

## The Unification of Private International Law

MND Emira Kazazi

*Albtelecom ltd.*

Dr. Ervis Çela

*Lecturer, Law Faculty*

### Abstract:

*Civil and the common law approaching Europe is no longer a “future project”, but more and more rather a present attempt (Kötz, 2003 – 2004). In this prism, concentrating on the European International Private Law within the space of mixed jurisdictions, it may seem surprising in light of the attempts to create a new European ius commune. But is it possible that a unification of the material law may sign the start of the end of the European conflicts of laws? Last but not the least private international law is not just a choice of law. The unification of the private law, in its definition as a concept, does not influence two of the three pillars of the private international law: respectively, that of the jurisdiction and recognition as well as implementation of foreign decisions.*

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The existence of different legal traditions and standards for the definition of the foreign law content and possible timeframes, defined for the judge to carry on his duty against the presence of a uniform practice in this field, may lead to unequal solutions, which harm the continual process of harmonization of private international law in Europe. But what happens in those cases when the foreign law is not considered sufficient for the solution of a concrete case? In some cases, the court may take into account the fact that the content of the foreign law has not been identified sufficiently. If that happens, all member states of EU will accept the application of *lex fori*. Despite this, the application of the domestic law instead of the foreign one is made by the opinion of the court. The application of the domestic law instead of that foreign one is only used as a last resource. France and Slovenia are simple examples of such rule.

By applying *lex fori*, the choice of solution by means of the applicable law is limited. Instead, it may be applied another disposition of the foreign law, for example like the one that Bulgaria is applying in practice now. But we may refer to it as well, as a reference to the law of the third state, which has a close connection with the dispute in question. Concrete examples are Germany, Czech Republic or Netherlands. At last, we do not have to forget to take into account even some principles of the acceptable international law. Some countries have the tendency to include defined rules, regarding the application of the foreign law from the non-judicial authorities. One example is Portugal with certain rules regarding the notary public. But in general, these are not as realizable in practice as acceptable ways. The common absence of a global responsibility against the application of the foreign law from the non-judicial authorities and absence of valid information

regarding an effective application of the foreign law is common among all the EU member states (Mota, 2011, 17).

Consolidation of the domestic market will increase the ever growing number of cases of international character at the courts, as well as the authority of the EU member states and consequently, there will be a growing number of the cases that will be regulated by means of the foreign law. In fact, the need for some common rules through the application of the competent foreign law has been felt even beyond the borders of EU. Therefore, the Hague Conference on the Private International Law was functioning in this field for some time, but without achieving any results so far (Hague Conference on Private International Law, 2009). The Hague Conference has fully acknowledged the relevance of this issue and the need to explore the feasibility of future instruments in this area. The existing legal framework is not yet established, and thus is the subject of many interpretations and manipulations. The actual situation is difficult and unclear, and moreover, instead of a tendency towards the harmonization within EU, it goes against the harmonization, and as a consequence, we shall have the creation of a system with shortcomings. What is upsetting is the legal security, because it is contrary to the objective of the security for the whole European citizens, in order to have full access to justice.

In those cases when the foreign law may not be considered as logical for any concrete case, then *lex fori* may be applied. Despite this, it must be taken into account to judge the case in question, if the foreign law is contrary to the public order. The actual situation regarding the application of the foreign law is difficult to be accepted for the citizens, as well as for the harmonized system of the international law as a whole. Achievement of certain common rules on such issue will provide a higher judicial security level, within the territory of the European Union. By offering the European citizens a flexible solution affordable for their problems, at the same time this also brings along an increase of the inter-border court process. By doing so, we may achieve the aim of making the domestic market functional in an efficient way, improving the harmonization process and consolidating a European space of justice.

Attempts towards a European *ius commune*, have not at the same time interrupted the way toward the unification of the private international law in Europe. As it was recognized from the European Group of the private international law, the debate for the creation of a European *ius Commune* in fact, creates even a suitable environment for the academic elaboration of a private international European code. Whereas the creation of a full Europe private international code is not in the daily agenda of Brussels, but on the other hand, the private international law has been in the center of attention of the European integration, brought by the Amsterdam Treaty (*La codification du droit international privé européen*, 2006). Discussions of whether mixed systems may be seen as possible models, open the way to European integration in the field of private international law. Taking into account that European Union includes legal systems that belong to common and civil law, and that the real purpose of the private international law is the coordination of legal systems, it seems more logical to say that such private European international law, should be borrowed from the these two traditions and have the characteristics of a mix system. Analyzed from the point of view of the codification of the private international law in special places, the actual movement of initiated codification in Brussels must not be

viewed as a prevalence of the civil law (Fiorini, 2005, 499-519). This is so because the codification relationship and the private international law, have always went beyond their traditional limits of the common and civil law, as well as also because the legislative activity in Brussels cannot put the equal sign on the codification, in the substantial sense. Codification without doubt, remains a foundational constant of the civil tradition. But also in the places where the civil law is in place, the private international law is considered for a long time, inappropriate for a legislative intervention. In fact, that didn't exist until the half of the XX century, but later, some private systematic rules of the international justice were approved. That was done so at the beginning, within the framework of the approval or reformation of the private code, based on the law that assures the key for the territorial application of the contained rules. Long absence of legal codes for the international private law, in countries which apply the civil law may be related to two factors. At first, it is recognized generally from the rules flexibility and adaptability of the conflicts, foreseen by the law. Moreover, the need for codification has not been seen as an attempt that will contribute greatly to reinforce the coherence of the law and facilitate its approach. This last aspect still explains the situation in France. In reality, the French courts, based on written rules of the private international law, have developed a number of general principles, which assure a coherent measure in treating private judicial international conflicts. Under such circumstances, it may be suspicious whether a code may improve greatly the consistence of the French private legal rules. In reality, even the countries that do not apply the civil law, have codified their private international law.

Sometimes, legal instruments of the European private international law follow the community objectives, which are in essence, different from the domestic purposes of the private national systems, and therefore, unavoidably they ruin the substantial stability (Schockweiler, 1996, 391). For a long time, despite the importance known regarding the international private law, in essence it still remained an issue that requires inter-governmental negotiations, within the context of the European Union. The states felt obliged from the wide political considerations, which somehow brought a certain delay in ratification, and therefore, in entering into power of the instruments of European private international law. European Commission approved new dispositions, with the aim of a "better use", producing a considerable number of directives and regulations, working in the field of reciprocal recognition and cooperation between member states in access to justice and lately, trying to unify the choice of the rules for the law.

The rules of the European private international law must show the ideal characteristics for a material code, like those of coherence, logical structure, clarity, facilitation of use from the public, and many others. Moreover, limits such as material ration, personal ratio and loci ration of the European competence in this field, are not without influence in the absence of the general coherence of the European international private law (*Electronic Journal of Comparative Law*, 2008). We must remember that the private international law is the start of what is called "the theatre of a great immigration of ideas". The jurisdiction area in the private international law is a big sector, divided between the common and the civil law. Even where the aims are in common, the methodology differs a lot, especially as a result of the deep difference of how the courts have to behave. It must be emphasized that this is not impossible to be organized, or to create a system of private international

law by mixing the characteristics of the common and civil law.

The relationship between EU legislation and the global instruments of the private international law may be discussed in some perspectives. The most actual phenomenon is the interaction between the private international legislation of EU, and the instrument of the private international law in international scale, demonstrated from the Maintenance Regulation and Hague Protocol of the year 2007. The PIL instruments of EU and the international PIL instruments must be seen as more combined, than just alternative or competitive ones.

In some countries, the academic debate is in favor of the creation for a Code, for the private international law. Anyway, in other states that is not noticed, and the political reality related to the minor participation of the United Kingdom, Ireland and Denmark, supposes that it will be difficult to ensure a sufficient support in a near future. Even though it was accepted that there were cases regarding the general principles of PIL which may be similar on some instruments, a final decision on the codification of these general principles may have been taken better, after the necessary instruments were completed. An argument in favor of continuing with separate instruments is that the law is more and more becoming part of the specialists' job. The experience with the Hague protocol may serve as an example, in order to modernize some of the Hague Convention that consists of problems or vacuums, within the legal framework of EU.

Problems in the field of the non-family law are in majority in the field of the applicable law. The measures regarding the non-family law must be viewed with priority, according to the importance they carry in the Common Market. Regarding the family law, it must follow a certain special procedure, which requires unanimity. If unanimity is not achieved, the conclusion will be that the only open way to have harmonization of this field will be by improved cooperation (following the steps of Rome III). It is suspicious that such a solution will be effective, because it would be difficult to come to the conclusion, that the advantages were more than the disadvantages. The consequence of such cooperation would be that within the EU, there are two States groups: those which participate under this cooperation, and those that do not participate. The citizens and judicial people that are residents in EU would be the first to be influenced from the legislation of the private international law. The importance of the PIL legislation grows out of the Domestic Market which is softer, and further, it will improve the inter-border commercial activities. Legislation within the PIL in a European level grows the legal clarity, and helps in eliminating the differences in treatment, which are a consequence of the national laws.

The clarity in the content of the rules of the private international law, would remove the barriers for the businesses and consumers to enter into inter-border transactions. Removal of barriers in principle, would also lead to a reduction of costs and speed up the legal procedures. Realistic reduction of costs may also be done in the future, as soon as the courts and the people practicing law would become familiar with the present and future legal framework. The focus of the Stockholm Program (2009) requires *inter alia*, promoting the full exercise of the right to free movement. When the citizens of Europe may exercise more this right, it is expected that they will deviate even from other rights (or obligations), from a legal relationship that has an international character. Moreover, the rights that derive from the legal relationships, which has always had a pure national

character, are to be sought in another state, where the parties exercise this right of their free movement.

Under the discussions for the codification of the private international law, there must be some attention devoted to the changes, between the European and national concept of the "codification". The meaning of this term differs considerably from one state to another. Within the EU level, "codification" in principle means, that the procedure by means of which the acts will be codified, are reformulated and substituted by solely one act, which does not contain substantial changes of those acts (Inter-Institutional Agreement, 1994). An important aspect of codification on an EU level is the reduction of the legislation volume. A gradual adaptation program would be more favorable.

Regarding a possible plan of work for eliminating problems and filling up the vacuums, would be advisable to continue the approach followed up to this point. The new legislation has to be developed in some fields of the private international law, more than just an instrument in itself. Every new legislation in every case, must be coherent with the previous instruments. The European legislation must devote its attention and attempts in three different fields of the private international law, respectively in: civil procedures in civil and commercial cases (field this already ready and completed); the choice of the applicable law for the non-family cases (problems raised, which also have close ties with the Domestic Market); PIL for family cases (which would require unanimity within the Council). Concentration of attention in these separated fields may help the EU legislation, to make progress in completing the existing legal framework.

The private international law is also influenced from the developments of the domestic systems of the private law. The new rules of the private international law will be necessary to face new legal institutions of the national systems, like those of not married, registered partners. Another way of how the developments within the substantial law may change the private international law is that the costs, considered important on a national scale, must find a way to be included in the private international law. The private international law rules which assure an additional protection for the employees as well as consumers are an example for this.

Harmonization and codification of the European private international law must be included in the objectives, in order to create and keep a unique area of justice. The present Stockholm Program (2009), concentrate in cases like: further reinforcement of reciprocal faith and promotion of citizens' rights, especially reinforcing the rights of people and promoting full application of the right of movement that may be realized through measures within the private international law ("A European Framework for PIL", 2012, 48-51).

## Conclusions

Out of this article, we notice once again the importance of the private international law. From the case-law we realize that it is a priority, a clear definition of the jurisdiction and the applicable law. Since laws differ from one state to another often times, the conclusions for a defined problem are different, for different states. Exactly for this reason, it is important to define clearly which courts will have the jurisdiction in defined cases, and which would be the applicable law for the concrete case.

Moreover, absence of such common system may trigger a “forum shopping” from the parties, and will thus influence in the proper functioning of different Regulations of EU, over the private international law. In addition, the actual situation makes the application of the foreign law predisposed to a certain level of manipulation, on behalf of the parties and “legal actors”. For example, the absence of a common group of rules regarding the application of the foreign law may result in the establishment of some unjustifiable “severe” laws. As the Commission itself accepts, this case may increase the legal danger related to the inter-border judicial cases, and expend the cost and timeframe of the procedure, which harms the expectations of the parties.

The clarity of the legislative framework in power is necessary. There is also the need to define the concepts so that there will be no confusions, and therefore, it will be eventually easier for businesses and individuals to enter into inter-border relationships. The academic debate also is in favor of the creation of such a code for the private international law. Harmonization and codification of the European private international law must be included within the objectives, in order to create and maintain a unique area of justice.

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