

Summary

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

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1. *Many multilateral conventions erga omnes on matters of private international law* exist only since recent years. Beside such conventions and within their field of application it is not necessary to have national rules of private international law. Therefore the legislators of new codifications of private international law have to make up their mind about the relation between multilateral conventions and national private international law.
2. The *incorporation* of multilateral conventions *erga omnes* into national codifications of private international law is to be recommended.
3. There are *two methods* by which national codifications of private international law may incorporate multilateral conventions *erga omnes*, i. e. by simple reference to the incorporated convention (reference-method) or by literal reproduction of the provisions of the convention (copy-method). Both methods are proposed in drafts of national codifications of private international law.
4. Making use of the *reference-method* the national legislator provides at a systematically proper place of the codification of private international law that a specific convention applies. This reference is a simple declaration if the convention as such already applies directly and in so far as the convention covers a certain subject matter. If, however, a multilateral convention *erga omnes* shall be applied to questions not covered by the stipulated field of application of the convention, such a direction by a national legislator is not a simple declaration any more. The direction constitutively creates new rules not yet contained in the convention.
5. There are mainly two *advantages of the reference-method*:
 - a) The reference preserves the *contents* of the convention because the convention will be applied as such and in form of the stipulated version of the convention.
 - b) There will be *no doubling* of a body of rules if the national legislator by municipal enactment and by a new domestic provision enlarges the coverage of a multilateral convention *erga omnes* beyond its field of

application or transforms a convention *quasi erga omnes* into a system of rules to be applied *erga omnes*.

6. Also two *disadvantages of the reference-method* have to be mentioned:
 - a) The *simultaneous existence* of municipal codifications of private international law and of convention rules will be kept.
 - b) A reference normally presupposes that the convention is *in force* and thereby links an incorporated provision of a codification of conflicts rules with conditions which are controlled not exclusively by the national legislator.
7. Making use of the *copy-method* the national legislator reproduces the wording of a multilateral convention *erga omnes* as the text of domestic conflicts rules. As far as such a convention applies directly in the country of codification, these incorporated rules of the national codification of private international law apply only if the convention does not apply according to its limitations as to the subject matter, time or personal and spatial relations. If, however, the wording of a convention applying only indirectly is incorporated in a national codification of private international law, the convention exclusively applies in form of this literal incorporation. An incorporation by the way of the copy-method normally creates new rules although to a different extent depending on the fact whether the convention applies directly or indirectly in the country of codification.
8. The *advantages of the copy-method* to a large extent correspond with the disadvantages of the reference-method:
 - a) The incorporated private international law is dealt with in a *single body of rules* only if the incorporated convention does not apply directly in the country of codification. This may simplify the law finding process.
 - b) The validity of literally incorporated rules is *independent* from the fact whether the reproduced convention is already in force or has been abrogated later.
9. Also the *disadvantages of the copy-method* correspond with the advantages of the reference-method:
 - a) A literal reproduction is *difficult*. Difficulties especially arise with conventions which do not only make provisions for certain problems of the special part of private international law but also for general questions (e. g. form of legal transactions) and if these general questions are merged with domestic rules of the same kind and codified in one provision. This may be done correctly by systematic standards, but incorrectly as to the convention. It is also questionable whether the terms "authority seized" or "international law of the authority

seised", used in conventions, may be translated into "inland" and "domestic law".

b) There is a *doubling of a body of rules* when a convention directly applicable is incorporated in a national codification of private international law; in this situation the convention applies directly within its field of application, and the copied national provisions answer only those questions not covered by the convention.

c) A *uniform interpretation* of conventions, which have been literally incorporated in national statutes, has produced up to now disappointing results. Such a danger may be reduced by an interpretation clause. Then there will be a chance for a uniform interpretation by paying regard to the aims of the convention. At the same time, however, the advantage mentioned above sub 8 b will vanish to a large extent.

10. The *reference-method* prevails over the copy-method because it meets better the duties and intentions of the parties to a convention. Also for domestic application the reference-method seems to be more suitable. The reference-method is the better solution too.

a) The *advantages* of the reference-method are considerable:

(1) The reference-method is simple and clear.

(2) It avoids the doubling of a body of rules for fact situations, which are governed by a convention directly applicable, and for fact situations, not governed by such a convention (supra 5 b and 9 b).

(3) It is well suited to the idea of a convention; it avoids difficulties arising out of a literal incorporation as well as inaccuracies and mistakes caused by the incorporation of convention rules in different systematic sections of a codification of conflicts rules (supra 5 a and 9 a).

(4) Especially the uniform interpretation of a convention is better guaranteed by the reference-method than by the copy-method; by a simple reference to a convention and its whole system it can best be made clear that there is a special body of rules which has to be interpreted in a different way compared with the domestic conflicts rules of a national codification of private international law (supra 5 a and 9 a).

b) The *disadvantages* of the reference-method cannot be avoided and also the copy-method cannot remove them completely. Conventions always cause a defect in a conflicts system consisting of domestic rules and rules stipulated in international conventions (supra 6 a) because both sets of rules are to be interpreted differently even if the convention applies indirectly only. Therefore the advantage of the copy-method to offer a unified body of rules (supra 8 a), is comparatively small and, if taken seriously, endangers the uniform interpretation

(supra 9c). The other disadvantage of the reference-method, i. e. the dependence of the national codification of private international law from conditions out of national control (supra 6d and 8b), can easily be avoided by a vigilant national legislator. As soon as conventions referred to in the codification are abolished the country of codification has to replace the reference by new conventions or by domestic conflicts rules.

11. The more important a *uniform interpretation* is, the more urgent is my advice to use the reference-method. The uniform interpretation is especially important in those situations in which a convention not only contains an interpretation clause but in which additionally the parties to the convention are obliged to examine the possibility of conferring jurisdiction in matters of interpretation of the convention on a supranational court of justice.
12. If a national legislator nevertheless will make use of the *copy-method*, the disadvantages of this method should at least be minimized by a direct application of conventions and by providing the literally incorporated rules copied from conventions for fact situations only not covered by the conventions (supra 9b).