

# Summary

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## Treaties Concerning Private International Law Public International Law and Constitutional Law Aspects

### *I. Treaties concerning private international law from the point of view of public international law*

#### 1. The crisis in the politics of international codification

The policy of international codification is hardly in need of additional scientific advice, but it is in need of political action which may be promoted by clearly elaborating the necessity of legal protection for a large section of the population.

#### 2. Techniques of codification

The so-called system of bilateralisation constitutes an instrument which combines both uniformity and flexibility in the codification process: A multilateral treaty serves as framework; operative rules are brought into force through additional bilateral agreements.

#### 3. Reciprocal effects of reservations

Reservations to conventions on private international law which provide for uniform rules of conflict of laws, have a limited reciprocal effect: the other contracting states, in their mutual relations, remain under an obligation to apply the uniform rule of conflict of laws, even as regards those cases which are related to the state which has formulated the reservation (art. 21 para. 2 Vienna Convention on the Law of Treaties — VC).

The contracting state which has formulated a reservation is not entitled to exercise diplomatic protection in favour of its nationals, if any other contracting state does not apply the uniform rule of conflict of laws to which the reservation is related (art. 21 para. 1 b VC).

#### 4. Concurring treaties on private international law

The later treaty prevails over earlier treaties as between the parties to the later treaty (art. 30 para. 4 a VC). The parties to the later treaty may not withdraw from the obligations of an earlier treaty as against those parties to the earlier treaty, which do not become parties to the later treaty (art. 30 para. 4 b VC). The treaty which prevails under these rules may provide for an entirely or partially different order of priority.

### *II. Municipal rules of conflict of laws and basic rights (as provided for in the Constitution of the Federal Republic of Germany)*

#### 1. Order of priority

Before German courts, the basic rights enjoy priority over German rules of conflict of laws and over such foreign law as is applicable under German rules of conflict of laws.

#### 2. The application of the basic rights to cases containing a foreign element

Where basic rights are applied to cases containing a foreign element, municipal rules of conflict of laws and the application of foreign law are subject to the standard of the basic rights. The basic rights are to be applied to cases containing a foreign element according to a combination of substantive law and of conflict of laws aspects. There does not exist an independent body of rules concerning the conflict of constitutional laws.

### *III. Treaties on private international law and basic rights from the point of view of constitutional law*

#### 1. The principle of "construction in conformity with international law" („Völkerrechtsfreundlichkeit“)

Specific rules of constitutional law determine the meaning of the principle of "construction in conformity with international law":

According to art. 25 (of the German Constitution) the general rules of public international law, but not the rules contained in international treaties, have to be taken into account in interpreting the Constitution, including also the basic rights.

Art. 24 merely covers international treaties which contribute to the structural development of international relations. Treaties on private international law belong to the traditional category of international treaties and are, therefore, not covered by art. 24.

## 2. Paying regard to the political background

The political background of treaties on private international law may have to be taken into account when applying the basic rights. The reciprocal effect resulting from a treaty on private international law and the international harmony of decisions achieved by such a treaty may contribute to the conformity of the treaty with art. 3 para. 1 and art. 6 para. 1 (of the German Constitution) respectively.

## 3. The doctrine of „approximate constitutionality“ („Annäherungstheorie“)

The application of such doctrine has to be limited to exceptional situations and will, therefore, not influence the evaluation of the constitutional law aspects of treaties on private international law.

# *IV. Treaties on private international law and basic rights from the point of view of public international law*

## 1. The impact of the basic rights on the contents of the treaty

At the public international law level treaties on private international law are in principle not to be interpreted in the light of the basic rights.

## 2. Invoking the basic rights by way of an exception to the treaty

Withdrawal from the application of treaty rules on conflict of laws by way of invoking the basic rights is presumed not to be in

conformity with international law, even where there is a treaty clause on public policy; to what extent invoking the basic rights may for certain groups of cases suspend the application of a conflict of laws rule has to be examined by delimiting the subject matter of the rule in question.

Where there is a treaty clause on public policy to invoke the basic rights and thereby to avoid a rule of foreign law otherwise applicable (i. e. because the treaty rule of conflict of laws refers to it) is possible in cases of doubt. The same applies even if the treaty does not contain a clause on public policy if no circumstances which would favour a different construction are present in the case.

### 3. The impact of "legal rights similar to the basic rights" („grundrechtsähnliche Rechte“) under general international law and under treaty law

It is unlikely that a rule of general international law contains any "legal rights similar to the basic rights" which are relevant in civil law matters. "Legal rights similar to the basic rights" under treaty law mainly influence the substantive rules of municipal law and may in this way contribute to the avoidance of conflicts with the basic rights.