The Communitarisation of Private International Law

– Introduction –

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In 1997, the Treaty of Amsterdam added a new title to the EC Treaty which was meant to "establish progressively an area of freedom, security and justice", see Art. 61 EC. It instructed and empowered the Community to adopt "measures in the field of judicial cooperation in civil matters" including those "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws …", Art. 65 EC.

Achievements of Community Legislation

The Community made use of the new powers almost immediately. Even before the Treaty of Amsterdam took effect, the Council and the Commission drew up an action plan in late 1998. With particular reference to the judicial cooperation in civil matters, the action plan stressed the need for the implementation of "principles such as legal certainty […] implying identification of the competent jurisdiction, clear designation of the applicable law, availability of speedy and fair proceedings and effective enforcement procedures."[1] Several projects for specific measures to be taken in five years' time were listed, including choice-of-law rules in the fields of contractual and non-contractual obligations, divorce, and some other family matters.

Starting in the year 2000, the Community has implemented these plans at a surprising speed. A number of regulations has codified the law of international civil litigation, in particular jurisdiction, notification, the procurement of evidence, the recognition and enforcement of judgments and insol-

[1] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, O.J. 1999 C 19/1 (2).

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vency proceedings.[2] But the Commission did not stop there. In accordance with a further draft programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted in the year 2000, it soon tackled choice-of-law issues, pointing out that "implementation of the mutual-recognition principle may be facilitated through harmonisation of conflict-of-law rules."[3] It took only five years from the publication of a preliminary draft proposal for a regulation on the law applicable to non-contractual obligations until the adoption of the Rome II Regulation on this matter in summer 2007.[4] In the meantime, the Rome I Regulation on the law applicable to contractual obligations has been finalized[5] and transformed the 1980 Rome Convention into a Community instrument.[6] Further proposals made by the Commission concern the law applicable to divorce[7] and to maintenance obligations[8]. Without having reached the stage of a formal proposal, other projects dealing with matrimonial property regimes[9] and with intestate and testate succession[10] indicate the Commission's intention to proceed in that direction as well.

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[2] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12/1; Council Regulation (EC) No. 2201/2003 of 22 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, O.J. 2003 L 338/1; Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000, O.J. 2007 L 324/79; Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of Member States in the taking of evidence in civil or commercial matters, O.J. 2001 L 174/1; Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. 2000 L 160/1.

[3] O.J. 2001 C 12/1 (6).

[4] 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), O.J. 2007 L 199/40.

[5] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, O.J. 2008 L 177/6.

[6] Consolidated version of the Convention on the law applicable to contractual obligations, done at Rome on 19 June 1980, O.J. 2005 C 334/1.

[7] Commission Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17 July 2006.

[8] Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final of 15 December 2005; see now Reg. No. 4/2009 of 18 December 2008, O.J. 2009 L 7/1.

[9] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final of 17 July 2006.

[10] Green Paper on succession and wills, COM(2005) 65 final of 1 March 2005.

Some of the topics mentioned above will be treated in specific papers delivered at a conference held at the Institute on 7 June 2008. An additional contribution to that conference focuses on the law applicable to companies. The present debate on this matter has been triggered, not by the Commission, but by the European Court of Justice. A series of Court decisions implementing the freedom of establishment granted to companies under Art. 48 EC has given rise to a far-reaching case law[11], putting pressure on Member States to bring their choice-of-law rules in line. There is no doubt that the legislative competence of the Community under Art. 65 EC would extend to this area as well.

The Concept of Justice

Before any discussion of specific matters it is perhaps useful to highlight some general aspects of Community conflicts legislation. The first one is of a philosophical nature. Since the Community's choice-of-law legislation is meant, under Art. 61 EC, to contribute to the establishment of "an area of freedom, security and justice", we may draw some inferences as to the concept of justice in the European Union. It is obvious, that the framers of the Treaty of Amsterdam did not believe that justice in the European context is equivalent to the equal treatment of similar cases irrespective of their links with different national jurisdictions. That would have required a harmonisation or unification of substantive law. But there is no legal basis for the harmonisation or unification of substantive private law in Title IV. The area of justice is to be achieved by choice-of-law rules, i.e. by the designation of one and the same national law as being applicable to a transnational case regardless of the Member State where the case is pending.

The unification of private international law does not remove differences in substantive private law. Some of these differences may impair the functioning of the internal market and give rise to the approximation of national laws under Arts. 94 and 95 EC. Where the functioning of the internal market is not affected by those differences, the European Treaty does not provide for harmonisation for the sole sake of justice. Apparently, the framers did not share the view on justice that was once expressed in Blaise Pascal's ironical aphorism: "Plaisante justice qu'une rivière borne! Vérité au-

[11] ECJ 9. 3. 1999, Case C-212/97 *(Centros Ltd.* v. *Erhvervs- og Selskabsstyrelsen)*, 1999 E.C.R. I-1459; 5. 11. 2002, Case C-208/00 *(Überseering BV* v. *Nordic Construction Co. Baumanagement GmbH)*, 2002 E.C.R. I-9919; 30. 9. 2003, Case C-167/01 *(Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd.)*, 2003 E.C.R. I-10155; 13. 12. 2005, Case C-411/03 *(Sevic Systems AG)*, 2005 E.C.R. I-10805; in a different sense now ECJ 16. 12. 2008, Case C-210/06 (*Cartesio*), not yet published in E.C.R.

deçà des Pyrénées, erreur au-delà."[12] If justice is to be achieved by common choice-of-law rules, the mere divergence of substantive provisions in different countries does not amount to the recognition of truth and mistake, it is rather the expression of different social values and customs. In an area including different jurisdictions with different laws, justice designates a state of a legal environment which allows for some divergences but enables everybody to predict which courts will apply which law in a given case. In this sense, justice is reduced to legal security in respect of the law applicable irrespective of the court seized. This is the objective of private international law as viewed by Friedrich Carl von Savigny.[13] It is based on the expectation that judges sitting in different countries will decide a case with the same result if the same national law is applicable in the various courts. Thus, Art. 61 EC builds on the idea defended by Konrad Zweigert that there is a specific justice of private international law which is independent from the justice in the substantive treatment of social conflicts.[14]

The Community as a Referee

A second remark points to the structural innovation brought about by Community legislation in the field of private international law. Conflict-of-laws legislation has traditionally been in the hands of the same legislators and judges dealing with substantive issues. Quite understandably, choice-of-law rules therefore have often been conceived as devices ensuring the undisturbed operation of domestic law in domestic courts. They have traditionally achieved this goal by allowing the application of foreign law only in peripheric and rare cases. Take the example of the nationality principle. It was conceived in an era of migration from Europe to the Americas; it is convenient for the administration of justice in continental countries because it allows the application of the *lex fori* to *émigrés* and their estates in European courts. But it has come under attack since the former countries of origin themselves have become destinations for millions of immigrants. Similarly, the *lex situs* rule governing *in rem* rights has strengthened the confidence of creditors, banks, sheriffs and other institutions in a given country in the applicability of one and the same law, i.e. the law of the forum, since most cases are litigated in the country where property or movables are located. It is certainly true that bilateral conflict rules refer to domestic and foreign law without any legal or theoretical discrimination. But the effect of these rules in respect of foreign and domestic law differs nevertheless as a matter of fact.

[12] *Pascal*, Pensées, Texte établi par *Louis Lafuma* (1973) 70 (no. 193–294).

[13] *Friedrich Carl von Savigny*, System des heutigen römischen Rechts VIII (1849) 27.

[14] *Konrad Zweigert*, Die dritte Schule im Internationalen Privatrecht, in: FS Leo Raape (1948) 35–52 (at 50).

The shift of legislation from national to European institutions breaks the linkage between substantive law and conflict-of-laws rules. To use a metaphor, private international law rules have been conceived by competing players in the field of substantive legislation, a field without a referee; since and to the extent that the Community is not a player in this field, it rather acts as a referee when legislating on private international law.[15] This might be compared with federal choice-of-law rules for interstate conflicts. But effective rules of that type are not very frequent. In particular, the U.S. Congress and the U.S. Supreme Court have refrained from drafting federal conflict of laws rules for interstate conflicts almost completely.[16] The objective pursued by the European Community under Art. 65 EC therefore appears to be both ambitious and novel. This is dissimulated by the dual capacity of Community conflict rules: Next to the solution of interstate conflicts within the Community, they purport to solve international conflicts of laws between Community countries and third states. In this latter capacity they are much closer to traditional conflict rules enacted by Member States.

The Legislative Bases

A third remark reflects on the basis of Community legislation. As compared with other Treaty provisions, Art. 65 EC is peculiar in respect of the legislative procedure, of the referral of preliminary questions to the Court of Justice and of the geographical limitations of the acts adopted under this provision. In particular, Art. 69 allows three Member States, i.e. the United Kingdom, Ireland and Denmark, to choose Europe à la carte. The Treaty of Lisbon will not fundamentally change this situation.[17]

Given the high goal of an area of justice, the selective approach is most regrettable. It could be forestalled if the Commission chose to act under other Treaty provisions, in particular under Art. 95 EC. This would be far from revolutionary. Before the Treaty of Amsterdam took effect, legislative acts containing conflict rules have in fact been based on Art. 95 or similar provisions. This is true for the conflict rules relating to insurance contracts[18]

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[15] Cf. *Jürgen Basedow*, Spécificité et coordination du droit international privé communautaire: Travaux du Comité Français de Droit International Privé 2002/2004 (2005) 275–305.

[16] Cf. *Jürgen Basedow*, Federal Choice of Law in Europe and the United States, A Comparative Account of Interstate Conflicts: Tul.L.Rev. 82 (2008) 2119–2146 (2124f.).

[17] Protocol (No. 22) on the Position of Denmark, O.J. 2008 C 115/299 now allows Denmark to participate in legislation adopted for the establishment of an area of freedom, security and justice, see Art. 3 of Annex I, if it chooses to do so and notifies the President of the Council accordingly.

[18] See Arts. 7 and 8 of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of

and also for the Directive on the posting of workers of 1996[19]. It is true that the legislative authority conferred upon the Community under Art. 95 is limited to the implementation and proper functioning of the internal market, but even within these limits Art. 95 or similar provisions might be workable alternatives to Art. 65. At least, the Commission's announcement to make use of a different legislative basis might be an incentive for the three Member States to improve cooperation in the legislative proceedings.

The critique of Art. 65 should not dissimulate one great advantage offered by this provision, however: It allows for the adoption of measures including regulations,[20] and the Community has in fact made use of this possibility in the vast majority of legislative acts adopted under Art. 65 so far. As a consequence, national rules of private international law are superseded by Community regulations without any implementing legislation being necessary to that effect. Given the speed and form of Community legislation, national law is about to lose much of its significance in this area in the foreseeable future.

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freedom to provide services and amending Directive 73/239/EEC, O.J. 1988 L 172/1, based upon what is now Art. 47 EC.

[19] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, O.J. 1997 L 18/1.

[20] See e.g. *Bernd von Hoffmann*, The relevance of European Community Law, in: European Private International Law, ed. by *id.* (1998) 19–37 (at 31); *Michel Petite*, Le traité d'Amsterdam, Ambition et réalisme: Revue du Marché Unique Européen 1997, no. 3, p. 17–52 (at 27); *Dirk Besse*, Die justitielle Zusammenarbeit in Zivilsachen nach dem Vertrag von Amsterdam und das EuGVÜ: ZEuP 1999, 107–122 (at 115); the measures cited in footnote 2 above have been adopted as regulations.