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INTERACTION BETWEEN EUROPEAN LAW AND PRIVATE INTERNATIONAL LAW: FROM ROME TO MAASTRICHT

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The author demonstrates that nowadays European Union Law and Private International Law have many areas of common interests, but the process of their mutual penetration was long and gradual. The article examines Private International Law instruments adopted by the Rome Treaty of 1952 and the Maastricht Treaty of 1992, during the so-called pre-Amsterdam period. The author focuses on the role of the European Court of Justice in gradual converging of European Union Law and Private International Law.

Keywords: conflict of laws; European Court of Justice; EU Law; europeanisation of Private International Law; the Maastricht Treaty; the Rome Treaty.

ВЗАИМОДЕЙСТВИЕ ЕВРОПЕЙСКОГО ПРАВА И МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА: ОТ РИМА ДО МААСТРИХТА

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Автор демонстрирует, что право ЕС и международное частное право имеют в настоящее время много точек соприкосновения. Однако процесс их взаимопроникновения был постепенным и длительным. Анализируются инструменты международного частного права, которые были предложены Римским договором о ЕС 1952 г. и Маастрихтским договором 1992 г., т. е. в так называемый доамстердамский период. Автор акцентирует внимание на роли Европейского суда справедливости в эволюции сближения европейского права и международного частного права.

Ключевые слова: коллизионные нормы; Европейский суд справедливости; право Европейского союза; европеизация международного частного права; Маастрихтский договор; Римский договор.

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Introduction

One of the reasons of the origin and development of Private International Law of the European Union (hereinafter – EPIL) emanates from substantial discrepancies in Private International Laws of jurisdictions of the EU member states (hereinafter – Member States) that are applicable to similar legal relationship. For example, with regard to conflict of tort laws: some Member States applied the *lex loci delicti commissi* law, whereas other Member States referred to the *lex loci damni*. Accordingly, the outcome of a legal proceeding depends entirely on the forum (the court) considering the claim. As a result, such dissonance of the conflict of laws in different jurisdictions leads to legal uncertainty and forum-shopping (the situation when a plaintiff unfairly exploits jurisdictional rules with the aim to affect the outcome of litigation) that adversely affect cross-border relations. In such scenario the regional economic integration would be considerably impeded and disabled.

The European Union proclaims the establishment of the internal market as one of its primary goals. Certainly, the EU could not tolerate the divergences of Private International Laws (hereinafter – PIL) of

the Member States as it considerably hampers the achievement of the EU major ambition. Accordingly, the EU was highly interested in *developing and supporting* PIL. In the meantime, the involvement of PIL in expanding European integration sparked the adjustment of PIL instruments to the EU needs. Nowadays EPIL plays a key role in regulation, facilitation, and enhancement functioning of the EU internal market. Therefore, we can name the following objectives of EPIL:

- to analyze the interaction between supranational (Union law) and national laws of the Member States;
- to designate the applicable laws to the legal relationship between individuals, and/or business entities;
- to amplify the supranational regulation on various subjects at cross-border level.

Given such circumstances, the EU has not only contributed to the origin of EPIL, but also factored significantly further development of PIL in general.

This article is concerned with some aspects of origin and development of EPIL as well as with some modern trends in it.

A brief analysis of differences between PIL and Union Law

First and foremost, we should admit that on the long way to the European integration PIL and European Union Law (hereinafter – Union Law) did not experience love at first sight. They have always been uneasy bedfellows [1, p. 119].

The reason is that PIL and Union Law do not have the same starting point despite of the fact that both PIL and Union Law fulfill a similar function – they both try to resolve a problem of conflict of laws [2, p. 7].

The starting point of Union Law underlies in the very specific legal nature of the EU. The EU is a *unique and unprecedented* hybrid form of international cooperation in the whole legal history. The European Union is half-way between an international organization and a state.

According to the theory of Public International Law, an intergovernmental organization is a legal entity that has been created by international treaty, involving two or a certain number of states. The authority and powers assigned to an intergovernmental organization stipulate from the international treaty concluded between sovereign states.

Turning to the process of European integration, the EU is founded on a series of international treaties concluded among its Member States. Accordingly, these treaties outline and limit the authority and power of the EU. In contrast, a sovereign state is considered independent from other states on its internal policy regarding the territory and population. Accordingly, the EU cannot be considered as a sovereign state.

In the meantime we should admit that the EU executes essential legislative power over the territory and the citizens of the Member States by issuing directly applicable regulations. Moreover, if there is a conflict between Union law and national law, the EU law prevails.

Therefore, the power of the EU to stipulate the regulation directly affecting the citizens and entities of the EU Member States characterizes the EU as a supranational entity.

As to the legal sources of Union Law, initially they evolved around the creation of a common market. Nowadays when the internal market already exists and functions, one of the major concerns of Union Law is the imposition of a rule that may affect negatively (impose any restriction) the internal market. Thereby, smooth functioning of the internal market may be ensured by harmonization of national laws of the Member States and its application in consistency with Union Law.

Considering PIL's starting point, PIL strives to achieve “an international harmony of decisions” and to serve international trade as a whole, not just the needs of intra-Union commerce. Initially, PIL is not concerned with the political aims of European integration. According to the theory of Savigny, PIL does not seek to overcome the flaws resulting from discrepancies between national laws. PIL strives to establish the center of the relationship between the private individuals and apply the law of the place most closely con-

nected to the relationship. PIL is value free and rule blind. [2, p. 7–8].

Therefore, Union Law tries to affect the national laws of the Member States in order to promote freedom of movement of goods, services, persons and capitals within the territory of the EU. While PIL is not biased to any legal system or political integration, it pursues to mitigate potential negative consequences of the conflict of laws and facilitate international trade between any countries.

The origin and development of EPIL

The Treaty of Rome [3]. Initially the EU tried to create a common market by removing obstacles to trade artificially created by the Member States with the implementation of the fundamental freedoms: free movements of goods, services, capital and persons. For this sake, the Member States signed the Treaty of Rome in 1957, establishing the European Economic Community (hereinafter – EEC).

It is difficult to overestimate the Treaty of Rome in the history of European integration. The Treaty of Rome founded a platform for future integration. The Treaty contained significant innovations, one of which was the institution of the European Court of Justice (hereinafter – the ECJ).

In the meantime, the Treaty of Rome was not flawless, had oversights, and was poorly developed in terms of cooperation of the Member States in the area of PIL.

Art. 220 of the Treaty of Rome states:

“Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;
- the abolition of double taxation within the Community;
- the mutual recognition of companies or firms within the meaning of the second paragraph of Art. 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries;
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”.

One of the drawbacks of the Treaty of Rome was a lack of authority of the Commission of EEC to rule on PIL matters. Only the Member States were empowered to negotiate unification of its national laws in certain matters. Such interpretation of Art. 220 of the Treaty of Rome was proven by historical facts. For example, the initiative to adopt the Rome Convention on the Law Applicable to Contractual Obligations of 1980 [4] (hereinafter – Rome Convention) was introduced by the Member States.

Despite these different legal grounds, rationales and aims, the interaction between Union Law and PIL has increased for the following reasons. Firstly, the EU uses PIL as the instrument to advance the main targets of the EU internal market: freedom of movement of goods, services, persons and capitals. Secondly, Union Law imposes restrictions on the conflict of laws of the Member States provided that such provisions collide with freedoms declared under the EU Treaty. And lastly, the EU codifies PIL at the European level.

Another oversight of the Treaty of Rome was that it did not envisage regulations and directives as the instruments of harmonization of the Member States' laws. The language of the Treaty of Rome referred only to the conventional legal sources, such as international treaties, as the instruments of cooperation between the Member States. During the term of the Treaty of Rome, EEC adopted neither regulations nor directives on the matter of PIL harmonization. The only exception was several specific directives dealing with free movement of persons and services.

For example, Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC [5] regulated the conflict of laws concerning self-employed professionals and provision of services [6, p. 50–52].

The next shortcoming of the Treaty of Rome was significant constraint on the ECJ power to interpret international treaties concluded between the Member States. According to the Treaty of Rome, the ECJ had the authority to interpret only Union Law. In case the Member States came across the legal issues arising out the international treaty concluded between them, the EEC Commission had to issue an additional protocol authorizing the ECJ to interpret the international treaties.

Another major deficiency of the Treaty of Rome was the absence of references to the individuals or business entities of the Member States. Technically, it meant that the provisions of the Treaty of Rome did not apply directly to the citizens and/or business entities of EEC.

Luckily, the ECJ cured this defect. The ECJ established in the landmark case *Van Gend and Loos* [7] that the provisions of the EEC Treaty and Union law were capable to provide the rights to the individuals.

Another impeccable example of functioning of the ECJ was *Costa v ENEL* [8] decision. The ECJ established the primacy of Union Law over the national laws of the Member States.

In *Defrenne II* [9] the ECJ stated that the non-discrimination principle embodied in Art. 141 of the EEC Treaty has direct effect and also applies to a contract between an employee and a private employer.

Therefore, the case law of the ECJ considerably developed, enhanced, and advanced Union Law in general and EPIL in particular.

Apart from invaluable contribution of the ECJ to the progress of EPIL, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter – the Brussels Convention) [10] is considered as one of the brightest examples of the unification of the conflict of laws at the international level. However, the Brussels Convention was only a regular international treaty that did not have direct effect on the individuals of EEC, unless a state adopted and implemented the convention. It seems that the Member States felt that it would be appropriate to undertake further steps for the unification of conflict of law. These attempts led to the adoption of the Rome Convention.

In the meantime, both the Brussels Convention and the Rome Convention were purely PIL instruments because they allowed the Member States to enter and apply other international treaties on the same subject matter. Basically, it meant that up to that point European integration was still relatively weak for the convergence of PIL and Union Law.

Subsequently, the ECJ in Case 22/70 Commission v. Council (ERTA) [11] and Case C-476/98 Commission v. Germany (Open Skies) [12] established the so-called doctrine of implied powers which means that the Union has the power to act externally, in so far as it is necessary for the fulfillment of its internal power. The Member States lose their power to enter into international treaties once the Union has exercised its competence internally and the treaty may affect the scope of the common rules.

If we go beyond the scope of the present article, we can realize that at a later stage the doctrine was codified in the Lisbon Treaty. Art. 351 of Treaty on the Functioning of the European Union (hereinafter – TFEU) provides that the Treaty will not affect the obligations of the Member States arising under other international conventions that entered into force before 1 January 1958. In the meantime, TFEU requires the Member States to take all appropriate steps to eliminate the existing incompatibilities.

Therefore, the Treaty of Rome provided a basis for the establishment of the common market between the Member States, but there were still a number of deficiencies and oversights related to many areas of integration, including the area of EPIL. Such defects impacted negatively the further development of the common market. And at different stages various legal instruments cured such shortcomings. The international treaties, namely the Brussels Convention and the Rome Convention, contributed to the development of PIL, while their flexible approach with regard to participation in other international treaties was still detrimental to the uniform application of Union Law. The

ECJ played a significant role in the origin and development of EU PIL by issuing far-reaching decisions on the uniform and consistent application of Union Law.

The Treaty of Maastricht (1992) [13]. The next step on the way of the development of EPIL was the Treaty of Maastricht [13] that specified the purposes expressed in the Rome Convention to continue the unification of PIL.

The Treaty of Maastricht in Article K. 1 proclaimed judicial cooperation in civil cases as a matter of common interest. According to Article K. 1 of the Treaty of Maastricht:

“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:

(1) asylum policy;

(2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;

...

(6) judicial cooperation in civil matters...”

The language of Art. K. 1 of the Treaty of Maastricht remains an open question regarding the scope of the “judicial cooperation” concept.

The traditional concept of judicial assistance includes the cooperation between judicial bodies (in particular, the courts) of different Member States in the areas of (1) enforcement of foreign judgments, (2) transmitting judicial documents for service abroad, (3) the examination of a witness or an expert residing abroad.

The interpretation of Art. K. 1 of the Treaty of Maastricht allows us to conclude that judicial assistance embodied in the Treaty of Maastricht is broader than the traditional concept of judicial interpretation. According to Art. K. 1 of the Treaty of Maastricht: “judicial cooperation in civil matters for the purposes of achieving the objectives of the Union, in particular the free movement of person”. The objective of the Union is establishing the freedom of the common market. The freedom of movement of persons includes the regulation on personal status and family relationship. In this case, judicial cooperation along with the freedom of movement of persons open the way to the regulation of all areas of conflict of laws, including the succession law. We may admit such conclusion as the succession law may play a crucial role in the choice of the place of habitual residence.

Another major contribution of the Treaty of Maastricht to the development of EPIL was delegating to the Council of EEC the right to draft international treaties with third parties (states) on the matter of judicial cooperation in civil matters and delegating to the ECJ the authority to interpret the provision of international treaties of the Member States. According to Art. K. 3 of the Treaty of Maastricht “the Council may

... without prejudice to Art. 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements... 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”.

As a result, the Treaty of Maastricht contributed to the development of PIL in the following ways:

1. The subject matter of EPIL unification was considerably extended;
2. The Council of EEC received the right to draft international treaties of the Member States on judicial cooperation in civil matters;
3. The ECJ was authorized to interpret international treaties.

Conclusion

Undoubtedly, PIL instruments have made substantial contribution to the foundation and development of the common market of the EU. In the meantime, it should be admitted that the expanding competences of the EU facilitated the convergence of PIL and Union Law. Eventually, PIL and Union Law have

become easy bedfellows. The first generation Union Law launched the process of the unification of PIL by the adoption of international treaties on different matters. The ECJ played the key role and triggered the subsequent development and harmonization of EPIL.

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