in the *Sapphire International arbitration*.¹⁰³⁹ Professor PIERRE LALIVE was sole arbitrator in the *Dalmia Dairy Industries arbitration*¹⁰⁴⁰ and chairman in the *Loan Agreement between Italy and*

Consumer Protection on 24 May 2011, <<http://www.europarl.europa.eu/document/activities/cont/2011/05/20110520ATT19888/20110520ATT19888EN.pdf>> visited 13 March 2012.

1018 <<http://www.risk.net/risk-magazine/news/2082036/basel-committee-impose-coco-requirement-sifis>> visited 14 March 2012.

1019 See with regard to the legal situation in the EU and the EEA CARL BAUDENBACHER/FRANK BREMER, Overcoming the financial crisis in the banking sector. The role of European Competition Policy, Conurrences No 2/2010, 45 ff.

1020 Supra, B.JIL.3; see also HELEN KELLER, Rezeption des Völkerrechts (fn 380), 292 f.

1021 See MAURO RUBINO-SAMMARTANO, International Arbitration: Law and Practice, 2nd ed., Netherlands 2001, 71 f.

1022 See MARC BLESSING, Swiss Tradition and Legal Culture, in: Stephen V. Berti (ed.), International Arbitration in Switzerland: An introduction to and a commentary on Articles 176–194 of the Swiss Private International Law Statute, Basel 2000, 59.

1023 *United States v. Great Britain*, 1872, in: J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Washington 1898, Vol. I, 543.

1024 *Argentina v. Chile*, 1977, 17 ILM (1978), 634.

1025 *Egypt v. Israel*, 1988, 27 ILM (1988), 1421.

1026 *New Zealand v. France*, 1986, 26 ILM (1987), 1346.

1027 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of Libya* (1979) 53 ILR, 389.

1028 *Socialist Libyan Arab Popular Jamarihiya v. Libyan American Oil Co.*, 20 ILM (1981), 1.

1029 *Westacre v. Jugoinport*, ICC Case No. 7047 (1994), 13 ASA Bull. 301 (1995).

1030 The arbitral award is referred to in Commission Press Release Antitrust: Commission market tests commitments proposed by Siemens and Areva concerning nuclear technology markets, IP/12/243, 14 March 2012.

1031 On the distinction between public and private international arbitration, see CARL BAUDENBACHER/FRANK BREMER, Arbitration in Public International Disputes, in: Carl Baudenbacher (ed.), Dispute Resolution, Stuttgart 2009, 266.

1032 ICC Statistical Report 2009, ASA Bulletin, 2010 Volume 28 Issue 4, 891–892.

1033 ICC Statistical Report 2009 (fn 1032), loc. cit.

1034 RAYMOND R. PROBST, «Good offices» in the light of Swiss international practice and experience, Dordrecht 1989, 62.

1035 *Great Britain v. Spain*, 1924, 2 RIIA, 615; *United States v. Netherlands*, 1928, 2 RIIA, 829. From 1921 to 1930, HUBER acted as a judge and, from 1925 to 1927, as the President of the Permanent Court of International Justice (PCIJ) at The Hague. See with regard to him DIETRICH SCHINDLER, Max Huber – His Life, 18 EJIL, 81 ff. (2007); DANIEL-ERASMUS KHAN, Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations, 18 EJIL, 145 ff. (2007).

1036 *Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy v. Turkey*, 1925, 1 RIAA 1 529.

1037 *Netherlands v. Portugal*, 1914, 11 RIAA, 481.

1038 *United States, Great Britain, France v. Italy*, 1953, 20 ILR, 441.

1039 *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, 1967, 35 ILR, 136.

1040 *Dalmia Cement Ltd. v. National Bank of Pakistan*, ICC case No. 1512, 1976, 67 ILR, 611.

*Costa Rica arbitration*¹⁰⁴¹. It is worth noting that both the Federal Council¹⁰⁴² and the Supreme Court¹⁰⁴³ 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 *lex causae*, the substantive law governing the arbitration.¹⁰⁴⁴ 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.¹⁰⁴⁵ Besides this, Swiss private law and in particular the Swiss Code of Obligation is widely considered as a concise and comprehensible legal instrument and appreciated for its **liberalism** when it comes to B-to-B relations and its deference to party autonomy.¹⁰⁴⁶ 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 (CPIL) constitutes a particularly **arbitration-friendly legal framework** recognizing, *inter alia*, the separability doctrine¹⁰⁴⁷, the arbitrators' competence-competence¹⁰⁴⁸, a broad concept of arbitrability¹⁰⁴⁹ as well as the parties' freedom to agree upon the applicable procedural and substantive law¹⁰⁵⁰. Furthermore, Swiss courts largely refrain from interfering with the arbitration process, limiting their role to judicial cooperation in the granting of interim measures¹⁰⁵¹, the taking of evidence¹⁰⁵² and the appointment of the arbitral tribunal¹⁰⁵³ or the review of challenges to the tribunal's composition.¹⁰⁵⁴ The right to seek judicial control of arbitral awards rendered in Switzerland is confined to

1041 *Italy v. Costa Rica*, 1998, 25 RIAA, 23.

1042 *Colombia v. Venezuela*, 1922, 1 Annual Digest of Public International Law Cases (1919–1922), Case 54.

1043 See RAYMOND R. PROBST, «Good offices» (fn 1034), 60.

1044 Thus, closely behind English law (14.3 percent), Swiss law was designated in 13.1 percent of all ICC cases in 2009 as the governing law.

1045 See MAREN HEIDEMANN, *Methodology of Uniform Contract Law: The Unidroit Principles in International Legal Doctrine and Practice*, Berlin 2007, 199; Emmanuel Gaillard/John Savage (eds.), *Fouchard Gaillard Goldman On international commercial arbitration*, The Hague 1999, 793.

1046 See Emmanuel Gaillard/John Savage (eds.), *Fouchard Gaillard Goldman On International Commercial Arbitration* (fn 1045), 843; MARC BLESSING, *Swiss Tradition and Legal Culture*, (fn 1022), 61.

1047 Article 178 CPIL.

1048 Article 186 CPIL.

1049 Article 177 CPIL.

1050 Articles 182 and 187 CPIL.

1051 Article 183 CPIL.

1052 Article 184 CPIL.

1053 Article 179 CPIL.

1054 Article 180 CPIL.

restrictive statutory grounds¹⁰⁵⁵ and may altogether be waived if neither party is domiciled in Switzerland.¹⁰⁵⁶

Swiss international arbitration law has inspired other jurisdictions, with some provisions becoming successful **legal transplants**.¹⁰⁵⁷ 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)¹⁰⁵⁸, founded by the Swiss Chambers of Commerce.¹⁰⁵⁹ Through its seven secretariats, the SCCAM administers and monitors international arbitration proceedings¹⁰⁶⁰ under the Swiss Rules of International Arbitration¹⁰⁶¹. 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*,¹⁰⁶² Switzerland still claims a predominant position in international arbitration.¹⁰⁶³ Besides its favorable economic implications, this first and foremostly provides an invaluable gateway for Swiss legal thinking to be articulated and promulgated 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

1055 Article 190 CPIL; see with regard to the notions of jurisdiction and *ordre public* supra, F. V. 4. d.

1056 Article 192 CPIL.

1057 See EMMANUEL GAILLARD/JOHN SAVAGE (eds.), *Fouchard Gaillard Goldman On international commercial arbitration* (fn. 1045), 77, 238; with regard to the notion of legal transplant supra, D. IV, 4.

1058 For a general overview see PASCALE GOLA/CLAUDIA GÖTZ STAEHELIN/KARIN GRAF (eds.), *Institutional Arbitration: Tasks and Powers of different Arbitration Institutions*, Zurich 2009, 235 ff.

1059 The Swiss Chambers of Commerce consist of the Chambers of Commerce of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

1060 Case statistics are available on the SCCAM website at <<https://www.swissarbitration.org/sa/en/>>.

1061 See TOBIAS ZUBERBÜHLER/CHRISTOPH MÜLLER/PHILIPP HABEGGER (eds.), *Swiss Rules of International Arbitration: Commentary*, Zurich 2005.

1062 See, for example, the brochure issued by the Federal Chamber of German civil notaries, the German Bar Association, the German Notaries' Association, the German Federal Bar, the Association of German Chambers of Industry and Commerce, and the German Judges Association «Law – Made in Germany», 2nd edition, 2012, <http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf> visited 10 July 2012; STEFRIED H. ELSING, *Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds*, *SchiedsVZ* 2011, 114 ff.

1063 See MARC BLESSING, *Swiss Tradition and Legal Culture*, (fn 1022), 62.

economy at large is heavily dependent on the possibility of investments in foreign markets.¹⁰⁶⁴ In 2010, **foreign direct investment** (FDI) by Swiss companies amounted to CHF 67.6 billion with an outward FDI stock of CHF 877.7 billion.¹⁰⁶⁵ This makes Switzerland the seventh largest direct investor in the world behind the US, the UK, France, Germany, the Netherlands and Luxembourg.¹⁰⁶⁶ Conversely, foreign investment in Switzerland is an important source of capital for the Swiss economy which in 2010 attracted inward direct investments of CHF 21.3 billion with an inward FDI stock of CHF 525.5 billion.¹⁰⁶⁷

It was mentioned above that in order to protect companies from typical risks involved in foreign investment such as unlawful expropriation or discriminatory treatment, to name but the most prominent, the availability of legal safeguards has moved high up on the political agenda of many states. This has led to a considerable proliferation of **bilateral investment treaties** (BITs).¹⁰⁶⁸ In the absence of a comprehensive multilateral agreement on the protection of foreign investments¹⁰⁶⁹ and with customary international law relating to the treatment of aliens only providing for minimum rules, BITs constitute the main legal framework.¹⁰⁷⁰ As one of the most active nations, Switzerland has concluded a tightly knit **web of BITs** which by May 2011 totalled 118¹⁰⁷¹, only marginally short of Germany (136) and China (127).¹⁰⁷² After the Germany-Pakistan BIT in 1959, which is commonly regarded as the first agreement of its kind, Switzerland was the second state to undertake the creation of a BIT network with

the conclusion of the Switzerland-Tunisia BIT in 1961.¹⁰⁷³ As a result of its long-standing and extensive treaty practice, Switzerland, while originally influenced by Germany,¹⁰⁷⁴ has provided an important **impetus** to the emergence of international investment law and profoundly shaped its further development.¹⁰⁷⁵ In particular, the Swiss standard clauses for BITs,¹⁰⁷⁶ frequently cited in academic literature, are often reflective of a certain state practice¹⁰⁷⁷ or even the prevailing *opinio 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 humanitarian international law

Switzerland is one of the most important contributors to the development of humanitarian international law. It all started with the foundation 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.¹⁰⁷⁸

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

1064 See Botschaft betreffend die Abkommen über die Förderung und den gegenseitigen Schutz von Investitionen mit Serbien und Montenegro, Guyana, Aserbaidschan, Saudi-Arabien und Kolumbien of 22 September 2006, BBl 2006 8473.

1065 See SWISS NATIONAL BANK (ed.), Swiss National Bank Direct Investment 2010, Zurich/Berne 2011, 4, <<http://www.snb.ch/en>> visited 3 July 2012.

1066 See International Monetary Fund, Coordinated Direct Investment Survey (CDIS), <<http://cdsis.imf.org/>> visited 3 July 2012.

1067 See SWISS NATIONAL BANK (ed.), Swiss National Bank Direct Investment 2010 (fn 1065), 4.

1068 See supra, D. III. 1. a; further MUTHUCUMARASWAMY SORNARAJAH, The International Law on Foreign Investment, Cambridge 2010, 172. On the reasons underlying the conclusion of BITs, see THOMAS POLLAN, Legal Framework for the Admission of FDI, Utrecht 2006, 73 ff.

1069 However, various investment-related provisions are incorporated into other multilateral instruments such as the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations, the WTO Agreements (in particular GATS, TRIMS, TRIPS, GPA and ASCM) and investment chapters of FTAs. See IVO KAUFMANN, Investitionsschutzabkommen – aktueller denn je, Die Volkswirtschaft 2006, 57; OECD Working Papers on International Investment, Relationships between International Investment Agreements, Number 2004/1, 4; KENNETH J. VANDEVELDE, Bilateral Investment Treaties: History, Policy, and Interpretation, Oxford 2010, 67 ff.

1070 RUDOLF DOLZER/MARGRETE STEVENS, Bilateral Investment Treaties, The Hague 1995, 1 ff.; MICHAEL SCHMID, Swiss Investment Protection Agreements: Most-Favored-Nation Treatment and Umbrella Clauses, Zurich 2007, 6 ff.

1071 A continuously updated list of Swiss BITs currently in force is available at: <<http://www.seco.admin.ch>> visited 3 July 2012.

1072 UNITED NATIONS (ED.), UNCTAD World Investment Report 2011 – Non-Equity Modes of International Production and Development, New York 2011, Annex Table III.1., 213–215, <<http://www.unctad.org>> visited 3 July 2012.

1073 ANDREW PAUL NEWCOMBE/LLUÍS PARADELL, Law and Practice of Investment Treaties: Standards of Treatment, The Netherlands 2009, 42. For a list of the first 40 BITs, see BETH A. SIMMONS/FRANK DOBBIN/GEOFFREY GARRETT (EDS.), The Global Diffusion of Markets and Democracy, Cambridge 2007, 225.

1074 ALBRECHT WEBER, Investment Risks and International Law, in: Thomas Oppermann/Ernst-Ulrich Petersmann (eds.), Reforming the international economic order: German legal comments, Tübinger Schriften zum internationalen und europäischen Recht, Vol. 1, Berlin 1987, 37.

1075 JEAN-CHRISTOPHE LIEBESKIND, One-Hundred-Two Swiss Bilateral Investment Treaties: An Overview of Investor-Host State Dispute Settlement Clauses, 19 ASA Special Series 81 (2002), 123.

1076 For an overview of Swiss standard clauses see JEAN-CHRISTOPHE LIEBESKIND, The Legal Framework of Swiss International Trade and Investments – Part I: Promotion, The Journal of World Investment & Trade (JWIT) 2006, 337. It must be noted that because each BIT is adapted to the particular needs of the signatories, there is only limited uniformity.

1077 For example with regard to the placement of an umbrella clause, see OECD Working Papers on International Investment, No. 2006/3, Interpretation of the Umbrella Clause in Investment Agreements, 10, <<http://www.oecd.org/dataoecd/3/20/37579220.pdf>> visited 10 July 2012.

1078 See HANS HAUG, Die Schweiz, das humanitäre Kriegsvölkerrecht und die Konventionen über Menschenrechte, in: Jörg Paul Müller (ed.), Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag, Bern 1981, 577–593; Marco Sassòli, La Suisse et le droit international humanitaire – une relation privilégiée?, in Schweizerisches Jahrbuch für internationales Recht, Jubiläumsband 1989, 47–71; HANS-PETER GASSER, Humanitäres Völkerrecht: Probleme – Perspektiven, in: Schweizerisches Jahrbuch für Politische Wissenschaft: Aussenpolitik, Vol. 28, Berne 1988, 209–220; DANIEL THÜRER, Humanität und Neutralität – zum politischen und völkerrechtlichen Spannungsverhältnis zweier Grundprinzipien der schweizerischen Aussenpolitik, in: Yvo Hangartner und Stefan Trechsel (eds.), Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug, Berne/Stuttgart 1986, 279–308.

(economic) law matters because it took a very active, even world leading role in humanitarian international law. This became particularly obvious after World War II when Switzerland was not invited to participate in the founding conference of the United Nations. In order to improve its international prestige, the country had to resort to its well proven foreign policy principles by actively promoting the development of humanitarian international law through the financing of the ICRC and the setting up of several international conferences. During the Cold War, Switzerland was able to successfully sell the idea that its foreign policy was driven by three goals: neutrality, solidarity and universality.¹⁰⁷⁹

All in all, Switzerland's one-sided approach to treaties has obviously been fostered and to a certain extent also camouflaged by the commitment to the development of international humanitarian law. The International Committee of the Red Cross (ICRC) and the Geneva Conventions laid down the standards, the humanitarian treatment of victims of war constituting the most important element. This was all the easier since the commitment to solidifying and expanding humanitarian law did **not affect Swiss legislation**.¹⁰⁸⁰

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.¹⁰⁸¹ It thereby obviously aimed at **camouflaging** the fact that Switzerland had been an extreme latecomer.

1079 HELEN KELLER, *Rezeption des Völkerrechts* (fn 380), 297 f.

1080 See KONRAD BÜNZLI, *Der Beitrag der Schweiz zum Zustandekommen universeller Kodifikationen des Völkerrechts*, Diss. Zürich 1984, 310.

1081 See the information brochure of the Federal Department of Defence, Civil Protection and Sports in cooperation with the Federal Department of Foreign Affairs «Die Neutralität der Schweiz», 4th ed., Berne 2004, 9.

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 Foreign Minister MICHELINE 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 bilateralism – 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.¹⁰⁸²

Publications on the so-called democracy deficit of the European Union are legion. When Swiss politicians and academics criticize this deficit and offer their own system as an alternative, they should be aware of the following:¹⁰⁸³ (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).¹⁰⁸⁴ 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.

1082 <http://www.swissinfo.ch/re/politique_suisse/La_Suisse_veut_exister_sur_l_ecran_radar_des_Europeens.html?cid=28812256> visited 14 March 2012.

1083 See for the following also WALTER R. SCHLUEP, *Über die Verantwortung schweizerischer Boten* (fn 12), 98 ff.

1084 See Articles 11(4) and 24(1) TFEU as well as Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative (O.J. L 65/1 of 11 March 2011).

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.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 simplemindedness.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.¹⁰⁸⁷ It seems, however, that such verdicts are limited to **social issues** such as the wide-spread fear that the country could be flooded with immigrants. Much would be gained if legislation on party and campaign financing would be introduced.¹⁰⁸⁸

In **economic law matters**, the people have in a high number of cases followed the solution approved by Parliament.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.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.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.¹⁰⁹²

1085 See NZZ International Edition of 4 July 2012, 29.

1086 Supra, C.X.1.

1087 See concerning the minaret ban, e.g., <<http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>>; <<http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>>, both visited 3 July 2012; concerning the deportation of foreigners convicted of crime <<http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112801706.html>>, visited 3 July 2012>. – It may be added that up until now, the Swiss political mill has ensured that initiatives whose compatibility with international law is doubtful have not been implemented on a one-to-one scale.

1088 See supra, B. V. 1.

1089 See also supra, B. V. 2.

1090 See, e.g., <http://www.focus.de/politik/deutschland/grosse-ferieninitiative-ist-gescheitert-wa-rum-sich-die-schweizer-gegen-mehr-urlaub-wehren_aid_723185.html> visited 3 July 2012.

1091 GILLES BRUGGER/TARO HAEFFELI (fn 225), 54, with reference to BBl 1986 II 521.

1092 Supra, E.VI.2.