CONTRACT COLLISIONS: AN EVOLUTIONARY PERSPECTIVE ON CONTRACTUAL NETWORKS

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I
INTRODUCTION

The anthropocentric bias inherent in our culture also informs our understanding of law. Because of this, we often have difficulty imagining that new schemata for dealing with unresolved legal conundrums may emerge in practice without conscious human effort. In the minds of jurists, a script (in the classic Goffman sense[1]) has become ingrained, according to which a legal concept is first invented by a legal scholar, then promoted by a political figure or tested in court by a (usually somewhat audacious) lawyer, and then enacted by lawmakers or applied by judges, at which point it becomes a fixture in legal practice—until such time as a new inventive spirit comes up with a better concept and the process repeats itself from the beginning.[2] In short, law is usually considered to be the product of human intention and planning.[3]

But who was it that devised the notion of the contract, or of legal personality, or of property? The traditional understanding of legal concepts fails to account for what could be called the "idiopathic" manner in which law evolves, and underestimates the creative force behind it. Legal evolution is a *communicative* process that takes place at a level of emergence detached from that of individual experience.[4]

This blindness to the existence of gradual evolutionary processes in the development of law is certainly more marked in Continental Europe than it is in

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1. *See* ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE (1974).

2. For the classic portrayal, see ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW (2d ed. 2001). For a similar take, embellished with more modern theoretical elements, see MANFRED ASCHKE, KOMMUNIKATION, KOORDINATION UND SOZIALES SYSTEM: THEORETISCHE GRUNDLAGEN FÜR DIE ERKLÄRUNG DER EVOLUTION VON KULTUR UND GESELLSCHAFT 315–17 (2002).

3. For a fundamental critique of this conception, see FRIEDRICH A. VON HAYEK, "DIE ERGEBNISSE MENSCHLICHEN HANDELNS, ABER NICHT MENSCHLICHEN ENTWURFS," FREIBURGER STUDIEN: GESAMMELTE AUFSÄTZE 97 (2d ed. 1994).

4. *See* Marc Amstutz, *Widerstreitende Götter: Zu Manfred Aschkes Rekonstruktion der systemsoziologischen Evolutionstheorie und ihrer rechtstheoretischen Bedeutung*, 2 RECHTSGESCHICHTE 14 (2003).

common law countries. Civil law jurisprudence is traditionally much less receptive to the notion of legal innovation through changing judicial precedent—the conventional practice of Anglo-American common law. This is unfortunate, because the solutions found in court judgments, though designed only for the settlement of specific conflicts in individual cases, often conceal within them, at a deeper, more abstract level, the seeds of legal paradigms that—if for no other reason than the means by which they came into being—offer considerable promise of being particularly suitable to existing social conditions.

In this article, I would like to demonstrate the plausibility of this thesis with the example of a judgment by the Swiss Federal Supreme Court, 115 BGE II 452.[5] Although this judgment did not attract a great deal of attention at the time it was published,[6] it nevertheless represents a particularly telling example of what may be termed "communicative" case law. In this judgment, social undercurrents come to expression (though admittedly still clouded in some obscurity) that are acting to compel the law of contracts to increasingly take into account the heterarchic or network logic of contractual relationships[7] (regardless of whether they are referred to as "combined contracts" or "legal consortiums," or as "contractual webs," "contractual networks," or *groupes de contrats*).[8] If I am correct in my reading of this judgment, it may even be said that 115 BGE II 452 contains within it the fragments of a model for a law of contractual nexus.

5. Bundesgericht [BGer] [Federal Supreme Court] Nov. 7, 1989, 115 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 452 (Switz.) [hereinafter 115 BGE II 452].

6. As far as I am aware, the judgment has not been analyzed in any legal journal since its publication. For the only discussions of the judgment that go beyond a simple mention in passing, see Bruno Cocchi, *Die Kündigung der Dienstwohnung*, 2 MIETPRAXIS 52 (1995); Raymond Bisang, *Fragen im Zusammenhang mit gemischten Verträgen mit mietrechtlichem Einschlag*, 17 MIETRECHTPRAXIS 239 (2010).

7. For the concepts of heterarchy and network in legal scholarship, see Gunther Teubner, *"And if I by Beelzebub Cast out Devils, . . .": An Essay on the Diabolics of Network Failure*, 10 GERMAN L. J. 395 (2009). For a description of these concepts, see Satoshi Miura, *Heterarchy*, *in* ENCYCLOPEDIA OF GOVERNANCE 267 (Mark Bevir ed., 2007) ("A governance mechanism that is neither hierarchy nor market (anarchy) is usually called a network. It is described as horizontal and nonhierarchical, but its basic organizing principle can more positively and appropriately be called heterarchy. Etymologically speaking, heterarchy consists of the Greek words heteros, the other, and archein, to rule. In a heterarchy, a unit can rule, or be ruled by, others depending on circumstances, and hence, no one unit dominates the rest."). For the significance of these concepts in social sciences, see Carole L. Crumley, *Heterarchy and the Analysis of Complex Societies*, 7 ARCHEOLOGICAL PAPERS OF THE AMERICAN ANTHROPOLOGICAL ASSOCIATION 3 (1995) ("While hierarchy undoubtedly characterizes power relations in some societies, it is equally true that coalitions, federations, and other examples of shared or counterpoised power abound. The addition of the term heterarchy to the vocabulary of power relations reminds us that forms of order exist that are not exclusively hierarchical and that interactive elements in complex systems need not be permanently ranked relative to one another.").

8. These are, without exception, contractual affiliations that arise *without* a "coupling agreement," that is, without an accord between the parties. Cases in which there is an explicit coupling agreement are not included in the present considerations.

II
VARIATION IN LEGAL EVOLUTION: DISTORTING JUDICIAL PRECEDENTS

The matter to be decided in 115 BGE II 452 related to the contractual affiliation[9] that had been created bilaterally between the operating company of the clinic, clinic Y, and the physician, Dr. X. On May 6, 1983, the parties finalized a so-called collaboration agreement that defined the terms for the use of the clinic's facilities by Dr. X for his private patients. The agreement was for an indefinite length of time, with a six-month period of notice for termination (Article 5 of the agreement). Less than one year later, on April 1, 1984, the same parties signed a lease, under which the premises within the clinic building were let to Dr. X to be used for the operation of his own (private) medical practice. This agreement was also not limited in time. The termination clause referred only to the relevant terms of the collaboration agreement, stipulating that the "period of notice fixed in Article 5 of the collaboration agreement dated May 6, 1983" was to apply.

On January 3, 1989, clinic Y gave notice of termination, based on the collaboration agreement, and demanded that Dr. X vacate the premises of his medical practice inside the clinic by no later than July 7, 1989. Dr. X. then applied to the court, based on Article 267a of the Code of Obligations (CO) then in force (Article 272 of the current CO), for an order extending the lease to the end of 1990. The application was denied both by the court of first instance[10] and in a first appeal. In a direct appeal to the Federal Supreme Court,[11] the operative part of lower court's decision was again upheld. Significantly, however, the reasoning of the first instance ruling was *not* confirmed.

The lower courts had, in principle, simply chosen the path of least resistance, treating the agreements *in casu* not as *two* separate contracts, but as a *single* (hybrid) contract. This construction made it possible for the courts (based presumably on the doctrine of absorption[12]) to avoid taking into consideration the provisions of former Article 267a of the CO (CO Article 272),[13] on the argument that the collaborative elements of that single agreement

9. For a typological overview of the various types of contractual links, see Marc Amstutz, Ariane Morin & Walter R. Schluep, *Einleitung vor Art. 184 ff. OR*, *in* BASLER KOMMENTAR: OBLIGATIONENRECHT ART 1–529 OR (Heinrich Honsell et al. eds., 5th ed. 2011) [hereinafter *Vor Art. 184*].

10. The statement of facts in the judgment reads, with regard hereto, that the lower court denied "as a matter of principle that the plaintiff had a right thereto based on CO art. 267 . . . but nevertheless extended the lease until 31 October 1989." A more detailed description of the lower courts reasoning is not available. 115 BGE II 453 ("dem Grundsatz nach einen Anspruch des Klägers aus Art. 267a OR [verneinte], . . . das Mietverhältnis aber dennoch bis zum 31. Oktober 1989 [erstreckte]").

11. For a more complete account of the facts, see 115 BGE II 453.

12. *See Vor Art. 184*, *supra* note 9, at N17.

13. The current CO Article 272 reads as follows: "The tenant may request the extension of a fixed-term or open-ended lease where termination of the lease would cause a degree of hardship for him or his family that cannot be justified by the interests of the landlord. When weighing the respective interests, the competent authority has particular regard to: a. the circumstances in which the lease was

predominated and therefore took precedence over the "added" elements of the lease. Because the legal effects of the lease were "absorbed" by those of the collaboration agreement, the statutory provisions governing leases could be disregarded.[14]

The Federal Supreme Court, however, found "a plurality of contracts," consisting of *two independent agreements*, presumably in view of the fact that there had not been an exchange of a single concordant intention between the parties.[15] The Court first noted that the question at issue was therefore "whether a right of use based not simply on a lease, but rather . . . on a nexus of agreements, by which the lease is affiliated with other contracts," was also subject to a right of extension. As this issue had not received a "general response from the legislator,"[16] the Court then looked to the doctrinal literature for direction—without success, however, as discussion there was limited to the question of hybrid contracts and saw the right of extension as being contingent upon the primary focus of the agreement (*Regelungsschwerpunkt*), on the one hand, and upon a "weighing of the interests" *in casu*, on the other.[17] Left thus to fend for itself, the Court's response was nothing short of spectacular. *Without stating its rationale*, the Court ruled that the doctrinal view on hybrid agreements must also apply in the case of compounded agreements:

> Here, too, the right to an extension of the lease must be disallowed where the contract to which it is linked is primarily determinant for the legal relationship between the parties and the grant of use of the leased premises appears to be no more than a subordinated, ancillary agreement. Hence, in each individual case, an examination must be made of the significance the parties attributed to the individual linked contracts for the construction of their legal relationship, and of the nature of the dependency that exists between those contracts in terms of their legal and economic significance[18]

At first glance, these remarks could create the impression that the Federal Supreme Court had resolved the issue by simply applying the absorption doctrine *analogously*. Such a conclusion, however, would be methodologically unsound[19] and does not adequately represent the underlying *ratio* of 115 BGE II

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contracted and the terms of the lease; b. the duration of the lease; c. the personal, family and financial circumstances of the parties, as well as their conduct; d. any need that the landlord might have to use the premises for himself, his family members or his in-laws and the urgency of such need; e. the conditions prevailing on the local market for residential and commercial premises. Where the tenant requests a second extension, the competent authority must also consider whether the tenant has done everything that might reasonably be expected of him to mitigate the hardship caused by the notice of termination."

14. 115 BGE II 453.

15. This is not expressly stated anywhere in the statement of the Court's considerations. In explicating the specific features of hybrid contracts, however, the Court notes that the existence of such a contract must be presumed, among other things, due to the "absence of a unified act of reaching an accord." 115 BGE II 454 E. 3.a.

16. *Id.*

17. *See id*. For a different legal approach of this issue, see Bundesgericht [BGer] [Federal Supreme Court] 2005, 131 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 532–33.

18. 115 BGE II 454 E. 3.a.

19. *See* discussion *infra* Part IV.

452. For one thing, the absorption doctrine makes sense only in cases where a nominate contract contains individual elements that—although they may be foreign to such contracts—do not change the essential nature of the contract such that it can no longer be classed as a nominate contract of a specific type. In cases of truly hybrid contracts, whose nature is such that they no longer fit the predefined criteria of any nominate contract, application of the absorption doctrine leads to their undifferentiated, arbitrary type qualification, in a manner that is fully at odds with the specific economy of interests for which individual hybrid contracts are designed.[20] This being the case, the reasoning of the Federal Supreme Court cannot be understood as having been developed along such lines.[21] The "material similarity"[22] demanded by prevailing legal opinion in order to justify an analogous application of the absorption doctrine simply does not exist between nominate contracts into which foreign elements have been integrated (for which the doctrine was developed) and linked, independent contracts. In fact, the linkage of contracts *never* leaves the economy of those contracts unaltered.[23] The *ratio decidendi* on which 115 BGE II 452 depends must thus be sought elsewhere.

Perhaps, as intimated above, the primary source of this *ratio* is not to be sought in the decipherment of known jurisprudential riddles. Perhaps it is rather a reaction by the legal system to changes in the structure of society, changes that traditional theories of contract—taking, as they do, the atomized relationships of classic liberal community as their point of departure—are not designed to deal with. If that is the case, then the rationale that underlies 115 BGE II 452 will be discovered not by working through the existing inventory of contractual doctrine, but rather by investigating the sociological circumstances that have given rise to tensions that the law of contracts is unable to resolve.

The following will attempt to illuminate the underlying rationale of 115 BGE II 452 in two steps. To use Luhmann's terms, it is intended that an *external* description of the legal system of contracts will have an influence on its *internal* description.[24] With this in mind, the discussion will begin with a description of

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20. *Vor Art 184*, *supra* note 9, at N17.

21. This assessment is confirmed by the more recent case law of the Court. For an in-depth analysis of this case law, see Marc Amstutz, *The Constitution of Contractual Networks*, *in* NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION 320 (Marc Amstutz & Gunther Teubner eds., 2009).

22. KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 318 (6th ed. 1991).

23. Christian Kirchner, *Unternehmensorganisation und Vertragsnetz: Überlegungen zu den Rechtlichen Bedingungen bei der Institutionenwahl Zwischen Unternehmensorganisation und Vertragsnetz*, *in* ÖKONOMISCHE ANALYSE DES UNTERNEHMENSRECHTS: BEITRÄGE ZUM 3. TRAVEMÜNDER SYMPOSIUM ZUR ÖKONOMISCHEN ANALYSE DES RECHTS 196–215 (Claus Ott & Hans-Bernd Schäfer eds., 1993).

24. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 496–97 (1993). For an illustration of the way in which a coupling of the description of the legal system by outside observers with the system's own self-description is conceivable from an internal perspective, see Marc Amstutz, *Historizismus im Wirtschaftsrecht: Überlegungen zu Einer Evolutorischen Rechtsmethodik*, *in* FESTSCHRIFT FÜR JEAN NICOLAS DRUEY ZUM 65. GEBURTSTAG 9–29 (Rainer J. Schweizer et al. eds., 2002). *See also* Marc Amstutz, *Der Text des Gesetzes: Genealogie und Evolution von Art. 1 ZGB*, *in* ZEITSCHRIFT FÜR

the contemporary "society" that constitutes the environment in which the law of contracts operates, that is, the social layers with which that law must come to terms—a description limited, of course, to the selective observations of a legal sociological perspective, one that is thus without any ambition of providing an exhaustive understanding of this inexhaustible subject. By this means (through the observation of outside description), some initial insights should become available for providing an answer to the dilemma of finding a mechanism to enable contract law to deal adequately with the phenomenon of networks. On this foundation (as a form of "externally influenced" self-description), a reading of 115 BGE II 452 will be proposed through which isolated characteristics of a model for applying the law to linked contracts will be revealed. At the core of this second step lies, above all, the question as to the extent to which the identifiable elements of that model can find general application.

III
SELECTION IN LEGAL EVOLUTION: LAW AND SOCIETY INTERACTING

In its searching over the past decades, contract law has consistently oriented itself on the memory of past hopes—as expressed, for example, in von Gierke's[25] utopian vision of private law "with foundations deep enough and arches high enough" to embrace even social concerns "in the structure of its thought."[26] That was a consequence of the effects of social forces that had taken shape in the shadow of the "great transformation" of economically oriented society (*Wirtschaftsgesellschaft*), which have served as a restraint on the constant expansion of the market in certain directions.[27] This "supplementation" of traditional notions of private law has, however, been only piecemeal and has not fully succeeded in keeping pace with the social realignments that have taken place since Savigny's day. The measure of this "supplementation's" success was largely determined by the extent to which the interplay of social forces allowed certain expectations or demands to be articulated, to find a place on the political agenda, and to garner support in the legislature or judiciary.[28] The development of contract law stagnated at a level defined by sociological concepts from the 19th century, when, in reaction to the

SCHWEIZERISCHES RECHT 237 (Helbing et. al. eds., 2007); Marc Amstutz, *Ex facto ius oritur: Überlegungen zum Ursprungsparadox des Rechts*, 13 SOZIALE SYSTEME 243 (2007); Marc Amstutz, *Ouroboros: Nachbemerkungen zum Pragmatischen Methodenpluralismus*, *in* MÉLANGES EN L'HONNEUR DE PIERRE TERCIER 19–32 (Peter Gauch et al. eds., 2008).

25. *See* OTTO VON GIERKE, DIE SOZIALE AUFGABE DES PRIVATRECHTS 17 (Erik Wolf ed., 2d ed. 1948); GEORGES GURVITCH, L'IDEE DU DROIT SOCIAL: NOTION ET SYSTEME DU DROIT SOCIAL. HISTOIRE DOCTRINALE DEPUIS LE XVIIE SIECLE JUSQU'A LA FIN DU XIXE SIECLE 535–67 (1932).

26. *See* PEER ZUMBANSEN, ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT: LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG 209 (2d ed. 2000).

27. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1st ed. 1957).

28. Compare with the overview by Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts—Tendenzen zu Seiner "Materialisierung,"* 200 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 273 (2000) regarding German law.

"social crisis" of the time, the dark side of modernity and its toll on the individual took center stage: social stratification and inequality, the loss of community, alienation, anomie, and so on.[29]

The law of contracts has, to date, taken only scant notice of the phenomenon of social differentiation.[30] The reference here is to the process, specific to modernity, of structuring society by drawing boundaries between various social functions, each of which is performed according to its own individual logic. Activities in the individual domains of social life are no longer seen as interrelated—economic activity detached from religious, familial, and political values, taking its orientation exclusively from the "cash nexus": politics is reduced to the acquisition of power; science interests itself only for scientific truth; the arts only for artistic beauty, et cetera.[31] Attempts to substantively describe the nature of the society we live in—as an "industrial society," an "affluent society," a "knowledge society," or a "risk society," for example—only serve to underscore its highly differentiated disjointedness. As Schimank has noted, a paradoxical situation has arisen in which "the identity of modern society consists in its non-identifiability"[32]—in other words, *reality as poly-contexturality*.[33]

The various discourses conducted by society have splintered off from each other, each developing its own perspective and individual notion of rationality.[34] Every real event thus takes on a plurality of significant meanings, with the sense of each dependent upon the context of the discourses into which it is incorporated.[35] To take the example provided by Schimank, a train crash has no sooner occurred than it becomes a legal, economic, mass media, scientific, technical, medical, and—depending on the circumstances—possibly also an educational, or artistic event, the true essence of which lies in the eyes of the various beholders.[36] This fragmentation has consequences that make themselves felt in all domains, including, quite directly, in the law of contracts.

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29. *See* UWE SCHIMANK, THEORIEN GESELLSCHAFTLICHER DIFFERENZIERUNG 10 (3d ed. 2007).

30. For information about the fundamental treatment of this issue see Gunther Teubner, *In the Blind Spot: The Hybridization of Contract*, 8 THEORETICAL INQUIRIES IN LAW 51 (2006). *See also* BJÖRN THIES, CO-GRUPPEN-DEMOKRATIE: VORÜBERLEGUNGEN UND SKIZZE ZU EINER INSTITUTIONELLEN DEMOKRATISIERUNG MODERNER GESELLSCHAFTEN 71 (2012); GUNTER RUNKEL, ALLGEMEINE SOZIOLOGIE: DIE KLASSIKER, IHRE GESELLSCHAFTSTHEORIEN UND EINE NEUE SOZIOLOGISCHE SYNTHESE 151 (2012).

31. *See* Rudolf Stichweh, *Zum Verhältnis von Differenzierungstheorie und Ungleichheitsforschung: Am Beispiel der Systemtheorie der Exklusion*, *in* DIFFERENZIERUNG UND SOZIALE UNGLEICHHEIT: DIE ZWEI SOZIOLOGIEN UND IHRE VERKNÜPFUNG 353–66 (Thomas Schwinn ed., 1st ed. 2004).

32. *See* Schimank, *supra* note 29, at 181.

33. GOTTHARD GÜNTHER, BEITRÄGE ZUR GRUNDLEGUNG EINER OPERATIONSFÄHIGEN DIALEKTIK: VOL. 2: WIRKLICHKEIT ALS POLY-KONTEXTURALITÄT 283 (1979).

34. *See* Detlef Horster, *Luhmann und die Nächste Gesellschaft*, *in* ZUKUNFTSGENESE: THEORIEN DES ZUKÜNFTIGEN WANDELS 107–27 (Victor Tiberius ed., 2012).

35. *See* MICHAEL BEETZ, GESELLSCHAFTSTHEORIE ZWISCHEN AUTOLOGIE UND ONTOLOGIE: REFLEXIONEN ÜBER ORT UND GEGENSTAND DER SOZIOLOGIE 98–100 (2010).

36. *See* Schimank, *supra* note 29, at 179.

The relationship that exists between the various discourses is not one of peaceful coexistence:

> At issue is not merely a contest between value orientations; in the current perception of the clash of discourses, the 'battle of the gods' has taken on self-destructive features . . . . The discourses are so hermetically sealed off from each other, that they are mutually denied any right to be heard, so that they can only do each other 'injustice.'[37]

Interactions between the individual subsystems of society are characterized by *mutual intransparency*[38]: they share no common language and are, in consequence, mutually incomprehensible.[39] Under these circumstances, it is clear that the law of contracts suffers a drastic loss of social underpinnings: the operative closure of the individual subsystems and the multiplication of individual rationalities rob the extracontractual bases on which contracts are built—as identified by Durkheim[40]—of their relevance, at least insofar as any attempt is made to link the various discourses together by means of the contract.

How then is the ability of contracts to function assured? Here, one can follow Teubner in relying on an understanding of the contract as a form of "interdiscursivity." In this view, the contract is seen as functioning as a *reciprocal translation of discourses*, in the sense that its consummation depends on a "productive misunderstanding":

> One discourse can reconstruct the meaning of another only within its own context, but it can, simultaneously, render the meaning content of that other discourse useful as an external perturbation, in order to create something new. In this sense, the contractual translation fundamentally misunderstands the meaning of the contract within the other discourse and by that very means creates its added value. Through the contractual translation, each of these languages is capable of reconstructively misunderstanding the other and occasionally to put that misunderstanding to use.[41]

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37. *See* Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, *in* LAW, SOCIETY AND ECONOMY 149, 155, (Richard Rawlings ed., 1997) ("This is no longer a competition between different value systems; in the contemporary view of discourse collisions the 'warring gods' have assumed almost self-destructive proportions. According to Lyotard discourses are so hermetically closed that they deny each other the right to be heard and only do 'violence', 'tort', 'injustice' to one another."). *See also* Gregor Bongaerts, *Grenzsicherung in Sozialen Feldern: Ein Beitrag zu Bourdieus Theorie Gesellschaftlicher Differenzierung*, *in* SOZIALE DIFFERENZIERUNG: HANDLUNGSTHEORETISCHE ZUGÄNGE IN DER DISKUSSION 113–33 (Thomas Schwinn et al. eds., 1st ed. 2011).

38. *See* NIKLAS LUHMANN, POLITICAL THEORY IN THE WELFARE STATE 51–52 (1990) ("[D]ifferentiation [of society's system] always means that a plurality of subsystems [for example, economy, law, and politics], that cannot reciprocally observe and calculate one another exactly and with certainty, is created within the system. . . . No subsystem can explain the actual state of affairs of the others any further. It has to be satisfied with black-box observations.").

39. *See* JEAN-FRANÇOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE (1983) (arguing that any dispute in society is, as a matter of principle, unable to be settled since each party is caught in its own language game that is incomprehensible for the others.).

40. *See* EMILE DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL 184 (2007) (1893).

41. *See* Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & L. STUD. 399, 408 (2000) ("In this sense, contractual translation basically misunderstands the meaning of the agreement in the other discourse and thus creates something new. Via the contractual translation each of these languages is able to distort and misunderstand the other language and from time to time

I would like to provide further support for this approach by adding to it an element that incorporates general sociological observations on the modes of social integration in a differentiated society, which has the advantage of making the *legal sociological singularity of contractual links* recognizable. Given that differentiation leads to unresolved problems that are hardly exclusive to the law of contracts (as a subsystem of the legal system), the question can be posed in more general terms: *What is it that holds society together at all?*[42] In a functionally differentiated society, that is, a society "without a top and without a center,"[43] there is no central authority responsible for overall coordination, no "meaningful integrative meta-level overspanning the differentiation of the subsystems."[44]

In modern sociology it is assumed that social integration is achieved today, above all, through the structural coupling of social systems and the recursive processes that make it possible. To explain briefly: the term "structural coupling" is used to denote observation schemata internal to a given system that are designed to "attach an informational value to events in the [system's] environment so that they may serve as a stimulus for further operations by the system itself."[45] Through these schemata, each system is able to take into account the autonomy and operative closure of the other subsystems it coexists with, by learning to conceive of itself as a system operating in an environment comprised of other systems.[46] It does this by taking certain problems of relevance to its cosystems, whose resolutions are of value for the system's own self-description, as a reference for its own internal information processing operations. The capacity of the system both to identify itself and to orient itself by this means is termed "reflection." This capacity is of an integrative nature in the sense that the "system must control its effects on the environment by checking their repercussions upon itself."[47] To illustrate with an example,

> If it becomes clear within the scientific system that the functionality of other social subsystems—such as the economic system—depends upon the scientific system's receptivity to non-scientific criteria of utility, and that this is also, on the other hand, of importance to the scientific system itself, since its own supply of financial resources is also crucially affected by public tax revenues, which are, in turn correlated with economic growth: it is then possible that the scientific system will arrive at a point where its production of knowledge is more strongly oriented towards economic performance references . . . . Such an increase in the consideration given to extra-

make productive use of the distortion and the misunderstanding.").

42. As an introduction to the question, see Aschke, *supra* note 3, at 1–15.

43. *See* Luhmann, *supra* note 38, at 16.

44. *See* Schimank, *supra* note 29, at 181.

45. *See* Aschke, *supra* note 3, at 78 ("Ereignisse in der Umwelt [eines Systems] mit Informationswert zu versehen und zum Anlaß für weitere eigene Operationen zu machen.").

46. *See* NIKLAS LUHMANN, AUSDIFFERENZIERUNG DES RECHTS: BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 440 (1981) ("Die Identität eines Teilsystems lässt sich dann nur noch mit Bezug auf eine Sonderfunktion begründen, die das System für die Gesellschaft im ganzen erfüllt.").

47. NIKLAS LUHMANN, SOCIAL SYSTEMS 475 (Timothy Lenoir & Hans Ulrich Gumbrecht eds., 1995).

> scientific criteria would be rational for the scientific system, since its own ability to function is ultimately contingent upon the ability of its social environment, that is, of the other relevant sub-systems, to function as well.[48]

What is the effect of this redefinition of social integration as a function of systemic reflection on the law of contracts in a fragmented society? Does it provide us with any insights for a more adequate understanding of the singular nature of hybrid contracts? In order to answer these questions, it is first necessary to analyze the institution of contract from the point of view of social differentiation theory.[49] From a systems theoretical perspective, as has been adopted for the present argument, a contract is not a consensual act between two or more actors—it is a structural coupling between a society's functional systems—economic, legal, scientific, et cetera.[50] This underscores the fact that contracts make it possible for the implicated systems to describe and observe each other with reciprocal effect.[51] Contracts are able to perform this function because, as a form of structural coupling, they are a repository of possibilities upon which the implicated systems can draw for information.

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48. *See* Schimank, *supra* note 29, at 191 ("Wenn . . . innerhalb des Wissenschaftssystems deutlich wird, daß die Funktionsfähigkeit anderer gesellschaftlicher Teilsysteme—etwa des Wirtschaftssystems—davon abhängt, daß wissenschaftliche Forschung sich stärker auf außerwissenschaftliche Nutzenkriterien einläßt, und daß dies wiederum also für das Wissenschaftssystem selbst von Bedeutung ist, weil seine Versorgung mit finanziellen Ressourcen also mit dem staatlichen Steueraufkommen steht und fällt, das mit dem Wirtschaftswachstum korreliert: Dann könnte das Wissenschaftssystem dahin gelangen, seine Erkenntnisproduktion stärker auf den Leistungsbezug zur Wirtschaft auszurichten. . . . [E]ine solche größere Rücksichtnahme auf außerwissenschaftliche Kriterien [wäre] für das Wissenschaftssystem rational, weil dessen Funktionsfähigkeit schließlich von der Funktionsfähigkeit seiner gesellschaftlichen Umwelt, also der relevanten anderen Teilsysteme abhängig ist.").

49. Some scholars undertake this analysis from a purely legal standpoint. *See, e.g.*, Mathias Habersack, *§ 358: Verbundene Verträge*, *in* MÜNCHNER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: BAND 2: SCHULDRECHT – ALLGEMEINER TEIL (§§ 241–432) N26 (Wolfgang Krüger ed., 6th ed. 2012); Markus Artz, *Grundzüge des Verbundenen Geschäfts*, 4 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM 368 (2008); *see also* 136 BGE III 70. Such attempts are not very helpful and do not contribute in any way to the understanding of contractual networks. *See, e.g.*, GUNTHER TEUBNER, NETWORKS AS CONNECTED CONTRACTS (2011) (drawing an identical conclusion); Stefan Grundmann, *Die Dogmatik der Vertragsnetze*, 207 ARCHIV FÜR CIVILISTISCHE PRAXIS 718, 765 (2007); MICHAEL HUNE, WIRTSCHAFTLICHE UND RECHTLICHE DIMENSIONEN EINER MODERNEN VERTRAGSVERBINDUNG ZWISCHEN WETTBEWERB UND KOOPERATION 39 (2010); *see also* Jean Nicolas Druey, *The Path to the Law—The Difficult Legal Access of Networks*, *in* NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION 87 (Marc Amstutz & Gunther Teubner eds., 2009). A more differentiated approach is practiced in French and English jurisprudence. *See, e.g.*, Carole Aubert de Vincelles, *Réflexions sur les Ensembles Contractuels: un Droit en Devenir*, 47 REVUE DE CONTRATS 983 (2007); Roger Brownsword, *Network Contracts Revisited*, *in* NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION, *supra* note 21, at 31. For a comparative law perspective, see Fabrizio Cafaggi, *Contractual Networks and the Small Business Act: Towards European Principles?*, 493 (EUI Working Paper Law No. 2008/15, 2008).

50. *Compare* Luhmann, *supra* note 24, at 440, *with* Gralf-Peter Calliess, *Das Tetralemma des Rechts: Zur Möglichkeit einer Selbstbeschränkung des Kommunikationssystems Recht*, 21 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 293 (2000), DAN WIELSCH, FREIHEIT UND FUNKTION: ZUR STRUKTUR- UND THEORIEGESCHICHTE DES RECHTS DER WIRTSCHAFTSGESELLSCHAFT 56–9 (2001), *and* Zumbansen, *supra* note 26, at 206.

51. *See* Zumbansen, *supra* note 26, at 206.

Luhmann emphasizes the point that, seen in this way, "structural coupling has, on the one hand, an exclusionary effect—the system is of no consequence in this domain—while, on the other hand, it gives rise to causalities that the system can make use of."[52] And how is the information obtained from a contract put to use by the various systems? As has already been aptly noted, this information is "constitutive for social systems in the sense that it . . . transforms latent expectations into concrete obligations, mere projections into operational links."[53] Put differently, the information generates, within the functional systems in question, the structures of a subsystem, which push "in the direction of achieving the contractual purpose."[54] And in this, the fragmentation of the contract's effects in the context of social differentiation becomes apparent: via the contract, there arises in each of the implicated systems an autonomous discourse, each of which takes on a different form in keeping with the internal logic of the domain to which it belongs. Thus, for example, within the economic system, a contract may lead to a commercial transaction as an orderly means of disposing of property; within the legal system, that same contract gives rise to a normative discourse that treats the contract as a "process;"[55] in other functional systems (scientific, cultural, medical, educational, et cetera) it provides the impetus for a project, whose communicative execution leads to a change in the productive output of that system (knowledge gain, added aesthetic value, generalized health improvements, enhancement of social and professional competence, et cetera).[56] And all of this occurs simultaneously.

It is in this social multi-dimensionality of contracts[57] that the key to a fundamental understanding of the connectivity that is created through the affiliation of legal transactions lies. Existing attempts to articulate this relationship, while highly evocative, do not go beyond what are essentially intuitive metaphors, speaking, for example, of the "intrinsic bond" or "internal connection" that exists between unified contracts,[58] or of the "ultimate nexus"

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52. NIKLAS LUHMANN, EINFÜHRUNG IN DIE SYSTEMTHEORIE 121 (Dirk Becker ed., 5th ed. 2009).

53. Teubner, *supra* note 41, at 407 ("Contract is constitutive for a discourse in so far as it transforms latent expectations into actual obligations, changes mere projections into binding promises.").

54. *Id.*

55. *See* Birger P. Priddat, *Märkte*, *Verträge, Netzwerke: Kompossibilität—Über die Diffusion von Rationalität im Transaktionsfeld* (Discussion paper Fakultät für Wirtschaftswissenschaft Universität Witten/Herdecke, Nov. 7, 2010), http://www.uni-wh.de/fileadmin/media/w/w_forschung/discussion_papers/7-2010Priddat_dicussionpaper.pdf.

56. For a detailed discussion, see Teubner, *supra* note 41, at 407 ("If a medical operation needs to be carried out, an engineering project to be executed, a complex service to be performed, the contractual relation actualizes this potential and transforms it into a firm promise, an obligation and an actual performance.").

57. Teubner, *supra* note 30, at 51–55.

58. *See* Joachim Gernhuber, *Austausch und Kredit im Rechtsgeschäftlichen Verbund: Zur Lehre von den Vertragsverbindungen*, *in* FESTSCHRIFT FÜR KARL LARENZ ZUM 70. GEBURTSTAG 455, 472 (Gotthard Paulus et al. eds., 1973). *See also* Ernst Kramer, *Art. 19-22 OR*, *in* BERNER KOMMENTAR: DAS OBLIGATIONENRECHT, BD. VI / 1. ABT. / 2. TEILBD. / UNTERTEILBD. 1A: INHALT DES

created by an affiliation of contracts,[59] or again of the "*identité d'objet*" or the "*communauté de cause*,"[60] of "multilateral synallagma"[61] or "innominate constructions,"[62] and so forth.[63] By contrast, the differentiation theory approach proposed here makes clear the way in which such contracts contribute to the emergence of independent discourses in the functional systems of society—discourses that are in no way obliged to remain at the level of simple interactions,[64] but can evolve to a degree of complexity that compels them to develop reflective capacities, to coalesce, in other words, into reflective subsystems.[65]

This is most easily conceivable in the case of long-term contracts—franchise agreements, just-in-time agreements, joint ventures, large construction projects, technology transfer agreements, for example—where the relationships between the parties are relieved of the subject-matter and time limitations of spot transactions and assume the features characteristic of long-term cooperation arrangements. With that, the (sub)systems that emerge out of the structural coupling—in the form of a contract—begin to observe their environment, and to reflect it. This enables them, in particular, to anticipate possible conflicts between themselves and the systems that make up their environment. Such potential conflicts are analyzed, through the process of reflection, in terms of their consequences for the respective (sub)system and induce the internal correctives needed to avoid them. It is these systemic operations that form the essence of the connectivity created through the linkage of contracts.

Where multiple contracts provoke multiple discourses, in the subsystems for which they provide the link, each of which develops its own complexity, then it is possible that those discourses will begin to observe each other and to integrate each other into their own reflective processes. It was just such a reflective interloop that appears to have been generated between the discourses

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VERTRAGES N 64 (Arthur Meier-Hayoz eds., 1991); ROMEO CERUTTI, DER UNTERVERTRAG 6 (1990).

59. *See* Gernhuber, *supra* note 58, at 461. *See also* JOACHIM GERNHUBER, DAS SCHULDVERHÄLTNIS: BEGRÜNDUNG UND ÄNDERUNG PFLICHTEN UND STRUKTUREN, DRITTWIRKUNGEN 710 (1989).

60. BERNARD TEYSSIE, LES GROUPES DE CONTRATS 295 (1975); *see also* FRANÇOIS CHAIX, LE CONTRAT DE SOUS-TRAITANCE EN DROIT SUISSE: LIMITES DU PRINCIPE DE LA RELATIVITE DES CONVENTIONS 47 (1995).

61. *See* PETER W. HEERMANN, DRITTFINANZIERTE ERWERBSGESCHÄFTE: ENTWICKLUNG DER RECHTSFIGUR DES TRILATERALEN SYNALLAGMAS AUF DER GRUNDLAGE DEUTSCHER UND U.S.-AMERIKANISCHER RECHTSENTWICKLUNGEN 138 (1998); *see also* Peter W. Heermann, *Ringtausch, Tauschringe und Multilaterales Bartering*, 4 JURISTENZEITUNG 183 (1999); Peter W. Heermann, *Verbundene Geschäfte im Sinne des § 9 Abs. 1 VerbrKrG*, 200 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1 (2000).

62. *Cf.* Amstutz, Morin & Schluep, *supra* note 9, at N11, *with* Bisang, *supra* note 6, at 239.

63. In this context, see also Cordula Heldt, *Internal Relations and Semi-spontaneous Order: The Case of Franchising and Construction Contracts*, *in*: NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION 138 (Marc Amstutz & Gunther Teubner eds., 2009).

64. For more on this concept, see HELMUT WILLKE, SYSTEMTHEORIE I: GRUNDLAGEN 68 (7th ed. 2007).

65. *See id.* at 96.

that arose out of the contracts in question in 115 BGE II 452. The discourses that arose in the health system and in the economic system, both founded on the collaboration agreement on the one hand, and on the lease on the other, attempted to adapt their operations to the approaching crisis (termination of the two agreements between the doctor and the clinic). This then led to a new conflict—the extension of the lease—which was unable to be resolved by the means at the systems' disposal and thus necessitated the intervention of the legal system.[66]

Seen in this way, it is evident that the reflective interloop does not appear as such on the legal system's monitor, but only as something that can be expressed in legal terms—that is, as a combination of contracts. In other words, the law reconstructs the reciprocal reflective processes going on between the discourses in other social subsystems, each of whose discourses was set in motion by a different contract, as the subject matter of a single, hybrid contract (and specifically not as interlooped reflective operations, which are of significance only to legal sociologists and not to legal practitioners). This manner of analyzing the situation provides a far more precise understanding of what is actually going on, of the legal reality, one might say, when multiple contracts are interconnected with each other.

The contractual network—as a reflexive Tower of Babel—obscures the origins of conflicts that arise within its compass, in the sense that it is no longer possible to identify the contract according to the statutory rules governing how a given conflict is to be resolved. Each of the discourses set in motion by the respective contracts observes the conflict from its own perspective and incorporates it—as construed according to its own logic—into its own decision making calculus. Because of this, the contract is "present," as it were, in each of the implicated discourses, for which the legal system creates a situation of disarray and which is unable to deal with in that form. The legal system is no longer able to determine with sufficient precision whether a given conflict is to be interpreted within the context of contract A or contract B. It then attempts to resolve this dilemma by finding the existence a "contractual nexus" (*Vertragsverbindung*), which, aside from giving a name to the problem, does little in the way of providing a solution. Ultimately, it is the same problem that private international law constantly faces, the sole difference being that the matter at hand is not plurinational in nature but "pluricontractual." The fundamental legal issue, however, is the same: under which statutory rules is the legal question posed by the facts of the case to be judged? That is to say, under which national legal regime, for questions of private international law, or according to the rules governing which contract, in a contractual network, is the matter to be decided? Contrary to the impression that such terms as "hybrid contract" or "affiliation," and so on, may create, what is at issue is not, in fact,

66. *See supra* Part II.

an "amalgamation" or "merger" or anything of that nature, but something quite the opposite: it is a conflict between two contracts, a contract collision.

Here again, 115 BGE II 452 may serve as a source for material to illustrate the phenomenon. What was unclear, from a legal point of view, was the question whether, due precisely to the fact that a connection existed between the contracts, the extinction of the right to use premises within the clinic building was to be resolved according to the statutory rules governing the collaboration agreement or of those governing the lease. One could, at first glance, be tempted to understand the contractual link *in casu* as being of a sort that creates a linkage between two statutory contractual regimes—that is, as resulting from the reference in the lease to the termination clause in the collaboration agreement, which would then constitute, in essence, a third agreement in the nature of a "contractual coupling agreement."[67] Such an analysis, however, lacks logical precision. For it must be recalled that the parties, in reality, had no say with regard to the applicability of former Article 267a of the CO (CO Article 272), which is a mandatory rule, not a default rule.[68]

As a result, the validity of the coupling agreement was not an issue, since its effect as a contractual term would still not have been sufficient to override the statutory right to an extension of the lease. Rather, the sole question to be resolved was whether the "power of attraction"—the magnetic field, as it were—of the collaboration agreement was sufficiently powerful to suppress the effects of the other agreement's status as a lease and thus to render the mandatory former Article 267a of the CO (CO Article 272) inapplicable with regard to the conditions for the termination of the lease. In other words, the issue in 115 BGE II 452 was, in point of fact, a classic case of a collision of contracts.

IV
STABILIZATION IN LEGAL EVOLUTION: EMERGING CASE LAW

If one accepts this view of the legal reality behind 115 BGE II 452, then it follows that that ruling also signals the emergence of a new norm—obviously, not yet fully formed—for dealing with the collision of contracts. This represents a step forward in contract law doctrine, in particular, because it opens the way for a theoretical analysis of the *ratio decidendi* using a paradigm that has thus far been widely ignored. The fundamental question relates to the logic of the normative structure that underlies the collision of contracts, the norm (implicitly) applied by the Federal Supreme Court.

In attempting to answer this question, a useful point of departure may be found in theories of private international law, which have by now become highly developed and for which the construction of such norms has for many

67. *See supra* note 8 and accompanying text.

68. *See* Peter Higi, *Art. 271-274g OR*, *in* KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH: OBLIGATIONENRECHT, TEILBD. V / 2B: DIE MIETE, ZURICH: SCHULTHESS N 12 (Peter Gauch & Jörg Schmid eds., 1996).

years been an important focus of study. It is generally assumed today that a conflict of laws norm comprises three elements. First, there is the *matter for referral*, that is, the abstract legal question for which an answer is sought. Second, there must be a *term of reference*, that is, a statement of the criterion according to which the respective conflict of laws norm decides that one statute or another is to be applied. And lastly, the determination of the *lex causae*, that is, the determination as to which statutes may be held to govern the question named as the matter for referral, pursuant to the norm.[69]

By applying the logic of this normative structure to the collision norm that appeared in 115 BGE II 452, it becomes possible to clearly identify the nature of the theoretical legal question involved in that ruling. There is no difficulty in identifying the *matter for referral* in the conflict of laws rule adumbrated by the Federal Supreme Court. The abstract question concerns the modalities for terminating a lease that is in nexus with another agreement—in this case, with a collaboration agreement. Equally simple to identify are the potential *leges causae*: either the statutory rules governing termination of a lease or those governing termination of a collaboration agreement are applicable. In contrast, more problematic is the *term of reference* used in the Federal Supreme Court's conflict of laws norm, the element of the norm that determines which of the two potential *leges causae* should be applied *in casu*—the statute on leases (that is, former CO Article 267a), or the statute specific to the collaboration agreement (here, Article 5 of the contract).[70]

This is, of course, not surprising. The choice of the "right" term of reference has always been the most fervently debated issue on the "front lines of legal policy" in modern conflict of laws theory and practice.[71] As for 115 BGE II 452, the considerations set forth in the ruling contain scarcely any indications that would allow firm inferences as to the terms of reference underlying the Court's decision. Mention is made there only of the "legal" and "economic" significance of the linked contracts, and of the "interdependence" that characterizes the relationship between them. At the same time, there is an inference that the

69. *See* IVO SCHWANDER, EINFÜHRUNG IN DAS INTERNATIONALE PRIVATRECHT: ERSTER BAND: ALLGEMEINER TEIL 70 (3d ed. 2000). *See also* GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 262 (9th ed. 2004).

70. For more information on the structure of the term of reference, see CHRISTIAN VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT: ERSTER BAND: ALLGEMEINE LEHREN 454 (2d ed. 2003).

71. Rudolf Wiethölter, Book Review of Engel, Pierre, *La détermination des point de rattachement en droit international privé* [Die Festlegung der Anknüpfungspunkte im internationalen Privatrecht]. Imprimerie Pezotti, Genf 1953. 158 S., 23 RABELS ZEITSCHRIFT 186 (1958). For a fundamental discussion of the term of reference, see Robert Neuner, *Die Anknüpfung im Internationalen Privatrecht*, 8 RABELS ZEITSCHRIFT 81 (1934); Hans G. Ficker, *Verknüpfung von Anknüpfungen?*, *in* 1 FESTSCHRIFT FÜR HANS CARL NIPPERDEY ZUM 70. GEBURTSTAG 297–321 (Rolf Dietz & Heinz Hübner eds., 1965); Werner Goldschmidt, *Anknüpfungsanordnungen und Anknüpfungen: Ein rechtstheoretischer und rechtspolitischer Versuch*, *in* KONFLIKT UND ORDNUNG: FESTSCHRIFT FÜR MURAD FERID 70. GEBURTSTAG 137–50 (Andreas Heldrich et al. eds., 1978); Fritz Schwind, *Die funktionelle Anknüpfung im IPR*, *in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS 547–58 (Albrecht Dieckmann et al. eds., 1986).

"economically most important agreement" in a group of affiliated contracts should be seen as constituting the term of reference. This notion must, however, be rejected, since the ultimate effect would be an analogous application of the absorption doctrine[72] to any and all legal issues arising in connection with contractual networks. As will be discussed, it can hardly be seen as advisable that the "most important" agreement should always take precedence, without exception, over all other agreements with which it is affiliated. Such a rule would be far too lacking in the refinement needed for doing justice to the intricacies of the relationships created through contractual networks. In order to extract a viable term of reference for the conflict of contracts rule applied in 115 BGE II 452, it is thus necessary to develop further the line of thought from which its seeds can be discerned.

Here, it will be helpful first to recall the function of a term of reference in a conflict of laws rule. With regard to private international law, Schwander has provided a succinct description of that function:

> The goal of a private international law conflict of laws rule is to indicate that criterion that leads to a referral that is "adequate," respectively . . . to each kindred group of cases (such as effects of marriage, succession) to which there is a foreign aspect. What is to be sought, therefore, is that term of reference by means of which plurinational subject matters can be made subject to that national legal order that—from an abstract and, as it were, supernational perspective—is best suited for dealing with such subject matters.[73]

These observations hold true not only with regard to private international law: they also make clear what, in essence, is needed from the term of reference here being sought to complete the collision of contracts rule prefigured in 115 BGE II 452. The task that this term of reference must perform is to make "pluricontractual" subject matters subject to the terms of *that contract* within the contractual network that is *best suited for dealing with that subject matter.*

This then raises the question, of course, as to how, in concrete terms, this task is to be performed. One possibility in seeking a response is to take Schnitzer's theory of *functional reference* as a point of departure: "Determinant for the subsumption [of a legal relationship] is the *function* of that relationship . . . , since a legal relationship orders rights and duties between persons, which themselves must be ordered by their function."[74] Applied to affiliated contracts, this would mean that the determinant for the subsumption of the rights and duties of contractual parties to the terms of one contract within a group of affiliated contracts would be the function of those rights and duties within the contractual network as a whole. In other words, an "adequate" referral criterion for articulating the collision of contracts rule arising out of 115 BGE II 452 would be the ability of the contractual network to function as such.

72. *See supra* Part II.

73. Schwander, *supra* note 69, at 78.

74. Adolf F. Schnitzer, *Die funktionelle Anknüpfung im Internationalen Vertragsrecht*, *in* FESTGABE FÜR WILHELM SCHÖNENBERGER 397 (Rechts-, wirtschafts- und sozialwissenschaftliche Fakultät der Universität Freiburg eds., 1968) (emphasis in the original).

The purport of the rule would then be that the rights and duties in a contractual network are subject to the provisions of that contract whose terms assure or further the ability of that network to function in the concrete circumstances at hand.

Obviously, this does not yet provide us, strictly speaking, with a term of reference. It does, however, provide us with a rule of reference, a referential guideline, or general clause, as it were, that—in contradistinction to traditional terms of reference—must not only be construed in the light of the concrete circumstances of each case, but also completed.[75] Does it make sense for the Swiss law of obligations to construct the missing collision of contracts rule on the basis of such a "rule of reference?" Doing so would certainly be in keeping with the essential nature of the contract as a legal instrument, the plasticity of which makes it suitable for ordering the widest range of transactional relationships. The prime difficulty, however, lies in arriving at a precise understanding of the way each individual contractual network functions, and defining the role of each individual right or duty.

A theoretical basis on which a method for making such determinations could be built cannot be furnished here. It is nevertheless worth noting that in the case of certain individual contractual relations, certain laws[76] make use of criteria based on network functions in order to resolve the subsumption question as discussed here. This is of interest not only because these criteria provide guidance in the concrete demarcation of the term of reference needed for the law collision of contracts in connection with contractual networks, but also because it demonstrates that the collision of contracts perspective suggested here can be seamlessly incorporated into Swiss contract law, in particular, as it in no way conflicts with the principle of private autonomy in contracts—were it otherwise, this would presumably be the prime criticism of the position argued in this article.[77] It is, of course, not practical to deal

75. For more information on the structure of a rule of reference (in particular, as compared with the classic notion of a term of reference), see Marc Amstutz, Nedim Peter Vogt & Markus Wang, *Art. 112, 113, 116–118 IPRG*, *in* BASLER KOMMENTAR: INTERNATIONALES PRIVATRECHT N1, N6 (Heinrich Honsel et al. eds., 2d ed. 2007).

76. CO Art. 262, Para. 3, Sent. 2; CO Art. 268, Para. 2; CO Art. 291, Para. 3, Sent. 2; CO Art. 299*c*; CO Art., 399 Para. 3; and the Consumer Credit Act Art. 21.

77. A more detailed treatment of this question is not possible here. This much may, nevertheless, be said: In classic legal theory, the principle of the mutual independence of contracts in contractual networks is founded on the doctrines of privity of contract and freedom of contract. *See* Cerutti, *supra* note 58, at 54 (providing a nearly paradigmatic example). In a punctilious study on subcontracting agreements Chaix has demonstrated that adherence to this principle leads in many cases to unsatisfactory solutions that are unacceptable for a modern private law regime. *See* Chaix, *supra* note 60, at 91. If the fundamental thesis here propounded is accepted, that is, that the differentiation of society has confronted the law of contracts with the phenomenon of contract networks, for which the traditional solutions of the law of obligations are no longer adequate, then new responses must be developed. It must be kept in mind that these network constructions correspond to very real needs in the real world, with which the legal system must be able to properly deal. *See* Walter R. Schluep, *Innominatverträge*, *in* SCHWEIZERISCHES PRIVATRECHT: VOL. VII / 2: OBLIGATIONENRECHT: BESONDERE VERTRAGSVERHÄLTNISSE 798 (Frank Vischer ed., 1979). A simple appeal to the doctrine of freedom of contracts is obviously insufficient for dealing with an issue so complex.

individually with each of the express norms in the laws just referenced. Instead, two of them will be briefly discussed: CO Article 262, Paragraph 3, Sentence 2 and CO Article 399, Paragraph 2. These two provisions offer paradigmatic examples of how specific constellations of circumstances can lead to a collision of contracts.

CO Article 262, Paragraph 3, Sentence 2 provides that a landlord is entitled to demand, both of a sublessor (his own tenant) and of a sublessee—with whom he has no contractual link—that the property in question be used in a proper manner, as set forth in the primary lease.[78] Article 399, Paragraph 3 of the CO foresees that, in cases of agency, where the agent delegates his authority to a third party, whether to a substitute agent (as authorized by the principal) or to a subagent (without such authorization), the principal is entitled to hold that third party—with whom he has no contractual link—directly liable to himself for all claims to which the agent is entitled.[79] As Cerutti has noted, the two norms share a common particularity, namely, "that they grant the principal only those specific preferential rights that the legislator considers as crucial to the respective subordinate contract."[80] The inference here is that the approach to contractual networks in the Swiss law of contracts—in keeping with the viewpoint here advanced—is not founded on an undifferentiated application of the absorption doctrine in all cases where there is a conflict of contracts. On the contrary, among the various issues that can arise in contractual networks, it is only in certain very specific cases that they are addressed as "collision of contracts" issues. The corollary question raised by Cerutti's observation is then this: What is the decisive criterion on the basis of which the law imposes cross-contractual rights and duties within a network of contracts?

Taking a closer look, first, at CO Article 262, Paragraph 3, Sentence 2, it is conspicuous that although the landlord is permitted to demand directly that the sublessee respect the terms of use as stipulated in the primary lease, the right to demand payment of the rental fee is withheld.[81] If one now considers the question of the duty of care and maintenance, as arises in connection with all rental agreements,[82] the purpose of this rule, as far as the functioning of the contractual network is concerned, is clear. The nature of the affiliation between the parties to a series of leases and subleases, as a network of contracts between parties with opposing interests, is such that it cannot give rise to a commonality

78. *See* Peter Higi, *Art. 253–265 OR*, *in* KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH: OBLIGATIONENRECHT, TEILBD. V / 2B: DIE MIETE 664 N 27 (Peter Gauch ed., 1994).

79. *Compare* Walter Fellmann, *Art. 394–406 OR*, *in* BERNER KOMMENTAR: DAS OBLIGATIONENRECHT, BD. VI / 2. ABT. / 4. TEILBD: DER EINFACHE AUFTRAG N 610 (Heinz Hausheer ed., 1992), *with* Art. 399 N 92.

80. *See* Cerutti, *supra* note 58, at 39. In both cases, a so-called coupling agreement is absent. *See also supra* note 8 and accompanying text.

81. *See* Cerutti, *supra* note 58, at 39. *See also* Chaix, *supra* note 60, at 205–6.

82. For more on the duty of care and maintenance, see JOSEF ESSER & HANS-LEO WEYERS, Schuldrecht, BD. II: BESONDERER TEIL, TEILBD. 1: VERTRÄGE 130 (8th ed. 1998).

of financial interests—it is not a "rental partnership" of any kind. In order for such a construct to function at all, however, it is of crucial importance that the rental object be maintained in a serviceable condition, and the judge of whether that is the case (in keeping with what is still the prevailing foundational principle of a free market society) is the landlord, as the owner of the property. Accordingly, CO Article 262, Paragraph 3, Sentence 2 seeks to ensure that the incentive for maintaining the substance of the rental object is distributed throughout the entire network. It does this by allowing the prime generator of that incentive—property ownership—to extend its effects to all parties contractually bound within the network.

A different rationale—though also network related—underlies CO Article 399, Paragraph 3.[83] Agency and other agreements for the provision of services are, insofar as the performance to be delivered by the agent or service provider is concerned, generally characterized by a notable lack of precision.[84] This is a natural consequence of the fact that the service provider is normally a highly qualified specialist—for example, a patent attorney or heart surgeon—so that it is often impossible for the principal to state the desired performance in precise terms, since he lacks the expertise needed to do so. In order to counterbalance this precision deficit, appeal is made to a blanket contractual obligation of performance in the interests of the principal, understood as a duty of means to safeguard those interests. When the authority granted to the agent or service provider is then further delegated to a third party, the level of imprecision is raised exponentially, since the substitute or subagent has no direct duty of any kind towards the principal.[85] The cure provided by CO Article 399, Paragraph 2 consists of providing for a network-wide recourse mechanism[86]: there is a redistribution of incentives by granting the principal a direct liability claim against the substituted third party for enforcement of the duties arising from the subordinate contract. All of the parties affiliated through the network of delegated authority—and, specifically the substitute—thereby have an inducement to share, to the greatest possible degree, the objective of safeguarding the principal's interests.[87]

83. The teleological issue with regard to CO Article 399, Paragraph 3 has not yet received a proper treatment in the Swiss legal scholarship. *See* Chaix, *supra* note 60, at 234. *Compare* Fellmann, *supra* note 79, at Art. 399 N 93, *with* Cerutti, *supra* note 58, at 45, *and* PETER DERENDINGER, DIE NICHT- UND DIE NICHT RICHTIGE ERFÜLLUNG DES EINFACHEN AUFTRAGES 146f (1988); JOSEF HOFSTETTER, *Der Auftrag und die Geschäftsführung ohne Auftrag*, *in* SCHWEIZERISCHES PRIVATRECHT: BD. VII / 6: OBLIGATIONENRECHT – BESONDERE VERTRAGSVERHÄLTNISSE, 98 (Wolfgang Wiegand ed., 2000).

84. *See* FRANZ WERRO, LE MANDAT ET SES EFFETS: UNE ETUDE SUR LE CONTRAT D'ACTIVITE INDEPENDANTE SELON LE CODE SUISSE DES OBLIGATIONS: ANALYSE CRITIQUE ET COMPARATIVE 192–210 (1993).

85. *Id.* at 191.

86. *See* Fellmann, *supra* note 79, at Art. 399 N 618.

87. *See* Chaix, *supra* note 60, at 237. This teleological orientation is clearly recognizable in the Federal Supreme Court's (correct) finding in 110 BGE II 186–87, that the rights foreseen in CO Article 399, Paragraph 3 also comprehend the right of withdrawal pursuant CO Article 404. *Id.* at 209. For a wrongly critical critique (based on a dubious line of reasoning), see Fellmann, *supra* note 79, at Art. 399

This "network-functional" construction of CO Article 262, Paragraph 3, Sentence 2 and CO Article 399, Paragraph 2 opens the way to a conceptualization of these norms as objective collision-of-contracts norms, in keeping with the model argued here as having being adumbrated by 115 BGE II 452, and for considering possibilities for a more general deployment of the principle applied in that ruling by the Federal Supreme Court as here understood.[88] Both CO Article 262, Paragraph 3, Sentence 2 and CO Article 399, Paragraph 2 take as their term of reference (or, more precisely, as grounds of referral) the capacity of the contractual network to perform its function. At the same time, however, the concrete manner in which this general term of reference is to be applied is variable and depends upon the specific *modus operandi* of a given contractual network or of a given category of contractual networks. CO Article 262, Paragraph 3, Sentence 2 seeks to extend the scope of the principal's rights of ownership as "anchored" in the primary lease throughout the entire nexus of leases. In contrast, the aim of CO Article 399, Paragraph 2 is to reconnect the agency or service performance obligations of a substituted third party, as anchored in the subordinate contract, with the primary function of safeguarding the principal's interests.

The formulation of the individual provisions is, accordingly, adapted to those concrete objectives. CO Article 262, Paragraph 3, Sentence 2 makes the duties of the debtor (the sublessee) subject to the terms of a contract to which the debtor is not formally a party (the primary lease). Conversely, CO Article 399, Paragraph 2 makes the rights of the creditor (the principal) enforceable under the terms of a contract (the substitution agreement) to which the creditor is not formally a party.[89] This "modulation" of the term of reference makes it possible for those whose task it is to apply the respective norms to subsume the matter for referral in each case under the "adequate" contractual regime. Though it is not possible to go further into the question here, it may be assumed that these norms furnish two of the possible paradigms for collision-of-contracts rules whose practical potential reaches far beyond the scope of leasing or agency agreements.

N 103. For critical remarks worthy of more serious consideration, see Cerutti, *supra* note 58, at 40, 119f-120.

88. The question of a more general applicability arises in connection with the fact that the statutory provisions mentioned have left the realm of *bilateral* agreements (as dealt with in 115 BGE II 452) and entered that of *trilateral* agreements, where there are three different contractual parties involved.

89. Fellmann fails to do justice to the fundamental difference between the structure of CO Article 262, Paragraph 3, Sentence 2 and that of CO Article 399, Paragraph 3, when he states that in both cases a "unilaterally grounded obligation" is created. *Supra* note 79, at Art. 399 N 97. By contrast, Chaix distinguishes in the same manner as here argued, between the "effets négatifs du contrat" and the "effets positifs du contrat." S*upra* note 60, at 185.

IV
CONCLUSION

Whether the theoretical construct of an objective collision-of-contracts law, as sketched in the foregoing, merits further development is a question that the future and, more specifically, the academic debate, will decide—insofar as it is willing even to enter into a discourse on the issue. In my view, the collision-of-contracts perspective provides a highly promising method for comprehending contractual networks within a legal regime for two reasons: not only because it offers a highly sensitive tool for deciding questions of referral, but also because it is principle based and should thus make it possible to avoid the need for perpetually improvised, ad hoc decisions. This then leaves us with a final question, namely, whether the development of a theory of contractual networks is, in the absolute sense, something even to be desired. In any case, for those of us with a preference for "timeless law," for a "law in its own time," there is little doubt on the matter—for, as von Jhering famously reminded us, *esse sequitur operari*.[90]

90. RUDOLF V. JHERING, VORGESCHICHTE DER INDOEUROPÄER 96 (1894).