

# Summary

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## Treaties Concerning Private International Law

### Aspects of Conflict of Laws, Constitutional Law and Public International Law

1. The recent development of Private International Law may be characterized by two opposite tendencies, on the one hand the increase of treaties and, on the other hand, the extensive application of the Constitution to cases with foreign elements.

2. Treaties tend to displace the conflicts rules of the Introductory Law to the German Civil Code. Since different institutions are drafting conventions as to the same matter, conflicts of treaties emerge as the new problem of Private International Law.

3. The Spaniard-case of the German Constitutional Court did not have to take issue with conventions on Private International Law. The three levels which the Court distinguished as to the relation between fundamental rights and Private International Law, are, however, to be taken into account also for treaties:

- a) the determination of the content of fundamental rights,
- b) the impact of fundamental rights on connecting factors in German conflicts rules and, finally,
- c) fundamental rights operating as limits to the application of foreign law.

4. Treaties can be distinguished as to whether they contain a general or a special public policy clause, or whether they do not contain any such clause at all. In the last mentioned case public policy cannot be referred to as a tool for bringing into play the fundamental rights. Therefore, unilateral conflicts rules have to be developed for the Constitution.

5. The prevalent opinion among writers which gives priority to treaties as against constitutional norms because of their public international law-character, is not convincing. Treaties, having been transformed by statute into internal law, have the same quality as other internal laws.

6. General principles of Public International Law (Art. 25 Grundgesetz) do not prevail over constitutional norms.

7. The special status of treaty-rules on conflict of laws with regard to autonomous conflicts rules, may, however, be inferred from the Constitution itself which favours Public International Law. This has to be taken into consideration in determining, spatially, the reach of the Constitution.

8. The federal structure of the Constitution which considers private law as a matter of concurrent jurisdiction, calls for the admittance of different solutions in private law matters. Therefore, the opinion which advocates incompatibility of all foreign *impedimenta matrimonii* unknown to the *lex fori*, is not correct.

9. The constitutional principle which favours Public International Law, may lead to limiting the reach of fundamental rights the applicability of which requires a particularly strong connection of the case with the forum country.

10. Thus, special constitutional law rules can be developed for conflicts treaties.

11. In connection with treaties on private international law the constitutional principle (see No 9) calls for a restrictive interpretation of the Constitution. Thus, art. 6 (1) (concerning marriage and the family) is not concerned with the capacity to marry of a person who is a Moslem and a national of one of the Islamic countries.

12. The Constitution does not simply apply in conflict of laws questions, to all Germans wherever domiciled, or to all foreigners residing within the country.

13. The mere fact that a case involves a German national, does not call for the application of the constitutional principles

against treaty norms of conflict of laws, since treaty norms aim at solving problems of "mixed" cases. The same is true for cases where the only relation to the forum is the habitual residence of a foreigner in Germany.

14. The rules concerning the conflicts law in treaties have to take into consideration how close the person concerned is linked to the matter governed by the convention. If the Constitution has only to do with a preliminary question, the Constitution will not intervene to produce a result contrary to international law.

15. In case of the treaty not being compatible with the Constitution, one has still to avoid a violation of treaty obligations wherever possible. Thus, a treaty may be applied until it is denounced.

16. Conclusion: In the process of developing unilateral conflicts rules for the Constitution, the constitutional principle of favouring obligations under Public International Law gives conflicts rules based on treaties a particular position which is different from that of autonomous conflicts rules.