

BRIEF SUMMARY OF THE EVOLUTION OF THE EU REGULATION ON PRIVATE INTERNATIONAL LAW

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Over the past decade, building common European private international law (PIL) has become a primary goal for European institutions. This aim derives from the need to reconcile the diversity in EU Member States' substantive law. To achieve this goal, European institutions have been creating uniform private international law rules, because the advantage of uniform PIL rules is that they leave the Member States' differing national substantive law untouched, notwithstanding they promote the 'international uniformity of decisions' (*internationaler Entscheidungseinklang* as it was originally called by *Friedrich Carl von Savigny*) in the European judicial space. Up to the present day, in order to provide an area of freedom, security and justice in civil matters, the European Union has employed a considerable number of legal instruments which deal with issues of PIL, such as matters of jurisdiction, applicable law and recognition and enforcement of foreign judgements. The PIL regime, described above, has been developed in the EU legislation in the form of conventions, regulations, directives and case law. This diverse evolution has been labelled in various ways: Europeanisation of Private International Law, European Private International Law, or EU Private International Law.¹

Three periods are regarded as having particular importance in the above-mentioned development of EU PIL: the beginnings of PIL evolution (1957–1999), the accelerated years after the Treaty of Amsterdam (1999–2009) and the most recent period after the Treaty of Lisbon (2009–).

I. The beginnings: harmonization of PIL rules at European level

The idea of harmonisation by means of international treaties was initiated by *Pasquale Stanislao Mancini* in 1874. According to him, the adoption of a comprehensive

¹ The topic of the work does not allow us to give detailed analysis of these definitions, all we can state here is that the use of different terms also shows the scattered character of PIL legislation at the European level.

international convention establishing uniform PIL rules might be of great importance in order to harmonise judgements of different national jurisdictions.²

Before 1999 the harmonisation of private international law rules at the European Union level took the form of conventions, which could be concluded on the basis of Article 220 of the EEC Treaty (later renumbered as Article 293 of EC Treaty, but now repealed by the Lisbon Treaty).³ Pursuant to the given legal basis, the Member States conducted the Brussels Convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters (1968).⁴ The Rome Convention on the law applicable to contractual obligations (1980),⁵ which was initiated by the EEC, had no legal basis in the Treaty; however, it was created and conducted in order to continue the work of unifying the law, which had already been accomplished within the Community, in the field of private international law.⁶ Incidentally, during the first period, conflicts rules appeared not only in international conventions but fragmentary and randomly in directives as well.

It is worth mentioning here that, apart from the authorisation of founding treaties, several multilateral conventions have been created by international organisations. The most important international institution in this respect is the Hague Conference on Private International Law (HcCH). In the history of the evolution of PIL, it can be considered an important landmark when the EU finally became a member of the Conference on 3 April 2007.⁷ The HcCH has so far adopted a substantial number of conventions in different fields of private international law. As such, it was essential that the EU was granted a status which enables it to participate as a full member in the negotiations of conventions organised by the HcCH.⁸ It should be emphasised that the accession of the EU was also generated by the fact that the EU was conferred with new legislative competence after the Treaty of Amsterdam.

II. After the Treaty of Amsterdam: unification of PIL rules primarily by means of European regulations

The Treaty of Amsterdam opened up new perspectives for the European legislation of PIL rules. Namely, competence in the field of judicial cooperation in civil

² MARCIN CZEPELAK: Would we like to have a European Code of Private International Law. *European Review of Private Law*, 2010/4. 705.

³ „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 simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

⁴ OJ L 299/32 (1972)

⁵ OJ L 266/19 (1980)

⁶ OJ L 266/19 (1980); cf. the 2nd recital of the Preamble

⁷ After the Statute of Hague Conference was amended which enables the admission of a Regional Economic Integration Organization and the Council's decision from the accession of the EC to the HcCH. 2006/719/EC: Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law OJ L 297, 26.10.2006, 1–14.

⁸ The EU has ratified the Protocol on the Law Applicable to Maintenance Obligations (2007), and has signed the Convention on Choice of Court Agreements (2005).

and commercial matters was transferred from the former third pillar to the first pillar, which thus afforded the EU institutions the competence to legislate in the area of PIL.

After the entry into force of the Treaty of Amsterdam (1 May 1999), the unification of private international law rules at European level was effected primarily by means of EC regulations adopted by the Council, or jointly by the Council and the Parliament, under Title IV (from Article 61 to Article 69) of the EC Treaty. Under Article 65, measures were adopted in the field of judicial cooperation in civil matters with cross-border implications, in so far as necessary for the proper functioning of the internal market. Such measures included the following: (i) improving and simplifying the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases (Article 65 (a)); and (ii) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction (Article 65 (b)). They also included measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. However, these measures adopted did not apply to Denmark, and did not apply to the United Kingdom or Ireland either, unless they elected to participate in the adoption of or to accept the measure in question.

Since the Amsterdam Treaty empowered the EU to create rules in the field of private international and international procedure law, a few legal instruments have been adopted that provide common legal rules in these areas. Following a path already established by conventions in many PIL areas, the Council (later with the European Parliament) first enacted regulations in the same fields. It is a well-known fact that the Brussels I Regulation replaced the Brussels Convention and the Rome I Regulation replaced the Rome Convention. By 2009 (when the Treaty of Lisbon entered into force), numerous new regulations covering jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, family matters and matters relating to maintenance obligations, as well as the law applicable to contractual and non-contractual obligations and maintenance obligations, had been adopted. The specific instruments are as follows: the Brussels I, the Brussels II bis, 4/2009/EC, Rome I, Rome II Regulations. Of course these regulations do not represent exclusive law sources of the EU PIL rules, because many other PIL provisions are scattered among other EU instruments, e.g. directives on company, consumer, labour law, insurance contracts, intellectual property rights, securities.

III. After the Treaty of Lisbon: on the way towards a deeper integration

The major innovations of the Lisbon Treaty considering our topic are the Union competences, Denmark's position, the competence of the European Court of Justice (ECJ) and the special legislative procedure (*passerelle* clause included) in family matters.

1. *The Union competences*

Since the Treaty of Lisbon (initially called the Reform Treaty) entered into force (1 December 2009), the most remarkable change with regard to PIL is the widening EU competences. The Treaty of Lisbon replaced Title IV on visas, asylum, immigration and other policies with a renamed and renumbered Title V “Area of Freedom, Security and Justice”. In the area of freedom, security and justice the EU competence is limited by the principle of conferral and is expressly shared between the EU and the Member States (Article 4 of the Treaty on the Functioning of the European Union (TFEU)).⁹ Measures on judicial cooperation in civil matters can therefore be taken by the Member States only to the extent that the Union has not exercised its competence or has ceased to exercise its competence.

While the former Article 61 (c) and Article 65 of EC Treaty required that any measures in the field of judicial co-operation in civil matters, including measures of PIL and international procedural law adopted, had to assist with the proper functioning of the internal market, the Lisbon Treaty modified this requirement. According to the new Article 81 TFEU, the European Parliament and the Council may adopt the above mentioned measures “*particularly* (the italics are the authors’) when necessary for the proper functioning of the internal market”.¹⁰ In this way the EU relieved itself of the internal market criterion. However, it does not give the European Union *carte*

⁹ *Article 4*

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - [...]
 - (j) area of freedom, security and justice.

¹⁰ *Article 81*

(ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. 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:
 - (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
 - (b) the cross-border service of judicial and extrajudicial documents;
 - (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
 - (d) cooperation in the taking of evidence;
 - (e) effective access to justice;
 - (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
 - (g) the development of alternative methods of dispute settlement;
 - (h) support for the training of the judiciary and judicial staff.

blanche,¹¹ because the Union competence is limited by the general principles, and on the other hand the grounds of measures are also limited, although the Lisbon Treaty adds some new measures to the already existing grounds listed in the second paragraph of Article 81 TFEU¹² by the following: “(e) ensuring effective access to justice, (g) the development of alternative methods of dispute settlement and (h) support for the training of the judiciary and judicial staff”.

Finally, we should briefly focus on the new wording of the first paragraph of Article 81 TFEU, which provides that “the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases”. The introduction of the principle of mutual recognition in the field of PIL into the Treaty is novelty, but not a surprisingly new idea, because we can find this principle in regulations like the Brussels I regulation and the decisions of the ECJ, such as the *Grunkin-Paul* case, which expanded the principle to the recognition of decisions duly taken by the public authorities of another Member States.¹³

2. Denmark's position

With a new protocol annexed to the Treaties, Denmark has changed its position regarding the measures to be taken on the basis of the former Title IV of EEC.¹⁴ Thus Denmark now enjoys an opting-in position similar to that of the United Kingdom and Ireland.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

¹¹ GERARD-RENE DE GROOT – JAN-JAAP KUIPERS: *The New Provisions on Private International Law in the Treaty of Lisbon*. *Maastricht Journal of International and Comparative Law*, 2008/1, 111.

¹² Article 81(2) TFEU reads: “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: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; rules on civil procedure applicable in the Member States; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff.”

¹³ Court of Justice of the European Communities, 14 October 2008, C-353/06, *Grunkin-Paul* [2008] ECR I-07639.

¹⁴ Protocol (No 22) on the position of Denmark OJ C 83, 30.03.2010, 299.

Article 1 of the protocol maintains Denmark's former negative position, namely, Denmark does not take part in the adoption by the Council of measures proposed pursuant to Article 81 of the TFEU. However, within three months after a proposal or initiative has been presented to the Council, Denmark may notify the President of the Council in writing that it wishes to take part in the adoption and application of any such measure under Article 3.¹⁵ According to Article 4 the procedure for enhanced cooperation shall apply *mutatis mutandis*.

3. *The competence of the ECJ*

It goes without saying that one of the crucial issues has always been how national courts apply these common EU instruments in a uniform manner; the European Court of Justice therefore plays an important role in shaping the private international law regulation at European level. As such, another notable change with regard to PIL resulted from the Lisbon Treaty: the granting of full legal review competence in preliminary references to the European Court of Justice.

Before the Lisbon Treaty, the ECJ had limited jurisdiction as a result of the former rule (Article 68 (1) of the EC Treaty). According to it, the only national courts that were enabled to refer a case for preliminary ruling to the ECJ were those where there was no legal remedy against their decisions. This rule was abolished by the Lisbon Treaty; consequently, the normal preliminary procedure of Article 267 TFEU was applicable to Title V as well, which means that every national court may request a preliminary ruling. Some authors find that this extension of the Court's jurisdiction was an appropriate amendment, because "[w]ith the increased adoption of acts on the basis of Article 81 TFEU, that national courts have the widest possibility to address the European Court of Justice is necessary to guarantee a uniform interpretation of regulations and directives".¹⁶

4. *Special legislative procedure in family matters*

Last but not least, although the Treaty of Lisbon has not essentially changed the ordinary legislative procedure (co-decision procedure) considering measures adopted on the basis of Article 81, Article 81(3) of TFEU establishes a special legislative

¹⁵ Article 3

1. Denmark may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon Denmark shall be entitled to do so.
2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with Denmark taking part, the Council may adopt that measure referred to in paragraph 1 in accordance with Article 1 without the participation of Denmark. In that case Article 2 applies.

¹⁶ See DE GROOT – KUIPERS i. m. 114. With similar conclusion: MICHAEL WELLS-GRECO: Evolving EU Private International Law: A brief overview of the Commission's proposal on the law applicable to divorce and legal separation. 4. <http://www.collyerbristow.com/fileservers.aspx?oID=1598&lID=0>

procedure which requires unanimity with regard to family matters.¹⁷ The Lisbon Treaty, however, has introduced a special passerelle clause in this respect. Generally speaking, the passerelle clause allows the European Council to unanimously decide to replace unanimous voting in the Council of Ministers with qualified majority voting (QMV), with the previous consent of the European Parliament in the above mentioned area, and to move from a special legislative procedure to the ordinary legislative procedure. The passerelle clause under Article 81(3) of the TFEU requires that the national parliaments be notified of the Commission and if any national parliament protest against the proposed decision within six months, the Council cannot adopt the decision. Consequently, the Council can only adopt the decision in the absence of any opposition from national parliaments.

It is worth mentioning that Denmark, Ireland and the United Kingdom may participate in the adoption and application of specific acts within three months after the proposal has been published by the Commission. In order to facilitate the opt-in of these Member States, the passerelle clause also applies to these Member States. However, objections by their national parliaments are restricted, because if a measure cannot be taken within a reasonable period of time with Denmark, Ireland or the United Kingdom included, the Council may adopt the decision without these countries.¹⁸

All in all, we can state that this legislative procedure can be applied effectively only in those matters which are considered as less sensitive politically; however, family matters are closely connected to the significantly diverse national substantive laws and the different traditions of certain national legal institutions. The main problem is that there is not a consistent approach within the Member States' family laws (just consider the different approaches over same-sex marriage or registered partnerships). Because of this, integration in this area is limited by differences between Member States' political will and intentions. Since enormous tensions and conflicts have characterised the unification process to date at a European level, it becomes more difficult to further enhance the Europeanisation process in family matters.

To overcome these obstacles, a possible solution to reconcile divergence utilising the discipline of PIL can be the enhanced cooperation procedure under Article 20 TEU in conjunction with Articles 326-334 TFEU. For the first time in the history of the European Union, Austria, Belgium, Bulgaria, Germany, France, Hungary, Italy,

¹⁷ Article 81(3) TFEU reads: "Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

¹⁸ See Articles 3(2) of the Protocol on the Position of the United Kingdom and Ireland as well as of the Annex to the Protocol on the Position of Denmark.

Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of law applicable to divorce and legal separation. On 12 July 2010 the Council adopted the Decision 2010/405 authorising the procedure in this field.¹⁹ According to Article 328(1) TFEU, enhanced cooperation is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision and it also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The reasons for the legislative procedure are to resolve the legal problems European citizens face when confronted with cross-border divorce or separation proceedings and to help the national courts when they have to deal with the problems of applicable law. However, opinions differ concerning the enhanced cooperation procedure. On the one hand, some have the view that it takes us further on the way toward a deeper integration, on the other hand others believe it can create a further risk of a ‘two-speed’ European Union.²⁰

IV. Conclusion

It is a positive fact that the regulation of private international law has profoundly changed in recent years. The underlying reasons are, as *Arroyo* states: “‘Multi-location’ and ‘multi-connection’, speed and mobility are characteristics of the present era. This is true for states and companies, and also rich and poor people. [...] To know only what ‘our’ courts do and what is the content of ‘our’ PIL rules can hardly allow us to solve real problems in an accurate way.”²¹ The legal codifications of international organisations and the European Union have a growing and strong impact on domestic legal systems. This phenomenon, which we called above the Europeanisation of PIL, has undoubtedly intensified resulting in domestic PIL becoming “more and more residual”.²² As *Kramer* points out: „The impressive legislative activities, resulting in about a dozen regulations, also put private international law on the European map in a quantitative manner. Private international law nowadays is an important pillar of EU law, and has in the past decade certainly made more progress than the harmonisation of substantive law.”²³

The above described evolution has actually changed the regulation of private international law at European level. The EU is legislating in this area of law at an

¹⁹ OJ L 189, 22.7.2010, 12–13.

²⁰ KARHARINA BOELE-WOELKI: To Be or not to Be: Enhanced Cooperation in International Divorce Law within the European Union. *Victoria U. Wellington Law Review*, 2008/2009, 779–792.

²¹ DIEGO P. FERNÁNDEZ ARROYO: Private international Law and Comparative Law: A Relationship Challenged by International and Supranational Law. *Yearbook of Private International Law*, 2009, 63.

²² See *id.* at 57.

²³ XANDRA KRAMER: The Interaction between Rome I and Mandatory EU Private Rules. 3. <http://ssrn.com/abstract=1666740>

accelerating pace, but there remains much to be defined and refined. The complexities of legislating in the European sphere on PIL have also resulted some disadvantages, e.g. difficulties arising from the multiplication of the sources of PIL (the labyrinth of PIL conventions, regulations, etc.), unsatisfactory technique of legislation (inconsistent, 'creeping unification'), lack of coordination, divergence in terminology and different methods applied as *Czepelak* demonstrates in his analysis.²⁴

The question is which way will the EU take to move on toward a deeper integration?

The first way seems just a desire now; an ambitious project, as *Czepelak* remarks, the European Code of Private International Law should be a corollary of the current state of development, hereby achieving *Asser's* idea for an overarching codification. However, *Czepelak* also adds correctly that it cannot be carried out because of the lack of common political will.²⁵

The second way to a deeper integration can be to develop 'European approaches' to PIL based on 'European values'. Because the difficulties of establishing common approaches stem from the differences and divergent interests between the Member States, these should be reconciled, taking common values and approaches in PIL, especially those based on human rights, into consideration.²⁶

The third way (with or without the above described second way) can be the same route that the EU has taken recently, i.e. the further fragmentary unification of PIL rules as well as the application of the enhanced cooperation process in certain areas. Nowadays the future success and appropriateness of the legislation in the area of the unification of the PIL rule(s) regarding e. g. matrimonial (registered partnerships) property, succession and wills, non-contractual obligations arising out of violations of privacy and rights relating to personality can be next steps, and which can predict the depth of any further integration.

²⁴ CZEPELAK i. m. 705–728.

²⁵ CZEPELAK i. m. 728.

²⁶ See more details, RUTH LAMONT: Evaluating European Values: The EU's approach to European private international law. *Journal of Private International Law*, 2009/2, 371–381.

