EUROPEAN REGULATION OF INTERNATIONAL PRIVATE RELATIONS: THE EMERGENCE OF A EUROPEAN PRIVATE INTERNATIONAL LAW

Maria Joao Mimoso
Portucalense University,
Portucalense Institute for Legal Research, Portugal
mjmarbitragem@gmail.com

Maria do Rosario Anjos
IPMAIA - Polytechnique Institute of Maia,
IJP - Portucalense Institute for Legal Research, Portugal
rosario.anjos@socadvog.com

ABSTRACT

There is no doubt that we are experiencing increasing integration on the part of the European Union, which has triggered a growing substitution of Member States' legislation. Of all the sectors of law, private international law (PIL) is the one where the most influence of the EU is felt. Thus, our aim is to address a specific issue: the implications of the Amsterdam and Lisbon Treaties on private international law from the internal source. The communitarisation process increased sharply from these two milestones, as we shall see, have announced the death of the classic PIL. We will discuss the implications of the new powers of the European Union bodies in the PIL and the contribution of the Court of Justice of the European Union on the relevance of Community freedoms under the PIL. Therefore, a review of the literature and an analysis of some of the legal texts that matter to the PIL will be carried out. We want to highlight the changes that have taken place not only in terms of the competence of the European institutions in PIL but also in the strengthening of community freedoms. The deductive method will be used in the process of analyzing the transformations that have taken place in the field of PIL in order to conclude the true Europeanization of the PIL.

Keywords: *communitarization, copmpetences, European Union, institutions, private international law*

1. INTRODUCTION

PIL is considered the area of private law more subject to external mutations, be they of a political, economic or even philosophical nature. It should be noted that it includes: the conflict law, the right to international jurisdiction and the right of recognition. The transformation in the PIL is due mainly to the Treaties of Amsterdam and Lisbon. When we talk about the current crisis in PIL we only want to show the decline of the national PIL systems after the entry into force of the Treaty of Amsterdam and not, properly speaking, the crisis of the PIL as a branch of law. This will continue to exist as a discipline able to solve the problems within the transnational private situations (SOUSA, 2012). The functioning of the state-owned PIL becomes increasingly hard to understand, since European Union law sort of "blurs" the diversity of PIL systems, seeking to end existing asymmetries (SOUSA, 2012). The Treaties establishing the European Communities did not contain conflict rules, norms of international competence and rules of recognition. Nonetheless, since the dawn of European integration, there has been a concern for the mutual recognition of judicial decisions (Calvo-Caravaca, 2003). Both the recognition of decisions in civil and commercial matters as well as the existence of norms of international competences, coupled with the Member States' willingness to unite conflict law in the context of contractual obligations, would contribute to the current communitarization of PIL (Sousa, 2012).

The Treaty establishing the European Economic Community (EEC), in its Article 200, already foresaw cooperation between Member States in order to standardize and unify the applicable legal regimes. The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was an example of this. However, the Member States, at that time, needed to see the right to conflict unified in terms of contractual obligations. It was necessary to limit forum shopping (Mimoso & Anjos, 2018). With this in mind, the Rome Convention of 1980 appeared, on the law applicable to contractual obligations which harmonized, as far as possible, the conflict rules of the Member States, since it was an instrument subject to ratification by States, indicating, wherever that the question was asked, the applicable law. It was not until the 90's that European Union law became directly interested PIL.

2. CONTEXTUALIZATION OF THE PARADIGM SHIFT

Private International Law (PIL), in its classic version, is seen as a set of legal norms created by a legislative body for the purpose of resolving conflicts of laws in space. Its object is the international private legal relations. It is a set of conflict rules that indicate to the local judge the applicable law to a situation that has contact with more than one legal system (Mimoso, 2009). Currently, Private International Law is in a process of communitarization or Europeanization, through the elaboration of common rules of PIL (Stones, 2014), (Miguel, 1997). Before the entry into force of the Treaty of Amsterdam (1999), the understanding was that the treaty did not contain "hidden conflict rules", did not condition the conduct of Member States' conflict law and did not raise the issue of the compatibility of internal conflict rules with originating Community law, with exception to certain discriminatory rules, which could arise due to the diversity of cultures and understandings between the affected countries (Pinheiro, 2011), (Sousa, 2012). The first phase of PIL unification was imminently intergovernmental since it was implemented through instruments of public international law (international conventions signed between Member States (Pinheiro, 2011).

2.1. The Treaty of Amsterdam

In Amsterdam, on October 2nd, 1997, the Heads of State and Government of the 15 EU countries drew up a new political treaty for Europe. It enshrined a more democratic and social Europe by introducing improvements in the Union's external policy, free movement of citizens and, at the same time, seeking to increase the effectiveness of the fight against organized crime. This treaty had four main goals:

- Make employment and citizens' rights the centerpiece of the Union;
- Eliminate the last obstacles to free movement and reinforce security;
- Give the EU a renewed identity in order to make itself better heard in the world and increase the effectiveness of the EU's institutional structure, in order to the next enlargement;
- Consolidate the three main bases on which the EU settles its action since the entry into force of the Maastricht Treaty (European Community, Foreign Policiy and common security and judicial and police cooperation in criminal matters).

In the area of Private International Law, the most significant shift was the change in the legal framework governing the competence of EU bodies. At the same time, there was a shift in the Court's case-law on the relevance of Community freedoms (Ribeiro, 2014). The Treaty of Amsterdam created a new Title, "Visas, Asylum, Immigration and other policies relating to the free movement of persons" (Part III, Title IV of the EC Treaty). This new title has led to the progressive creation of an area of freedom, security and justice in the EU, in particular through judicial cooperation in civil matters (Article 61c)) and also set out the objectives to be achieved through judicial cooperation measures with Article 65 of the EC Treaty.

The Treaty of Amsterdam has assumed civil judicial cooperation as essential for the free movement of persons, consecrating as its aim the improvement and simplification of legal matters essential to that freedom of movement (Remien, 2001). As set out in Article 61 (c), the Council shall adopt measures in the field of judicial cooperation in civil matters, as provided for in Article 65, which shall add that "to the extent necessary for the proper functioning of the internal market", those will aim to improve and simplify the recognition and enforcement of judgments in civil and commercial matters, including non-judicial decisions, to promote the compatibility of the rules applicable in the Member States on conflicts of law and jurisdiction as well as to remove obstacles to the good conduct of civil actions by promoting, if necessary, the compatibility of the rules of civil procedure applicable in the Member States (Stones, 2014). In practice, the EU entities understood this competence as being generic in terms of regulation in matters of PIL, and the Member States did not contest this understanding (Pinheiro, 2011). Thus, some regulations have been created regarding to international jurisdiction and recognition of foreign decisions in matters of property right:

- Regulation (EC) n. º 1346/2000 of 29 May 2000, on insolvency proceedings;
- Council Regulation (EC) n. º 1347/2000 of 29 May 2000, on jurisdiction, recognition and enforcement of decisions in marriage matters and in matters of parental responsibility for children of both spouses;
- Council Regulation (EC) n. º 1348/2000 of 29 May 2000, on the service and notification of judicial and extrajudicial acts in civil or commercial matters in the Member States;
- Council Regulation (EC) n. º 44/2001 of 22 December 2006, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
- Council Regulation (EC) n. º 1206/2001 of 28 May 2001, on cooperation between courts of the Member States regarding the attainment of evidence in civil or commercial matters.

The Treaty of Amsterdam also created the formal possibility for some Member States to establish enhanced cooperation between themselves in the framework of the Treaties, using EU institutions and procedures, i.e. the possibility for a group of countries to move to a higher level of integration in a given area, even if others did not wish to join in right away, with the possibility of these countries to join later (Piçarra, 2001). Currently, the mechanism of enhanced cooperation is found in only two areas: divorce and legal separation as well as unitary patent protection (Alves, 2015). Examples of this cooperation include:

- Council Regulation (EU) n. º 1259/2010 of 20 December 2010, establishing enhanced cooperation in the area of applicable law to divorce and legal separation;
- Regulation (EU) n. º 1257/2012 of the European Parliament and of the Council of 17 December 2012, regulating enhanced cooperation in the field of the creation of unitary patent protection.

It should be noted that the unification of PIL changed from an intergovernmental basis (through conventional instruments) to a supranational basis, carried out by community legislative acts, mainly by the regulations (Pinheiro, 2011).

2.2. The Treaty of Lisbon

The Treaty of Lisbon, signed on December 13th, 2007, entered into force on December 1st, 2009 and amended the previous treaties, although without replacing them, presenting itself as the most recent step in deepening the Europeanization. The fundamental principles of this instrument are democratic equality, representative democracy and participation democracy. Regarding the competence of the EU bodies in matters of private international law, it has since become established in the Treaty on the Functioning of the European Union (TFEU), in Title V of Part III, which aims the so-called freedom, security and justice.

Article 81 (1) of the Treaty established that the Union is an area of freedom, security and justice in compliance with fundamental rights and different legal systems and traditions of the Member States, implementing easy access to justice through the mutual recognition of judicial and extra-judicial decisions in civil matters. Competence has been attributed as follows: the EU now has exclusive competence in matters covered by Article 3 TFEU, has shared competence in matters set out in Article 4 TFEU and also has support competence in areas where the EU complements measures aimed to support, coordinate or supplement national policies, in accordance with Article 6 TFEU. Chapter III is intended for judicial cooperation in civil matters, by establishing in Article 81 that the EU will develop legal cooperation with cross-border implications and may adopt measures to achieve approximation of the laws and regulations of the Member States. Anytime deemed necessary, the Council and the European Parliament may take steps, through the ordinary legislative procedure, to ensure the proper functioning of the internal market. For the freedoms of movement of persons and goods within the EU, have led to an increase in transnational litigation and, consequently, to an increase in costs and difficulties in access to justice for these transnational litigation. PIL is no longer conditioned by the proper functioning of the internal market, becoming one of the vectors to be taken into account (Pinheiro, 2011). Decisions on PIL matters are now scrutinized in accordance with the ordinary legislative procedure and by a qualified majority in accordance with Article 81 (2) TFEU. However, by way of derogation from paragraph 2, measures relating to family law having cross-border implications shall be laid down by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament, Article 81 (3). Thus we can see that there is a consolidation and generalization of the process of European unification on a supranational basis of private international law. This Europeanization has made important progress in many aspects and has managed to bring about controversial solutions and on conflicts of jurisdiction.

3. THE EUROPEAN PIL

As a result, we have no doubts as to the delineation of a genuine European Private International Law. However, there have been some doctrinal divergences concerning the national or international foundation of PIL. In addition, the modern doctrine of Private International Law draws on two established methods in the search for solutions to the problems arising from inter-state legal relations: the individualist (from the followers of the conflict method, proposed by Jitta) and the universalist (from the lessons of Pillet on the extraterritoriality of the law). The universalist method, thinking the human being within the scope of the international society, seeks uniform solutions to the conflicts of different laws, through bilateral and / or multilateral treaties, thus avoiding conflict of laws; the individualist method advocates the incorporation of the PIL rules into the domestic positive law of each country, through a system of options (rules of connection) to determine which domestic legislation to apply in cases of conflicts between individuals connected to autonomous and divergent legal systems. Internationalist doctrines refer to the exercise of communitarian competence in matters of PIL, both in the field of conflict of laws and in the field of conflict of jurisdictions, appealing to universalist principles that have always presided over the construction of this legal branch, defending that recognition within the EU of the legal situations constituted in the various Member States (Ramos, 2016) is undeniable. They think of the human being within the framework of international society, seeking uniform solutions to the conflict of laws. In line with the internationalist doctrine (or so-called universalist doctrine), there are those who see PIL as a supra-seasonal problem, which means a problem analyzed in the context of relations between States, transcending the autonomy of each Member State individually considered (Mimoso, 2009). In effect, there would be an integration of PIL in its own rules of the International community (Urrea, 2016).

On the other hand, others support the idea that PIL will be a product of the autonomous creation of the States themselves, contemplated from the nationalist positivism that would be established from a purely national codification, expanding, on a case-by-case basis, to rules of international source (Ramos, 2016). They advocate the incorporation of PIL rules into the domestic positive law of each country, through a system of connections aimed at determining the domestic legislation to be applied. However, in the present, this system, as far as conflicts of laws are concerned, has not been revealed, even though it has a residual application in conflict of jurisdictions. In fact, its residual use for resolving conflicts of jurisdiction does not create problems, but this does not happen in the field of conflict of laws. Here a real substitution of the rules of state source is operated by EU standards (Ramos, 2016). Universalists argue for the need to create a new corpus of PIL rules, imposed on all Member States, emphasizing the idea of a uniform model of conflict rules. In this way, the application of the same law to a given international private relationship is desired, regardless of the place where it's discussed. The designative criteria of the regulatory act will be the same. Nevertheless, this uniformity has consequences. It should be pointed out that the uniformity of the rules on conflicts accentuates their own rigidity, undermining the idea of flexibility, very common, in the face of the right of conflicts of State origin, moreover proclaimed by eminent international privatistics (Correia, 2018). The normative instruments that contemplate state source conflict rules usually have a general part in PIL, where solutions to problems arising from the modus operandi of those rules are contemplated. Currently, towards the replacement of the overwhelming majority of Member States' conflict rules with European PIL standards, conflict rules themselves (in addition to the recognition and enforcement rules), it are no longer take into account the legislative and interpretative rules regarding the general part of PIL. The state, coherent and harmonic PIL systems, as a whole, cease to make sense, losing their unity. The general part "has as its main function to consecrate a particular conception of justice" (Ribeiro, 2014). Consider, for example, the general part of the Portuguese civil code of 1966, where the option of the Portuguese legislator is verified by criteria of formal justice, always aiming at stability and security of multi-location juridical relations. In the scope of PIL, a disengagement by the state legislator in relation to the criteria of the lex fori was evident, leading to a constant concern in the search for the protection of the legitimate expectations of individuals (Ramos, 2016), (Ribeiro, 2014). It should also be noted that PIL rules set up by the Community legislature have been subject to scrutiny by the Court of Justice of the European Union (CJEU) through the questions referred for a preliminary ruling (Ramos, 2016). It has been understood that whenever cross-border private situations are involved in the EU, an integrated analysis of such relations should be carried out on a basis of private international law and European Union law, in particular the European Union primary material law on free circulation. Regarding non-EU relations, it should be noted that they too are no longer in the orbit of state legislators. The European legislator has adopted universal norms and the rules of conflicts (contained in the European Regulations) for a given international private relationship may designate the law of a third State (universal character). In terms of jurisdictional conflict, mutual recognition has been limited to the recognition of judgments handed down within the Union, and judgments from the courts of third States will be subject to the rules of common international civil procedural law.

4. CONCLUSION

European Private International Law is an area of law that has been heavily influenced by the EU. By 1958, PIL had a marginal place in the European Union, being of a strictly intergovernmental nature, which means each State created its rules of conflicts in order to regulate the absolutely international legal relations. What was intended to be investigated was to what the extent there is a Common European Private Law in the European Union. Nonetheless, Private International Law is now common law for almost all Member States

(Stones, 2014). The European Union has undergone an evolution in which there were two important milestones, the Treaty of Amsterdam and the Treaty of Lisbon. The major consequence of the amendment of the Treaty on European Union, through the Treaty of Amsterdam, was that the European Union had the competence to regulate matters of Private International Law aiming to ensure freedom of movement within the Community. From here the European Union, through the Treaty of Amsterdam, came to have direct competence to legislate in Private International Law. This competence has been confirmed and strengthened by the Treaty of Lisbon. To highlight the character of the reinforced corporations that has allowed a development more sustainable and safe for the achievement of these objectives. Prior to the entry into force of the Treaty of Amsterdam, the Treaties establishing the European Communities did not contain rules of conflict of international jurisdiction or of recognition addressed to the law enforcement agencies of the Member States. It is questionable to what extent the unification of Private International Law is necessary for the proper functioning of the internal market, since there are several countries where pluralities of local legal systems in which they have their own private international law coexist. The Union has adopted an important set of regulations dealing with international jurisdiction and the recognition of foreign decisions in matters of marriage law, including insolvency and maintenance obligations, divorce, separation and annulment of marriage, parental responsibility and determination of the applicable law to contractual and non-contractual obligations, to insolvency and maintenance obligations and currently also to succession. It was intended that there would be a shift in the case-law of the Court of Justice aiming to deduce from Community freedom limits on the operation of Member States' conflict law. However, the contours of these limits are not sufficiently clear, since it seems that the basis for Europeanization of Private International Law is found in European legislative instruments and not in a case-law. However, the unification of Private International Law has shifted from an intergovernmental basis to a supranational or community basis and has now been implemented through Community legislative instruments.

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