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CAMBRIDGE
UNIVERSITY PRESS

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge, CB2 2RU, UK <http://www.cup.cam.ac.uk>
40 West 20th Street, New York, NY 10011-4211, USA <http://www.cup.org>
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

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First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Swift 10/13 pt [vN]

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication data

Reinisch, August.

International organizations before national courts / August Reinisch.

p. cm.

ISBN 0 521 65326 6 (hb)

1. International agencies. 2. International and municipal law.

3. Jurisdiction. I. Title

KZ4850.R45 1999

341.5'5 - dc21 99-11072 CIP

ISBN 0 521 65326 6 hardback

International Organizations Before National Courts

This book investigates in a radically empirical way how national courts 'react' to disputes involving international organizations. Comprehensively analyzing both national courts' attitudes and techniques and underlying policy reasons, it first describes various legal approaches that result in adjudication or non-adjudication of disputes concerning international organizations. Secondly, it discusses policy issues *pro* and *contra* the adjudication of such disputes. It scrutinizes the rationale for immunizing international organizations from domestic litigation, especially the 'functional' need for immunity, and substantially debates the implications of a human rights-based right of access to a court on the immunizing of international organizations against the jurisdiction of national courts. The book finally identifies contemporary trends, seeking to ascertain whether a more flexible principle exempting certain types of disputes from domestic adjudication might substitute for the traditional immunity concept, which would simultaneously guarantee the functioning and independence of international organizations without impairing private parties' access to a fair dispute settlement procedure.

AUGUST REINISCH is Professor of Public International Law and EC Law at the University of Vienna Law School, and a lecturer at the Austrian Diplomatic Academy in Vienna and at the SAIS/ Johns Hopkins University in Bologna.

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Preface

My interest in the subject-matter of this book arose rather incidentally when I attended the 1992 Centre for Studies and Research seminar of the Hague Academy of International Law on 'The External Debt'. It was my task there to focus on responsibility issues concerning debt rescheduling and the international debts crisis; one of the side issues that emerged from this investigation was whether international organizations could be made responsible or liable for part of the crisis and, if so, whether international or national fora would be available to adjudicate such claims. As far as the latter were concerned, it was apparent that immunity from jurisdiction could impede the enforcement of liability. At first, I simply assumed that international organizations would enjoy a similar degree of immunity as states. After a second look, I realized, however, that most applicable international agreements and domestic statutes provided for functional and/or absolute immunity without making explicit what this difference implied. Later on, I found that some national courts, in particular, in the US and Italy, are in fact using a state immunity standard. It appeared that no predictions about any judicial outcomes could be readily made.

To some extent my book is an attempt to find answers to this puzzle. Its subject was soon broadened to include all the various types of reasoning employed by national courts when they have to decide whether or not they will hear cases involving international organizations. It also reflects my preference for 'real world' problems which should hopefully make it a useful companion for the practitioner. At the same time it will evidence my attempt to use strict systematic standards in classifying the types and rationales of judicial responses. If it thereby combines elements of a Common Law inspired case analysis with a more formal Civil Law approach, this was not wholly unintended.

I have attempted to make the study current to spring 1998. This inevitably implies that important later developments could not be covered.

August Reinisch

Acknowledgements

This study was submitted as 'Habilitationsschrift' to the Law Faculty of the University of Vienna in 1997. I wish to express my gratitude to all friends and colleagues at the Institute of International Law and International Relations in Vienna who helped me during the various stages of preparing it.

My main debt of gratitude goes to Professor Hanspeter Neuhold, who did not only take up the arduous task of presiding over the faculty committee which accepted my thesis in 1998, but who also gave me constant encouragement and practical advice, initially, when delimiting the scope of my study and, later, when confirming my decision to wind it up without venturing into new fields. Equally, I benefited from the wise counsel and valuable comments of Professors Karl Zemanek and Gerhard Hafner. Special mention must also be made of emeritus Professor Ignaz Seidl-Hohenveldern from whose unique experience in the particular subject-matter of my work I benefited when discussing with him various aspects of my work.

I also greatly appreciated the critical remarks and comments of numerous other professors at the University of Vienna among them: Ena-Marlies Bajons, Peter Böhm, Peter Fischer, Christoph Grabenwarter, Hans Hoyer, Theo Öhlinger, Walter Rechberger, and Hannes Tretter. I should also like to thank the external member of the faculty committee, Professor Martti Koskenniemi, whose 'deconstruction' of my policy approach did not only enliven the thesis defense before the faculty committee, but whose suggestions were most helpful and were thus incorporated in the final version.

As regards my work in Washington D.C., particular thanks must go to Professor Christoph Schreuer, with whom I had many discussions on the

legal status of international organizations and whose hospitality at the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, enabled me to immediately start with my research. This work was further facilitated by the SAIS staff, all of whom I would like to thank, singling out Betty Glover for a particular recognition of her help.

I should also like to express my gratitude to Charlotte Ku for the American Society of International Law and to Michael Byers for the British Branch of the International Law Association for inviting me to present parts of my still unfinished study at Tillar House, Washington D.C., and at Jesus College, Oxford. These presentations and the ensuing debates helped me to develop and improve the arguments contained in this book.

My gratitude is further extended to Professor James Crawford, who carefully read my original manuscript, provided a wealth of highly valuable suggestions, which I have largely followed, and did not exasperate over my persistent objections to some others. I can only guess that his role in the decision of the Press Syndicate of Cambridge University Press to include my study in the International and Comparative Law Series was all but marginal. Likewise, I am indebted to the anonymous Reader A who also reviewed my draft manuscript for Cambridge University Press. His valuable comments helped to improve the book. I am particularly grateful to Finola O'Sullivan for preparing the publication of this book in a most efficient and professional manner. And my sincere admiration goes to Martin Gleeson, who helped me to avoid many technical imperfections of the text at the copy-editing stage.

Of course, all the errors and mistakes remain my exclusive responsibility. On the institutional side, I would like to express my gratitude to the Paul H. Nitze School of Advanced International Studies of Johns Hopkins University in Washington D.C. where I was invited to do research as a visiting scholar in 1995/96. The Erwin-Schrödinger-scholarship, which was awarded to me by the Austrian Science Fund, was a *sine qua non* for carrying out this research plan in the United States. Equally, the assistance of the Emil-Boral-Foundation has been instrumental in enabling me to complete my study.

On a personal level, I have relied very much on the support of my family. I am grateful to my mother and father, Herta and August Reinisch, who have enabled me to pursue my studies and who have always encouraged me in my work. Finally, and most importantly, I have to express my thanks to my wife, Elisabeth, for her support and patience with which she endured my passion for tracking down obscure case-

quotations and cryptic footnotes which often made me less available for my family than I wished to be, especially during our 1995/96 stay in Washington D.C. This book is dedicated to her and to our wonderful children, Johanna and August, who have grown up splendidly, while I was writing, without having to worry about 'international organizations before national courts'.

August Reinisch

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