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Summary

Multinational Corporations in Conflict of Laws

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A. THE REPORTER'S ASSIGNMENT

I. Specification and delimitation of the problems to be dealt with

1. For the reporter on private international law, it is necessary, first, to specify and delimit the task assigned to him during this conference.

The „private international law of multinational corporations" is neither wholly nor partly identical with the private international law of business organizations. For it traditionally also comprises the conflict rules with regard to public regulation of business (e. g. with regard to confiscations, trading with the enemy, dealing in foreign currencies, etc.) insofar as these rules might apply to those corporations. Whether, however, the „private international law of multinational corporations", in and of itself, is an autonomous branch of private international law (with rules of its own applying only to multinational corporations, but not to bi-national or national corporations or other business organizations) is, from the very outset, most doubtful. This latter question can, in any case, definitely be answered only at the end of this inquiry.

II. The two assumptions upon which the following inquiry is premised

2. There are many definitions of the multinational corporation, especially in the field of economics and political sciences. Whether, however, there is a notion of the multinational corporation peculiar to private international law, is a question which — for the reasons stated above — has to be left open until the end of this inquiry.

3. As of today, it is very common to reproach the multinational corporations for many evils and „sins". Thus there has been the contention that multinational corporations have ample opportunities (which they largely make use of) to effectively evade the rules of law applicable to them in the different countries in which they operate. Among these rules, those of corporation law and of public control of business are said to be substantially circumvented in many instances. The latter reproach is of concern for the reporter on conflict of laws.

Whether this reproach is justified or not, cannot be inquired into to prevent such evasion or circumvention, it would have to be considered how they could appropriately be changed.

III. The specification of the reporter's assignment

4. Thus the reporter on private international law will have to inquire into whether and how far the present rules of private international law are sufficiently susceptible of preventing an evasion or circumvention of private law in general and public regulation of business in all states in which a multinational corporation operates. Among these bodies of law, the ones relating to corporation law are of utmost importance. If, therefore, the first-mentioned rules of private international law should turn out to be inadequate to prevent such evasion or circumvention, it would have to be considered how they could appropriately be changed.

B. THE DIFFERENT RULES OF PRIVATE INTERNATIONAL LAW, ALSO WITH REGARD TO CONFLICTS ARISING OUT OF PUBLIC REGULATION OF BUSINESS

I. The incorporation of domestic corporations and the recognition of foreign corporations, as well as the „personal law" of both

5. The (continental) so-called *seat-theory* shows too many shortcomings to be adopted as a persuasive rule of conflict of laws. The so-called *theory of incorporation*, on the other hand, (prevalent, above all, in Anglo-American conflict of laws), does not meet certain requirements and therefore has to be modified, and this in the sense ot the so-called *theory of super-addition* (Überlagerungstheorie).

6. This theory of super-addition substantially has the following contents: One must carefully differentiate the law governing the incorporation of a domestic corporation and the recognition of a foreign corporation, on the one hand, from the „personal law" of both groups of these corporations, on the other hand. The „personal law" of a corporation comprises all rules relating, first, to ist internal affairs, and, second to the question under which circumstances the corporation ist bound with regard to third parties, either on the basis of a contract or of a tort.

a) The *incorporation of a domestic corporation* and the *recognition of a foreign corporation* are exclusively to be determined by the law of their incorporation.

b) This law of incorporation is, in principle, also their „personal law". In this respect, the following exception may, however, apply: If a corporation is being managed from a place (managerial domicile) outside of the realm of its incorporation, if, in other words, the law at its place of principal management differs from the law at its place of incorporation, *the creditors, (minority-)share-holders and all other persons having an immediate private legal interest in the corporation* (e. g. the representatives of its employees with regard to eventual rights of co-determination in the business affairs of the corporation) *may invoke the law in effect at the place of its management*, if this

law seems to be more favorable to them than the law in effect at the place of its incorporation.

7. If, indeed, the creditors, (minority-)shareholders and other persons having an immediate private legal interest in the corporation, invoke the law in effect at the place of its management, the law of its incorporation no longer can be applied to that extent. It is superseded and thus displaced by the law in effect at the place of its management (so-called effect of displacement). Both laws, therefore, never are applicable, to one and the same question, concurrently.

8. Art. 4 of the Treaty on the Mutual Recognition of Corporations and other Legal Persons, concluded on February 29th, 1968, between the member-states of the European Economic Community, has to be interpreted in the sense of the before-formulated „theory of super-addition".

9. The „theory of super-addition" produces persuasive practical results

— not only in the category of cases in which a corporation has been incorporated under the rules of the lex fori, but is being managed from abroad (two jurisdictions being involved);
— but also in the much more frequent cases of the second category in which a corporation has been incorporated abroad (e. g. in Liechtenstein or in Liberia), but is being managed from a place located inside the boundaries of the „lex fori" (again, two jurisdictions being involved);
— and finally in a third category of cases in which a corporation has been incorporated under the laws of a foreign country A und is being managed from a place located within the boundaries of a foreign state B and in which a question of law relating to the status of this corporation has to be determined by a court of the „lex fori" (here, three jurisdictions being involved).

In all three categories, one has to distinguish between conflicts of those rules prescribing only certain standards of conduct for the (management of the) corporation, on the one hand, and conflicts of other rules affecting the very structural organisation of the corporation, on the other hand.

If there is a conflict of rules prescribing different standards only for the conduct of a corporation (e. g. as to the permissibility of the payment of dividends), this conflict usually is easily resolved: the management of the corporation not only has to obey to those rules in effect at the place of its incorporation, these rules being part of its „personal law"; it also has to pay attention to the rules in effect at the place of its management, since these rules can be invoked, to the displacement of those of its „personal law", by its creditors, (minority-)shareholders and other persons having an immediate private legal interest in it. This means: the stricter rule always applies. Therefore, if the management of a corporation wants to avoid being sued by its creditors, (minority-)shareholders, etc. for a violation of the rules in effect at its place of management, it has to follow them concurrently with those of its law of incorporation. Usually, this does not present any difficulties.

This, however, might be otherwise, if there is a conflict of rules relating to the very structural organization of a corporation (one example being that the law of incorporation prescribes a non-cumulative voting procedure for the election of its board of directors, whereas the law in effect at the place of its management contrarily requires a cumulative voting). In these cases, the „personal law" of the corporation (i. e. its law of incorporation) will, in the first instance, prevail; for no corporate body can be organized in two different ways conflicting with each other. The creditors, (minority-)shareholders, etc. can, however, here again invoke the law in effect at the place of its management alleging that the corporation, by not following these rules, has acted to their detriment, and that they therefore are entitled to claim any eventual damage, resulting herefrom, to be compensated.

II. The law governing the „internal affairs" of a corporation

10. The „internal affairs" of a corporation are governed by the law of its incorporation (see this summary above at B, I). The afore-mentioned creditors, (minority-)shareholders and other persons having an immediate private legal interest in the corporation

(see above at B, I, 6), can, however, invoke the rules in effect at the place of the management of the corporation, and this to the displacement of the rules according to which it has been incorporated.

III. The law governing the question whether a corporation is bound by a contract consummated by its officers, or by a tort committed by them

11. These questions also are, in the first instance, governed by the law of incorporation which, upon the demand of any creditors, (minority-)shareholders, etc., may be superseded and displaced by the law in effect at the location of the management of the corporation. In addition, the law in effect at the place where the contract has been consummated or where the tort has been committed, can, to the advantage of any creditors, (minority-)shareholders, etc. be applied.

IV. The law governing the corporate relationships between a subsidiary and its parent company

12. Some jurisdictions (e. g. the Federal Republic of Germany) have enacted rules regulating the corporate relationships between a subsidiary and its parent company. Under those rules, the minority-shareholders, e. g., can claim the payment of a compensation from the parent company, if the subsidiary does not earn any profits, these profits having been transferred to the parent company.

According to the almost unanimous opinion of legal scholars, these corporate relationships are governed by the law under which the subsidiary has been incorporated. According to the theory of super-addition put forward in this paper, the creditors, minority-shareholders etc. of the subsidiary have, in addition, the right to invoke the rules (regulating such corporate relationships) in effect at the place of the management of the subsidiary.

V. The rules of conflict of laws with regard to public control of business

13. In substantive law, all rules of public regulation of business have substantially to be interpreted according to their legislative and teleological intent. The same is true when their purview in conflict of laws has to be determined. Thus, if a rule of public regulation of business is part of the ,,lex fori'', it will have to be applied whenever its legislative or teleological intent requires it. If such a rule, however, is part of a foreign law, it has to be applied in exceptional cases only (foreign rules of antitrust law, e. g., are enforced only in very exceptional cases under the ,,lex fori'').

C. CONCLUSIONS

14. The ,,normal'' rules of conflict of law are fully susceptible of taking care of all conflicts arising out of different laws that might apply to a corporation (especially out of all corporation laws and out of all public regulation of business). Thus there is no need to define a notion of the multinational corporation peculiar to private international law. And it is not necessary either to develop specific rules of conflict of laws applying only to multinational corporations but not to bi-national or purely national corporations. This is the reason why there is no specific ,,private international law of multinational corporations'' as an autonomous branch of the general private international law.