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Summary

Multilateral Conventions *erga omnes* and Their Incorporation into National Codifications of Private International Law — Advantages and Disadvantages

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I. State practice under debate

1. There is no uniform state practice with regard to incorporating international treaties into municipal law. This holds also true with regard to treaties for the unification of law. In some states such treaties are applied directly, in others the treaty law is transformed into municipal private international law statutes and at the same time the treaty law transformed in some cases is adapted to the municipal legal order systematically and terminology-wise.
2. The Federal Republic of Germany until now has usually adhered to the method of adopting self-executing treaties directly into the municipal legal order, while Great Britain and the Scandinavian countries have mostly tended to incorporate international treaty law into municipal legislation. In the case of treaties concluded within the context of the European Communities (e. g. The European Convention on Jurisdiction and the Enforcement in Civil and Commercial Matters), however, Great Britain has applied the method of reception of the treaty law as it is used by the Federal Republic of Germany and other European states on the Continent. The Federal Republic, on the other hand, in the case of the European Convention on the Law Applicable to Contractual Obligations is about to engage in the opposite course by excluding the direct applicability of the Convention in municipal law and providing for a new codification of the municipal private international law.
3. From a private international and a public international law perspective the lack of a uniform state practice with regard to the reception of multilateral conventions *erga omnes* is regrettable since it puts the success of such treaties — i. e. the unification of law — into jeopardy. The existing practice, however, is only rarely considered to contradict international law. In the on-going debate on the pros and cons of applying such treaties directly in municipal law arguments of intra-state practicability (and statutory aesthetics) are confronting those of securing uniformity of the laws.

II. State practice from an international law point of view

1. Multilateral conventions erga omnes outside of regional integrationist communities

4. The question whether there exist any rules of international law asking for a particular way of bringing treaty law to bear within municipal law, is to be answered independently of the more general question as to which mode of reception of treaty law is (more) in line with international law. It has to be recognized, however, that a reception of treaty law in a way that the municipal legal order prescribes the internal application of the treaty law as international law — i. e. without transformation into municipal law — leads to more adequate results than other methods of reception.

5. General rules of international law prescribing a particular method of reception of international treaty law into municipal law do not exist. If anything it is the lack of a uniform state practice which does not allow for postulating a respective rule of customary international law. Furthermore, the Vienna Convention on the Law of Treaties does not contain any rule of this kind.

6. Multilateral conventions *erga omnes,* however, have to be fulfilled *bona fide* (art. 26 Vienna Convention). This principle rules out any application of the permissible method of reception of treaty law, which would lead to an incorporation into municipal law of some or all of the treaty regulations not in line with the provisions of the treaty concerned.

7. It is doubtful, whether it is technically feasible at all that treaties aimed at the unification of laws can be incorporated into municipal law in conformity with the treaty concerned if such incorporation is brought about by casting treaty law into municipal laws without any links to the treaty itself. In particular, the way in which the Federal Republic of Germany is about to incorporate the European Convention on the Law Applicable to Contractual Obligations into the new private international law statute is subject to well founded doubts as to whether a reception in conformity with the Convention has been achieved.

8. Much may be said in favour of a rule that the principle of *bona fide* fulfillment of multilateral conventions *erga omnes* requires the direct application of such treaties in municipal law. The growing economic and social interdependence of states, particularly the high international mobility of people (the development of permanent national minorities in many states) ask for according priority to the aim of the unification of law. The readiness of a growing number of states to revise

their traditional method of reception of treaty law in favour of direct application of multilateral conventions *erga omnes* in municipal law speaks in favour of the development of a respective *opinio iuris.*

9. Such a *bona fide* duty to apply multilateral treaties directly in municipal law without any textual modification or adaptation would leave to the states a certain discretion as to the method of how they achieve these results. It is permissible to incorporate such treaties into the municipal private international law by way of reference to the treaty or by taking over the text of the treaty literally into a municipal statute. In any case, international law demands that a uniform interpretation of the norms incorporated and that their taking precedence over succeeding municipal law (*lex posterior* rule) is being secured.

10. If it is not accepted that the principle of *bona fide* fulfillment of treaties constitutes an obligation to secure the direct application of multilateral conventions *erga omnes* in municipal law, the principle at least establishes a presumption in favour of the intention of the states parties to the treaty to proceed in the way indicated above for the sake of achieving the unification of the law. If a state party wants to engage in a different course of action, it is under an obligation vis à vis the other states parties to show good cause for this policy and it is to be held liable under international law in case of a possible discrepancy between the treaty law and municipal law deriving from the deviating method of reception chosen by such state party, unless a reservation to the treaty allows for such devious method of reception.

2. Multilateral conventions erga omnes within regional integrationist communities

11. In case of conventions *erga omnes* concluded within the context of a regional integrationist community the aim of unifying the law acquires an even more urgent character. Such treaties are also serving the purpose of integration. Reservations contrary to such aims would be illegal under art. 19 Vienna Convention.

12. If multilateral conventions *erga omnes* constitute the basis for other agreements aimed at unifying the law and at more integration, deviations from the treaties in the course of their incorporation into municipal law would have to be considered as illegal under art. 19 Vienna Convention.

III. Some pros and cons of incorporating multilateral conventions *erga omnes* into municipal codifications of private international law

13. The evaluation of the pros and cons of an incorporation of multilateral conventions *erga omnes* into the municipal codifications of private international law primarily is a matter of concern to private international law. From a public international law and a municipal constitutional law point of view such incorporation into municipal codifications is not mandatory. From a public international law perspective it may be stated, however, that a reception of such treaty law into municipal law by way of reference to the self-executing treaty law is preferable. Thereby, the national agent applying the law is remembered of the existence of the respective international treaty law within the context of the familiar municipal law. At the same time he or she is served with the relevant rules of interpretation. Thereby, most suitable preconditions for an application of the law in line with the international obligations are created.

14. Possible disadvantages of making the coming into force of the municipal codification dependent on the entry into force of the international instrument referred to, must be put up with. Likewise disadvantages have to be accepted which may arise from the fact that the international treaty law incorporated as such may be changing. This may in fact oblige the national legislature to consent to changes in the treaty law unless the unification of the law shall not be jeopardized (problem of a continuing reference to treaty law).