

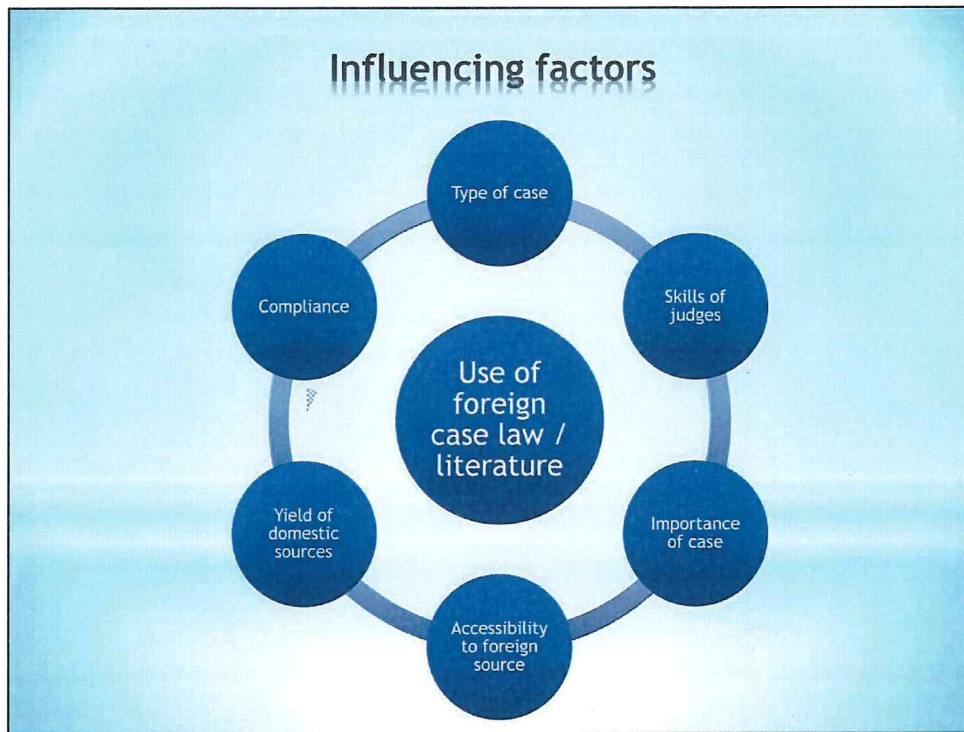
Use of Foreign Case Law by Courts

A Swiss View

by

Justice Thomas Stadelmann
Swiss Supreme Court

Also: use of foreign literature



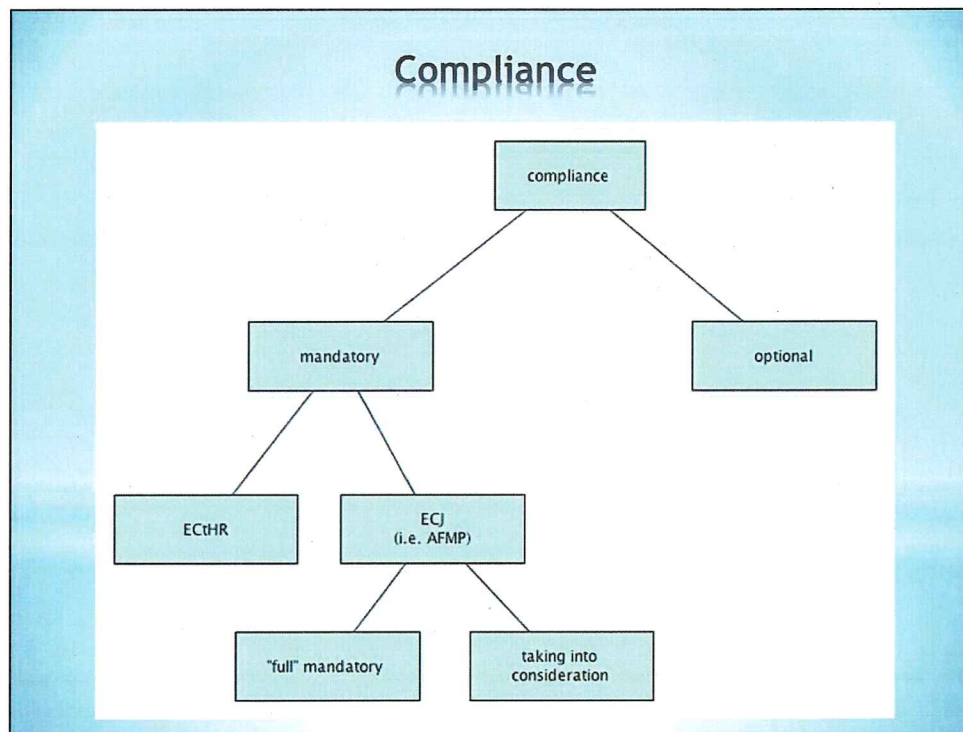
➤ Compliance: Following foreign case law mandatory or optional

➤ Type of case

➤ Skills of Judges

➤ Yield of:
domestic rules,
domestic case law,
domestic literature

➤ Accessibility to:
foreign case law,
foreign literature



- European Court of Human rights => mandatory
 - ECJ: depending on agreement
 - Agreement between EU and CH on free movement of persons
 - => partially mandatory, partially only obligation to take in consideration
 - Optional: Use of foreign cases in Switzerland still exception; pioneer „Swiss Federal Administrative Court“
 - in general aleatoric, notably in judgements of the Swiss Supreme Court
- Reasons? Maybe following slides will give some answers

Agreement on the Free Movement of Persons (AFMP)

Article 16

Reference to Community law

1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.

2. Insofar as the application of this Agreement involves concepts of Community law, **account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention.** To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.

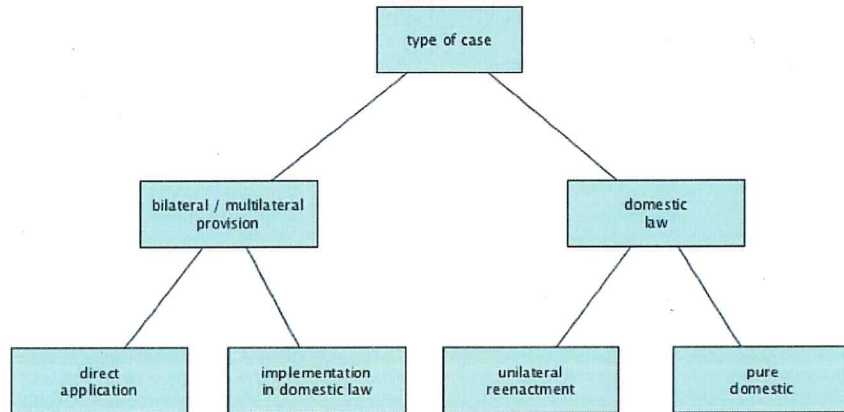
➤ AFMP

Compliance to ECJ Case law mandatory if before 21st of June 1999

After 21st of June 1999 approach of majority of involved panels of Supreme Court: comply with decisions of ECJ if ever possible

=> absurd situation that SC blamed the parliament for discrimination of residents, where as the parliament adopted the case law of the ECJ in effect 2005 for the respective law and it was the Supreme Court who provoked a discrimination of residents by adopting newer case law of the ECJ regarding EU citizens.

Type of case



f.i.:
- ECHR
- DTC

f.i.:
- tax at source
(of employees)
in conjunction with
Agreement EU-CH
on free movement
of persons

f.i.:
- VAT

Skills of Judges

- Knowledge and experience in public law
- Knowledge and experience in tax law
- Knowledge and experience in public international law and in international public law
- Language competences (in part. English)
- Open-mindedness

Difficult if only experienced in private law

f.e. if one doesn't know that DTC don't constitute the right to tax but limit it

Difficult if no experience with interpretation of international treaties and the application of the VCT

Negative example: 143 II 146 cons. 6.1.1:

The question if the OECD Model Tax Convention and the Commentary should be applied dynamic or static does not arise. Reasoning: The federal council declared in his message regarding the Tax Administrative Assistance Act, TAAA, that he wanted to adopt the considerations made in the commentary, version 2012

Problems: - unilateral material should not be taken in consideration for treaty interpretation

- the treaty in discussion was concluded before 2012

- the federal council made his remarks in another context, regarding

the TAAA

Accessibility to foreign case law and foreign literature

- Access
- Language
- Search tools

Access: helps a lot if online accessible, maybe even a *conditio sine qua non*

Tools

- IBFD Database
- ECJ
- ECtHR
- German Bundesfinanzhof
- International Tax Law Reports ?
- ...

Depending on personal likings- and skills - of the individual judge
=> Very aleatoric

Depending also on financial resources: ITLR

Examples

➤ Mandatory:

- BGE 136 II 241: „The flat-rate deduction, which is included in the tax rate of the withholding tax ... Violates the prohibition of discrimination stipulated in art. 2 AFMP.“
referring to case law of the ECJ
- SSC 2C_221/2009: European Community law does not prohibit the Member States from providing for compulsory military service solely for men.
referring to case law of the ECtHR and the ECJ

➤ Optional:

- BGE 138 II 251: „The ‚Wellcome-Practice‘ developed by the ECJ, according to which the entrepreneurial nature of the activity of a physical person is assessed with a view to the overall use of ‚similar means as a producer, trader or service provider‘, is analogous applicable in Swiss VAT law.“
- SFAC BVGE 2010/ 7 E: „A memorandum of consultation can't change the agreement; but it is a means for interpretation.“
referring to Austrian Verwaltungsgerichtshof; German Bundesfinanzhof;
Appelationsgericht Gent

Excursus: “Entscheidungsharmonie” (Harmonisation of Decisions)

- Definition ?
- Legal foundation ?
- New approach:
International Tax Court ?

Definition: effort to obtain corresponding interpretation of articles of treaties through harmonisation of decisions of different

Legal foundation:

- in treaty: AFMP art. 16 par. 2: „To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.“
- Art. 31 par. 1 Vienna Convention on the law of treaties (VTLC): „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.“ ??
- Purpose of DTC: „avoidance of double taxation“ and – new ? – avoidance of double non-taxation ??

International Tax Court:

- A matter to put on the agenda by IATJ ?

Remarks?

Questions?