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INTENSIFICATION OF THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW OF THE EUROPEAN UNION

E. V. BABKINA^a

^aBelarusian State University, 4 Niezaliežnasci Avenue, Minsk 220030, Belarus

To define the main steps and the methods of the europeanisation of private international law, to find out its pros and cons and to propose possible directions for the application of the European Union experience in the practice of the Eurasian Economic Union are the objectives that the author of the present article set for herself. The positive experience of the transnationalization of sources of private international law can also be used by the Eurasian Economic Union.

Key words: private international law; europeanisation; the European Union; regional unification; sources of law.

ИНТЕНСИФИКАЦИЯ РАЗВИТИЯ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА В ЕВРОПЕЙСКОМ СОЮЗЕ

Е. В. БАБКИНА¹⁾

¹⁾Белорусский государственный университет, пр. Независимости, 4, 220030, г. Минск, Беларусь

Определены основные этапы и методы европеизации международного частного права, выявлены их положительные стороны и недостатки, предложены основные направления применения опыта Европейского союза в практике Евразийского экономического союза. Позитивный опыт транснационализации источников международного частного права может быть использован Евразийским экономическим союзом.

Ключевые слова: международное частное право; европеизация; Европейский союз; региональная унификация; источники права.

Entry into force on 2 September 1997 of the Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts (hereinafter – Amsterdam treaty) gave to F. Pocar [1, p. 873], a renowned researcher of private international law, the basis to pose a question whether the communitarisation of private international law is the revolution for the former. Today without any doubt the answer to the question is positive. To define the main steps and the methods of the europeanisation of private international law, to find out its pros and cons and to propose possible directions for the application of the European Union (hereinafter – EU) experience in the practice of the Eurasian Economic Union (hereinafter – EAEU) are the

objectives that the author of the present article set for herself.

The term *europeanisation* [2; 3; 4] of private international law refers not only to the adoption of the sources of EU law which govern transnational private law relationships but also to the influence of EU law on the regulation of such relations at other levels – international and national levels along with supranational level within the framework of the regional integration organizations other than the EU.

Entry into force of the Amsterdam treaty provided additional possibilities for the europeanisation of private international law in the form of participation of the institutes of the EU in the unification of private international law and international civil procedure

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Автор:

Елена Васильевна Бабкина – кандидат юридических наук, доцент; заведующий кафедрой международного частного и европейского права факультета международных отношений.

Author:

Elena V. Babkina, PhD (law), docent; head of the department of private international and European law, faculty of international relations.
babkinaelena16@gmail.com

provisions. Thus, art. 65 sets out: "Measures in the field of judicial cooperation in civil matters having cross-border implications ... in so far as necessary for the proper functioning of the internal market, shall include ... promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction".

Article 81(2) of the Consolidated version of the Treaty on the functioning of the European Union signed on 13 December 2007, by altering somewhat the text of the relevant rule further expanded the possibility to apply supranational instruments in this sphere: "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring... the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) co-operation in the taking of evidence".

The Court of Justice of the European Union (hereinafter – the CJEU) extended the internal competence of the EU to its external powers. In Opinion 1/03 [5] the CJEU inferred that the Community's competence to conclude international treaties may not only be directly expressed in the primary treaties, but may equally derive from other provisions of these treaties as well as from measures adopted by the institutes of the Community for the implementation of these provisions. Since the relevant authorities to achieve specific objectives have been delegated to the EU institutes by the Community, it has the competence to assume international commitments that are necessary for the achievement of these specific purposes even when it is not expressly conferred by the treaties. However, it is not necessary for international agreement's scope to coincide fully with the scope of Community legislation. Where the test of 'an area which is already covered to a large extent by Community rules' is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis 9 (p. 124–126). In Opinion 1/13 [6] the CJEU supplemented this thesis with the conclusion about the existence of the exclusive competence of the EU, even if there is only a risk of violation the uniform and consistent application of regulations in the Member States (p. 89).

It should be duly noted that the existence in the European law of some instruments designed to limit the monopoly of the EU to adopt sources of private international law and to implement the competence of the Member States to conclude the international agreements in the area of the regulation of the transnational private law relationships.

Thus, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) specify in the preambles the aim of the elaboration of the special legislation on the conclusion by the Member States on their own behalf the international treaties with third countries on the issues within the scope of the regulations. For example, Article 42 of the preamble of the Rome I sets out "Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations".

Consequently, the Regulation (EC) No. 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations and the Regulation (EC) No. 664/2009 of the European Parliament and of the Council of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations were adopted.

The Regulation (EC) No. 662/2009 and the Regulation (EC) No. 664/2009 approve the exclusive competence of the EU in the areas within the scope of the above-mentioned regulations as a general rule but nevertheless set out the procedure to negotiate and to conclude international agreements with third countries by Member States.

According to the established procedure, the member state must notify the European Commission of its intention to begin negotiations on the conclusion of a treaty with a third state. The Commission is obliged to check whether there is any intention to conclude such an agreement with that country within the next 24 months. In case of a negative response, the Commission shall verify compliance with the following conditions: 1) the member state has a specific interest in conclusion of the relevant agreement, caused by economic, geographical, cultural, historical, social or political ties with the third state; 2) the proposed agreement is compatible with the effectiveness of the law of the Union and does not undermine the functioning of the system established by EU law; 3) the proposed agreement does not frustrate the object and objectives of the Union's policy in the field of external relations.

In addition, the duty to include in the text of the treaty provisions for its denunciation by a member state, in the event of the subsequent conclusion of a treaty between the EU and this third state, is established.

European law granted European private international law its specific forms – directive and regulation. At the same time, the method and structure of the source of legal regulation remained the same: basic rules in the field of private international law contain bilateral conflict-of-laws rules, as well as general provisions on public policy, direct regulation, *renvoi*, enforcement of law of the country with plural legal system, in some cases – jurisdiction and recognition of foreign judgments. Hence, sources of European private international law repeat the method and structure of international treaties adopted by the Hague Conference and other organizations. It seems that such an approach is driven by the understanding of the need for interaction between the above-mentioned acts, as well as by the simplicity of the technique developed by more than a century of experience of the Hague Conference. Thus, Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, in accordance with mentioned EU Advisory Opinion No. 1/13 “complements and clarifies the provisions of the Hague Convention on the Civil Aspects of International Child Abduction” and establishes precedence over this convention and several other Hague Conventions on matters within the scope of the regulation. In order to determine the applicable law in EU Member States Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations refers to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, if the Protocol is legally binding.

However, one cannot ignore the tendency to expand the scope of the sources of European private international law. At the initial stage, there were adopted regulations that enforced conflict-of-laws rules (they were called Rome regulations – Rome I, Rome II, Rome III – in order to emphasize the consistency principle: the origins of the European conflict of laws provisions on obligations lie in the draft of the Rome Convention, the idea of which was to develop a comprehensive legal act in the field of private international law) or dealt with the jurisdictional regime and the procedure of recognition and enforcement of foreign judgments (they were called Brussels Regulations, with a view to highlighting their genesis due to the evolution of the Brussels Convention (Brussels I regulations, Brussels Ibis, Brussels IIbis)). Currently, we see a more comprehensive construction of European regulations

which include conflict-of-laws rules along with jurisdiction issues and recognition and enforcement of foreign judgments but in relation to a particular subject of legal regulation (Regulation Rome IV, Council Regulation (EU) No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [7], Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [8]).

Despite the similarity in the methodology of regulation and structure of regulatory legal acts, European instruments are specific ones. Specific characteristics of European conflict of laws’ sources are explained by the duality of the goals they pursue. On the one hand, it is harmonization – uniformity and consistency – of judgments and, as a result, legal certainty, predictability and stability of international private law relationships. On the other hand, the qualifying element of private international law within the framework of this integration association is the ‘filling’ of these norms with European values and principles of European law, orientation towards achievement of EU goals, primarily, towards the maintaining of the common market’s effective functioning, namely, the realization of the four fundamental freedoms and creation of an area of freedom, security and justice.

A striking example is the system of connecting factor in Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [9]. The main principle is the autonomous will of the parties, limited by the law of the state of residence or last residence of the spouses, in so far as one of them still resides there, or by the personal law of at least one of the spouses or by *lex fori*. In the absence of a choice of law by the parties the applicable law is the law of the state of spouses’ cohabitation or the last cohabitation, in so far as it took place not earlier than one year prior to the court session and one of the spouses still resides there, or the common citizenship of the spouses, or *lex fori*. In this case, we see a compromise between two opposing objectives: the creation of a predictable and certain legal regime and the ‘harmony of judicial decisions’, the overall goal of the unification process, and free movement of persons in the Union, the goal of integration, where the latter is being provided not only by the opportunity for the parties to choose a more favorable applicable law and avoid unfavorable, but also by the possibility of application of the spouses’ personal law, which might be third country’s law, so that national, cultural and religious traditions are taken into account, and, thus, the recognition and enforcement of judgments in those countries are simplified.

The possibility of achieving such different goals, considering various circumstances, distinguishes European private international law from the instruments of other international forums. The typical goal of any unification, which is to uniformise the application of the law of the integration association, in this case is being achieved, among other things, by institutional mechanisms designed to ensure European legal order and to achieve its goals, values and principles [10, p. 124–125]. The EU Court acts as a direct regulator which has the jurisdiction to give preliminary rulings and express an authoritative opinion on the interpretation of the norms of European law. The EUCJ played an instrumental role in the development of European law and promotion of European integration.

It should be emphasized that European private international law does not aim to replace current legislation at the universal level. As a rule, European instruments regulate those areas of social relations that are of the greatest difficulty for harmonization and unification or require specific regulation for the purposes of regional economic integration: contract law, transport relations, banking operations, and financial sector.

An indicative example is the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COD) [11]. Despite its name, this act is intended to regulate relations with consumers as a weak party: Art. 8 establishes that it applies only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise (which employs no more than 250 people and the annual turnover of which does not exceed 50 million euros). The new project of 2017 [12], designed to replace the draft of the Common European Sales Law, further narrows the scope of application: it regulates the contracts with the consumer, who may exclusively be an individual.

Consideration and appreciation of the effectiveness of universal regulators by EU legislator is even more clearly traced on the example of the approach to the legal regulation of international commercial arbitration. Discussions on the exclusion of the legal regulation of arbitration from the scope of the Brussels I Regulation took place even during the preparation of the Brussels Convention [13, p. 113]. Subsequently, at the drafting stage of the revision of the EC Regulation on Jurisdiction, the European Commission proposed to include in the text an article on the relation between the jurisdiction of member states and international commercial arbitration, since before the EU Court, in several preliminary rulings, confronted with the question of injunctive relief [14, p. 843, 847]. In the case *Marc Richand Co. v. Società Italiana Impianti* [15] the EC Court ruled that the litigation connected with ar-

bitration proceedings was not within the scope of the Brussels Rules.

However, the proposal of the European Commission, submitted to Green Paper [16], to incorporate several provisions on arbitration in the draft, including the law applicable to the existence and validity of the arbitration agreement, drew sharp criticism from the arbitration institutions, so that a large number of provisions were excluded even from the Regulation's draft, except for the *lis pendens* – the rule that in order to exclude parallel proceedings between national courts and between national courts and arbitration courts establishes the priority of the arbitration courts or the court of residence of the arbitration with respect to the value, validity and consequences of the arbitration agreement [17, p. 4, 9, 35, 36].

As a result, the final text of the regulation not only does not regulate the above-mentioned issue, but includes the norm on the priority of the New York Convention over the Regulation (Part 2, Article 73).

Hence, the scope of these European instruments has no points of contact with the existing unification of international sales contacts (Vienna Convention on Contracts for the International Sale of the 11 April 1980) and international commercial arbitration (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958).

At the same time, one cannot but note criticism on the complexity of the system of sources of EU private international law which is increasingly being heard in the doctrine [18, p. 175–176, 181; 19, p. 585–586, 592–593]. It is also called a “rag carpet”, and “a mountain of regulations without a system”, and “a large number of trees which are nothing like a forest” [18, p. 180].

Norms of private international law are contained in a large number of sources. The scopes of application of regulations sometimes overlap. Complexity of terminology, significant differentiation of legal environment also do not contribute the problem solving. Today international private law of the EU is a complex, multi-structural, differentiated system of legal norms, characterized by autonomy and, as a rule, direct and immediate application in the member states.

Similarly, the terms “contract”, “one's party promise” and other ones should be interpreted and are being interpreted by both the EU Court and national courts without reference to national and supranational European law [20, p. 162–171].

Certainly, such situation contradicts the provisions of Article 7 TFEU, which states: The Union takes care of coherence between different directions of its policies and activities taking into account the totality of its objectives and in accordance with the principle of empowerment.

The above-mentioned difficulties in the practical usage of the sources of private international law of the EU, as a result of its fragmentation, have led to the pro-

posal of the development of comprehensive source of European law – the Code of European Procedural Law [21, p. 187–196] and the Code of European private international law [22, p. 175–186; 23; 24, p. 175–185].

However, the most suitable is the idea of autonomous complex codification of European Private International Law (comprehensive codification), the creation of a single comprehensive legal act.

One of the allegations in support of this proposal is the success of the codification of private international law at the national level in almost all Member States and in a lot of third countries. Moreover, the European region is characterized by the idea of reception of legal constructions. For example, the doctrine of “characteristic performance” was borrowed by the authors of the Rome Convention on the Law Applicable to Contractual Obligations of 19 June, 1980 and then transferred to the Rome I Regulation from the third state legal system, Switzerland, to be exact. None of legal system of the States-Members contained any similar legal institution in that time [25, p. 654–655].

Furthermore, the advantage of this approach is the advance of legal certainty and predictability, consistency and systemacy of legal regulation, as well as unified application and minimization of forumshopping. As a model for such a project, it is proposed to use the Law on Private International Law of Switzerland of 1987 [26, p. 600].

It is necessary to emphasize the receptivity of the European legislator to fresh scientific ideas, especially, to multi-vector cooperation between the doctrine and EU bodies. Thus, on 11 October 2012, the Legal Affairs Committee (JURI) of the European Parliament requested the Report on the Assessment of the Absence of Legal Regulation (CostofNon-Europereport (CoNE)) regarding the prospects for the development of the European Code of Private International Law. The purpose of such reports is to estimate social and economic costs, as well as the consequences of insufficient protection of the citizens’ rights and legitimate interests due to the absence of the European Code of Private International Law.

The relevant report, presented in March 2013 [27], points out 13 spheres characterized by deficiencies in legal regulation on the EU level: legal capacity, inca-

capacity, name and patronymic, recognition of defacto family relations, recognition of same-sex marriages, parent-child relationships, decisions about adoption, alimony obligations in defacto family relations, gifts and trusts, movable and immovable property, agency services, private life and corporations [27, p. 7].

The evaluation criteria were factors such as: costs associated with doing business (costs associated with managing business, such as arrears, unrealistic for collection, non-execution of contracts and the complexity of their enforcement, and as a whole, loss of profits), administrative costs, including applications for recognition of civil status, apostille, cross-border activity certification and justification of the right to payment, legal costs (legal assistance, as well as representing in court, recognition contracts’ legal effect, recognition documents’ status, estate administration, rights of property and other assets), social and emotional costs (loss of wealth, stress and discomfort caused by the length of legal procedure), as well as the loss of the EU in a broad sense – the uncertainty and inconsistency caused by the barriers for the freedom of movement, goods, persons and services on the domestic market.

The absence of legal regulation – as a whole, the lack of regulation and applicable law, and jurisdiction, and recognition and enforcement of foreign judgments, and at the level of one or more components of private international law – entail serious legal consequences for both the administration and citizens EU, which is estimated by the economic damage to the Union in the amount of 138 million euros per year. Comparing the legal consequences of introducing changes and amendments to the sectoral legislation and codification, the authors of the report express an unconditional preference for the latter, naming its advantages – transparency, simplification of procedures, cost reduction, the possibility of non-specialists applying, creating a complete picture of the object, reducing the number of norms that lead to realization of the main goal – the implementation of the principle of legal certainty, reducing barriers and restrictions for the freedom of movement of persons in the internal market [27, p. 10], as well as simplifying the recognition of judicial decisions and the prevention of forumshopping [27 p. 12].

Conclusion

The analysis of the interaction of the unification processes presented in this paper at the universal and regional levels allows us to make the following theoretical and practical conclusions.

1. One cannot but acknowledge a substantial impact of regional unification of private international law within the EU on its universal unification. Moreover, this influence is found in several planes.

A. At the regional level, the europeanization of private international law is manifested in the proposal to

international private law of new regional forms while maintaining the classical method of legal regulation, as well as the system of normative rules.

B. The scope of application of European private international law is rapidly expanding both at the horizontal level – the branch nature of regulated public relations, – and at the vertical level – the territorial nature of regulated social relations. The classical approach that regional unification is limited by the boundaries of the regional integration association is

currently failing. The scope of regulation of private international law of the EU today is not limited by relations within the Union, but extends to third countries. This thesis is being consistently developed by the EU Court in its advisory opinions and decisions.

C. At the universal level, the communitarianization of this industry leads, unfortunately, to negative consequences. First, this is seen in the loss of interest of European states, which historically, embodying the idea of F. K. von Savigny on *Entscheidungsharmonie*, were the driving force behind the processes of unification and harmonization, to the work of some international organizations. EU Member States leave such international institutions, which is explained both by the presence of more significant unification results at the regional level, and by the recognition, with the lightness of the Court of the EU, of the exclusive competence of the Union in the field of legal regulation of cross-border private law relations.

The practice of these organizations demonstrates the failure to create tools for universal unification on issues within the scope of legal regulation of European private international law: recognition and enforcement of foreign judgments both in general and on specific issues, for example, inheritance. Thus, this issue was deleted from the Hague Conference program immediately after the first meeting of the General Affairs Council after the adoption of the EU Regulation No. 650/2012. At the same time, there is a tendency for the EU not to “interfere” with regulation of public relations at the universal level.

At present the European doctrine expresses an extremely pessimistic view on the possibility of a universal settlement of issues that were not previously regulated at this level, for example, the law applicable to the existence and validity of the arbitration agreement at the pre-arbitration stage, and the issue of jurisdiction to consider such a dispute. The length and complexity of the process makes it impossible to revise the New York Convention. The only solution is unification at the regional level. The suggested proposal to use the instruments of the European Convention of 1961 seems too optimistic both in the above arguments and

in view of the fact that only 19 EU member states participate in it. Obviously, European states will have to return to the issue of including norms on regulating aspects related to arbitration proceedings in EU law.

2. The trend of the “centrifugal” movement (from the universal to the regional one) in the conflict-of-laws rules of cross-border private legal relations, of course, has to be reflected in the EAEC right.

3. The positive experience of the transnationalization of sources of private international law can also be used by the Eurasian Economic Union. Unification acts of private international law in the post-Soviet space – Kiev Agreement on the procedure for resolving disputes related to the implementation of economic activities, dated 9 October 1992, the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases of 22 January 1993, as well as the Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases of 7 October 2002 – no longer in tune with modern world trends.

4. The lack of special competence of the EAEC in the area of cross-border private law relations cannot be an obstacle to unification within the framework of the Eurasian Economic Union. These issues may fall within the competence of the EAEC on the basis of the doctrine of “implied authority”, developed law enforcement practice of the European Union. The goals of the EAEC, as stated in Article 4 of the Treaty on the Eurasian Economic Union of 29 May 2014, are the creation of conditions for the stable development of the economies of the Member States in order to improve the living standards of their populations. The aspiration to form a single market for goods, services, capital and labor in the framework of Union – fully justifies the attribution of decisions on those issues of public relations, which are not directly attributed to the jurisdiction of the EAEC by the founding treaty, to its competence.

A special role in the interpretation and development of private international law of the EAEC can be played by the EAEC Court, the purpose of which is to ensure uniform application of the EAEC rights by the member states and the Union bodies.

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