

Studies and comments

The private international law communitarization

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Abstract

The Community impact on private international law (PIL) began to be felt in the late 1990s. A phenomenon that would become a visible reality through an exponential increase in legal texts of community origin on issues related to PIL. Such was anchored in the concern to ensure the proper functioning of the internal market and the need to regulate private relationships that went beyond the limits of each state, enhanced by the freedom of movement (people, goods, services and capital), one of the cornerstones of European Union. This study aims to reflect on the creation of the International Law European Private and its impact on state PIL. A literature review will be conducted in order to understand the evolution of this reality after the Treaties of Amsterdam and Lisbon. We will use a deductive and speculative reasoning anchored the views expressed by the doctrine, law and jurisprudence. We will try to demonstrate the disuse of the classic PIL (of state origin) in relation to the community PIL.

Keywords: *Private International Law; Treaties; Amsterdam; Lisbon.*

JEL Classification: K33

1. Introduction

By making a brief foray into the source of conflict rules, as instruments delimiting the law applicable to a particular international private relationship, we have come to the conclusion that these can emerge, especially, from three systems of sources: national source, which is subordinate to the national legislative activity; conventional source, which are norms in international treaties; and institutional source, that include norms elaborated within international organizations in a process of economic and political integration.

This enumeration on the methods of creation and revelation, due to the current relevance of the theme, impels us for an analysis of Private International Law (PIL) of Community origin.⁴

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On national legal systems, PIL acts to provide solutions for two conflicts' paradigms: intra-Community and non-Community.

Regarding the first, PIL's Community impact started to be felt on the end of the 90's. It was a phenomenon which would become a non negligent reality, visible through the exponential increase on legal texts of Community origin on thematic related to PIL. It also noted its special ability to regiment new situations created by the dynamics of transnational, although intra-Community, legal relations, e.g. insolvency and taking evidence abroad.

This was anchored in the concern to ensure the proper functioning of the internal market and the need to regulate private relations that exceeded the limits of each State, boosted by the freedoms of movement (people, goods, services and capital), one of the EU's cornerstones.

Legal instruments have been developed to facilitate conflict of laws, jurisdictions and others capable of contributing to international judicial cooperation.

Although classic PIL, markedly of state origin, wasn't an obstacle to the freedoms' substitution, the internal market's demands impose the unification and harmonization of some sectors.^{5/6}

Taking into account the current context, it is imperious a reflexion on the need of a European PIL and its coexistence with the national source's PIL. For that purpose, it is imposed a revision on the matter's literature as well as a foray on the importance of the Lisbon and Amsterdam treaties in the Europeanization of this normative sector, regulator of transnational private relations, most of them intra-Community.

2. The States' approach and the necessary PIL's communitarization

It is verified that the PIL's legal diplomas, made by the UE, have claimed since the early days an interpretation according to the internal market, not neglecting, however, the promotion and protection of Community liberties.

The Community Law, initially, was focused on the Economy's Public Law, reducing the discriminations between subjects originating from different State Members and which developed economical activities in other States.⁷

Even though the Private Law, at the time, was notoriously relegated to second plan,⁸ the States' approach and the intensifying of commercial relations has brought the necessity of undertaking a specific protection, capable of contributing to

ISSN 1888-0525, Año 4, N°. 9, 2006, p. 46. Available from: <https://dialnet.unirioja.es/servlet/articulo?codigo=233869>, consulted on 9.10.2018.

⁵ This goal has been achieved through EU's juridical measures, especially regulations and directives.

⁶ Cfr. Pinheiro, L.L., *Um Direito Internacional Privado comum?* Congresso Internacional "25 Anos na União Europeia – 25 Anos de Instituto Europeu", Faculdade de Direito da Universidade de Lisboa, novembro de 2011. Available from: https://www.ideff.pt/xms/files/Noticias/25_anos/Prof._Doutor_Luis_de_Lima_Pinheiro.pdf, consulted on 9.10.2018.

⁷ Calvo Caravaca, A. L., *El derecho internacional privado de la Comunidad Europea*, Anales de Derecho, Universidad de Murcia, n° 21. 2003., p. 50.

⁸ *Idem*, p. 50.

the good performance of the internal market.⁹ This phenomenon led, initially, to a harmonization of civil and commercial law, through Directives, namely aiming the agency contract, the abusive articles on consumers' contracts, the responsibility of liability arising from damage caused by producers, amongst others.¹⁰

Firstly, it was implemented the free circulation of verdicts in the Community space. This initiative would propitiate the decision's effectiveness and, therefore, it would be achieved certainty and juridical security values on all Community territory. In order to stop the justice from varying because of the latitude of the place where it acts, it was also necessary to harmonize the international rules competences on civil and commercial matters.

The 1968 Brussels Convention, regarding the judicial competence and the execution of civil and commercial matters' decisions has consecrated several options, allowing the petitioner several alternative venues. This allowed for the propelling part of the process to be chosen by one State Member courts against those of another, rooting this choice on the fact that the applicable law of that State is more favorable (*forum shopping*)¹¹.

It was easily concluded that the simple existence of unified competences rules wouldn't avoid the problems raised by the applicable law to the case's merits.

It was, therefore, imperative to establish criteria indicating the applicable law to international contractual relations. The law regulating this type of relations could not vary according to the judicial body requested.

In order to limit *forum shopping*, the conflict rules of the States Members, which were only then possible under international commercial contracts, were harmonized by means of the Rome Convention of 1980 on the applicable law to contractual obligations, so that the selection criteria of basis of the applicable law were the same within the Community.

The operability of this instrument allowed, regardless of the chosen court or competent reputed, that the escorted law was always the same, since the individualizing criteria would point to the same legal order.¹²

With the evolution of the times and with the enormous proliferation of harmonized texts, especially regarding substantive law, it was questioned if the PIL's future would not be in question.

It was fast noticed how inoperative, on large scale, the harmonization of private law was. The origins of a people, its history and roots wouldn't allow, nor do they still do, that certain national conceptions would vanish under the harmonizing

⁹ *Idem*, p. 50.

¹⁰ Wortley, B.A., (*Apud* Calvo Caravaca, A.L., *op. cit.*, p. 51), *Harmonisation of Law in the European Economic Community*, Mélanges R.D.Kollewijn - J.Offerhaus, Leiden, Sijthoff, 1962, pp. 529-536

¹¹ Granger, C., *The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation*. Ottawa L. Rev., 1973, 6: 416. [online] RDO | OLR. Available from: <https://rdo-olr.org/1974/the-conflict-of-laws-and-forum-shopping-some-recent-decisions-on-jurisdiction-and-free-enterprise-in-litigation/> [Accessed 9 Oct. 2018]. p. 417

¹² The Treaty of Rome, in 1957, included in its Article 220 (4) that Member States should establish negotiations to ensure among themselves the simplification of formalities for the drafting of international conventions regulating the typical PIL's problems.

process. This allowed State Members to prosecute the legislative power in areas strictly connected with the social path of the respective population¹³.

In this context, the importance of the principle of subsidiarity, which is an essential part of the EU's functioning, must be underlined. This principle allows the Union to legislate only just when the interests of citizens claim it.¹⁴ This means that harmonization should only take place when it is necessary to eliminate national disparities which are an obstacle to the proper functioning of the internal market, including health, safety, environmental and consumer protection, Cfr. Article 5 (3) of the Treaty on European Union.

Each State's PIL doesn't show any friction regarding the Uniform Substantive Law, even being stated a peaceful coexistence and an excellent complementarity between both¹⁵.

In 1993, with the Maastricht Treaty, and according to what was being developed at the time, other PIL conventions emerged, in accordance with Article 220 of the EEC Treaty and Article 3 of the Maastricht Treaty¹⁶.

¹³ González Campos, J. D., *Diritto Privato Uniforme e Diritto Internazionale Privato* in Picone P., *Diritto Internazionale Privato e Diritto Comunitario*, Padova, 2004, p. 56; Iriarte Ángel, José Luis, *op. cit.*, p. 53.

¹⁴ Cfr. Article 5 Treaty on European Union

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
5. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

¹⁵ González Campos, J. D., *op. cit.*, p. 59.

¹⁶ Maastricht Treaty, *Article K.1* - For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: (...)

6. judicial cooperation in civil matters;

Article K3 - 1. In the areas referred to in Article K.1, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.

2. The Council may:

- on the initiative of any Member State of the Commission, in the areas referred to in Article K.1(1) to (6);
- on the initiative of any Member State, in the areas referred to Article K1(7) to (9): (...)

c) **without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance**

We are referring, namely, to diplomas on service of judicial and extrajudicial documents in civil and commercial matters, jurisdiction, recognition and enforcement of verdicts in matrimonial matters and in matters of parental responsibility¹⁷.

However, none of the abovementioned texts entered into force, given the difficulties which the procedural technique of the conventions entails.¹⁸ Consequently, particular attention should be paid to the consistency in the Community legislative policy. Let us not forget that the conventions suffer from some vicissitudes, allowing the ratifying States to make reservations, and therefore to adopt different regulations in the national regimes for the same situations.

The conventions also provide for a certain period of validity, which precludes a uniform interpretation by States.

All these constraints have ended up limiting the creation of a genuine area of European justice.¹⁹

In this sense, the Luxembourg Protocol was created, on the interpretation of the Brussels Convention of 1968.²⁰

In the wake of the long-standing European Court of Justice, in connection with the 1980 Rome Convention, two protocols were drawn up (Brussels): one concerning the interpretation of the Rome Convention by the Court of Justice of the Communities (TJC) and another attribution of TJC on the interpretation of the Rome Convention.²¹

It was only later, through the Treaty of Amsterdam, that the emphasis could be placed on the progressive creation of an area of freedom, security and justice. The Council should therefore adopt the necessary measures for the proper functioning of

with their respective constitutional requirements. Unless otherwise provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down. (our underline)

¹⁷ Iriarte Ángel, José Luis, *op. cit.*, p. 56.

¹⁸ Cfr. GREEN PAPER on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, 14.1.2003.COM (2002). The Community's task was to ensure the smooth functioning of the single market, the harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection and equality between women and men. These were the objectives to be achieved by the Community, within the limits of the powers entrusted to it, by establishing a common market and related measures, as set out in Article 3 of the EC Treaty, and by adopting an economic policy and of a single currency in accordance with Article 4. Community action should respect the principle of proportionality and, in areas which do not fall within its exclusive competence, the principle of subsidiarity (Article 5 of the EC Treaty).

¹⁹ In creating the European Union, the Maastricht Treaty in 1992 established a system of pillars: the first pillar, with the three existing Communities; the second pillar with cooperation on common foreign and security policy; and the third pillar, with cooperation in matters of interior and justice.

²⁰ Carried out by the Court of Justice of the Community.

²¹ The purpose of the preliminary ruling procedure was to achieve a uniform interpretation of the two Conventions, cfr. Iriarte Ángel, José Luis, *op. cit.*, p. 57.

the internal market, namely²² promoting the compatibility of the rules applicable in the Member States on conflicts of law and jurisdiction.^{23/24}

Two outlined legal bases have thus been retained: Treaty of Rome and the Treaty of Amsterdam, regarding the drawing up the Community PIL rules. On the one hand, conventions can be elaborated; on the other hand, provision is made for the possibility of secondary legislation.

Therefore, it is urgent to determine by which of the binding legal acts should be chosen, whether by regulation or directive (?).

In this sense, the EU has opted for the use of the Regulation, a general legislative act, binding in its entirety and directly applicable in all countries of the Union.²⁵

In favor of this typology of legal acts, it also militates the fact that it completely unifies the rules of DPI of the Member States, suppressing the problems of conflict of laws.

At the same time, the Community regulation avoids serious obstacles to the law of treaties, such as reservations, denunciations, ratifications, etc. It also strengthens international legal certainty, "*allowing individuals to directly invoke the rules contained in the regulation and obliges state judges to apply it ex officio*".²⁶

The Treaty of Amsterdam, in addition to simplifying certain formalities, in particular for citation, cross-border notification of judicial and extrajudicial acts, the

²² Article 61 (c) Treaty of Amsterdam.

²³ Article 65 (b) Treaty of Amsterdam.

²⁴ The new Title IV (Visas, asylum, immigration and other policies related to free movement of persons) had strong effects for the normative technique adopted.

²⁵ This way, an uniform interpretation is implemented, with the possibility of making a reference for a preliminary ruling under Articles 68 and 234 TEC (*Treaty of Amsterdam*).

Article 68 - 1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

(...)

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

Article 234 - The Court of Justice shall have jurisdiction to give preliminary rulings concerning :

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

²⁶ Calvo Caravaca, A.L., *op. cit.*, p. 54.

obtaining of evidence, recognition and enforcement of judgments in civil and commercial matters, has also compatibilized conflicts of laws and jurisdictions of the States Members.

3. The European PIL

From a certain point, and due to the intensification of private legal relations between individuals from different States, the EU felt the need to create common conflict rules for Member States. Let us not forget that the harmonization process, in some areas, has approximated national legislation and that this could not fail to have repercussions on PIL.²⁷

Throughout the various stages of the EU, with particular attention to the two milestones, Amsterdam and Lisbon Treaties, we have seen significant changes in the Member States PIL. And it was starting from the first that, under PIL, legislative powers were assigned to certain EU bodies.²⁸ Article 65 of the Treaty of Amsterdam recognized the competence of the Community institutions to draw up rules on judicial cooperation in civil matters.

Specifically, in order to improve and simplify the compatibility of standards in international civil proceedings and the law of conflicts between Member States, the EU has regulated the system of citation and cross-border notification of judicial and extrajudicial acts; cooperation on the provision of evidence; recognition and enforcement of judgments in civil and commercial matters, including non-judicial decisions; and the compatibility of the rules applicable in the Member States on conflicts of law and jurisdiction.

The communitarization of the PIL must, however, honour the fundamental principles of the EU so as not to create obstacles to the proper functioning of the internal market, without discriminating against nationals of other Member States, much less undermining Community freedoms. From these two milestones we can speak in a (growing) communitarization of PIL.^{29/30/31}

²⁷ Cfr. Ramos, Rui Manuel Moura, *Estudos de Direito Internacional Privado da União Europeia*, Imprensa da Universidade de Coimbra, 2016, p. 19.

²⁸ Cfr. Pinheiro, L.L., *op. cit.*, p.1.

²⁹ Pérez Vera, E., (*Apud* Calvo Caravaca, A. L., El derecho internacional privado de la Comunidad Europea, *op. cit.*, p. 53), El DIPr. y la UE", La UE ante el siglo XXI: Los retos de Niza, Actas XIX, Jornadas AEPDIRI, BOE, Universidad Cantabria, Madrid, 2003, pp. 173-188.

³⁰ As an example, there are some very clear regulations of the option for this type of act, although many have already been replaced by others: Council Regulation (EC) No 1346/2000 of 29 May 2000 on procedures for insolvency; Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial acts in civil or commercial matters, Council Regulation (EC) No 1347/2000 of the European Parliament and of the 29 May 2000 on jurisdiction and the recognition and enforcement of verdicts in matrimonial matters and in matters of parental responsibility for the children of the couple; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of verdicts in civil and commercial matters; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

³¹ *Vide our considerations above.*

At this stage, it should also be borne in mind that measures in the field of judicial cooperation in civil matters will only be adopted to the extent of the necessary for the proper functioning of the internal market.³²

In short, the application of the substantive law determined by the conflict rules of a State Member must respect the principles of Community law, in particular the compliance for Community public policy.

There are, however, situations beyond the scope of the PIL of internal origin and Community law, namely in matters excluded from the scope of the regulations.

Emphasis should be placed on the need to adopt internal provisions to complement Community rules of origin, making its implementation more operational. Inserted in PIL, there is the so-called enhanced cooperation. This means that a group of countries may decide to cooperate without all State Members necessarily participate in such cooperation. It allows States that do not want to join to remain outside without stopping other States to cooperate.

We must also take into account the Community origin PIL's on national legislators and jurisprudence, emphasizing the importance of legislative coherence throughout the system.

The first step was the Extra Contractual Obligations Regulation (Rome II), which complemented the process of unification of the rules on compulsory disputes initiated with the Rome Convention of 1980³³.

Also in the area of contractual obligations³⁴ operated the unification, the Rome Convention became an act of the Union, with the adoption of the Rome I Regulation³⁵.

It took place the communitarization of the following areas:

- Alimony obligation (Regulation on jurisdiction; to applicable law, recognition and enforcement of verdicts and cooperation in matters relating to alimony obligations. It should be noted that this law concentrates conflicts of jurisdiction and conflicts of laws³⁶.

³² As part of the co-decision procedure, the European Parliament and the Council became virtually equal co-legislators, with the exception of agricultural policy and competition policy, the co-decision procedure applied to all areas in which the Council could deliberate by qualified majority. In four cases (Articles 18, 42 and 47 as well as Article 151 on culture policy), the co-decision procedure was always combined with the requirement of a unanimous Council decision. With the exception of those legislative areas which required unanimity and which, thus, were not covered by co-decision.

³³ Lagarde, Paul. L'européanisation du droit international privé – Conflits de lois. Ejtn.eu [online]. 2018. Available from: http://www.ejtn.eu/PageFiles/6333/Rapport_Vienne_Lagarde.pdf, p.3-4, consulted on 9.10.2018.

³⁴ Cfr. Peter Mankowski, *Stillschweigende Rechtswahl und wahlbares Recht*, in *Das Grunbuch zum internationalen Vertragsrecht. Beitrage zur Fortentwicklung des Europaischen Kollisionsrechts der vertraglichen Schuldverhaltnisse* (cit. supra, nota 73), p. 63-108.

³⁵ Kramer, Xandra, Rooij, LL.M., Michiel, Lazić, Vesna, Blauwhoff, Richard and Frohn, LL.M., Lisette., 2012. *Citizen's Rights and Constitutional Affairs*. Bruxelles: União Europeia. [online]. 2018. Available from: <http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf>, p.28-29, consulted on 9.10.2018.

³⁶ Cfr. Rosario Espinosa Calabuig, «Las obligaciones alimenticias hacia el menor y su relación com la responsabilidad parental: los reglamentos 4/2009 y 2201/2003»

- Divorce, after the entry into force of the Lisbon Treaty, a Regulation establishing closer cooperation in the area of the law applicable to divorce and legal separation. This domain is also excluded from national legal orders.

- Successions, after the entry into force of the Lisbon Treaty, Regulation which “*pursues the creation of a common private international law, (...) (materializing) the principle of mutual recognition*”.³⁷

4. Conclusions

Following a brief analysis of the impact of the European Union on private international law, it will be essential to keep the following considerations in mind:

1. We have seen that the Community PIL has emerged in order to fill certain legislative gaps and deficiencies. It was aimed the creation of conditions capable of governing private transactional relations fostered by freedom of movement (people, goods, services and capital), Treaty of Amsterdam;³⁸

2. A harmonization process was carried out, bringing together the internal rules of the State Members, which had, as was expected, its repercussions on the PIL;

3. EU law does not regulate all areas of those relations, as it does not remove the plurality and diversity of national legal systems, and is only subsidiary in relation to them.³⁹

4. With the proliferation of normative diplomas, the disuse of classic PIL in relation to the Community PIL has become increasingly visible. Not forgetting the continued legislative intervention of the State Members in areas strictly linked to the social path of each population.

5. Community intervention and, consequently, loss of sovereignty of individual states are increasingly signaled.

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³⁷ Ramos, Rui Manuel Moura, *op. cit.*, p.237-238.

³⁸ Borrás, A. (2002). *La comunitarización del derecho internacional privado: pasado, presente y futuro*. Available from: http://www.ehu.es/cursosderecho/internacionalvitoria/ponencias/pdf/2001/2001_5.pdf, consulted on 9.10.2018.

³⁹ Morales, P. (2014). *Direito Internacional Privado*. Portugal. [online] Recil.grupolusofona.pt. Available from: http://recil.grupo_lusofona.pt/bitstream/handle/10437/6417/jurismatesp_33-60.pdf?sequence=1, consulted on 9.10.2018.

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