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## Americanization of Law: Reception or Convergence?

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... he could see the island of Manhattan off to the left. The towers were jammed together so tightly, he could feel the mass and stupendous weight. Just think of the millions, from all over the globe, who yearned to be on that island, in those towers, in those narrow streets! There it was, the Rome, the Paris, the London of the twentieth century, the city of ambition, the dense magnetic rock, the irresistible destination of all those who insist on being *where things are happening* ... (Tom Wolfe, *The Bonfire of the Vanities*)

### I. Introduction

When I first published my study about the "Reception of American Law,"<sup>1</sup> I tried to describe a development which up to that time had not been analyzed or recognized in the literature.<sup>2</sup> Although there were remarks here and there about the (bad) influence of American law and American "legal imperialism," there was no real study of the reasons for this "imperialism," or its consequences.<sup>3</sup> I got interested in the topic when I taught a course on the history of private law, beginning with the re-discovery of the Roman law in the eleventh century. This led to the so-called "reception of the Roman law" throughout Europe, the dominant and still most important development in European legal history, which has recently gotten even more important after the break-down of the communist regimes in Eastern Europe and the Soviet Union—an aspect I will return to. This Roman basis bias survived, despite important philosophical and theoretical innovations in European legal theory and practice. Such a background made it at least surprising to find a broad and deep change in law and legal culture in Europe in the middle of the 20th century. Was this change just a personal impression, or could it be verified? I focused on Switzerland because it is a small country where it is

relatively easy to combine personal experience, empirical studies and analysis of court decisions and jurisprudential literature. In the end, I concluded that a reception of American law has indeed taken place, which could and should be compared to the reception of Roman law in Europe at the dawn of the period of modern European legal thought.

This thesis—that there is a parallel between the reception of Roman law in the Middle Ages in Europe and the reception of American law in today's Europe—seemed obvious and helpful to some, inadequate and misleading to others. Hans Schlosser, in the 1993 edition of his popular book, "Neuere Privatrechtsgeschichte" (that is, his history of modern private law)<sup>4</sup>, adopted the thesis. In any event, the concept of "reception" was important but not crucial; it was merely an aid in explaining what was actually going on. The process of reception of American law is indeed connected to significant and important changes in substantive law, legal procedures and legal thinking in Europe.<sup>5</sup> The process has continued and gotten stronger since my article appeared in 1986-7. This essay points out some aspects of the process.

## II. New Aspects of the Reception of American Law

### A. The Universities

American styles and methods of university education have become more influential. Although the traditional style of law teaching on the Continent remains, there are some important innovations which owe much to American models.

First, the examination system has been altered. Normally, in German speaking areas of Europe, students used to attend lectures, and then prepare for final examinations on all the material they had learned. It is a major change to grant "credits" for particular courses, and to give exams for those specific courses.

Especially with regard to legal education, there is much discussion on whether this system is helpful or not. Nonetheless, it has been becoming more common. The European Community has introduced the so-called ERASMUS-program, which offers students the opportunity to study in all EC-countries. The idea behind this system is to make examinations interchangeable. Universities participating in the program tend to introduce the new mode of credits and examinations. Since this program is of high prestige, all leading faculties will soon, at least partly, introduce the new system.

A second important innovation is the introduction of post graduate studies in European community law as well as in American law. Many European faculties offer programs taken by an increasing number of students who are not able or willing to study in the United States. Especially in the Netherlands, Belgium, Italy and now also in Germany programs are offered which are in style as well as in

structure copies of American post-graduate education which leads to an LL.M. or M.C.L.

There are several reasons for this development. First, the number of professors who have studied in the United States is growing. These teachers bring their experience back home, and try to reform traditional legal education, sometimes without realizing that they are importing American models.

The importance of postgraduate education is growing, since both industry and law firms prefer young lawyers who have American legal education in addition to their regular training- a point I will return to. European Universities that wish to compete with American universities therefore have to offer comparable opportunities.

In this manner, European Universities are becoming more and more "Americanized," in a double sense: first, they adopt the style and structure of American legal teaching and, second, they become more competitive—an obvious aspect of education in the United States but quite unknown on the Continent in Europe.

## ***B. Law Firms***

1. Traditionally, law offices in the German speaking area had three, two or even only one practicing lawyer. Over the last twenty years there has been a trend toward larger law firms; and a major change took place from about 1990 on. There have been waves of mergers of law firms; large firms now have offices in all major German cities and other European cities, sometimes also with branches in New York and Tokyo. In Switzerland there have been mergers of several large Zürich- and Geneva-based law firms which at the same time have opened bureaus in Eastern Europe and in Brussels.

2. Firm structure is also becoming more similar to the US style of structure, with senior and junior partners, associates and young lawyers as assistants. Many of these young lawyers have—and are sometimes required to have—an additional American education, leading to a LL.M. or comparable degree.

3. It goes without saying that the style of legal argument, and modes of handling litigation, are increasingly influenced by American models; this is evident as well in the drafting of contracts. In the seventies, a merger of two Swiss firms with more than 1 billion dollars turn-over per year was effected through a contract of less than ten pages. Nowadays I am sure the contract would run to 100 pages or more.

The continuing influence of the American legal system and legal education causes changes in traditional European structures. These changes in university teaching and examination are not confined to legal education. As I explained earlier,<sup>6</sup> these changes are part of a broader development. America is dominant in science and culture. The leading role of American universities in nearly all fields is a well-known fact that needs no further explanation or documentation. It is therefore quite natural that students from all over the world come to these

universities and that universities in other countries pick up elements of the American system or even copy it. This occurred first in the natural sciences, then spread to other branches of learning.

Education in *economics*, very notably, is totally dominated by American models. The books and articles students read are written in English. They also often write their papers and doctoral theses in English. More and more universities give degrees with American names (e.g. the M.B.A.). They do so to meet a demand from industry and law firms.

The need for these degrees, and the interest of students in American education, leads some American Universities to organize courses in Europe, where students can get an LL.M. or M.B.A. So, for example, the Rochester Graduate School of Business Administration offers in cooperation with the University of Berne a postgraduate program in Switzerland. In short, the "Americanization" of legal education is part of a wider phenomenon.

### III. Procedural Law

#### A. Civil Procedure

The rules of civil procedure on the Continent were developed during the Middle Ages by Italian and French jurists. Of special importance was the canon law, which formed the basis of the main structures and the theory of procedure. American ideas or techniques have not influenced "normal" civil procedure,<sup>7</sup> but there are important American influences in some special areas:

**Arbitration.** International arbitration is becoming more and more a kind of industry. The main players are lawyers of international law firms, judges and sometimes professors. Under most arbitration regulations, the arbitrators are free to follow whatever procedural rules they wish. I have noted, in discussions with people involved in this kind of arbitration, that they more and more adopt American models. This is especially true for pretrial discovery.

**Bankruptcy.** In the German speaking area, rules about bankruptcy are mainly conceived of as aspects of the law of procedure. During the last decades, these laws have been reformed or even completely revamped in many European countries. In 1994, the German legislature adopted, after nearly twenty years of work and discussion, an entirely new code of bankruptcy.<sup>8</sup> The so-called "Reform des Insolvenzrechts" was strongly influenced by American ideas and conceptions. This is especially true of the totally new concept of reorganization ("Reorganisation" or "Sanierungs-verfahren"), which follows the concept of Chapter 11 of the US bankruptcy code of 1978.<sup>9</sup> The new law also establishes the new principle of "Restschuldbefreiung" (forgiveness of debt), also taken from American models. Reorganization and "Restschuldbefreiung" are more than reforms. They give up the traditional principles of German bankruptcy law and introduce new principles developed in the United States. In this rather technical area of law, the United

States, as a highly industrialized nation, first developed modern concepts to solve problems caused by changing economic and social conditions.<sup>10</sup>

### ***B. Criminal Procedure***

Besides changes in substantive penal law<sup>11</sup> there have been major changes in criminal procedure. An excellent example is Germany where new laws relating to witnesses were introduced into German "Strafprozessordnung" (i.e. criminal procedure law). These new laws were a sharp break with the tradition of criminal procedure in the German speaking area.<sup>12</sup> The association of German jurists ("der deutsche Juristentag"), the most important body of German lawyers, with strong influence on legislation, has also discussed and approved allowing plea bargaining in German criminal procedure.<sup>13</sup>

### ***C. Constitutional Courts***

The law of basic constitutional rights has changed, under American influence, during recent decades all over Europe. Hand in hand with that development, the power of constitutional courts has grown to an extent nobody could have imagined in, say, 1950. This is especially true for Germany where the Bundesverfassungsgericht (Federal Constitutional Court) in many aspects resembles the Supreme Court of the United States. The functions of the Bundesverfassungsgericht—its decision-making as well as its importance and influence—are without precedent in European legal history. But they closely correspond to the practice and role of the United States Supreme Court. That is also true of many details of the work of the court. For example dissenting opinions and especially the publishing of dissenting opinions were introduced under the influence of the American model into German constitutional courts. This practice was totally unknown before.

### ***D. Summary***

Thus, the influence of American law can be shown in civil procedural laws, in the work of constitutional courts, and in innovation in criminal procedure. The reception of parts of American bankruptcy law is of great significance. The take-over of American bankruptcy rules is not the result simply of studying law comparatively; rather, the United States, here as in many others fields, was the first to confront certain problems of industrial and post-industrial society. American innovation and leadership is perhaps the most important reason for the permanent and ongoing reception of American legal models.

In the field of constitutional law, an additional reason is the dominant position of constitutional law in American legal history as well as in the legal system generally. In the European countries, especially in the German-speaking area, this new concept was accepted gradually and leads to a new conception of and role for the constitutional courts.

#### IV. Substantive Law

Although changes in legal education, or the implanting of American models in procedural law, are remarkable and important, the influence of American law and legal conceptions on substantive law is even more significant—perhaps the most important development in legal culture in Europe and globally since the Second World War.

American expressions and phrases, American models and principles—these cause deep changes in legal structure and in the dogmatics of civil law. I will give some examples from fields I teach, or in which I act as a consultant. In Switzerland, by long tradition professors are asked by lawyers, banks and other industries for legal opinions on questions which are either too complicated for the average lawyer or which are new. I take my first example, which is both curious and typical, from that realm.

##### *A. The So-called Letter of Intent*

In 1992 a downtown lawyer in Bern sought a legal opinion. She explained that a client had presented her a document which caused some difficulties. When I read the document I could understand the difficulties the lawyer had with it. The title was 'letter of intent.' The following German text had nothing to do with any kind of declaration about the formation of a contract or something comparable to that. Instead it turned out to be a kind of letter of awareness, in the so-called "soft" version.<sup>14</sup>

The document was formulated to secure bank credit for one firm in a Swiss group of companies doing business in the construction industry. It was formulated and presented to the firm by representatives of the bank.

The first remarkable point is that a contract between two Swiss parties, whose text is German, carries an English name. This underlines one aspect of the reception of American law. It looks modern, international and professional to use English phrases or topics in business and legal texts. That this phenomenon is not restricted to the business or legal worlds is well-known and needs no further explanation.<sup>15</sup>

More astonishing is the fact that the banker who used the formula "letter of intent" obviously did not know what it actually meant. Had this heading been written at the beginning of an ordinary German text of a contract of guarantee, it would be easy to say that this was a mistake made by someone who simply wanted to be fashionable. This would be misleading however, because, as I mentioned before, the German text does not follow a traditional contract model, or that of any kind of traditional credit security instrument. It is nothing less than an exact translation of clauses well known to a "letter of awareness" in the American sense. These were introduced into the German-speaking area during the seventies and eighties and are now part of German and Swiss commercial law. They are called

"Patronatserklärung," and, as in American usage, have both a soft and a hard version. For our topic two aspects are of importance:

The wording of the Patronatserklärung is a translation nearly word by word, of American clauses. Moreover, the whole concept is an import from America; and so too of the function. European lawyers learned the clauses from their American counterparts, in contracting with American companies. They soon realized that European groups of companies would and could need this special form of security for partners of group members. In the meantime, the "Patronatserklärung" became part of university courses on commercial law, and is discussed in books of authority on commercial law as well as used in business life. The bank representative used the right formula of the Patronatserklärung—probably taken from an in-house form book of the bank—but used it incorrectly. This simple example shows American terms have been received which are independent of the Americanization of the law; but the general trend of Americanization is nonetheless quite real, and this example shows the strength of the trend.

### **B. Commercial Law<sup>16</sup>**

It is no coincidence that the example just given stems from what in Europe is traditionally called commercial law, which includes corporate, banking and capital market law. This is the field where Americanization in terminology and in substance is strong and accelerating.

As I mentioned earlier, the field of economics is entirely dominated by American literature and the American language. Even in German and Swiss newspapers, phrases like "corporate identity" or "corporate culture" as well as "corporate financing" are not translated but are simply used as they are. The terms are well-known and so are the concepts linked to these terms. In corporation law, too terms and concepts of American Corporation law influence traditional European business law. Sometimes American models are introduced to cope with problems that were unrecognized earlier in European law—e.g. the corporate opportunity doctrine<sup>17</sup> or the business judgment rule. Examples could be multiplied. The general development of European corporation law owes a great deal to American legal theory in this field.

This is especially clear for the rules the European Community developed for harmonization of European corporation law.<sup>18</sup> Some of those EC-directives directly import American models into European law. The EC-Accounting Directives are one example.<sup>19</sup> The same trend is even more pronounced in Switzerland. The new Swiss corporation law of 1991<sup>20</sup> is fairly traditional; but many Swiss companies on a voluntary basis have adopted so-called "International Accounting Standards,"<sup>21</sup> which are basically American law.

Thus both the EC and Switzerland have embraced the concepts of transparency—one of the main principles of American corporation law. In so doing, they reversed the legal acceptance of the traditional European attitude of companies, that is, to hide as much as possible.<sup>22</sup>

But this development is just a piece of a mosaic. The whole picture is that capital market law (including the corresponding part of criminal law) has been restructured totally under strong influence or by direct reception of American rules.

### *C. Capital Market and Security Law*

Perhaps the most significant example of this development is the new Swiss Stock Exchange Law ("Börsengesetz"). The government introduced it in February 1993; it passed both Chambers in June 1994, needing only some small adjustments between the two Chambers as of late 1994.<sup>23</sup> This law includes detailed rules on stock ownership notification and take-over regulations, as well as a special criminal provision on stock price manipulation. It is evident from the text that American models were at work here. American market theory and American legal doctrine underlie all of the law's provisions. The government's commentary, on publication of the draft, spoke for example about the "efficient functioning of the Swiss financial system" and "the confidence of market participants in a clean and undistorted capital market offering equal opportunities." Boeckli remarks that "this sounds like a newspaper clipping" from an American business newspaper, though it is in fact "the language of the Swiss White Book."<sup>24</sup>

There is another branch of the law of capital markets where the terminology and the form of business transactions have been completely Americanized. The economic as well as the legal definitions of financial futures or derivatives stem from American capital market theory, and the legal doctrines based on these theories. More examples could be given; but it is already clear that American legal concepts and terminology dominates the law of capital markets.

### *D. Antitrust Law*

That the antitrust law of the EC as well as that of Germany has been strongly influenced by American theory and practice is common knowledge.<sup>25</sup> Especially significant is the development in Switzerland. There cartels were considered quite natural and were tolerated or even esteemed. Nevertheless a new cartel law of 3 September 1993 implants the American principles of antitrust law as well as American theory and practice directly into Swiss law. The same is true for the proposed control over mergers; and the duty to notify concerning "presumably unlawful cartels."<sup>26</sup>

### *E. Insider Trading and Money Laundering*

Switzerland was the first country in Europe to introduce a criminal provision on insider trading, which was explicitly called a "Lex Americana"<sup>27</sup>. Many European countries are preparing or have already enacted insider trading rules. Switzerland also promulgated a money laundering provision on August 1, 1991, and is preparing additional provisions against illegal financial transactions related

to international terrorism and crime.<sup>28</sup> All of legislation and the rules themselves betray strong American influence.

Thus commercial law shows strong evidence of direct and significant reception of American law. The reasons for this development are very clear. There are two major factors:

The first is that economics has developed a body of theory and doctrine on capital markets and related areas. But economics as a field is completely dominated by American theory and models. These theories and models, of American origin, were taken up and spread widely in European circles. They also opened the door to the introduction of legal institutions based on these economic insights.

Second, many questions related to capital market or to new financial instruments have—as mentioned above—first arisen in the United States. So, for example, takeovers as well as new financial instruments have been phenomena of economic life in the United States. Legal practice, legislatures, and legal scholars have all been forced to find rules and concepts to deal with these phenomena. This brings us back to my central thesis: after the Second World War nearly all major new concepts of law, and new developments in legal theory and practice, had at least their starting point in the United States.

## V. Change of Conception

### A. Liability

The tendency to extend forms of liability, discussed in my earlier article,<sup>29</sup> has been continued and even intensified. Liability of lenders was totally unknown some years ago anywhere in Europe. Nowadays there are several doctoral theses about lender's liability and the tendency to adopt it.<sup>30</sup> There is also a strong trend to extend liability for providers of services, which is manifest in the proposed EC Directive for Services Rendered.<sup>31</sup>

Finally, the responsibility of company officers, though discussed, was not a major legal issue until recently. Now in Switzerland as well as in Germany, there are more and more suits; and the chances that creditors or shareholders will win their cases seems to be improving every year.<sup>32</sup>

### B. Change of Civil Law Doctrine

The fundamental structures of the civil law are based on Roman law traditions. The influences and receptions described here and elsewhere in my work may change aspects and bring about new rules in fields of commercial law or in areas where no rules existed; the traditional core structures of the law are apparently untouched by these developments. But even in the core areas one can detect the growing influence of American legal concepts. A prominent example is the United

Nations Convention on Contracts for the International Sale of Goods (CISG). This convention may, in the next century, dominate international trade in goods. It has been signed by all important trading nations of the world. It is interesting to note that this law follows American tradition in matters that concern performance and failure to perform. Americanized rules about breach of contract or anticipatory breach will replace Roman-based rules about failure to fulfil and the like. It goes without saying that rules of international sale contracts will influence national laws of sales. Thus, a German commission to reform that part of the German civil code which concerns non-performance has proposed new rules, much influenced by CISG, or more accurately by American law.<sup>33</sup>

### C. A New Style

Whereas the CISG has partly taken over some rules of American law, in other fields, there is an astonishing amount of reception of the *style* of American legal culture. All the directives of the EC follow the American pattern of legislation: they begin with definitions and explanations which determine the range and application of the law. When the members of the EC fulfil their obligation to create national rules within the framework of EC directives, they also follow that style, starting with definitions of subjects and terms. This technique, well-known to American lawyers, has no basis in European legal history. The canons of interpretation in Europe have been developed with an eye to the traditional style of European laws and their application. There may then be some difficulties in applying and interpreting EC law, and the national laws which follow EC directives, since European lawyers feel unable to use their customary tools of interpretation and analysis.<sup>34</sup>

The same phenomenon appears with regards to contracts: All over Europe, lawyers impressed by their American education or influenced by patterns used by their American counterparts, have adopted the American style of drafting contracts. These begin, too, with definitions of terms. European lawyers thus may also find it hard to adjust to modes of interpretation of such contracts. European contract interpretation rules are derived from and are similar to the rules for interpreting statutes. They are adequate to the traditional European style of contracting. Their application to contracts styled the American way may be rather difficult.

European legal scholarship thus faces a problem. To interpret these new laws or contracts we may have to use American forms of interpretation; otherwise one should perhaps return to the traditional European style of legislation and contracting. Since this latter seems unlikely, the situation leads necessarily to a further degree of reception. In fact, the reception of American law proceeds step by step; it is not restricted to regulations and legal models but also takes place at a higher level, the level of legal theory and legal thought.

#### **D. General Aspects**

In my prior article, I argued that reception of general models and concepts from American laws had taken place. I mentioned the "law and economics" movement and, more generally, the interdisciplinary approach of American legal reasoning and doctrine. This process continues in many areas of legal life.

Important is the ongoing intrusion of constitutional law into other fields of legal theory and practice. This is still for European lawyers a frightening or at least surprising experience, exemplified particularly by the judgments of the German Bundesverfassungsgericht. This court, in many decisions, has directly intervened in matters of private law,<sup>35</sup>—a process once unthinkable in Germany.

The American conception of constitutional law tends to break down the traditional walls between public and private law and replaces them with a pragmatic approach, concerned with problem-solving, and indifferent to whether the rules to be applied are traditionally labelled public or private. This tendency is seen in banking law, health law and in many other fields as well.

Finally, as a natural consequence of all aspects discussed before, the importance of codified law itself has been step by step reduced; and the importance of court decisions has increased. Many European countries, despite their "gapless" codes, are more and more oriented toward case law. Case law grows in importance, perhaps because legislators are not able to react to social and economic developments as quickly as courts. Courts confront the problems of the modern society in the first instance; that is why they play a leading role in dealing with those problems. Perhaps here, as in many of the other examples, the so-called reception of American law is nothing more than a common reaction to the needs of modern society which may have little or nothing to do with Americanization.

### **VI. Conclusion and Consequences**

It would be easy to say that industrialized nations share certain problems; hence the harmonization of legal rules and techniques is simply, and naturally, part of a process of convergence.

It is certainly true that many legal problems are consequences of industrialization, and of the structure of modern society and of modern states. There is no doubt for example that risk-spreading, and the urge to find compensation for accidental losses, is a worldwide phenomenon and is independent of the legal influence of the United States.<sup>36</sup> Nevertheless this does not explain why so many legal solutions and legal arguments used in solving new problems come from American legal patterns and models. Yet reasons for this aspect of development are not hard to find.

The United States, as the most industrialized nation, dealt with many of these problems earlier than other countries. Legal scholarship and the judiciary developed solutions; and the solutions, because of the high standards of universities and the legal profession, were themselves at a high level. These are again results of the leading role of the nation. To summarize: I would say that the reception of American legal thought (as well as of procedural institutions and legal patterns) is a natural phenomenon. It is not the result of simple convergence brought about by the identity of problems faced by industrialized countries. It is a true *reception*, in a sense well-known from history: the leading power, the most developed society, acts as a model; other societies adopt this model, including the legal culture of the dominant nation.<sup>37</sup>

This explanation of a process going on in Europe and many other parts of the developed world is not of purely academic interest. There are indeed many practical consequences.

Since this is reception and not simply convergence, nations are free to follow American models or not. That means, concretely, that, if a problem has to be solved, they can decide which solution they want. This includes the option to choose a model other than American. This is important with respect to such fields as property law or the law of torts where, in my view, the traditional European system is much better than the American.

In other fields it is evident that we have no traditional models; we are thus nearly forced to accept American patterns. This is especially true in very young fields—some dealing with such things as the capital market. But it is also true of others very far from the commercial world. Thus laws against discrimination of all sorts—race, gender, handicapped, or sexual minorities—tend to be copies of American patterns. Here convergence is clear, because problems of discrimination exist everywhere in the world. But on the other hand, the society which first developed legal instruments to fight discrimination in an efficient form is the United States.

Finally: The societies of the former communist states are on their way back to the rule of law. In many fields, they return to their 19th century situation, dominated by German law and ultimately based on the Roman legal tradition. In other fields, this will not be the case. What happens in Eastern European forms a kind of natural experiment on the modernization of law. It will perhaps give us a broader and surer basis for discussions of convergence and reception.

### Notes

1. Wolfgang Wiegand, "Reception of American Law in Europe," *American Journal of Comparative Law* 39:229 ff., (1991). A (longer) German version was published in 1988: "Die Rezeption amerikanischen Rechts," in *Die schweizerische Rechtsordnung in ihren internationalen Bezügen, Festgabe zum Schweizerischen Juristentag 1988* (the manuscript was conceived and written in 1986/87). Some of the main topics and arguments are repeated

here in the Introduction.

2. Marc Galanter anticipates some aspects in his article "The Modernization of Law," in *Modernization*, ed. Myron Weiner (1966).

3. For Germany see Rolf Stürmer, "Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland," in *Festschrift Rebmann* (München: C.H. Beck, 1989), 839 ff.

4. Hans Schlosser, *Neuere Privatrechtsgeschichte*, 7th edition (Heidelberg: C.F. Müller, 1993), 212 f.

5. The remarks in this article are confined to the legal situation in Europe and especially to the German-speaking area.

6. Wiegand, supra n. 1, "Reception of American Law."

7. On the contrary: some American scholars, such as John Langbein, have suggested reforming American civil procedure through use of German models; Walter K. Olson *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991) suggests replacing the "American rule" with the traditional European rule on partition of costs in civil procedure.

8. New bankruptcy code of July 8, 1994, which will come into force on January 1, 1999.

9. This legal institution was partly developed in the twenties and thirties by German emigrants, so that we can speak now of a "re-reception."

10. On the connection between new business concepts and the corresponding new legal concepts, see Wiegand (supra n. 1) 236 ff. It was Germany on the other hand that developed the first system of social security—as a response or reflex to the social situation at the end of the 19th century in central Europe.

11. Cf. Wiegand (supra n. 1) 239, with reference to Art. 161 Swiss Penal Code of December 17, 1987, in force from July 1, 1988 (insider trading). For further development both in criminal procedure law and in criminal substantive law, see below at n. 27 and 28.

12. Cf. Uwe Bocker, *Der Kronzeuge: Genese und Funktion der Kronzeugenregelung in der politischen Auseinandersetzung mit dem Terrorismus in der Bundesrepublik Deutschland* (Pfaffenweiler: Centaurus, 1991.)

13. See Bernd Schönemann, "Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen, Gutachten B für den 58." *Deutschen Juristentag* (München: C.H. Beck, 1990), and id., "Die informellen Absprachen als Überlebenskrise des deutschen Strafverfahrens," in *Festschrift für Jürgen Baumann*, ed. Arzt, Fezer, Weber, Schlüchter, Rössner, (Bielefeld: E. und W. Gieseking, 1992), 361 ff.

14. See e.g. on the letter of intent Marcus Lutter, *Zur rechtlichen Bedeutung von Absichtserklärungen* (Köln/Berlin: C. Heymann, 1982); Peter Siebourg, *Der "Letter of intent": Ein Beitrag zum US-Amerikanischen und deutschen Recht mit vergleichenden Anmerkungen* (diss., Bonn, 1979); and on the letter of support or awareness Michalski, "Die Patronatserklärung," *Wertpapier Mitteilungen* (WM) 1994, 1229 ff. for Germany; Anton K. Schnyder, "Haftungsgrundlage für Konzernobergesellschaften?" *Schweizerische Juristen-Zeitung* (SJZ) 1990, 57 ff. for Switzerland. The terminology is partly also misleading in the Swiss juridical literature, e.g. in Gohl/Merz/Koller, *Das Schweizerische Obligationenrecht*, (8th ed., Zürich: Schulthess, 1991) 168; and Guach/Schlupep, "Schweizerisches Obligationenrecht," *Allgemeiner Teil*, Bd. II, Rz 3896 (5th ed., Zürich: Schulthess, 1991).

15. Cf. Wiegand (supra n. 1) 231 ff. American phrases and words have taken hold in all aspects of life; however, the penetration of Americanisms into everyday German or French faces stiff opposition. France adopted a bill about the protection of the French

language on June 30, 1994. By this law, the French language becomes obligatory for spoken and printed advertising as well as for all radio and TV transmissions. The same is true for official communications and for operating instructions. English terms are to be banished from the French language. Sanctions are fines and revocations of subventions. The French Constitutional Council moderated the French Language Law on July 30, 1994. It ruled that the law could be declared obligatory only in the domain of the state itself, and not for private and legal persons who do not act by order of the state. See for that *Neue Zürcher Zeitung* (NZZ), August 2, 1994, 4 (Nr. 177); NZZ, July 2-3, 1994, 3 (Nr. 152); NZZ, May 10, 1994, 7 (Nr. 108); NZZ, May 6, 1994, 2 (Nr. 105).

16. See for the following Peter Böckli, *Swiss Business Law: Osmosis of Anglo-Saxon Concepts* (1993) (an as-yet unpublished paper, for which I am grateful). Böckli's main conclusion is that Switzerland is heading generally more and more toward the use of Anglo-American concepts (p. 12).

17. Cf. Wiegand (supra n. 1) 238.

18. See the documentation by Marcus Lutter, *Europäisches Gesellschaftsrecht* (2nd ed., Berlin/New York: W. de Gruyter, 1984).

19. Cf. in particular the 4th EC Council Directive on Company Law concerning annual accounts of companies of July 25, 1978, L 222/11 and the 7th Directive about the consolidated annual accounts of June 13, 1983, L 193/1.

20. Law of October 4, 1991, put into force on July 1, 1992.

21. IAS, *International Accounting Standards* (revised edition, London, 1993).

22. Cf. Böckli (supra n. 16) 10.

23. Federal Law on Stock Exchanges and Securities Trading (Stock Exchange Law), based on the (in part considerably) amended draft of the Federal Government which was published with a commentary (Government White Book) on 24 February 1993 in the *Federal Gazette* (FG) 1993 I 1369 ff. For further information about the newest development in Swiss Capital Market Law see the following references: Böckli (supra n. 16); Urs Brügger, "Schweizerisches Börsenrecht im Wandel, in *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz* (Bern: Stämpfli, 1994), 48 ff.; Peter Nobel, "Reform of the Swiss Securities Markets, The proposed Federal Law on Stock Exchanges and Securities Trading," *Swiss Review of Business Law*, 1993, 209 ff.; Rolf H. Weber, *Neuere Entwicklungen des Kapitalmarktrechts*, *Aktuelle Juristische Praxis* (AJP), 1993, 275 ff. For Germany see the new law of June 17, 1994, on markets (Zweites Finanzmarktförderungsgesetz), which contains much new law about securities trading.

24. Böckli (supra n. 16) 5 f.

25. Germany's Antitrust Law (Gesetz gegen Wettbewerbsbeschränkungen, GWB) goes back to the middle fifties and came into effect on January 1, 1958, the same day Art. 85 ff. of the EEC Treaty became effective. Hence Germany had an interest in getting trade regulation rule on the European level parallel to that in its own country. Germany's law stems basically from the decartelization law of the occupying powers after World War II. See Wernhard Möschel, "Deutsches und Europäisches Recht der Wettbewerbsbeschränkungen—ein Vergleich," in JA 1986 7 ff. and id., *Recht der Wettbewerbsbeschränkungen* (1983).

26. Cf. Böckli (supra n. 16) 10 ff.

27. Cf. Official Minutes "Nationalrat" 1987 1370 ff. and Böckli (supra n. 16) 4 f.; Wiegand (supra n. 1) 239; further see Peter Böckli, "Schweizer Insiderrecht und Banken, Einfluss der EG-Richtlinie von 1989", AJP 1993 769 ff.; Peter Forstmoser, *Das neue Schweizer Insider-Recht* (Zürich: Bank Vontobel, 1988); Christoph Peter, "Erfahrungen mit

dem Insideratbestand, *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz* (Bern, Stämpfli, 1993), 105 ff.; Niklaus Schmid, "Insiderdelikte und Geldwäscherei—neue und künftige Aspekte aus der Sicht der Banken," in *Berner Tage für die Juristische Praxis* ed. Wolfgang Wiegand (Bern: Stämpfli, 1993), 189 ff. with further references.

28. The Swiss Government proposed to the Parliament two packages of legal rules. The first package contained the money laundering provision and a rule about wrongful financial transactions, articles 305bis and 305ter Swiss Penal Code. Therefore the Swiss Bank Regulatory Authority put into force a directive concerning money laundering. The second package of measures against organized crime includes a provision defining criminal organizations (Art. 260ter of the draft bill, published in FG 1993 III 295, 331), and a new regulation about seizure of property (Art. 59 of the draft bill). See Peter Müller, "Organisiertes Verbrechen—Gegenstrategien des Gesetzgebers, AJP, 1993, 1180 ff.; Gunther Arzt, "Organisierte Kriminalität—Bemerkungen zum Massnahmepaket des Bundesrates vom 30. Juni 1993," AJP 1993, 1187 ff.; Daniel Zuberbühler, "Die Geldwäschereibekämpfung," *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz* ed. Nobel, (Bern: Stämpfli, 1993), 126 ff.

Developments in this field are proceeding very fast; see the Bill for a new provision in the Swiss Penal Code punishing "stock price manipulations" (cf. Böckli (supra n. 16) 5 ff. and FG 1993 I 60, 1369); Government White Book of 12 January 1994 concerning creation of central office for fighting organized crime (FG 1994 I 1145); preliminary draft of 12 January 1994 of an administrative law against money laundering in the financial sector; exchange of letters of 3 November 1993 between the U.S. and Switzerland concerning legal assistance connected with the offer, purchase and sale of securities and derivative financial products (enacted on 3 November 1993).

29. Cf. Wiegand (supra n. 1) 241 ff.

30. Cf. e.g. Andreas Länzlinger, *Die Haftung des Kreditgebers, Beurteilung Möglicher Haftungstatbestände nach schweizerischem und nach amerikanischem Recht* (diss. Zürich, 1991); *ibid* (Zürich: Schulthess, 1992).

31. Official Journal of the European Communities (OJ) C 12/8 of 18 January 1991.

32. See Wolfgang Wiegand, "Die Verantwortlichkeit des Verwaltungsrats," *Grundfragen des neuen Aktienrechts (Festschrift Rolf Bär)* ed. von Büren, Hausheer, and Wiegand (Bern: Stämpfli, 1993), 1 ff.

33. See Eugen Bucher, "Überblick über die Neuerungen des Wiener Kaufrechts; dessen Verhältnis zur Kaufrechtstradition und zum nationalen Recht," *Berner Tage für die juristische Praxis*, ed. Bucher, (Bern: Stämpfli, 1991), 13 ff. On German reform of the law of obligations see *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts* (Bundesminister der Justiz), Bonn, 1992, 29 ff, 192 ff.; Ulrich Huber, "Leistungsstörungen (Empfiehlt sich die Einführung eines Leistungsstörungenrechts nach dem Vorbild des Einheitlichen Kaufgesetzes? Welche Änderungen im Gesetzestext und welche praktischen Auswirkungen im Schuldrecht würden sich dabei ergeben?)" *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Band I (Bundesminister der Justiz, Bonn, 1981), 647 ff.

34. See Marcus Lutter, "Die Auslegung angeleglichen Rechts," *Juristenzeitung* (JZ) 1992 593 ff. and Wolfgang Wiegand, "Die zentralen Elemente des Konsumkreditgesetzes," *Berner Bankrechtstag* (BBT Band 1), *Das neue Konsumkreditgesetz* ed. Wolfgang (Bern: Stämpfli, 1994), 37 ff.

35. See Friedrich Krauss, *Der Umfang der Prüfung von Zivilurteilen durch das Bundesverfassungsgericht* (Köln/Berlin: C. Heymann, 1987); and for example Erwin Deutsch, "Neues Verfassungsprivatrecht: Rechtswidriger Abtreibungsvertrag gültig—Unter-

haltungspflicht aber kein Schaden," *Neue Juristische Wochenschrift* (NJW) 1993, 2361 ff.

36. See the remarks in Wiegand (*supra* n. 1) 242 f.

37. Cf. e.g. for Japan, Hideo Nakamura, "Der Einfluss des amerikanischen Rechts auf den japanischen Zivilprozess," *Gedächtnisschrift für Peter Arens* ed. Leipold, Lüke, Yoshino (München: C.H. Beck, 1993), 309 ff.