THE "FUNCTIONAL APPROACH" IN COMPARATIVE LAW, PRIVATE INTERNATIONAL LAW AND TRANSNATIONAL COMMERCIAL LAW: PROMISES AND CHALLENGES

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I. Introduction

The adjective "functional" is a cloak of many colours. "Functional approach" seems to be and is used as a magic stick – in business consultancy as in sociology, in reform discussions on the health care or pension systems as in urban planning, in tax law as in international commercial law. Yet, vague as it may seem, ambiguously as it may sometimes be used and abused, it is meaningful, needed and mature and it has done much good in our fields of research and legislative activity.

Over the past decades – and coinciding with legal realism, *Interessenjurisprudenz*, *Freirechtsschule* in different shades, sociology of law and economic analysis –, the functional approach has brought about major progress in weaving the garments (and the safety net) for private and commercial law relations across borders.

Neither do I envisage to outline anything coming close to a *theory* of the functional *method*[1] nor do I believe that any (one?!) such theory would be desirable. On the contrary, continued pressure on users of this label to define and explain what they mean each time they employ it and case by case can only be healthy. I would propose to explore the ground and evaluate the measure of deeper understanding, enlightenment, progress, in three stages keeping as close as possible to concrete examples.

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[1] Only at the time when this paper was to be sent to the printers did I receive galleys of *Ralf Michaels*, The Functional Method of Comparative Law, to be published in: *Reinhard Zimmermann* (ed.), Manual of Comparative Law [correct title?]. The author regrets this state of affairs and endeavours in particular to explore in more detail the links between comparative law and the social sciences a highly welcome and timely contribution.

II. Comparative Law

In an article published in 1973 in the *Acta Juridica Academiae Scientiarum Hungaricae, Konrad Zweigert*, one of the four or five scholars who shaped comparative law, defined the ultimate goal of comparative analysis in the context of the hardest test it was ever to be put to, viz. the comparison of socialist with capitalist legal systems, as follows[2]:

'My second category is comparison which aims at or at least implies critical evaluation. Its method is strictly functional: we compare the different solutions which the same social-factual problem has found in different systems of law. For purposes of this type of comparison, the term "analogous institutions of law" means the total of legal phenomena – or even extra-legal ones – which make up the actual solution of any such problem, regardless of any systematic order or conceptualization employed by the different legal systems themselves. The only common denominator – the "tertium comparationis" – is factual social purpose.

The ends of such comparison may be manifold. They extend from legal critique or critical dogmatic analysis of the different legal systems to immediately practical purposes as e.g. the reformation or improvement of one's own law or the creation of international uniform legislation. The common characteristic of such comparative work – whether it be for theoretical or for practical purposes – is that it always includes evaluation; it is – to put it as neutrally and practically as possible – the search for a better solution. This may be the better solution among the existing ones, or it may be a better solution which would yet have to be found on the basis of the material and of the standards furnished by the comparative analysis.

It is this kind of comparison which presents obvious difficulties not only of a conceptual but also of a very real and practical nature. They follow most naturally from the method which is being employed which in turn is nothing but an expression of the purposes to be served by this type of comparison. First, looking for the better solution presupposes that the same problem exists in different systems as a matter of social fact. Second, even if this is so, the solution which the problem has found in one legal system may be formed or influenced by social values which differ to such a degree from those adhered to in another social system that they cannot possibly serve as standards or guidelines, much

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[2] *K. Zweigert/H.-J. Puttfarken*, Possibilities of Comparing Analogous Institutions of Law in Different Social Systems, Acta Jur. Acad. Sc. Hung. 15 (1973) 107, 113 et seq. The basis for Zweigert's groundbreaking work as distilled in the seminal textbook *K. Zweigert/H. Kötz*, Einführung in die Rechtsvergleichung I (Tübingen 1971), II (Tübingen 1969) was obviously laid by *Ernst Rabel* and *Max Rheinstein*.

less have a chance of being adopted or imitated in a different social system. It is these problems which we will have to follow through the different distinctions of social systems which I have outlined above'.

Here, *Jhering's* vision has found its ultimate and most ambitious expression. *Jhering* had sketched it in the preface to his '*Geist des römischen Rechts*'[3]

'legal science has degenerated into the jurisprudence of states, limited like them by political boundaries – a discouraging and unseemly posture for a science! But it is up to legal science itself to cast away these chains and to rediscover for all time that quality of universality which it long enjoyed: this it will do in the different form of comparative law. It will have a distinct method, a wider vision, a riper judgment, a less constrained manner of treating its material: the apparent loss [of the formal community of Roman law] will in reality prove a great gain, by raising law to a higher level of scientific activity'.

However, the chains had not yet been cast away. A promise had been handed down from the summit of our science – and a very bold promise it was indeed.

Having outlined the ends, the purposes of comparison, let us now turn to the adjective '*functional*'. What do comparatists promise when they claim – rightly so, in my view – that the basic methodological principle is or should be that of functionality? They purport to compare only institutions, rules, usages and applications – in short: systems in the sociological sense – which fulfill the same function: the means by which different legal systems address and try to solve the same problem, such as to protect parties to a contract from being held to an agreement not seriously intended, distribute the burden of damages flowing from the use of accepted but inherently dangerous means of communication, or to protect parties from not knowing which one of a group of companies will be liable for an obligation the controlling shareholder of them all has undertaken to perform on. Secondly – and this is in some ways the flip-side of the same medal – functionality requires that the comparatist eradicates all preconceptions of his own legal system.

To measure how close to the objectives we have come, let us look at four examples of comparative research that prepared the ground for major pieces of law reform, both at the domestic level and internationally. I shall skip the two most influential ones because they are also the best-known: *Ernst Rabel's* preparatory work for the unification of the law of sales and the worldwide quest for reforming and fine-tuning the law of tort – in particular in dealing with liability in cases of accidents – in light of the availability of insurance.

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[3] Translation by *Tony Weir* in *K. Zweigert/H. Kötz*, An Introduction to Comparative Law, translated from the German by Tony Weir (2nd ed., Oxford 1987) 44.

My first example may remind some of you of the post-1989 era when consultants descended upon Hungary to convince you of the benefits to be reaped (*öffentlicher Glaube* – 'public reliance') from a land register which you had already but which for the have-nots, in particular in common-law jurisdictions, seemed to be a strange yet interesting alternative to the combined effects of the conveyancing system and title insurance. The functional approach employed[4] was to find an answer to the queries whether the purchaser's attorney's researching the deeds provided by the seller with a view to establishing an unbroken chain of title, or simply taking out insurance against loss the purchaser might suffer from third person's rights to the land, were functionally as good – and maybe even better, more efficient – a solution as land registers. Or whether, on the contrary, land registers and legal rules protecting reliance upon them were better, cheaper, and in this sense more functional. The result of this fine example of functional comparison in action was that, depending on certain external parameters such as density of population and frequency and turnover of transactions in land, registries were considered to be marginally advantageous.

The second example[5], a large-scale enquiry into the world's job protection systems was particularly complex in that, like the god Janus, it not only had one 'tertium comparationis', i.e. one function, against which unfair dismissal regulations were screened, viz. how efficiently workers were protected against unwarranted lay-offs. Rather, the query was, at the same time, to what extent those regulations petrified labour markets, blocking access by new entrants, job seekers. Obviously, in this as in all other instances where there is a variety of objectives existing or to be created rules are expected to achieve, functionality alone loses its magic stick quality. Rather, polices have to be formulated and choices have to be made by the political system seeking advice from comparatists.

Incidentally, another important comparative labour law project led the late Professor *Folke Schmidt*, one of the most eminent European labour lawyers of the 20th century, to insights into the multi-functionality of legal institutions and the added difficulties which such complexity entails for comparatists[6]. He identified no fewer than five distinct functions of collective labour agreements: (1) an instrument of peace; (2) an instrument for employees to control the supply of labour; (3) a form of standard conditions; (4) an instrument of co-operation between the '*Sozialpartner*', i.e. essentially a procedural framework for the negotiations between participants in a very special market; (5) an industrial code.

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[4] *B. von Hoffmann*, Das Recht des Grundstückskaufs (Tübingen 1982) 50 et seq., 105 et seq., 164 et seq..

[5] *H. Kronke*, Regulierungen auf dem Arbeitsmarkt (Baden-Baden 1990) 206-287.

[6] For details, cfr. *F. Schmidt*, The Need for a Multi-Axial Method in Comparative Law, in: Festschrift für Konrad Zweigert (H. Bernstein, U. Drobnig, H. Kötz eds.) (Tübingen 1981) 525.

Closer examination reveals that some of these 'functions' are actually legal *goals* or *objectives* whereas others are social – or economic – *effects*. Another reminder of how many colours the cloak lightly called 'functional approach' is. Moreover, as far as conduct of any specific research project is concerned, the example must be read as a warning to precipitously assume that the (formally) identical legal institution fulfils the same functions in every economic context, every country. Suffice it to mention that the function to create co-operative structures between supply and demand side of the labour market is certainly *not* a function US unions and employers are expecting their collective agreement to serve.

The fourth example is the herculean effort to modernise out-of-date German law of insolvency and, as a sub-objective and as such less successful, the law of secured transactions[7]. Contrary to what the Civil Code (*BGB*) of 1900 provides for, the prevailing type of security for bank credit is the chattel mortgage as developed and constantly refined and extended by case law and requiring neither possession on the part of security taker nor any form of publicity (registration). Lenders greatly preferred it over other vehicles for providing security and, taken together with the many forms and layers of – also publicityless – retention of title arrangements (purchase money security), the *faillite de la faillite* (*Konkurs des Konkurses*) was the consequence: nothing was left for the general creditors and the principle of the *par condicio creditorum* was something for law students only. Although lobbying by special interest group in the end prevailed, comparative law had provided the legislator with the analysis of the advantages of an Article 9 UCC type of functional and uniform approach to secured transactions based on registration. The process appropriately reminds us that the correct scientific approach is by no means a guarantee for ultimate success. UNCITRAL's current work to formulate a legislative guide on secured transactions[8] massively draws on that experience.

To sum up this highly condensed overview, it is fair to state that not only were the promises kept. The imperative, widely accepted today, that comparative research critically evaluate and identify the best solution (or, equally valuable, the worst, or to state the law's failure to reach a defined objective, to fulfil a function) gradually pushes the boundaries of comparative law further and raises expectations and the comparatist's ambitions.

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[7] *U. Drobnig*, Empfehlen sich gesetzliche Maßnahmen zur Reform der Mobiliarsicherheiten?, Gutachten F zum 51. Deutschen Juristentag, in: Verhandlungen des Einundfünfzigsten Deutschen Juristentages, Stuttgart 1976, I (München 1976).

[8] Cfr. The most recent summary in United Nations, General Assembly, A/CN.9/WG. VI/WP. 27, 27 April 2006, Working Group VI (Security Interests), Tenth session, New York, 1-5 May 2006, Draft legislative guide on secured transactions and references to other documents therein.

III. Transnational Commercial Law

Conflict of Laws

General Doctrines

The area of private international law where the principle of functionality has left the most visible footprint and made the longest qualitative leap in the last century is *characterisation* or classification (*Qualifikation*). The problem of characterisation consists in determining which juridical concept or category is appropriate in any given case for the purpose of choosing the right conflicts rule which, in turn, will indicate by way of its connecting factor the substantive law governing the solution (e.g., are we dealing with a matter of contract law – then the parties' choice will decide; or is it a matter of tort law or company law – then the *lex loci delicti* or the *lex societatis* will govern).

While virtually all courts in the world until the 1950s characterised according to the *lex fori*, i.e. they accorded the transnational situation or the foreign juridical concept the place it would have in the judge's home system, his own substantive law, in the mid-Sixties enlightened courts broke with such provincial, inward looking traditions. They did not go as far as *Ernst Rabel* had urged them to go, viz. to cast the chains of *national* concepts altogether and to characterise autonomously in a comparative perspective. But they characterised, as it was termed 'functionally', the root of this approach being obviously the method of teleological interpretation[9].

Famous examples are the characterisation of a legal separation as divorce, the characterisation of the Islamic '*mahr*' as partly an element of the formation of marriage and partly a consequence of divorce, the characterisation – of great relevance for international commerce – of unknown foreign interests in movables or of rights with effects only *inter partes* as domestic security interests or title retention with effects *erga omnes*, etc. It must not be forgotten that it was the X. International Congress of Comparative Law, held in 1978 here in Budapest[10], which provided a laboratory and a launch site for future legislative reforms in a number of jurisdictions.

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[9] Examples and discussion of case law in *G. Kegel/K. Schurig*, Internationales Privatrecht (9th ed., München 2004) 343-356; *K. Siehr*, Das Internationale Privatrecht der Schweiz (Zürich 2002) 522-535.

[10] Cfr. the General Report by *U.Drobnig*; The Recognition of Non-Possessory security Interests created Abroad in Private International Law, in: general reports to the 10th International Congress of Comparative Law (Z. Péteri, V. Lamm eds.) (Budapest 1981) 289-310. cfr. also the German National Report discussing relevant case law by *U. Drobnig/H. Kronke*, Die Anerkennung ausländischer Mobiliarsicherungsrechte nach deutschem internationalen Privat-

These are most commendable results of a 'functional approach' to characterising juridical concepts and categories according to their purpose and the intended effects rather then their form and, for that matter, the availability of that very same form under the *lex fori*.

The Hague Securities Convention

It so happens that the most recent – and also one of the exceedingly few – English cases which tackled the issue of characterisation, *Macmillan Inc. v. Bishopsgate Investment Trust plc (No 3)*[11], is at the same time the case which brought to the surface a problem the traditional conflict of laws rules on property rights in securities – shares, bonds, and other financial instruments – were unable to address. Traditionally, such rights were governed by a mechanical use of the *situs* as the undebated connecting factor. Securities were treated as movable property. Property rights in securities were governed by the *lex cartae sitae*, the law of the place where the shares or bonds, i.e. the certificates incorporating and evidencing the shareholder's or bondholder's rights, were located.

Unfortunately, there was a serious problem with this mechanical approach: in many cases and in a growing number of jurisdictions there were no certificates any more which could have been physically located anywhere. The development of dematerialised (uncertificated) securities in which transfers are effected purely by book-entry could not remain unreflected in the conflict of laws rule. Moreover, the real world had moved from direct holding of investment securities – in one's bank safe or under one's mattress or, in the case of registered share, by entry of the individual shareholder in the issuing company's register – to indirect holding through one or more tiers of custodians (banks, brokers, etc.). Finally, internationally traded securities were regularly immobilised by deposit with so-called international securities depositaries (ICSDs)[12].

The *Macmillan* case arose from the famous Robert Maxwell's fraudulent dealings in securities which one of his companies held as a nominee. The court had to consider the law applicable to the competing claims to priority of securities held indirectly through an account with an intermediary (a bank).

At first instance *Millet J*, after careful examination of all available connecting factors and conflicts rules (*lex situs*, *lex loci actus*, the law of the issuer's incorporation) chose the act of transfer and identified the place of this, correctly in the view of most commentators with some insight in the real world of secu-

recht, in: Deutsche zivil-, kollisions- und wirtschaftsrechtliche Beiträge zum X. Internationalen Kongress für Rechtsvergleichung in Budapest 1978 (Tübingen 1978) 91.

[11] [1995] 3 All E.R. 747.

[12] For details, cfr. *R. Goode*, The Nature and Transfer of Rights in Dematerialised and Immobilised Securities, in: The Future for the Global Securities Market (F. Oditah ed.) (Oxford 1996) 107-130.

rities holdings, as the place where the book entry effecting the transfer took place. On appeal, the Court of Appeal held the *lex situs* to be applicable, identifying this *as* the *law of* the issuer's *incorporation*. With all due respect, this fails to take account of the indirect holding system where the account holder's relationship is solely with his own intermediary, not with the issuer, who will have no knowledge of his existence, or, for the same reason, with any other intermediary in the chain between the account holder's intermediary and the issuer.

How can *Millet J*'s and the Court of Appeal's approaches be described? *Lord Millet* (as he now is) himself later wrote in the preface to a book which very much laid the foundations of the 2002 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary[13]:

'This [i.e. the changing underlying facts and techniques of securities trading] became uncomfortably apparent to me when trying the *Macmillan* case. The supposed rule that the applicable law governing a charge on shares depended on the *lex situs* was not obviously appropriate to dematerialised securities held through an intermediary. Struggling to maintain some kind of rational link with precedent, I applied the law of the place where the relevant electronic entries would be made, that is, the law of the immediate intermediary (though I was not sophisticated enough to describe it as such)'.

The judge had *functionally* modified the conflicts rule adapting it to the changed facts whereas the Court of Appeal had been dogmatic in clinging to an old-fashioned rule in no way in synch with that rule's own function, i.e. to have the law of the asset's physical location govern where it and its legal relationship were visible. This is, obviously, a purely legal construct. Fiction instead of function. Since industry experts advised that not even the place of the relevant intermediary can be readily ascertained because offices and parts of the electronic account maintenance and booking system are scattered over various countries or are purely 'virtual', the 2002 Hague Convention focused on the concept of the account entry but replaced the 'place' by the parties' choice. The primary rule adopted (Article 4 (1)) is that the law governing the account agreement (i.e. a contract between the account holder/investor and his bank) governs not only their relationship *inter se* but also effects against third parties and even priorities. This is certainly counter-intuitive.

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[13] *Lord Millet*, Foreword, in: Cross Border Collateral: Legal Risk and the Conflict of Laws (R. Potok ed.) (London 2002) V et seq.

Professor *Sir Roy Goode*, one of the draftsmen and authors of the explanatory report to the Convention notes[14]:

'The notion that an agreement between A and B should govern the law applicable to a priority contest between C and D ... astonished me when I first heard of its appearance in Article 8 of the ... Uniform Commercial Code. But it turns out to have many advantages. Conflicts forum shopping is avoided and all issues relating to a securities account are routed to the same law. Those intending to acquire an interest in the securities will as a matter of course call for a copy of the account agreement to see what law applies and can obtain confirmation from the intermediary. The transfer from one account to another created a new relationship with its own governing law.'

That the agreement between A and B should solely govern their relationship *inter se* is clearly a rule flowing from a *normative* approach. That it should also govern a priority contest between C and D was accepted as it had passed the test of hundreds of cases – it reflects, therefore, a *functional* approach. However, it must also be noted that this new conflicts rule is highly fact-specific. It responded to a specific need in a very unique field of commercial activity. And its drafters were able to develop this rule because industry experts and practitioners were actively involved in a way hitherto unknown. Practitioners – unlike scholars – prefer fact-specific rules to loosely knit standards. That, again, poses new problems and challenges for the private-international-law making process. But to discuss those is for another paper.

Substantive Transnational Commercial Law

UNIDROIT draft Convention on Intermediated Securities

Already at the time when the negotiation in The Hague started – to be more precise, even before that, namely in my Hague Academy lectures in 1999[15] – it had been observed that a new, uniform and functionally sound conflicts law was badly needed but would be insufficient. Insufficient, because the majority of legal systems in the world had no sound, modern, let alone cross-border compatible substantive domestic rules. Suffice it to mention the most basic elements: firstly, the definitions of what constitutes a security are frequently not compatible. Secondly, there are many jurisdictions – even sophisticated ones – where book-entries in a securities account have no legal effect at all.

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[14] *R. Goode*, Rule, Practice, and Pragmatism in Transnational Commercial Law, Int.Comp.L.Q. 54 (2005) 539, 543.

[15] *H. Kronke*, Capital Markets and Conflict of Laws, Recueil des Cours 286 (2000) 245, 318 et seq.

Apart from this, one problem of unprecedented dimensions might have appeared as an insurmountable obstacle to producing a uniform instrument capable of reducing legal and systemic risk and of promoting market efficiency. And that is the abyss separating the conceptual techniques, the legal institutions used in the various systems to shape the relationship between investor and his immediate intermediary or account keeper (bank, broker, etc.) and up the chain to the issuer[16].

One group of legal systems maintains the position that the ultimate investor has *property* in the securities held as an electronic book-entry. A second group views the legal relationships from the investor up the chain as *fiduciary*, the one being the legal owner and the other one holding an equitable interest; on the basis of centuries of case law on the law of trusts this works fine – internally. A third pre-existing model, and this is the most modern one, shapes the legal relationship as a *bundle of rights*, partly of a proprietary, partly of a *contractual* nature, which entitles the investor or account holder that his intermediary act in a certain way, refrain from certain acts and which ensure that the account holder's interest is good against not only the intermediary but also third parties, even in case of insolvency of the intermediary.

To fully appreciate what this meant in terms of challenges awaiting the experts is not hard to imagine. We only have to go back two decades. In the 1980s, when work on what are now the UNIDROIT Principles of International Commercial Contracts started, it was accepted that it would be impossible to cast the general part of the law of contractual obligations in the form of a binding international treaty, a convention. That is, as far as I can see, still the generally held view. And against that background, we are now trying to bring under one umbrella, cast into one uniform set of rules the solution of a problem seen hitherto as one of property law by some, contract by others, and trust by yet another group of legal systems. A formidable test for the limits and yet unfathomed potential of the functional approach, indeed.

What does that imply in practical terms? Firstly, to use neutral language, not associated with – necessarily preconceived and nationally connoted – legal concepts. As regards, for example, a concept that is traditionally termed in many jurisdictions "good faith acquisition", the requirements need to be defined in as plain a wording as possible so as to avoid recourse to traditional

[16] For details, cfr. The UNIDROIT Study Group on Harmonised Substantive Rules Regarding Indirectly Held Securities, Position Paper August 2003, UNIDROIT 2003, Study LXXVIII – Doc. 8 and contributions to a special issue of the Unif.L.Rev./Rev.dr.unif. 2005, cfr. 17 contributions in the special issue of Unif.L.Rev. 2005, 4-367.

concepts. The current[17] formulation of Article 7 aiming at avoiding any such trap is:

'1. – Where securities are credited to a securities account under Article 4 and the account holder does not at the time of the credit have knowledge of an adverse claim with respect to the securities –

the account holder is not subject to the adverse claim;

the account holder is not liable to the holder of the adverse claim; and

the credit is not ineffective or reversible on the ground that the adverse claim affects any previous debit or credit made to another securities account.

4. – For the purposes of this Article a person acts with knowledge of an adverse claim if that person:

has actual knowledge of the adverse claim; or

has knowledge of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim;

and knowledge received by an organisation is effective for a particular transaction from the time it is or ought reasonably to have been brought to the attention of the individual conducting that transaction.'

As regards the crucial issue of characterising the investor's/account holder's position, again, the relevant provision (Article 9) of the draft describes the content of the rights in plain, everyday language without dressing them up in legal concepts.

'The credit of securities to a securities account confers on the account holder:

the right to receive and exercise the rights attached to the securities, including in particular dividends, other distributions and voting rights...;

the right, by instructions to the relevant intermediary, to dispose of the securities in accordance with Articles 4 and 5; ...'

The second strategic choice of the drafters was to go for a minimalist instrument, i.e. to limit the scope of application and produce as unintrusive an instrument as possible by employing fact-based rules. However, this does not mean that intrusion can be avoided entirely. Where the purposes of the future convention require a *uniform* practice, the respective provision of the instrument will be rather detailed and inflexible.

[17] UNIDROIT 2006, Study LXXVIII – Doc. 42, Original: English/French, March 1006, Preliminary Draft Convention on Substantive Rules Regarding Intermediated Securities. This document as well as all other drafts and related documents are accessible at www.unidroit.org.

Neutral, non-connoted language and favouring fact-based minimalist rules over the grand design has allowed to take along even the sceptics. What we are currently observing – and I believe it happens for the first time in intergovernmental negotiations – is that, whenever a delegation wishes to push something which it considers important or where it wishes to block something it does not want to see in any circumstances, it evokes the 'functional approach'. As I mentioned initially, it sometimes is used – and abused – as though it was a magic stick.

Generally speaking, its effects are twofold: Firstly, the scope of application is being reduced gradually wherever we find that a uniform rule is not absolutely necessary to achieve the objective. If one compares the May 2006 version of the draft with the previous one, it is easy to see that the instances where "the domestic non convention law" is called upon to settle a matter are increasing. Secondly, the content of certain key positions has – under the pressure flowing from the functional approach – been considerably changed – some say for the better, others say it has been 'continentalized'. Comparing current Article 9 with its predecessor (Article 4 of the May 2005 draft) gives the flavour of what is meant. Be that as it may, the functions we set out to cast in legal language ought to be safe.

Assuming that continues to be the case throughout the consultation process and a text satisfactorily improving internal soundness and cross-border compatibility of all systems dealing with intermediated securities can be produced, the Convention will be adopted by a Diplomatic Conference. What then? That depends, would be the classic answer we lawyers tend to give. However, contrary to the expectations of some, it does not so much hinge on whether a Contracting State adheres – constitutionally – to the 'monist' or the 'dualist' approach regarding the implementation of international treaties[18]. Rather, it would appear to depend primarily on how much specific law on trading in securities, custody, clearing and settlement the Contracting State has in place.

The have-nots will be the luckiest – they just have to take the Convention tel quel and put it in force, monist or dualist – it won't make a difference. But how will the United States, France, Germany, Japan, the United Kingdom or Hungary where relevant law expressing itself in typical domestic concepts such as property, entitlement, or trust, exists channel the a-national provisions dictated by the functional approach into their system? So far, we lightly say in encouraging words, they will have to 're-translate' the neutral into nationally meaningful conceptual language. But undoubtedly here lies a significant challenge.

[18] On this and the following, cfr. UNIDROIT 2006, Study LXXVIII – Doc. 26. Original: English, February 2006, Report of Ad hoc Working Group on Legislative Techniques for the Implementation of the preliminary draft Convention.

The implementing domestic legislation must give full effect to the Convention's provision, weigh carefully how far it may go beyond minimum requirements so as to not disrupt trans-border compatibility of its rules, and ensure that any conceptually diverging but functionally equal re-translation by other Contracting States will be recognised as such in a domestic forum and, where applicable, applied on an equal footing.

I hear that Japan has already made its analysis and that eight articles of the current draft have been identified as needing re-translation and requiring existing legislation to be amended. And we hear from one important European country that this will be the leading official's homework during the coming summer holidays. Happy holidays!

Previous Experience

Obviously, the functional approach did not reach this degree of maturity overnight. Scholars in charge of laying the scientific groundwork, practitioners and Government officials had gradually widened and deepened their experience, their intellectual open-mindedness and their analytical and drafting skills during the past decade and a half. Not only at UNIDROIT but obviously also at UNCITRAL (in particular their insolvency and secured transactions projects) and the Hague Conference on Private International Law.

In 2001, a Convention on the taking of security in high-value mobile equipment was adopted in Cape Town[19]. There, economists had defined the 'best solution' in terms of credit-cost reduction flowing from the predictability of the outcome of what happens when the security giver (the chargor) defaults expressed not in 'standards', i.e. open to judicial interpretation, but in 'rules' whose application provides results predictable even for non lawyers in rating agencies and export-credit banks. The functional approach, in other words, was identical with what is now called the commercial approach[20]. Secondly, the Cape Town Convention's central feature was a newly created 'international interest' which previously did not exist in any domestic system. However, the process had gone the other way round in that pre-existing concepts – retained title, lessee's position, security interest – had been merged into one that – functionally – encompasses all three of them, the international interest, Article 2.

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[19] Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001. Text of the Convention and related protocols at www.unidroit.org.

[20] Cfr. *J. Wool*, Rethinking the notion of uniformity in the drafting of international commercial law: a preliminary proposal for the development of a policy-based unification model, Unif.L.Rev. 1997, 46; *idem*, Economic Analysis and Harmonised Modernisation of Private Law, Unif.L.Rev. 2003, 389. For its use in the European context, cfr. *H. Kronke*, The Takeover Directive and the "Commercial Approach" to Harmonisation of Private Law, in: Festschrift für Norbert Horn (K. P. Berger, G. Borges eds.) (Berlin 2006) 445.

And yet at an earlier stage – although in the context of a non-governmentally negotiated soft-law instrument, the UNIDROIT Principles of International Commercial Contracts – significant progress in contract law theory triggered by the functional approach had been achieved when three sacred cows of domestic contract law had been dispensed with: (1) the doctrine of 'consideration', (2) the doctrine of the 'causa' as a requirement for the valid conclusion of a contract, and (3) the parol evidence rule. The best solution – fair contracts, commercially viable contract management procedures, and the *favor validitatis*[21] – had dictated the drafters' approach and made possible to send them to where they belong: legal history.

IV. Conclusions

In comparative law and in view of its objectives to better understand, to critically reflect, to advance and prepare reform, aiming at having best solutions available, the promises made by our teachers who called for functional comparison have, overall, been honoured.

In transnational commercial law, progress which in 1980 – at the Vienna Diplomatic Conference for the adoption of the CISG – would have seemed unimaginable was made by moving to transaction-specific objectives of harmonisation, fact-specific rules replacing normative standards, and accepting increasingly that a compromise is not in and by itself a good solution – let alone a best solution – if it induces to stray away from a defined economic or social function of a text[22].

The challenges ahead are, firstly, not to abandon general concepts and systematic coherence – on the contrary: to develop techniques capable of keeping the system together notwithstanding the increasing number of fact-driven legislative acts that we will undoubtedly see. Secondly, to re-translate purely functionally drafted uniform instruments into nationally meaningful concepts compatible with internal consistency and uniform application and practice at the

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[21] Cfr. *M. J. Bonell*, An International Restatement of Contract Law (3rd ed., Ardsley, NY, 2005) 113 et seq.; *J. Gordley*, An American Perspective on the Unidroit Principles (Rome 1996) 2 et seq., 19 et seq.

[22] While *R. Michaels*' contribution, op.cit., is rich with interesting analysis and valuable suggestions, his statement that 'functional international comparative law is a particularly bad tool for the unification of law' (at III 6) is pure speculation and based on a narrow sample of uniform law instruments. Today, moreover, comparative law studies are never the sole basis for the development of any relevant instrument. Where appropriate and feasible, economic impact assessment studies precede them.

transnational level. Thirdly, to win the battle against the theory of a "clash of legal cultures" and its prospected solutions. Insisting on functionality both at the stage of analysing the status quo and when formulating the objectives of any rule or body of rules can serve as a vaccine against the pestilence of resurfacing legal provincialism disguised as – legitimate – traditionalism. Fourthly, to win the battle against indolence, ideological or bureaucratic instincts and intellectual narrow-mindedness wherever they persist.

This has always been the mission and the banner of the Faculty of Law of Eötvös Loránd University. *Our* faculty as I may now proudly say.