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Legal Transplants Under the Magnifying Glass: A Bridging Study from Louisiana to Germany and Back

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I. INTRODUCTION

In his chef d'oeuvre *On the Spirit of Law*s Charles de Secondat, Baron de la Brède et de Montesquieu outlines his ideas for designing a government that would work best for its people.[1] These received universal attention. But Montesquieu's admonition that "[t]he political and civil laws of each nation must be so peculiar to the people for which they were made, such that it would pose a great danger if those of one nation could be agreeable to another"[2] has been largely confined to the discussion of "legal transplants" conducted in comparative law circles over the past several decades.[3] Independent of the wisdom and utility of the metaphor, whether rooted in advanced surgery or simple gardening,[4] the theory of legal transplants posits the technical transfer of legal conceptions, rules and institutions from one legal order to another.

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1. CHARLES DE SECONDAT BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS LIV. 1, CHAP. 3 *in* OEUVRES DE MONSIEUR DE MONTESQUIEU (A. Amsterdam et A. Leipsick 1764).

2. *Id.* at 102 ("Les loix politiques et civiles de chaque nation . . . doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à un autre.").

3. For a concise and insightful discussion of the debates, along with a critical evaluation, see Gudula Deipenbrock, *Legal Transplants?—Rechtsvergleichende Grundüberlegungen zum technischen Rechtsnormtransfer*, 107 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [ZVGLRWISS] 343 (2008) (using the "technical transfer of legal norms" as the overarching category). *See also* John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637 (2013) (adding a personal note to his meticulous review of the history of the theory of legal transplants).

4. Deipenbrock, *supra* note 3, at 345. *See also* Cairns, *supra* note 3, at 643 (referring to organ transplantation and organ rejection as common discussion topics in the 1960s and 1970s).

The academic debates about the comparative viability of legal transplants, however, have largely remained in the theoretical and methodological realms, with a divide among interlocutors as to the perspective that should guide the analysis—the recipient system undertaking the borrowing, the donor system where the model resides, or the expertise of a third person who could not be neatly attributed to either side?[5] Yet, the crucial question of whether it might be desirable or beneficial to keep the umbilical cord between the recipient and donor systems intact as a live conduit for informing the operations of the transplant, even long after the transfer has been confected, has not received much scholarly attention.

Instead of another piece at the macro-legal levels, this Article tells the story of a specific legal transplant borrowed by Louisiana from Germany: the limited personal servitude of right of use. Triggered by Louisiana litigation over the scope and extent of such a servitude, the Article describes my project of reconnecting discussions in the recipient system with the practical operations of the transplant in the donor system.

After introducing the arc of the legal transplants discourse and reviewing the litigation in Louisiana, the Article presents the yield of extensive research that I conducted in Germany. It addresses several questions posed with regard to construing the German model. Was its English translation before the Louisiana drafters accurate? What is the nature of the law borrowed from Germany? What is the framework of analysis developed by German doctrine and courts? How have the courts in Germany decided comparable cases? What lessons, if any, can be learnt from how the transplant is construed in Germany? The Article concludes with recommendations for what I might call transplant care.

II. THE LEGAL TRANSPLANTS DISCOURSE: SCHOOLS AND PROTAGONISTS

In the early 1970s, Alan Watson, who is generally considered the founder of the theory of legal transplants,[6] assessed that, because heavy and successful legal borrowing had been confirmed by history, transplantation offered a viable methodological comparative law tool to

5. *See* Deipenbrock, *supra* note 3, at 358.

6. Mathias Siems, *Malicious Legal Transplants*, 38 LEG. STUDIES 103, 104 (2018) (describing Alan Watson as the "founding father" of the theory). *See also* Cairns, *supra* note 3, at 688 (crediting Frederick P. Walton with the first use of the terms "transplant" and "transplantation" as early as 1927).

elucidate relationships between legal systems.[7] In response, Otto Kahn-Freund countered that the theory disregarded the societal and cultural realities and dynamics, which stand in the way of readily transferring law from the donor system to the recipient system.[8]

Subsequent to the early debates, numerous conceptual models modifying or refuting the theory of legal transplants have emerged. Pursuant to his deep interest in comparative law methodology, Rudolfo Sacco added to the discussion of transplants the dimension of "legal formants"—factors such as legislated law, doctrine, jurisprudence as well as behavioral patterns ("cryptotypes") that float in the legal landscape with the potential to act as stimulants for the rise of unified law.[9] Against the backdrop of unification-of-law initiatives in Europe, Pierre Legrand gave expression of his deep skepticism by contending that legal transplants were conceptually impossible because law, by its nature, function and role, was contextually hitched to a specific interpretive community;[10] and therefore, were one to change its context, the law would change.[11] Considering legal transplants a somewhat misleading metaphor, Gunther Teubner, a system theorist, developed the model of "legal irritants" to describe a diagnosis of touchiness when alien law, which could not be domesticated, comes into contact with indigenous social sectors in the recipient system and triggers a whole series of new and unexpected events.[12] Speaking of legal transfers and drawing on the social engineering debates of the 1960s and 1970s, David Nelken argued for a sociological approach to the relationship between law and society, especially when

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7. ALAN WATSON, LEGAL TRANSPLANTS, AN APPROACH TO COMPARATIVE LAW (1st ed. 1974) (illustrating his proposition with the reception of Roman law). For the second edition, supplemented by the author's afterword, see ALAN WATSON, LEGAL TRANSPLANTS, AN APPROACH TO COMPARATIVE LAW (2nd ed.1993).

8. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974). For detailed background with regard to the debate between Watson and Kahn-Freund, see Cairns, *supra* note 3, at 642-48.

9. Rudolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment I of II), 39 AM. J. COMP. L. 1 (1991); Rudolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment II of II), 39 AM. J. COMP. L. 343 (1991). For additional detail, see Deipenbrock, *supra* note 3, at 351-53; Cairns, *supra* note 3, at 670-71.

10. Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. COMP. L. 111 (1997); *see also* Pierre Legrand, *What "Legal Transplants"?*, *in* ADAPTING LEGAL CULTURES 55 (David Nelken & Johannes Feest eds., 2001).

11. Cairns, *supra* note 3, at 680.

12. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 (1998). For more detail, see Deipenbrock, *supra* note 3, at 353-55; Cairns, *supra* note 3, at 682-83.

"legal cultures" undergo a process of adaptation.[13] Roger Cotterell argued for moving the debate about transplants into actual contexts and consequences of "rapid legal change" driven by political law and transnational regulatory pressures.[14] More recently, Gudula Deipenbrock recommended that those confronted with technical transfers of legal norms should opt for openly textured comparative law methodologies and unencumbered working hypotheses, which means letting go of the doctrinal blinders associated with restricting the scientific process either to a search for commonalities or a primacy of the dissimilitude.[15]

In the contemporary literature, the omnipresence of legal transplants has been widely accepted.[16] But the visor has shifted to the reasons for and fallout from trans-jurisdictional circulation.[17] For example, legal transplantation may be externally imposed.[18] It may prove attractive to societies in transition, whether in the wake of post-conflict rehabilitation or linked to economic aid schemes. Otherwise, legal borrowing may be due to the prestige of a foreign model under consideration,[19] possibly based on a pre-existing relationship, a simple desire to save resources in the process of law reform[20] or a shrewd ploy by norm entrepreneurs to create positions of knowledge and advantage in the home arena.[21]

Being a prominent member in the family of mixed jurisdictions,[22] Louisiana offers a particularly fertile ground for the practical study of legal transplants. Its mixed legal heritage is replete with legal borrowings from a rich palette of donor systems. These include not only France, Spain and

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13. DAVID NELKEN, COMPARING LEGAL CULTURES (2007); David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES, *supra* note 10, at 7, 8. For additional references, see Deipenbrock, *supra* note 3, at 355-57, Cairns, *supra* note 3, at 683-86.

14. Roger Cotterrell, *Is There a Logic of Legal Transplants*, *in* ADAPTING LEGAL CULTURES, *supra* note 10, at 79. *See also* Deipenbrock, *supra* note 3, at 358-59; Cairns, *supra* note 3, at 683 n.298.

15. Deipenbrock, *supra* note 3, at 357-61.

16. For this proposition, see, for example, Eugenia Kurzynsky-Singer, *Wirkweise der Legal Transplants bei den Reformen des Zivilrechts*, 14/8 Max Planck Private Law Research Paper 4 (2014) (offering further references).

17. *See, e.g.*, Jaakko Husa, *Developing Legal System, Legal Tranplants, and Path Dependence: Reflections on the Rule of Law*, 6 CHIN. J. COMP. L. 129 (2018); Siems, *supra* note 6, at 103-19; Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003).

18. Miller, *supra* note 17, at 847-49.

19. *Id.* at 854-67.

20. *Id.* at 845-46.

21. *Id.* at 849-54.

22. T.B. Smith, *Mixed Jurisdictions*, *in* 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Konrad Zweigert & Ulrich Drobnig eds.) para. 2-228 (Martinus Nijhoff 1976).

the United States as the typical suspects, but also donor locales not necessarily associated with Louisiana law, such as, for example, Germany.[23] The importation of German law, frequently in the guise of Greek law, which in turn has heavily copied from German law,[24] is a much more recent phenomenon.

III. PROJECT TRIGGER: LITIGATION IN THE RECIPIENT SYSTEM

More than four decades after being enacted on the basis of a legal transplant from Germany a controversy over the question of how to construe Article 642 of the Louisiana Civil Code ("Article 642"), which addresses the extent of limited personal servitudes of right of use, recently ended, for now, before the Louisiana Supreme Court. Article 642 declares that "[a] right of use includes the rights contemplated or necessary to enjoyment at the time of its creation as well as rights that may later become necessary, provided that a greater burden is not imposed on the property unless otherwise stipulated in the title."[25]

A. The Story

In 1979, Texas Brine Corporation, LLC (Texas Brine) entered into a "Salt and Underground Storage Lease" with the predecessors of W&T Offshore, LLC (W&T) to utilize certain land for conducting salt mining operations.[26] Pursuant to the lease Texas Brine was granted a limited personal servitude of right of use "to construct, operate and maintain a pipeline for the transportation of brine over and across" the leased property.[27] The original pipeline, which was installed in 1980, was 14 inches in diameter and 6.7 miles long.[28] In 1993, W&T acquired a co-ownership interest of roughly a quarter in the land that was burdened by the right of use.[29] Several years later, after the original pipeline had begun to leak, Texas Brine installed a replacement pipeline, which was 18 inches in diameter, roughly 7 miles long, and eight feet away from the original

23. *See* Markus G. Puder, *Law and Language in Action: Transformative Experiences Associated with Translating the Louisiana Civil Code into German*, 84 RABELSZ 282 (2020).

24. INTRODUCTION TO GREEK LAW (Konstantinos D. Kerameus & Phaedon J. Kozyris eds. 1988). For a review of the work, see Christopher L. Blakesley, *Introduction to Greek Law*, 39 AM. J. COMP. L. 446 (1991).

25. La. Civ. Code art. 642 (1976).

26. W&T Offshore, L.L.C. v. Tex. Brine Corp., 250 So. 3d 970, 973 (La. App. 1 Cir. 2018).

27. *Id.*

28. *Id.*

29. *Id.*

pipeline.[30] All co-owners except W&T had previously agreed to the project.[31]

In the litigation that followed between Texas Brine and W&T their various actions were ultimately consolidated.[32] Texas Brine sought declaratory and injunctive relief asserting that the construction and operation of the replacement pipeline was covered by the original lease as well as the agreement with the other co-owners.[33] W&T emphasized that it never gave its consent to the replacement project and therefore, asked in its own right for injunctive and possessory relief, damages for trespass, and damages for bad faith.[34]

B. The Outcome

The district court held for Texas Brine and granted it full injunctive and declaratory relief, while dismissing all of W&T's claims.[35] According to the district court, both the new location for the replacement pipeline as well as the increase in its diameter were covered by Article 642. On appeal, the Louisiana First Circuit held that Article 642, as applied to the original agreement between the grantors of the right of use and Texas Brine, allowed Texas Brine to construct and install a replacement pipeline,[36] which could be located eight feet away from the original pipeline in order to allow for continuous production and transportation of salt brine over the servient estate.[37] However, the increase in diameter by four inches constituted a trespass on the servient estate because Texas Brine had failed to obtain consent from all of the co-owners of the servient estate.[38] Therefore, according to the court, W&T was entitled to trespass damages against Texas Brine. Both Texas Brine and W&T Offshore filed petitions for writs of review which were granted.[39] In a brief per curiam opinion supported by four of the seven justices, the Louisiana Supreme Court reversed the court of appeal and reinstated the judgment of the district court with regard to the trespass claim and damages.[40] A few months later,

30. *Id.* at 973-74.
31. *Id.* at 973 & 974.
32. *Id.* at 974.
33. *Id.*
34. *Id.* at 974-75.
35. W&T Offshore, L.L.C. v. Tex. Brine Corp., C-128742 C/W C-128754 (Jan. 27, 2017).
36. W&T Offshore, 250 So.3d 970.
37. *Id.* at 979-80.
38. *Id.* at 980-81.
39. W&T Offshore, L.L.C. v. Tex. Brine Corp., 253 So.3d 788 (La. 2018).
40. W&T Offshore, L.L.C. v. Tex. Brine Corp., 2019 La. LEXIS 1582 (per curiam), at pp. 1-2.

the Louisiana Supreme Court granted W&T's application for a rehearing,[41] but subsequently recalled its order and denied W&T's application for a rehearing.[42]

IV. TWIN SPINS: CONNECTIONS BETWEEN THE LEGAL PROVISIONS IN THE RECIPIENT AND DONOR SYSTEMS

As illustrated by the litigation, the stakes involved with the proper construction of Article 642 are high. In light of the startling scarcity of secondary source materials and the author's own scholarly interest in interactions between Louisiana law and German law, the idea for reconnecting the construction of the legal transplant in the recipient system of Louisiana with its practical operations in the donor system of Germany was born.

A. From Louisiana

The rise of Article 642 did not occur as a result of selective borrowing but was part and parcel of a wholesale reception of Germany's law governing limited personal servitudes into Louisiana law. In 1976, Louisiana enacted a sweeping overhaul of its law of servitudes. Jettisoning the French servitude of "use" the revision established the personal limited servitude of right of use, which was previously not codified in Louisiana law.[43] Limited personal servitudes are a species of real rights conferring on a person certain specified advantages of use or enjoyment over an immovable belonging to another person.[44] Limited personal servitudes fill an intermediary position between predial servitudes, which are charges in favor of an estate, and usufruct, which furnishes full enjoyment.[45] In the words of the late Greek-American law professor A.N. (Thanassi) Yiannopoulos who was the driving force behind the reform "[t]he notion of limited personal servitudes is sufficiently broad to accommodate not only habitation [a nominate limited personal servitude] but all real rights that confer on a person a specified use of an immovable less than full

41. W&T Offshore, L.L.C. v. Tex. Brine Corp., 2019 La. LEXIS 2592.

42. W&T Offshore, L.L.C. v. Tex. Brine Corp., 2020 La. LEXIS 212 (per curiam), at p. 1.

43. A.N. YIANNOPOULOS, 3 LOUISIANA CIVIL LAW TREATISE: PERSONAL SERVITUDES 520-29 (5th ed. 2011) (offering that the revision of the Louisiana Civil Code codified the holdings of a number of Louisiana judicial decisions which had gradually recognized that the specified list of real rights less than full ownership in the Civil Code of 1870 (usufruct, use and habitation) did not prohibit the recognition of what we now call a limited personal servitude of right of use).

44. *Id.* at 520-21.

45. *Id.* at 521.

enjoyment."[46] Compared to its precursor, the right of use embodies a more open but completely different category of real rights. Rather than restricting itself to the gratuitous use of a thing or its fruits for personal or family wants,[47] the revised servitude "confers in favor of a person a specified use of an estate less than full enjoyment."[48] Needs for extracting a maximum of wealth out of property interests through dismemberments of ownership, demands for a greater margin of contractual freedom in property law, and benefits associated with a systematization of property rules have been regularly invoked as revision rationales.[49]

Article 642 emerged as an integral part of the reform package. The revision comments, which do not enjoy the status of hard law,[50] merely declare that "[the] provision is new [and] based on corresponding articles in the German Civil Code and in the Greek Civil Code."[51] In his treatise on servitudes, Professor Yiannopoulos identifies the models for Article 642 in the donor systems: Section 1091 of the German Civil Code ("Section 1091"), along with Article 1189 of the Greek Civil Code.[52] Other than these cryptic references no further scholarly elaborations with regard to the specifics surrounding these transplants have been offered. The pre-enactment materials prepared by the reporter, Professor Yiannopoulos, are available through the Louisiana State Law Institute. They furnish few insights other than that the committee at the helm of revising the law was exposed by the reporter to the contents of Section 1091 through an unofficial translation into English.[53]

Otherwise, however, no documentation is available with regard to possible consultations of any other materials that could possibly further elucidate the contents of what was thought to have been transplanted from Germany in 1976. To this day it is unknown whether court decisions or doctrinal literature from Germany were ever accessed to inform the drafting process that culminated in Article 642.

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46. *Id.* at 523.
47. *Id.* at 555.
48. La. Civ. Code art. 639 (1976).
49. YIANNOPOULOS, s*upra* note 43, at 522.
50. For a comprehensive discussion of Louisiana's experience with comments, see Melissa T. Lonegrass, *Hidden Law: taking the Comments More Seriously*, 92 TUL. L. REV. 265 (2017).
51. La. Civ. Code art. 642 rev. cmt. (1976).
52. YIANNOPOULOS, s*upra* note 43, at 522.
53. A.N. Yiannopoulos, Appendix, Memorandum No. 33, Advisory Committee for the Revision of Book II of the Louisiana Civil Code of 1870 (undated).

B. To Germany

In its current German version, Section 1091 reads: "Der Umfang einer beschränkten persönlichen Dienstbarkeit bestimmt sich im Zweifel nach dem persönlichen Bedürfnis des Berechtigten." [54] Other than undergoing a simple apocope, which dropped the last two letters of "Bedürfnisse"[55] to achieve "Bedürfnis,"[56] without a change in meaning, the provision has remained untouched since its enactment more than a century ago.

At the outset, the German Civil Code is legally authentic in the German language only. An unofficial translation available to the Louisiana framers of Article 642 read: "In case of doubt, the extent of a limited personal servitude is determined in the light of the needs of the person having the right."[57] A more recent translation published under the auspices of Germany's Federal Ministry of Justice and Consumer Protection but offered "solely as a convenience [and without] legal effect for compliance and enforcement purposes"[58] declares: "The scope of a restricted personal easement is determined in case of doubt by the personal need of the person entitled."[59] Finally, in light of its legal nature, I would personally prefer to align the translation more closely to the source text: "The extent of a limited personal servitude is, when in doubt, determined by the personal need of the person having the right."

A facial comparison between these translations yields several observations. First, the translation available in 1976 changes the word order. It moves the phrase "in case of doubt" to the beginning of the provision and thereby shifts the emphasis. Moreover, its phrase "in light of" appears fuzzier than "by." Also, the translation before the discussants uses the plural "needs" rather than the singular form chosen by the German original. Might the translator have conflated the dative singular following a modal preposition with a plural form? Finally, the translation before the committee properly uses civilian legal English for identifying the real right in question as a "limited personal servitude" rather than a "restricted

54. Bundesministerium der Justiz und für Verbraucherschutz & Bundesamt für Justiz, Gesetze im Internet, Bürgerliches Gesetzbuch (2019), *at* https://www.gesetze-im-internet.de/bgb/BGB.pdf.

55. Bürgerliches Gesetzbuch [BGB], RGBl. 1896, p. 195, no. 21 (Aug. 24, 1896), entered into force on Jan. 1, 1900, *at* http://www.koeblergerhard.de/Fontes/BGBDR18961900.htm.

56. BGB § 1091 in the version of Jan. 2, 2002, BGBL. 2002 I, p. 42 (Jan. 2, 2002).

57. Yiannopoulos, *supra* note 53 (Appendix, 2. German Civil Code).

58. Bundesministerium der Justiz und für Verbraucherschutz & Bundesamt für Justiz, *supra* note 54, *at* https://www.gesetze-im-internet.de/Teilliste_translations.html.

59. *Id. at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4209.

personal easement" as offered by the German Government's version, which invokes but oddly hybridizes, yet truncates, the common law term of art "easement in gross."[60] These preliminary observations are offered in recognition of the diagnosis that "law and language" disconnects in the context of a legal transplant could "cause problems for the unwary in comparison,"[61] especially in light of the practice to outsource translation work to contractors with little or no comparative legal training. Quite surprisingly, a more recent stream in the comparative legal academy, and legal practice for that matter, has chosen to embrace a posture of ignorance with regard to this proposition.

Legal transplants generally run the risk of becoming uprooted and rootless, especially when their construction relies on purely textual comparisons ("textism") conducted exclusively in the recipient system.[62] As the full complement of German secondary sources is not readily available in Louisiana, I decided to conduct a reconnaissance visit in the donor system and research how Section 1091 has fared in German theory and practice. Hosted by a German research center known for its rich collections of source materials from all over the world I consulted the doctrinal literature as well as the topical jurisprudence in the donor system to distill a framework of analysis and develop a more practical sense for Section 1091 through the study of cases actually decided by the courts.

1. Framework for Understanding the Transplant Provision

Section 1091 is formulated in the crisp style so characteristic of the German Civil Code. This stems from the pandectist credo to create a scientific codification that eschews any textual surplusage.[63]

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60. Knud E. Hermansen & Donald R. Hermansen & Richards, *Main Roads and Easements*, 48 ME. L. REV. 197, 203 (1996) ("An easement in gross benefits a person rather than a parcel of land.").

61. Cairns, *supra* note 3, at 665 (crediting a law review article authored by Gregory Alexander in 1976). *See* Gregory Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602, 629 n.121 (1976).

62. Bernhard Großfeld, *Schritte über Grenzen: Rechtsvergleichende Kulturerfahrung*, *in* 20 WORTE?—WERKE?—UTOPIEN: THESEN UND TEXTE MÜNSTERSCHER GELEHRTER 93 (LIT Verlag Berlin 2019) (inviting comparativists to delve deeply into the cultural background of the legal norm in question or what the author calls the "ocean of silence" (*Ozean des Schweigens*), the "dreamy landscape" (*Traumlandschaft*)).

63. *See generally* Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C.L. REV. 837 (1990).

a. Nature of Section 1091

In terms of legal methodology Section 1091 houses an "interpretive rule" (*Auslegungsregel*) offered in "suppletive law" (*abdingbares Recht*).[64] This double feature is not discernable to the unschooled eye. Under German doctrine, interpretive rules rank as such among the types of dispositive law.[65] A closer look at the nature of Section 1091 yields more specific observations.

Firstly, the seemingly innocuous phrase "when in doubt" (*im Zweifel*) deployed by Section 1091 is, in German legal technolect, a signal for the rise of a rule of interpretation.[66] The language thus makes clear that Section 1091 embodies neither an "irrebuttable presumption" (*unwiderlegliche Vermutung*), which does not allow the other party to refute, nor a "fiction of law" (*gesetzliche Fiktion*), which presupposes a fact that under no circumstances reflects reality.[67] Both would generally be signaled by the phrase "shall be deemed" (*gilt*).[68] Since the law does not codify any further guidance as to how interpretive rules are executed, courts will refer to the prevailing canons of interpretation[69] when resolving uncertainties about the extent of limited personal servitudes.

Secondly, the suppletive nature of Section 1091 is not obvious from its text because Germany's Civil Code does not identify whether a particular provision is suppletive and how to go about answering this

64. Wolfgang Wiegand, *BGB § 1091*, *in* STAUDINGER, BGB, 3 SACHENRECHT, ERBBAURG, §§ 1018-1112 (ERBBAURECHTSGESETZ, DIENSTBARKEITEN, VORKAUFSRECHT, REALLASTEN) § 1091 para.1 (Sellier/de Gruyter, Berlin 2017) (interpretive rule of a dispositive nature); Michael Martinek, *§ 1091 Umfang*, *in* JURIS PRAXISKOMMENTAR, 3 SACHENRECHT § 1091 para.1 (juris GmbG, Saarbrücken 2017) (suppletive rule of interpretation); Horst Konzen, *§ 1091 [Umfang des Rechts]*, *in* BÜRGERLICHES GESETZBUCH, 16 SACHENRECHT § 1091 para.1 (Verlag W. Kohlhammer, Stuttgart 2001) (not mandatory law). For historical documentation emphasizing that a suppletive rule of law, rather than a mere interpretive rule of interpretation alone, should be established, see, for example, DIE BERATUNG DES BÜRGERLICHEN GESETZBUCHS IN SYTEMATISCHER ZUSAMMENSTELLUNG DER UNVERÖFFENTLICHTEN QUELLEN, SACHENRECHT II (1018-1296) 314 (Horst Heinrich Jakobs & Werner Schubert eds.) (Walter de Gruyter, Berlin/New York 1991); BENNO MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH, III. BAND: SACHENRECHT 567 (R.v. Decker's Verlag, G. Schenk GmbH, Heidelberg 1899).

65. For a comprehensive elaboration of this proposition, see Lorenz Kähler, *Begriff und Rechtfertigung abdingbaren Rechts*, 165 JUS PRIVATUM*?*—BEITRÄGE ZUM PRIVATRECHT 72-81 (Mohr Siebeck, Tübingen 2012)

66. *See id.* at 73.

67. Christian Rolfs, Fiktion oder unwiderlegliche Vermutung, beck-community (Feb. 14, 2018), *at* https://community.beck.de/2018/02/14/fiktion-oder-unwiderlegliche-vermutung.

68. *See* HEINZ HÜBNER, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 54 (Walter de Gruyter, Berlin/New York 1996).

69. Helmut Heinrichs, *Einleitung*, in PALANDT, BÜRGERLICHES GESETZBUCH Einl. paras. 40-55 (C.H. Beck, München 2008).

question. A crystalline definition of suppletive law is conspicuously absent.[70] Moreover, unlike its precursor drafts subject to the deliberations preceding the enactment of the German Civil Code, Section 1091 no longer contains language that it will apply unless provided otherwise by law or juridical act or, simply, unless provided otherwise.[71] Whether a law is suppletive or mandatory must therefore be determined on a case-by-case basis.[72] In American doctrine, scholars might speak of a default rule as the closest analogue.[73]

Thirdly, because interpretive rules are a species of suppletive law,[74] the rule of interpretation offered by Section 1091 is only triggered if the extent of the limited personal servitude cannot be determined through an interpretation of the agreement between the parties,[75] which in Germany requires consent and recordation.[76] German courts will thus focus on the text and purpose of what has been recorded in the public registry, as evident from the entry itself as well as the underlying declaration of consent from the perspective of an objective observer.[77]

Finally, interpretation may include what in German law is known as "supplementary interpretation of the contract" (*ergänzende Vertragsauslegung*), which functions objectively[78] and "according to what the legal order deems reasonable and in conformance with the properly understood interests."[79] The parties to the agreement, however, may foreclose this canon by identifying their will to the contrary.[80] They could

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70. Kähler, *supra* note 65, at 5.

71. DIE BERATUNG DES BÜRGERLICHEN GESETZBUCHS IN SYTEMATISCHER ZUSAMMENSTELLUNG DER UNVERÖFFENTLICHTEN QUELLEN, *supra* note 64, at 314.

72. Kähler, *supra* note 65, at 72.

73. *Id.* at 13-14.

74. *Id.* at 72- 81.

75. Wiegand, *supra* note 64, at § 1091 para.1; Martinek, *supra* note 64, at § 1091 para.3.

76. Herbert Grziwotz, *§ 1091 Umfang*, *in* 2 ERMAN BGB § 1091 para.1 (C.H. Beck, München 2017). *See generally* Reinhold Geimer, The Circulation of Notarial Acts and Their Effects, XXIII. International Congress of Latin Notaries*?*—Report of the German Delegation (2001), *at* https://www.bnotk.de/_downloads/UINL_Kongress/Athen/GEIMER_ENGLISH.pdf.

77. Alexander Bartsch & Eric Ahnis, *Leitungsrechte in der Energiewirtschaft: Die Beschränkte Persönliche Dienstbarkeit*, 14 IR ENERGIE, VERKEHR, ABFALL, WASSER 122, 125 (2014). For the refutation of a proposal advanced in a doctoral dissertation to run the interpretation subjectively when the original parties are concerned, but to run the interpretation objectively when the right holders have changed, see Thomas Dingeldey, *Die Notwendigkeit der Anpassung von Dienstbarkeiten bei der Änderung von Leitungsbauvorhaben*, 48 RECHT DER ELEKTRIZITÄTSWIRTSCHAFT 50 (1987) (arguing that real rights require a unified objectively oriented interpretation).

78. Kähler, *supra* note 65, at 78.

79. *Id.* at 78-79 n.332.

80. *Id.* at 79.

also establish their own rules of interpretation,[81] including, for example, a rule that the interests of burdened party shall likewise be considered.[82] Moreover, the parties could simply exclude Section 1091 or specifically agree to resolve any open questions that may arise in the future through a process of re-negotiation rather than through a rule of interpretation supplied by law.[83]

b. Flow of Analysis

In light of the above, the analysis starts with according primacy to the text and meaning of the recordation in the public registry (*Grundbuch*) and the consent to record (*Eintragungsbewilligung*) referenced therein. Once this gatekeeper stage has been completed and a clear and unambiguous agreement with regard to probing the extent of the servitude has been ruled out, the analysis proceeds to questions of adjustment against the personal need of the servitude holder. In Germany, virtually the entire legal community agrees that "personal need" is to be construed broadly and liberally.[84]

Significantly, the extent of a right of use must be distinguished from its type.[85] This distinction is crucial because the type of the right of use cannot be left open but must be spelled out at creation of the servitude in accordance with the principle of specificity in property law.[86] Contrariwise, the extent of the right only concerns the manner of its exercise; and therefore, a margin of maneuver accrues,[87] especially when, with the passage of time and the arrival of technical and economic developments, the need of the servitude holders may change or increase.[88] The presence of legislated, albeit suppletive, law addressing situations of doubt over the extent of a limited servitude suggests that questions of scope are not frozen

81. *Id.*

82. KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, §§ 611-1296, AGG, ERBBAURG, WEG § 1091 para. 4 (Heinz Georg Bamberger & Herbert Roth eds., C.H. Beck München 2012).

83. *See* Kähler, *supra* note 65, at 73.

84. Peter Bassenge, § 1091, IN PALANDT, *supra* note 69, at § 1091 para. 1 (including household and business).

85. Kathrin Filipp, *Inhalt und Umfang beschränkter persönlicher Dienstbarkeiten am Beispiel von Leitungsrechten*, 3/2005 MITTEILUNGEN DES BAYERISCHEN NOTARVEREINS, DER NOTARKASSE UND DER LANDESNOTARKAMMER BAYERN [MITTBAYNOT] 185, 192 (2005).

86. *Id.*

87. *Id.*

88. Wolfgang Schmenger, *Die Grunddienstbarkeit und die beschränkte persönliche Dienstbarkeit, Grundsätze, neue Entwicklungen und neue Rechtsprechung*, 74 ZEITSCHRIFT FÜR DAS NOTARIAT IN BADEN-WÜRTTEMBERG [BWNOTZ] 73, 80 (2007).

in place for all time.[89] This is particularly important when the right of use is held by a juridical person because the time horizons over which the servitude may last in such a case may be quite long.[90]

Controversies over the extent of limited personal servitudes boil down to the issue of whether the change or increase of the use is still covered by the contents of the servitude.[91] German courts have traditionally distinguished between an admissible change or increase that stays within the confines of the type of use originally established and an inadmissible change or increase that is unforeseeable and arbitrary.[92]

Due to the operations of the "civiliter principle" (*Schonungsprinzip*), which is codified in the law of predial servitudes but applicable to limited personal servitudes,[93] the interests of the owner of the estate subject to the charge cannot be disregarded but must be weighed against those of the servitude holder.[94] Under the civiliter principle, servitude holders must exercise their right in a gentle and considerate manner least inconvenient for the servient estate.

Ultimately, questions of possible adjustments to the extent of a limited personal servitude of right of use in the wake of changed or increased needs are enveloped by the general requirements of good faith and proportionality, which call for a proper weighing and balancing of interests.[95] According to the prevailing doctrine, adjustments, however, cannot contradict what the parties have established in light of the interpretational yield from the analysis of their agreement.[96] Only one voice in the literature has asserted, albeit in the context of predial servitudes, that even despite the presence of an agreement with regard to the scope of the servitude, whether contained in explicit terms or distilled by interpretation, an adjustment of the extent of the servitude could exceptionally be admissible.[97]

In Germany, the extent of "utility rights of way" (*Leitungsrechte von Versorgungsunternehmen*) has been the subject of frequent litigation. Germany's energy transition (*Energiewende*) in progress will likely heighten controversies over rescoping servitudes already in place.

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89. Filipp, *supra* note 85, at 192.
90. *Id.*
91. *Id.*
92. Dingeldey, *supra* note 77, at 52.
93. BGB §§ 1090(2), 1020 (cl.1).
94. Filipp, *supra* note 85, at 192.
95. *Id.* at 192-193.
96. Filipp, *supra* note 85, at 192; Wiegand, *supra* note 64, at § 1091 para.3.
97. Herbert Grziwotz, *Der Aktuelle Umfang von Wegerechten*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2008, 1851, 1853 (invoking the purpose of the servitude).

2. Selection of Case Law

The following selection of cases, which are offered in great detail for purposes of developing a more practical sense and closer appreciation of typical conflicts under Section 1091, features a range of themes, including: higher electricity volumes at a transformer station, a larger footprint of a pole-mast foundation in the wake of repairs, increases of voltages for electricity lines, plans for rerouting an underground pipe, replacement sewage pipes with increased diameters, and telecommunication added to an existing gas pipe.

a. Transformer Station: Increased Electricity Volume

In a case involving a right of use servitude for a transformer station, the Higher Regional Court of Munich (*Oberlandesgericht München*) rejected the plaintiff's petition to have the transformer station dismantled and returned to prior performance levels.[98] Urging that the future supply of additional residential and commercial units was not foreseeable as of 1980, the plaintiff had alleged that a six-fold increase of the electricity volume routed through the transformer station in the wake of a substantial growth in electricity demand was no longer covered by the type of use contemplated when the servitude was created.[99] The defendant had countered that the commercial area slated to come online was known in 1980.[100] Moreover, according to the defendant, the transformer station had not undergone any expansion of its footprint when, simply, a more powerful unit was added.[101]

The Higher Regional Court of Munich opened its analysis by noting that the size of the construction housing the transformer station was not changed and that the facility had not exceeded permissible emission levels.[102] After determining that the recordation of the servitude did not address the amount of the electricity supplied through the transformer station, the court moved the analysis to Section 1091 and observed that its notion of personal need was to be construed broadly so as to include commercial interests.[103] Significantly, the court then determined that the increase in electricity demand since 1980 remained within the limits of a

98. OLG München, Judgment of Oct. 9, 2000, 17 U 2218/00, RECHT DER ENERGIEWIRTSCHAFT [RdE] 2001, 74.

99. *Id.*, para. 8

100. *Id.*, para. 15.

101. *Id.*

102. *Id.*, para. 22.

103. *Id.*, para. 23.

use of the same type as originally contemplated.[104] The right of use servitude permitted the servitude holder to supply third parties with electricity without being limited to residential households only[105] and the addition of commercial customers did not constitute a change in use.[106] Moreover, according to the court, the increase in need was neither arbitrary nor unforeseeable. Rather, future land development and construction activity could have been expected.[107] Therefore, the servitude of right of use still provided the requisite coverage for the expansion of the aggregate.[108]

b. Pole-Mast Foundation: Expanded Footprint

In a case involving a right of use servitude that was statutorily imposed in favor of a utility for a 110 kV electricity-transmission line and a pole mast, the Regional Court of Chemnitz (*Landgericht Chemnitz*) upheld the lower court decision which had blessed the expansion of the mast foundation in the course of repair measures.[109] The plaintiff had contended that the agreement specifically fixed the foundation area at a dimension of five by five meters for a total of 25 square meters, but, in the wake of the repairs, the foundation now measured 5.8 meters by 5.8 meters and, if the additional earth for bedding and filling were included, seven by seven meters for a total of 49 square meters.[110] According to the defendant, however, the overall width of 5.8 meters was only true for the subterranean foundation plate, which was embedded in the ground at a depth of 80 centimeters, while the foundation above the ground only measured 3.42 meters.[111] Moreover, no impacts to agricultural use had accrued.[112] Also, the technical regulations required a larger mast step to accommodate higher transmission loads.[113] Finally, the mast was indispensable for the transmission line.[114]

The Regional Court of Chemnitz first looked at the instruments referenced in the recordation and recalled that the size of the foundation

104. *Id.*, para. 24.
105. *Id.*, para. 25.
106. *Id.*, para. 26.
107. *Id.*, para. 29.
108. *Id.*, para. 32.
109. LG Chemnitz, Judgment of May 3, 2018, 3 S 53/17, GAS- UND WASSERFACH/RECHT UND STEUERN [GWF/R+S] 2018, 47.
110. *Id.*, para. 6.
111. *Id.*, para. 8.
112. *Id.*
113. *Id.*
114. *Id.*

was not specified.[115] According to the court, it could not be deduced from the assessment factor for calculating the indemnification in the wake of the expansion of the mast step, that the servitude for the mast step was inalterably fixed at five meters by five meters.[116] Neither the legislature nor the defendant had contemplated such a result.[117] While the need of the servitude holder could change over time in line with technical and economic developments, changes through increased use would not be covered when unforeseeable or arbitrary.[118] Moreover, the notion of the personal interest of the servitude holder could not chip away at the servitude holder's obligation to exercise the servitude gently, and therefore, a balancing with the interests of the ground owner was required.[119] The court then added several observations. First, masts, which are indispensable for transmission lines, require a foundation built according to the rules of physics.[120] Second, neither the voltage nor the routing had changed.[121] Third, the applicable statute covered maintenance, repair, operation and renewal, which necessarily would entail certain factual changes.[122] These changes, which consisted in a subterranean expansion of the mast step, remained within the confines of a use of the same kind contemplated at the time when the right of use servitude was established.[123] Moreover, the eventuality of repairs, after more than 25 years of operations, corresponded to general life experience.[124] Fourth, the alleged increase of the footprint from 25 to 49 square meters was negligible in relation to a tract measuring 136,427 square meters.[125] Finally, the increase was not inapposite to the civiliter principle, because the cultivation of fields was minimally impacted by the increase in use.[126]

c. High-Voltage Electricity Lines: Increase from 220 kV to 380 kV

In a case involving plans by the holder of a right of use servitude to replace older 220-kV lines with 380-kV lines in the context of a servitude for masts of a high-voltage electricity transmission line, the Higher

115. *Id.*, para. 20.
116. *Id.*, para. 24.
117. *Id.*
118. *Id.*, para. 27.
119. *Id.*
120. *Id.*, paras. 28, 29.
121. *Id.*, para. 28.
122. *Id.*, para. 30.
123. *Id.*, paras. 32, 33.
124. *Id.*, para. 35.
125. *Id.*, para. 37.
126. *Id.*, para. 39.

Regional Court of Stuttgart (*Oberlandesgericht Stuttgart*) upheld the lower court decision, which had found that the servitude holder was authorized to take these measures.[127] The plaintiff had described the project as one unfolding in two stages. The first phase would consist in adding isolators to free spots along the rods and installing conductor cables for a 380-kV circuit.[128] In the next stage, the existing isolators would be replaced with 380-kV isolators and existing roping would be supplemented by additional rope to achieve a triple bundling.[129] The plaintiff had also noted that it had secured the requisite official zoning consent for its plans.[130] In opposition, the defendant had contended that the existing servitude covered a nominal voltage of 220 kV only.[131] Moreover, there was plenty of scientific suspicion that low-frequency electrical and magnetic fields would pose significant risks to human health, including childhood leukemia and neurodegenerative disease.[132]

The Higher Regional Court of Stuttgart started out with emphasizing that the contents and extent of the servitude had to be ascertained on the basis of the text and meaning of what had been recorded.[133] The court further explained that the analysis had to be objective to determine what was obvious to an impartial observer.[134] According to the court, circumstances extraneous to the relevant instruments could be admissible inasmuch they were readily apparent to anyone under the conditions surrounding the individual case.[135] If the parties had not provided otherwise, the personal need of the servitude holder, which was to be construed broadly, would guide the analysis required for scoping the servitude.[136] In this light, the court confirmed that the nominal voltage had not been explicitly limited by the parties.[137] Moreover, such a limitation could not be deduced from the fact, that in 1967, a voltage exceeding 220 kV was not under serious consideration.[138] The court then explained that, if the extent of the servitude had not been conclusively established, it was

127. OLG Stuttgart, Judgment of Mar. 27, 2013, 4 U 184/12, GWF/R+S 2013, 43.
128. *Id.*, para. 7.
129. *Id.*
130. *Id.*, para. 8.
131. *Id.*, para. 10.
132. *Id.*
133. *Id.*, para. 68.
134. *Id.*
135. *Id.*
136. *Id.*, para. 69.
137. *Id.*, para. 71.
138. *Id.*, para. 73.

not frozen in place.[139] Rather, technical and economic developments could engender increased needs and changes in the scope of the servitude.[140] These developments had to be assessed in accordance with the prevailing usages, the character of the burdened estate through the prism of an unencumbered observer, and the need to make use of the servitude within these parameters.[141] But, the increased need had to stay within the limits of the same type of use, as opposed to amounting to an unforeseeable or arbitrary change in use.[142] But a change of use that veered away from the destination of the original servitude would, according to the court, be inadmissible.[143] The court then determined that an increase of the voltage slated for transmission did not change the nature of the servitude but remained within the same type of use.[144] According to the court, the increase of the nominal voltage from 220 kV to 380 kV was not only necessary but also not beyond what was foreseeable at the time.[145] Moreover, since the servitude holder was making its project plans to comply with statutory requisites, the increase did not amount to an arbitrary change in use.[146] The court then turned to the consequences for the burdened estate by the increase in nominal voltage and found that the transmission of 380 kV did not amount to a significant impairment.[147] Therefore, the changes planned by the servitude holder were covered by the right of use servitude.[148]

d. Underground Pipe: Routing Change

In a case involving a right of use servitude for laying an underground pipe to discharge stormwater, the Higher Regional Court of Köln (*Oberlandesgericht Köln*) decided that the landowner had to tolerate a certain deviation from the route originally in place.[149] The court first diagnosed that the recorded servitude did not position with precision the exact route of the pipe.[150] This was evident from the formulation "the pipe

139. *Id.*, para. 74.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*, para. 75
144. *Id.*, para. 76.
145. *Id.*, para. 77.
146. *Id.*, para. 78.
147. *Id.*, paras. 79-83.
148. *See id.*, para. 67.
149. OLG Köln, Judgment of June 7, 2013, 19 U 4/13.
150. *Id.*, para. 12.

embedded in the earth next to plot 184."[151] As properly interpreted in line with its wording and purpose, the right of use servitude was all about draining stormwater through the burdened tract into a stream.[152] Certain changes in the contents and extent of the servitude could result from technical and economic developments.[153] The question of whether these would be covered had to be assessed not so much by the use practiced at the time when the servitude was established, but rather against the backdrop of the nature of the burdened estate and the need to make use of the servitude.[154] The analysis had to be conducted objectively according to societal expectations and from the vantage point of an objective third-party observer.[155] According to the court, the extent of the servitude could grow in consonance with the need of the servitude holder, as long as the increased need remained within the same type of use and did not result from an unforeseeable or arbitrary change in use.[156] Here, the change was required by a regulatory development, which meant that, prior to being discharged into the stream, the stormwater had to be treated in a treatment basin specifically constructed across the stream for that purpose.[157] Therefore, the piping had to be rerouted toward the stream and then under it so as to reach the basin, in lieu of simply bending by a 45 degree angle and onward directly into the stream.[158] The court further noted that the use of the burdened estate and the servitude holder remained essentially the same, since the current and the planned routes concerned open spaces.[159] According to the court, such development was foreseeable.[160] Moreover, the change remained within the type of use originally established.[161] Also, the burden on the estate subject to the charge was not increased.[162] Finally, the civiliter principle did not lead to a different result because the servitude holder remained responsible for maintaining the pipe and, according to the planning documents prepared by an engineering firm and presented by the servitude holder in support of the plans for a rerouting of the pipe, proper

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

maintenance required a connection to the treatment basin.[163] The court concluded that likewise, the placement of an electrical cable next to the pipe to supply electricity to the pumps and sliders of a treatment basin could still be deemed as a change in use that remained within the framework of the servitude.[164]

e. Sewer Pipe: Increased Diameters for Replacements

In a case involving a right of use servitude for sewage piping, the Higher Regional Court of Nürnberg (*Oberlandesgericht Nürnberg*) affirmed the lower court when deciding that the replacement and expansion of existing works, which included switching from pipes with a diameter of 25 to 30 centimeters to pipes with diameters of 120 to 140 centimeters and adding a water pipe, was within the rights of the servitude holder.[165] The plaintiff had argued for an adjustment of the servitude to accommodate technical and economic developments.[166] In opposition, the defendant had asserted that diameters of the pipes were identified on the plat with 25 to 30 centimeters and that alternative routing was possible and feasible.[167]

The Higher Regional Court of Nürnberg first recalled established case law declaring that the extent of a servitude may increase with the needs of the servitude holder, as long as the increased needs remain within the same kind of use of the estate and do not result from an unforeseeable or arbitrary change in use.[168] According to the court, the analysis had to start with the original contents of the servitude, as established by the contents and meaning of the recordation in the public registry and the consent to record therein referenced.[169] The court found that in the case before it the diameters were not frozen in place for all time at 25 to 30 centimeters.[170] Drawings and measurements indicated on the site plan merely amounted to a description of the conditions at the time without being binding as such for the future.[171] Therefore, the analysis could proceed into whether the requisites for an adjustment were met.[172]

163. *Id.*
164. *Id.*
165. OLG Nürnberg, Judgment of July 19, 2010, 19 U 408/10.
166. *Id.*, para. I.
167. *Id.*
168. *Id.*, para. II.1.a.
169. *Id.*, para. II.1.b.
170. *Id.*
171. *Id.*
172. *Id.*

According to the court, the servitude was amenable to being adjusted for several reasons.[173] Firstly, the needs of the municipality had changed as evidenced by the rise of the population equivalent from 500 when the pipe system was constructed to 900 at present, with a concomitant increase of total drainage volumes from 2,147 to 4,794 liters per second.[174] Moreover, the endeavored re-dimensioning of the system would stay within bandwidth of the agreed type of use.[175] In addition, the change was already foreseeable in 1986, and by no means arbitrary, especially in light of zoning documents exhibiting plans for future building in the area.[176] Also, the relocation alternative along the county road urged by the landowner could entail new costs of up to 370,000 euros plus another 120,000 euros for a new pumping station, and therefore, was unreasonable for a small municipality.[177] According to the court, the planned reconstruction project would not critically impair the interests of the landowner; on the contrary, there would be no necessity for the installation of a rainwater retention basin and excavation of a fourth shaft.[178] Finally, the servitude holder's request for adjustment did not to amount to conduct adverse to the principle of good faith, because the servitude holder was not required to alert the landowner to potential future changes which were objectively foreseeable at the time when the servitude was confected.[179]

f. Gas Pipe: Addition of Telecommunication Network

Finally, in a case involving a right of use servitude for a gas line, along with cables and accessory for a monitoring and surveillance line, Germany's Federal Court of Justice (*Bundesgerichtshof*) decided that the servitude holder was not authorized to use the burdened estate for telecommunication more generally.[180]

The Federal Court of Justice first diagnosed that the recordation in the public registry did not further specify the contents of the "right to pipe gas."[181] Moreover, the consent to record, which was referenced by the recordation, permitted the underground installation, operation and maintenance of a grid gas transmission line, along with cabling and

173. *Id.*, para. II.1.c.
174. *Id.*, para. II.1.c.aa.
175. *Id.*, para. II.1.c.bb.
176. *Id.*, para. II.1.c.cc.
177. *Id.*, para. II.1.c.dd.
178. *Id.*, para. II.1.c.ee.
179. *Id.*, para. II.1.c.ff.
180. BGH, Judgment of July 7, 2000, V ZR 435/98.
181. *Id.*, para. II.2.a).

accessory, within an 8 meters wide protective strip.[182] Considering the functional nexus between the cable link and the operation of the pipeline, there was no general authority to operate a comprehensive telecommunication network.[183] Telecommunication activities outside the operational parameters identified in the public registry were not covered by the servitude.[184]

The Federal Court of Justice further determined that the purported need of the servitude holder, when assessed against the backdrop of technical and economic development, did not call for a different result. According to the court, the increase in use had to be within the limits of the same type of use for which the servitude was established; and such increase could not derive from a change that was unforeseeable or arbitrary. [185] The construction and operation of a comprehensive telecommunication network designed to serve the informational needs of the public, however, embodied an inadmissible qualitative change in use.[186] Such expansion by the utilities of their economic field of activity to include the telecommunication sector was not foreseeable at the time when the right was established.[187] The court further rejected the view allowing a qualitative change in use as long as the intensity of the use does not increase.[188] It reasoned that such contentual increases would veer too far away from the frame of use identified in the public registry and the consent to record, and they could ultimately lead to the expansion of real rights without limits.[189] In the remainder of its judgment, the court determined that a statutorily imposed duty to tolerate the addition of a fiber-optic cable to the existing conduit triggered a claim for indemnification that had to be valuated under prevailing market conditions.[190]

3. Extract

In Germany, courts are in agreement that the analysis surrounding the extent of right of use servitudes rests on two pillars. Firstly, the text and meaning of the relevant instruments for creating the servitude must be ascertained by way of interpretation. Secondly, if not foreclosed by the

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*, paras. II.2.b), III.

results of the previous analytical stage, the presence of the requisites for adjusting the extent of the servitude must be determined. At the core of their analysis, the courts determine whether a shift in the extent of the servitude brings about a change in contents of the original right of use servitude. This analysis is conducted according to qualitative criteria, typically without considering that, for the property charged, a quantitative change or increase may be equally concerning.[191] Voices in the literature have therefore proposed to accord greater weight to the intensity of the adverse effects slated to further burden the property, rather than merely focusing on the objective purpose of the original charge to which the property owner concerned has consented.[192] Finally, even if changes in the wake of technical and economic developments are covered, the interests of the ground owner are taken into account through the prism of the civiliter principle as well as good faith and proportionality.

C. Back to Louisiana

Litigation with Article 642 at the center of a dispute has been sparse. Prior to the recent case before the Louisiana Supreme Court, the closest decision on topic was handed down by Louisiana's Fifth Circuit in 2006—three decades after the enactment of Article 642.[193] In this case, the court confronted the status of certain private hunting camps immediately adjacent to a drainage canal constructed by the servitude holder under a right of use servitude across the servient estate.[194] The camps had initially been established by private clubs with the permission of the original landowner, then donated by the clubs to the parish, and finally leased back by the parish to the clubs.[195] The majority decided that these hunting camps were not necessary to the enjoyment of the servitude holder's right of use regarding the canal.[196] After simply recalling the contents of Article 642, the court, again without much further explication, invoked, as another rationale for its decision, Article 743 of the Louisiana Civil Code from the law of predial servitudes, which governs accessory rights.[197] The dissent

191. Dingeldey, *supra* note 77, at 52.
192. Wiegand, *supra* note 64, at § 1091 para.3.
193. St. John the Baptist Parish v. Dep't of Wildlife & Fisheries, 943 So. 2d 1209 (La. App. 5 Cir. 2006).
194. *Id.* at 1210.
195. *Id.*
196. *Id.* at 1215.
197. *Id.*

countered with a finding that the camps would not be a burden at all.[198] Other than those terse decision rationales, no further guidance as to the operations of Article 642 can be gleaned from this case. Its German origins find no mention.

The next, eagerly awaited, chance to hear from Louisiana's judiciary about Article 642 arrived with the most recent litigation. By design, however, the majority opinion does not yield further insights. It is clothed in a brief per curiam decision. Such opinions typically allow for matters to be rapidly and summarily dispensed with.[199] Some even assert that, since per curiam decisions do not identify a particular author, they offer a "cloak of invisibility."[200] Due to "the highly unique facts and circumstances of the case," the majority cautions that "[the] holding is limited to the precise and narrow facts before the court and should not be interpreted expansively beyond the specific factual confines presented."[201]

Justice Weimer responded with a vigorous dissent in which he chided the majority's opinion for eviscerating civilian precepts, construing Article 642 too broadly, and unduly tipping the scales in favor of servitude holders and to the detriment of landowners.[202] Justice Weimer's dissent contains several significant missives striking at the core of potential disconnects and looming pitfalls associated with legal transplantation.

Firstly, Justice Weimer underlines that the language of the provision enacted in the recipient system differs from the model in the donor system.[203] Indeed, the ultimately enacted version Article of 642 does not mirror the simple elegance and sophistication of its German model. The convoluted and contorted optics of Article 642, in its attempt to replicate the suppletive interpretation rule of Section 1091, may very well be the result of haggling in the Louisiana State Law Institute combined with input from non-native speakers of English.[204] Rather than simply speaking of "need" Article 642 imports the term "necessary" from what the law of

198. St. John the Baptist Parish v. Dep't of Wildlife & Fisheries, 943 So. 2d 1209, 1215 (J. Dufresne, dissenting).

199. James T. Genovese, Appellate Review 14 (Dec. 12, 2017), *at* https://www.lafayettebar.org/files/905am%20SupCt%20v_%20AppealCt.pdf.

200. *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL L. REV. 1197 (2012).

201. W&T Offshore, 2019 La. LEXIS 1582 (per curiam), at pp. 1-2.

202. W&T Offshore, 2019 La. LEXIS 1582 (J. Weimer, dissenting), at pp. 1-23 [hereinafter Weimer Dissent].

203. *Id.* at p. 4.

204. *See* JOHN R. TRAHAN, LOUISIANA LAW OF PROPERTY: A PRÉCIS 24-27 (Mathew & Bender Co., Inc., New York 2012) (discussing whether, in the law of immovables, "standing timber" was meant to encompass all trees.)

predial servitudes declares with respect to "accessory rights."[205] The provision then splits the needs analysis into two temporal stages—"rights contemplated or necessary to enjoyment at the time of its creation" and "[rights] that later become necessary . . . ." After the comma the provision continues with "provided that a greater burden is not imposed on the property."[206] This language, neatly dubbed proviso clause by Justice Weimer,[207] intimates the civiliter principle. The provision, however, does not end here, but subjects the proviso clause to the negative conditional "unless otherwise stipulated in the title,"[208] which, redundantly, signals the suppletive nature of the provision.[209] Notably, prior draft versions of Article 642 were much clearer. They had opened with the phrase referring to the contents of the title.[210] This made more sense because it signaled the primacy of the title and the suppletive nature of the codal offer with regard to construing the extent of the right of use servitude. By moving it back and tacking it to the proviso clause, this important message became unnecessarily fudged.

Secondly, Justice Weimer emphasizes that the agent behind the transplant, Professor Yiannopoulos, "would have devoted more than a passing mention" with regard to the donor provision if he had intended to depart from the civilian principle that doubts must be resolved *in favorem libertatis*, which has been codified in the law of predial servitudes.[211] This observation raises what might be considered idiosyncrasies of the expert responsible for the transplant—Professor Yiannopoulos in the case of Article 642. While revered in Louisiana and beyond, his practices have raised questions in the past. For example, Professor Yiannopoulos has frequently relegated crucial guideposts for construing revised law to the revision comments. At times, these references might have been more precise.[212] In instances where Professor Yiannopoulos addresses German models in his treatises, he simply cites to German literature, often authored

205. *See* La. Civ. Code art. 743 (1977).

206. La. Civ. Code art. 642 (1976).

207. Weimer Dissent, *supra* note 202, at pp. 4, 7.

208. *Id.*

209. *See* Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 LA. L. REV. 1007 (1981) ("Suppletive laws, on the other hand, are those legal norms designed to supplement the parties' will in cases wherein its application is not excluded.").

210. A.N. Yiannopoulos, Materials Prepared for Meeting of Council April 6-7, 1973, Louisiana State Law Institute, Revision of Book II of the Louisiana Civil Code of 1870.

211. Weimer Dissent, *supra* note 202, at p. 19.

212. *See, e.g.*, La. Civ. Code rev. cmt. (a) (1976) (noting that the provision allowing the transferability of rights of use differs from the German model). But see German Civ. Code sec. 1092 (3) (making significant exceptions to this rule for juridical persons and certain partnerships).

in the 1950s, without further explications.[213] Jurisprudence from Germany is almost entirely omitted. Lastly, Professor Yiannopoulos appears not to have hesitated to make dramatic shifts in the law away from its Romanist base—through Pandectist grafts or wholesale importations. Apparently, there were no real compunctions about the effect of rendering futile much of the translation work commissioned by the Louisiana State Law Institute in the 1950s and 1960s for the purpose of making classical French literature accessible to English speakers.[214]

Finally, in concurring with the Louisiana Supreme Court's order denying W&T's petition for a rehearing, Justice Hughes offers language for purposes of considering in the analysis the burden accruing to the landowners.[215] He notes that a removal and relocation of the old pipeline itself would engender more harm to the environment when compared to laying a new pipeline in conformance with industry standards and specifications.[216] Moreover, according to Justice Hughes, replacing the pipe in the original trench would cause more damage to the landowners because such operation would necessarily require halting the flow of brine.[217] Under his balancing standard of environmental safety and economic feasibility, says the justice, Texas Brine selected the most reasonable option.[218] These reasons, however, seem to be written from an "objective" vantage point and in this light, the landowners might disagree based on their own, "subjective" reasons.

In their ensemble, the observations by both justices confirm the need to further explore questions with regard to transplant care in general and with regard to construing the extent of a right of use servitude in particular. Meanwhile, Professor Yiannopoulos, the originator of the legal transplant, has passed.[219]

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213. *See, e.g.*, Yiannopoulos, *supra* note 43, at 521 n.1, 544 n.3, 545 n.8, 555 n.2. For the German work he most frequently cited, see MARTIN WOLFF & LUDWIG RAISER, SACHENRECHT (J.C.B. Mohr (Paul Siebeck), Tübingen 1957).

214. Vernon V. Palmer & Harry Borowski, *Louisiana*, *in* MIXED JURISDICTIONS WORLDWIDE?—THE THIRD LEGAL FAMILY 349 (Vernon V. Palmer ed., Cambridge Univ. Press, Cambridge 2012).

215. W&T Offshore, L.L.C. v. Tex. Brine Corp., 2020 La. LEXIS 212 (La. 2020) (J. Hughes, concurring), at pp. 1.

216. *Id.* at pp. 1-2.

217. *Id.* at 2.

218. *Id.*

219. *See* Cathy Hughes, *A.N. 'Thanassi' Yiannopoulos, Who Revised Louisiana's Civil Code, Dies at 88*, THE ADVOCATE (Feb. 1, 2017), *at* https://www.theadvocate.com/baton_rouge/news/education/article_07c07df4-e74b-11e6-813b-1b67fe457f25.html.

IV. CONCLUSIONS: TRANSPLANT CARE

The silence by all actors in the litigation saga with regard to the actual operations of the transplant in the donor system may simply be due to a lack of resources or expertise; or it may reflect a conscious posture that, once Article 642 was in place, it embarked upon its own autonomous trajectory independent of the fate of its model in Germany. At a preliminary threshold, the recipient system may therefore want to come to a decision as to whether to keep or cut the force bond with the donor system. By invoking the German template, the litigants and Justice Weimer appear to engage the alternative decision of a continued connectivity contemplated by the original expert and associated with the prestige of the model. What has been avoided in the case of Section 1091, however, relates to construing the transplant beyond the legislated text. As shown earlier, the alternative approach would have required delving deeply into the weeds of contemporaneous German doctrine and jurisprudence.

In this light, a screen of sequential questions could guide the analysis of cases such as the recent controversy about the extent of a right of use servitude. What does the original agreement between the parties establish with regard to replacements, locations and diameters of the original pipeline? How much supplementation by way of interpretation, if any, does this agreement cover? Considering that the original agreement does not fix the diameter of the original pipeline, leaves the designation and approval of its routing to the parties, and, other than language with regard to the lease term, does not use the term replacement, should the presence of a second agreement expressly providing language addressing replacements and diameters for the new pipeline affect the interpretation of the first agreement?

If, in the wake of having exhausted interpretational canons, the agreement remains ambiguous, are the requisites for an adjustment of the limited personal servitude of right of use met? Does the new pipeline with a larger diameter routed alongside the original pipeline change the contents of the servitude? If the replacement is deemed still within the confines of the original consent to a right of use, should the addition of a second pipeline be considered a factor as to whether the type of servitude was changed? Do technical and economic developments call for such a replacement? Do balancing considerations, such as the civiliter principle, good faith, and proportionality, call for the removal of the disused pipeline? If so, should this situation be addressed by remedies under accession law with regard to large-scale improvements?

The stakes associated with properly construing Article 642 could not be higher. Louisiana is carpeted with limited personal servitudes for oil and gas pipelines, electricity transmission lines and other rights of way. This infrastructure will require repair, rehabilitation and replacement. By the same token, especially in an era of impending further land losses, Louisiana landowners wish to guard against what they may consider burdens no longer covered by their original consent.

Article 642 has been flying under the radar screen for more than four decades. But this era is ending, even if the Louisiana Supreme Court did not grant the petition for a rehearing. Once that time arrives, German doctrine and jurisprudence with regard to Section 1091 offer a valuable analytical screen that promises to balance out the interests of servitude holders and landowners. Meanwhile, all stakeholders may be well advised to make their servitude agreements as airtight and specific as possible. Some may wish to shore up the primacy of the servitude agreement by disallowing any subsequent adjustments under Article 642 or by calling for negotiations between the parties.

Returning to Montesquieu's grand hazards associated with legal transplants, Article 642 was not a surgical loner, but part of a comprehensive reform designed to model the new law governing limited personal servitudes of right of use along German templates. In this vein, the contours of the battle lines drawn with regard to a companion provision—Article 645—are already on the horizon. The provision declares that "[a] right of use is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude."[220] In this context, a different decision by the Louisiana Supreme Court appears to suggest, albeit in dicta, that a personal servitude of right of use granted in favor of a juridical person, just like a usufruct for the benefit of a juridical person, terminates upon the lapse of thirty years from the date of the commencement of the usufruct.[221] Again, discussions in Louisiana may very well benefit from being informed by the German model in that instance.

In the final analysis, the beautiful words of Judge Henry Friendly continue to ricochet across time and space. He once described a law, which had largely lain dormant for almost two centuries, as a "kind of a legal

220. La. Civ. Code art. 645 (1976).

221. Faulk v. Union Pacific Railroad Company, 172 So.3d 1034, 1048 (La. 2015) (citing both Articles 645 and 608 as well as former articles 612 and 628 of the 1870 Civil Code). *See also* La. Atty. Gen. Op. No. 12-0166, 2013 WL 191348, at *3, n. 10 (April 29, 2013).

Lohengrin,"[222] after the mythical German knight who arrives in a boat pulled by swans, because "no one seems to know whence it came."[223] We do in the case of Article 642; and the legal community in Louisiana may want to build on this knowledge for purposes of transplant care.

222. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. National Australia Bank, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) (offering these observations in the context of the Alien Tort Statute, originally contained in the Judiciary Act of 1789 and currently codified at 28 U.S.C. § 1350 (2018)).

223. *Id.*