THE CONFLUENCE OF PRIVATE INTERNATIONAL LAW AND EU LAW

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Abstract

Adopting an international systemic perspective, the division of private international law into three components of jurisdiction, applicable law and the recognition and enforcement of foreign judgments may be seen in the fresh light. The existence of different national legal systems creates the potential for inconsistent legal treatment of disputes.

The three components of private international law are usually distinguished and examined separately. While this separation is understandable, it risks missing the interaction and intersection between EU law and Private law. Choice of law rules try to find a single most closely connected law to a dispute, although there can be disagreement on how such a connection should be measured.

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1. Definition of Conflict of laws

Each country's legal system reflects its society's values. As a result, national laws and the structure of domestic judicial systems vary considerably from country to country. The courts of each involved country may claim jurisdiction over the matter, and the laws of each involved country may be applicable under certain circumstances. When such conflicts, or differences, exist, procedures need to be in place to resolve them; the term *conflict of laws* (sometimes also *conflicts* or *conflicts law*) describes the body of law of each country or state that is designed to resolve problems arising from the differences between legal systems[1].

In Romanian legal system the definition of Conflict of laws it's regulates by Part VII, of the Civil Code[2].

Conflicts law must address three principal questions. First, when a legal problem touches upon more than one country, it must be determined which court has jurisdiction to adjudicate the matter. Second, once a court has taken jurisdiction, it must decide what law it should apply to the question before it. The rules governing the court may direct it to apply its own law or call for the

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[1] Alex Mills, Justice, *Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge Press, 2009, p. 19.

[2] The New Civil Code, officially Law no. 287/2009 on the Civil Code is the basic source of civil law in Romania. It was adopted by Parliament on 17 July 2009 and came into force on 1st of October 2011. It replaced the Civil Code of 1865 as well as the Commercial Code of 1887 and the Family Code of 1954.

application of the law of another country. Third, assuming that the court ultimately renders a judgment in favour of the plaintiff, conflicts law must address the enforcement of the judgment. In the event that the defendant has insufficient assets locally, recognition and enforcement of the judgment must be sought in a country where assets do exist[3].

2. The differences of legal systems

Notable differences exist, for example, between countries with a common-law tradition and those employing civil law. In contract law, for example, civil law has no direct counterpart to the common-law requirement that a promise be supported by "consideration" - *i.e.,* by a bargained-for exchange - in order to be binding. Similarly, the systems differ with respect to formalities that may be required for a contract (e.g., a writing). Even within the broad groups of common law and civil law, national legal systems diverge, sometimes substantially. Thus, English substantive law often differs materially from American law, though the two common-law countries share a common tradition and basic methodology.

In Germany, for example, the Commercial Code (Handelsgesetzbuch) prescribes a subjective approach toward defining a merchant: it depends on the person and the purpose and manner of his actions. The French Code de Commerce adopts an objective approach: it is the particular transaction that determines which party in a transaction is the merchant. Older Sweedish law focused on the definition of a merchant *(köpman);* newer legislative provisions employ more comprehensive concepts of those engaged in commerce *(näringsidkare)*.

3. Different jurisdiction approach

Conflicts law is a part of national legal systems and is not codified in a systematic way at the supranational or international level. Nevertheless, some international treaties have unified particular areas of substantive and conflicts law with respect to the participating states. When a treaty provides uniform rules of substantive law - as does the UN Convention on Contracts for the International Sale of Goods (1980) - it may displace national law, rendering the rules of conflicts law obsolete. In contrast, when an international treaty unifies conflicts law, substantive differences between national laws continue to exist, but the uniform rules provide a way to bridge them.

Notable exception was the Convention on the Law Applicable to Contractual Obligations (1980), commonly known as the Rome Convention, which applied in the member states of the EU and whose interpretation lay within the scope of the European Court of Justice upon reference from national courts. The EU possesses law-making powers that enable it to establish uniform rules of substantive law, thereby displacing previous national law and eliminating

[3] Weiler and Wind, *European Constitutionalism Beyond the State*, Cambrige University Press, 2003, p 15.

conflicts. In 2008 the EU adopted the Rome I Regulation, which transformed the Rome Convention into binding EU law, and adopted the Rome II Regulation, which provided rules for determining the applicable law in cases of noncontractual obligations.

European choice-of-law methodology has undergone similar changes, both in the law of individual European states and within the EU - in the latter first as a result of the Rome Convention and more recently as the result of EU legislation. In tort the EU's Rome II Regulation contains specific rules for a few torts but in general calls for the application of the law of the place of injury, with exceptions in favour of the law of the parties' common habitual residence and, as an alternative, of a more closely connected law. In contract the Rome I Regulation also provides specific choice-of-law rules for a number of contract types - for example, seller's law for contracts for the sale of goods in the absence of a contrary party stipulation. In so doing, it translates the preceding Rome Convention's reference to the law of the party rendering the "characteristic performance" (e.g., selling the goods, providing the service) into concrete rules. The Rome Convention's underlying policy - application of the most closely connected law - becomes the default rule when no specific rule applies. The Rome I Regulation also provides special rules for consumer, insurance, and employment contracts[4].

4. The perspective upon Private International Law

Adopting an international systematic perspective, the division of private international law into the three components of jurisdiction, applicable law and the recognition and enforcement of foreign judgments may be seen in a fresh light. The existence of different national legal systems creates the potential for inconsistent legal treatment of disputes. This problem could be addressed through three distinct strategies of „metajustice"(5), in support of the principle of justice pluralism. One strategy would be to try to ensure that disputes will only ever be heard by one court, by minimising the overlap in the jurisdiction of national courts. A second approach would be to adopt unified rules for the application of foreign law. The idea would be that wherever a dispute is litigated, the same national substantive law should be selected and applied. A third approach would to provide that where a foreign court has heard a dispute, the judgment will be recognised locally rather than reheard. This approach would eliminate inconsistent judgments, but would have the disadvantage of accentuating the incentives for forum shopping.

Each of these strategies is emodied in a component of private international law – rules on jurisdiction, the applicable law, and the recognition and enforcement of foreign judgments. Since the perfect implementation of any of these strategies is impossible, each of them is pursued simultaneously. There are limits on the jurisdiction of national courts, although those limits are not perfectly defined and

[4] Peter Stone, *EU Private International Law, Harmonization of Laws*, Elgar European Law, 2006, p. 4.

may permit overlapping jurisdiction. The existence of those limits may be obscured by the fact that they are governed by a judicial discretion (which may also involve consideration of whether to exercise jurisdiction under national policies), but equally can be reinforced by the possibility that in some courts an anti-suit injunction will be issued to prevent their breach[5]. Choice of law rules try to find a single most closely connected law to a dispute, although there can be disagreement on how such a connection should be measured. Even if there were complete agreement difficulties in proving the content of foreign law and differences in the procedural law of the forum could still lead to inconsistent legal treatment of disputes, although the likelihood as such differences is minimised by the concurrent application of the rules which limit jurisdiction. At the same time, foreign judgments are frequently recognised and enforced, reducing the likelihood that inconsistent judgments will arise through duplicated local proceedings. But a foreign judgment will only be enforced when it is final, not merely an interim award which could be varied by the judgment court, a requirement clearly motivated by the desire to avoid increasing the possibility of inconsistent judgments.

5. European Private International Law harmonization

The harmonization of conflict of laws at EU level has been effected by European Commission regulations adopted by the Council, or jointly by Council and Parliament, under the 61 Articles of the Lisbon Treaty. According to Articles 61C and 65, in order to establish an area of freedom, security and justice, measures may be adopted under Title IV in the field of judicial co-operation in civil matters having cross border implications, in so far as necessary for the proper functioning of the internal market.

All of the measures adopted under the Title IV in the sphere of private international law have taken the form regulations, though directives and decisions are in principle possible. Most important European Union instrument in the sphere of international private law is Regulation 44/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, which is linked to as "Brussels I Regulation".

The Regulation lays down rules on direct jurisdiction, applicable by the court seized of the original action in determining its own jurisdiction, as well as rules on the recognition and enforcement of judgements given in other States to which the Regulation applies. It applies to the most types of civil matter, but certain matters such family and insolvency proceedings are excluded from its scope[6].

In the sphere of choice of law, the Rome Convention of 19th of June 1980 on the Law Applicable to Contractual Obligations, which is commonly referred to as "the Rome Convention", lays down choice of law rules for most types of contracts.

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[5] Broude and Shany, *The shifting allocation of Authority in International Law*, Oxford, Hart Publishing Law, 2008, p. 17.

[6] Petersmann E., State Sovereiggnity, Popular Sovereignty and Individual Sovereignty, European University Law Working Paper, 2006, p. 45.

The Convention was not based on any particular Treaty provision, but on the desire of the Member States "to continue in the field of private international law the work of unification the law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgements".

In the sphere of family law, jurisdiction and judgements in respect of important matters are governed by EC Regulations 2201/2003, concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility. In addition, on 19th of December 2002 the European Council adopted Decision 2003/93, authorizing the Members States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Measures for the Protection of Children.

In what concerns procedural co-operation, EC Regulation 1348/2000 on the Service in the Members States of Judicial and Extra-judicial Documents in Civil or Commercial Matters was adopted by the Council on 29th or May 2000.

Last, on 9th of December 2005 the Commission presented a Proposal for a Council Decision on the Accession of the European Community to the Hague Conference on Private International Law. The European Community became a Member of the Hague Conference on 3 April 2007. With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaces and succeeds the European Community as from that date.

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