

Session of Dijon - 1981

**The Scope of Application of Rules of Conflict of Law
or of Uniform Substantive Law Contained in Treaties**

(Twenty-third Commission, Rapporteur : Mr Alfred E. von Overbeck)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Observing the increasing number of rules of conflict of laws or of uniform substantive law that are contained in treaties and the difficulties encountered in determining their scope of application,

Makes the following Recommendations in aid of the drafting of future treaties :

I. Treaties covered by the Recommendations

Article 1

1. These Recommendations apply to multilateral and bilateral treaties containing rules :
 - a) on the applicable law ;
 - b) on the jurisdiction of courts and other authorities ;
 - c) on the recognition and enforcement of foreign decisions and on judicial assistance ;
 - d) of uniform substantive law.
2. The Recommendations are concerned only with the scope of application of such rules and do not deal with the entry into force of a treaty either between contracting States or in the legal system of any such State.

II. Issues to be Regulated in the Treaties

Article 2

1. It is desirable that all the treaties referred to contain in particular precise provisions relating to the following issues :

- a) the subject-matter covered by the rules which they contain ;
- b) the territorial application of such rules (provisions on territorial application) ;
- c) the application of such rules to facts that occurred before the entry into force of the treaty (provisions on the application in time) ;
- d) conflicts with other treaties covering the same subject-matter ;
- e) the operation of the treaty in relation to States having a non-unified legal system and, where appropriate, its application to situations which concern several units of one of such States ;
- f) the meaning of such terms as “law”, “national law”, “international law”, if used in the treaty ;
- g) the scope of clauses on reciprocity, if any ;
- h) issues on which reservations are permitted and, if appropriate, the effect of such reservations.

2. Since the content of provisions on these issues will depend on the subject-matter of the treaty, the only recommendations which it seems possible to make at the present time relate to provisions on territorial application, to reservations and to the application in time. On the last point, the Institute refers to the Resolution on the Problem of Time in Private International Law which it also adopted at its Dijon Session.

III. Conditions of Territorial Application

Article 3

The provisions on territorial application shall define the scope of the treaty rules with respect to :

- a) purely internal situations subject to national law ;
- b) situations which have no significant link with a contracting State.

Article 4

1. Treaties on the applicable law or on the jurisdiction of courts and other authorities which permit the parties to choose the applicable law or the competent authority shall specify whether the parties may use this option in purely internal situations.
2. Treaties on the jurisdiction of courts and other authorities shall contain provisions on territorial application specifying the links which the situations covered must have with a contracting State.
3. Treaties on the recognition and enforcement of foreign decisions shall indicate precisely the decisions to which they refer.
4. Treaties on the applicable law which only govern situations having certain links with a contracting State shall contain provisions on territorial application that describe the situations covered. Treaties which do not contain such limitations should make this clear by means of an express provision which could be worded as follows : “The rules of this Treaty shall apply even to a situation that has no link with a contracting State”.

Article 5

1. Where the application of uniform substantive law is limited to situations involving a foreign element, the treaty shall contain a provision specifying that element.
2. Treaties which contain rules of uniform substantive law shall restrict the application of such law to situations that have a significant link with at least one contracting State. To this end, the treaties may :
 - a) contain applicability provisions that directly specify the situations to which the uniform substantive law applies ;or
 - b) contain their own provisions on the applicable law, or refer to provisions on the applicable law that are contained in another treaty which is binding upon all parties to the treaty on uniform substantive law ;
 - c) combine the methods of subparagraphs a) and b) above.
3. Under the system described in subparagraph b) of the preceding paragraph, the uniform substantive law shall apply if the provision on the applicable law designates the law of a contracting State and if the uniform substantive law is applicable pursuant to the provision referred to in paragraph 1 of this Article.
4. Treaties which contain rules of uniform substantive law shall specify whether the persons concerned may agree to deviate from provisions that determine the territorial application of such rules.

Article 6

1. Article 4 also applies to rules of uniform substantive law that are contained as ancillary provisions in a treaty covered by that Article.
2. Article 5, except where otherwise expressly provided in the treaty, applies to rules of conflict of law in a treaty which contains mainly rules of uniform substantive law.

Article 7

The criteria that determine territorial application shall be clearly defined. In particular, one should indicate :

- a) the time at which a criterion is to be assessed ;
- b) the subsidiary solution to be used whenever a criterion would result in the designation either of several legal systems or of none at all.

IV. Reservations

Article 8

Reservations to a treaty which applies even if a situation has no link with a contracting State have no reciprocal effects.

Article 9

Whenever reservations to a treaty which is restricted in its application to situations that have some link with a contracting State are to be given reciprocal effects, one should specify in the treaty the factor which, in connecting the situation with the State that has made the reservation, produces these effects.

Article 10

Whenever reservations are permitted by a treaty which contains rules on the recognition and enforcement of foreign decisions, the recognition and enforcement of the decisions of a State that has made such a reservation shall be subject, unless otherwise provided, to similar limitations in the other contracting States.

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(1st September 1981)