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FORMATION, DEVELOPMENT AND MODERN STATE OF PRIVATE INTERNATIONAL LAW IN THE EUROPEAN UNION

Oksana RUDENKO¹

Abstract

The article discloses the formation, development and modern state of private international law in the European Union. The concept of “European private international law”, including an analysis of the term in a narrow, wide and broadest sense is revealed in the article. The author analyses three main stages in the development of the private international law (PIL) in the EU, in particular: formation (1957 – 1999); active development – after the entry into force of the Amsterdam Treaty (1999 – 2009); modern period – after the entry into force of the Lisbon Treaty (2009 – present). This article examines the limits of EU legislation as the source of a single law and highlights the difficulties associated with projects on the codification of private law in the EU. Such an approach may be appropriate in the current state of EU integration if it is limited by the rules of binding contract law and the provisions of private international law. Further harmonization of private law in Europe also requires significant changes in the institutional structure for the creation of uniform rules and the development of new methods of regulation.

Keywords:

European Union, European private international law, private international law, harmonization, unification, law of collision, conflict law, material law, foreign element.

Introduction.

The main aim of the article is to reveal the main stages of formation, development and modern state of private international law in the European Union.

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Considering the concept of «private international law in the European Union», we can give the following definition – it is the interconnection and interaction between the systems of national law of the member states of the European Union (EU) and the system of unified legal norms, aimed at regulation of private legal relations with foreign element (sphere of private international law) within the framework of the EU.

Theoretical Background.

The article is based on the unique experience of the European Union and its legislation. The main issues of private international law in the EU were revealed by J. Chuah, R. Earle, S. Bariatti, T. Hartley, A. Briggs, J.J. Fawcett, J.M. Carruthers, A.S. Doherty and others.

Argument of the paper.

In general, European private international law can be considered in a narrow, broader and the widest sense. In the narrow sense, this is a law of collision, which should give answers to all five or six possible collision issues: spatial (international and interlocal), personal, temporal, ranked and subject matters. In a broader sense, this law also includes the norms of the European civil process and European commercial arbitration. Thus, this law should also answer the question of the conflict of jurisdiction and how foreign judgments are recognized and enforced, and on some other issues. Such a twofold representation is dominant in the EU [1]. In the widest sense, European private international law includes, in our opinion, along with the two components mentioned before also the rules of private material and procedural law. Consequently, it is worthwhile to speak about European private international law in the narrow sense (law of collision), in the broader sense (law of collision and conflict law) and in the widest sense (supplemented by material and procedural law) [2: 153].

In the development of the private international law (PIL) in the EU, there are three stages: formation (1957 – 1999); active development – after the entry into force of the Amsterdam Treaty (1999 – 2009); modern period – after the entry into force of the Lisbon Treaty (2009 – present).

The first stage of development of the PIL in the EU was characterized by the fact that the main source of unification was the conventions which were concluded on the basis of Art. 220 of the Treaty establishing the European Economic Community [3]. This article was subsequently renumbered in Art. 293 of the Treaty establishing the European Community [4], according to

which: “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 protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals,

the abolition of double taxation within the Community,

the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,

the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”. This article was canceled by the Lisbon Treaty of 2007.

In 1968, guided by this article, EU Member States signed the Brussels Convention on jurisdiction and the enforcement of judgments on civil and commercial matters [5]. This Convention applies to any commercial and civil disputes, regardless of whether they were considered by a court or a tribunal, except for tax, customs and administrative matters. At that time, the Convention was signed by six Member States. This treaty has changed several times and is now almost completely replaced by the regulation adopted in 2001 – Brussels-I Regulation (discussed later). To date, the Convention applies only to the 15 States that were members of the EU before its enlargement in 2004 and to certain territories of EU member states outside the Union, which include Aruba, the overseas territories of France and Mayotte. It is expected that the Brussels Convention will be replaced by the new Lugano Convention of 2007 [6], the latter is open to ratification by the Member States of the European Union acting on behalf of the non-European territories which belong to those Member States.

The next in the regulation of private international legal conflicts between Member States was the Rome Convention on the law applicable to contractual obligations (1980) [7]. The Convention was signed on 19 June 1980 by Belgium, Germany, France, Ireland and Italy, Luxembourg and the Netherlands, and vice versa with Denmark and the United Kingdom in 1981, thus covering all members of the European Communities. It came into force in 1991 for 8 of these countries, and a year later – for Ireland. During the enlargement of the Community in connection with the accession of new members, in particular Greece (1984), Spain and Portugal (1992), Sweden, Finland and Austria (1996), and then the next 10 countries in 2004, there were agreements on the extension of the convention to these countries. However,

these expansion treaties were not ratified by the United Kingdom, Denmark and Ireland, and thus prevented the entry into force of a convention between the three countries and the acceding countries. With the accession of Romania and Bulgaria in 2007, the EU Council has been authorized to accede to the treaty in 2008. The Rome Convention is the criterion in international private or conflict law, on the basis of which the general choice of the system of law in contracts within the EU is carried out. The Convention determines which law to use, but does not harmonize substantive law (actual law). It was signed in Rome, Italy, on June 19, 1980 and came into force in 1991.

Currently, this Convention is replaced by the Rome I Regulation (593/2008) (which will be discussed later), with the exception of Denmark, as well as overseas countries and territories of the EU Member States. In the same way, the convention applies in the Aruba, the Caribbean of the Netherlands, Curaçao, Sint Maarten (Kingdom of the Netherlands), Faroure (Denmark), Saint-Pierre and Miquelon, Saint-Barthélemy, French Polynesia, Wallis and Futuna and New Caledonia (France), which applied opt-out, which means that they refused to apply regulatory acts in the area of freedom, security and justice. In general, the EU law is valid in all twenty-eight EU member states. However, sometimes Member States negotiate certain abandonment of EU legislation or agreements, meaning that they should not be involved in certain political areas. Today, there are four such countries: Great Britain (four refusals), Denmark (three refusals), Ireland (two refusals) and Poland (one refusal).

The fundamental principle of this document is the autonomy of will (lex voluntatis) of the parties of the treaty. If the law applicable to the contract was not chosen by the parties in accordance with the above principle, the contract will be governed by the law of the state with which it has the closest connection. At the same time, such is the country in which the party, which must execute this contract, has at the time of its conclusion its usual place of stay.

During this first period, the conflict of laws was created not only by international conventions, but also by directives that were fragmentary and incidental.

The second stage of the development of the PIL in the EU opened up new perspectives for the EU legislative activity on the norms of the PIL. In particular, according to the Amsterdam Treaty [8], competence in judicial cooperation in civil and commercial matters was transferred from the former third pillar to the first, which thus gave the EU institution the competence to issue laws in the field of PIL.

It should be noted that between 1993 and 2009, the EU lawfully included three pillars. This structure was started from the Treaty of Maastricht [9] on November 1, 1993 and was eventually abolished on December 1, 2009, after the entry into force of the Lisbon Treaty, under which the EU became a legal entity. Consequently, the concept of “support”, or “pillars”, is commonly used in connection with the Treaty on European Union. Under this treaty, the EU was based on three pillars:

the first pillar, or the basis of the Community, consisted of three European communities – the European Community, the European Atomic Energy Community (Euratom), and the abolished European Coal and Steel Community (ECSC);

second pillar – common foreign and security policy;

third pillar – police and judicial cooperation in criminal cases.

Amsterdam Treaty transferred some of the areas of the third pillar (provisions relating to the free movement of persons) to the first pillar.

At the same time, for the three pillars, there were different decision-making procedures: within the framework of the first pillar, the Community method was used, and in relation to the other two pillars, – the method of intergovernmental cooperation. In areas relating to the first pillar, only the Commission could propose bills to the Council and Parliament, for which a qualified majority of the Council’s votes was sufficient. As regards issues relating to the second and third pillars, the right of legislative initiative was divided between the Commission and the States of the EU, and the Council, as a rule, had to reach a unanimous decision.

Consequently, after the entry into force of the Amsterdam Treaty (May 1, 1999), the unification of the norms of the PIL at the European level was carried out mainly through EU regulations adopted by the Council or jointly by the Council and Parliament in accordance with Section 4 (Articles 61-69) of the Treaty establishing the European Economic Community. Continuing the course introduced by the conventions in many areas of the PIL, the Council (later with the European Parliament) adopted regulations in similar fields: Rome I and Rome II, which replaced the Rome Convention and Brussels I, Brussels II, Brussels II A (or “Brussels II bis”), which replaced the Brussels Convention.

So, let’s consider these documents in detail. Thus, *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)* [10] contains a number of amendments, sometimes quite radical, in comparison with the Rome Convention of 1980. The first novelty deals with the rule of “choosing the law”. If, in the Rome Convention, this choice had to be demonstrated with “reasonable certainty” by

the terms of the contract or the circumstances of the case, the Rome I required that such a choice is “clearly” demonstrated. Subsequent specification in Rome I was given to the principle of the law of the closest connection of the country with the legal relationship. If, the Rome Convention, used a general connecting factor, the Rome I Regulation introduced specific clauses in eight categories of contracts (sales, services, contracts for real property rights, franchising, etc.). Special rules for individual contracts (consumer contract, labor contract) were also changed in Rome I. The scope of contracts with a special regime for collision regulation has been extended: new rules for transport contracts (Article 5) and insurance (Article 8) have been introduced into the Regulation, which reflected the needs of the domestic market. The transformation of the 1980 Rome Convention on the law applicable to contractual obligations to the Rome I Regulation was developed by the European Commission in the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization of January 14, 2003 [1], which raised the issue of the need to transform the Rome Convention of 1980 into a legal instrument of the EU (a regulation or directive) and its substantial modernization, as well as in the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) of December 15, 2005 [11]. The regulation does not differ much from the Rome Convention of 1980, however, significant provisions have been made regarding the law applicable to contractual obligations in the absence of the consent of the parties (Article 4). In particular, some innovations were made to certain types of contracts in Art. 4 of the Regulation: contracts in the field of intellectual or industrial property, distribution agreements, franchising agreements and financial market. There were also new rules on insurance contracts (Article 7), transportation contracts (Article 5), prevailing imperative provisions (Article 9), assignment of claim and subrogation (Article 14), legal subrogation (Article 15), multiple liability (Article 16) and legal compensation (Article 17). All other provisions of the Rome I Regulation actually repeat the rules of the Rome Convention of 1980 with minor modifications and amendments, such as the material scope (Article 1), universal character (Article 2), freedom of choice (Article 3), treaties with the participation of the consumer (Article 6), individual labor contracts (Article 8), formal validity (Article 11), the scope of the right to be applied to the contract (Article 12), the lack of capacity (Article 13) etc. The most significant changes and innovations can be divided into such groups as:

exit from the situation in the absence of choice of the law to be applied;

the rights of the weak party in contracts;
the problem of contractual and legal subrogation, as well as legal compensation;
the problem of superior mandatory provisions;
issues of interaction of the Regulation “Rome I” with other existing legal instruments (conventions, directives, regulations, etc.).

The Regulation (Article 1) states that it applies in cases involving a conflict of laws to contractual obligations in the civil and commercial spheres. This provision differs from the one stated in the Rome Convention of 1980 (Article 1), which stated that it applies to contractual obligations in any situation where conflict of laws exists. In addition, another innovation is stated in the Art. 1 of the Rome I Regulation, which is related to the circumstances of *negotiorum gestio* (voluntary activities in another’s interests) and *culpa in contrahendo* (the fault of the conclusion of the contract) arising from business negotiations conducted before the conclusion of the contract. Such circumstances are the part of the material scope of the Rome II Regulation. Changes were made in the Art. 3 of the Rome I Regulation – the freedom of the parties to choose the law which should be applied to contractual obligations (*lex voluntatis*). The basis of the document is the autonomy of the will of the parties, however, in clause 1 of Art. 3 of the Rome I Regulation clearly defines the term “law” and, thus, the parties cannot use norms like *lex mercatoria*. The principle of splitting the collision bindings and the possibility of replacing the right to be applied to future contractual obligations are identical. The Rome I Regulation establishes a universal mode of application of conflict of laws rules to contractual obligations. The Rome Convention of 1980 and the Rome II Regulation, the Rome I Regulation has a universal character: the right is applicable even if it is not the law of one of the EU Member States (Art. 2 of the Regulation “Rome I”). This means that the scope of the Rome I Regulation is wider and does not require additional connections with the European Union. The Rome I Regulation defines *ad intra* and *ad extra* as the right to apply, that means it refers to both – to the internal affairs of the European Union and to external affairs. For example, the Rome I Regulation will apply even if the contract is concluded and executed between legal entities or individuals of two non-EU states, but, if there are certain reasons, a dispute between them will be considered in the court of the State party. Therefore, for the application of the Rome I Regulation, there is no need for the party of the dispute to reside or be registered in a State Party of the Regulation.

The provisions of the Rome I Regulation apply in cases involving the right of different States (not only EU Member States). The application of the

provisions of the Regulation does not even depend on the relationship of a contractual obligation with at least one EU Member State. If a court in a Member State of the EU still considers a dispute between a non-Member State and an EU Member State, the application of the provisions of the Rome I Regulation is mandatory, but taking into account the rules of international conventions, since, in accordance with paragraph 1 Art. 25 of this legal instrument, the provisions of this Regulation shall not affect the validity of international conventions to which one or more EU Member States are the party at the time of the adoption of this Regulation and which govern conflicts of law in the field of contractual obligations. Dovgert A.S. believes that Rome I reduced the “flexibility” of collisional regulation of contractual relations through greater certainty in the application of two basic principles: the autonomy of the will of the parties and the closest connection [12: 33].

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) [13] continues the line of the Rome Convention on the unification of the rules of the member states of the conflict – but this time in the field of private legal obligations arising not from the treaty, but from other legal facts: first of all, obligations as a result of damage. Non-contractual obligations which are the subject of this Regulation also include obligations concerning unjust enrichment, actions in interests of others without authorization and unfair action by one of the counterparties at the pre-contract negotiation stage (“culpa in contrahendo”). Consequently, the Rome II Regulation, which came into force on January 11, 2009, represent a harmonization of EU conflict-of-law rules in civil or commercial matters in the field of non-contractual obligations. The regulation regulates the following issues: the definition of the law applicable to delinquents, obligations due to unjust enrichment, actions in interests of others without authorization and the activities before the conclusion of the contract (culpa in contrahendo). The regulation under Article 3 is “universal”, that is, the law to which Rome II refers, applies even if it is not the law of one of the EU member states. In addition, the Regulation provides that in certain circumstances and subject to certain conditions, the parties may choose the law applicable to non-contractual obligations. Similar rules were established by the Rome Convention of 1980 on the law applicable to contractual obligations, which was replaced by the Rome I Regulation on the law applicable to contractual obligations. Consequently, the rules apply in determining the applicable law in a case of conflicts of law with respect to non-contractual obligations in civil and commercial relations and does not apply to tax, customs and administrative relations, as well as to the State’s liability for

acts or omissions committed in the exercise of public authority (“*acta iure imperii*”). The regulation establishes some exceptions to the scope: non-contractual obligations under family law, inheritance, negotiable securities, legal regulation of legal entities, trust, damage to nuclear materials, encroachment on private life and personal non-property rights. The Regulation states that due to the fact that the concept of a non-contractual obligation varies from one Member State to another, it is necessary to use autonomous qualifications when interpreting it. In accordance with the Regulation, harm is any harm that results from a tort, an unjust enrichment, or a *culpa in contrahendo*.

The main collision clause used in the Regulation is the *lex loci damni* (law of the place of damage), according to which the law applicable to non-contractual obligations arising out of damage is the law of the country where the damage occurs. Exceptions: 1) the person who is prosecuted and the person who is harmed at the time of injury have their habitual residence in the same country – the law of the country of usual residence; 2) the existence of a tight connection of the non-contractual obligation with the law of a country other than the country of the occurrence of the damage and the country of the habitual residence.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [14] replaced the Brussels Convention of 1968. The reference to it is stated almost in all procedural acts of the EU, which is not surprising because of its most general nature. This Act defines the jurisdiction of all civil and commercial matters in the EU, if they are cross-border. In addition, it determines (with some exceptions) the conditions for the recognition and enforcement of decisions of one State Party on the territory of another. *Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses* [15] unified the issue of jurisdiction, recognition and enforcement of court decisions in family matters and in the area of responsibility of parents for joint children. *Council Regulation (EC) No 2201/2003 of 27 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* [16] abolished Regulation (EC) No. 1347/2000 and introduced significant changes in the procedure for regulating the recognition and enforcement of court decisions in matters of parental responsibility. The regulation broadly interprets the term “parental responsibility” as it recognizes the subject of parental rights and responsibilities not only of the biological parents of the child, but also of other individuals who serve as guardians. In addition, it contains special rules for enforcing judgments in case of abduction

of children. According to the *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* [17] the alimony payer located in the EU Member State should be able to easily obtain a decision that automatically becomes legally enforceable in another EU Member State without further formalities. This Regulation includes all obligations to pay alimony arising out of family, parental, marital or family relationships, in order to ensure the same effect on all alimony payers.

The third stage in the development of the PIL in the EU begins with the entry into force of the Lisbon Treaty, which abolished the so-called three pillars of the EU, as enshrined in Art. 47 of the EU Treaty, and consolidated the legal personality of the EU. The regulations continue to be the determining source of the PIL and become binding on the courts of the EU Member States. They should be equally interpreted and applied throughout the EU. An authoritative interpretation of their content was entrusted to the Court of Justice of the EU, which has already made a large number of decisions on them. *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [18], which has changed the previous *Regulation (EU) No. 44/2001 of December 22, 2000* in January 2015. The main objective of the Regulation is to abolish exequaturism between EU countries, as the existing differences between the national systems of countries in the recognition and enforcement of decisions significantly complicate the functioning of the internal market. New Brussels I has clearly identified the main grounds of refusal to recognize and enforce civil and commercial judgments. A characteristic feature of this institution is that the rules governing it are determined by the proper court to which it is requested to apply, and not the territory of the EU member state where it should be located. At the same time, the EU Court ensures the same interpretation of the rules of the Regulation. *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation* [19] decides such issues as a court, which should consider a case on the dissolution of cross-border marriage, applicable to these legal relationships, the right to choose the right (autonomy of the will of the parties). It is intended to simplify the procedure for the dissolution of marriage in the EU's international private law and does not extend to property matters of the spouses. *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of*

Succession [20] establishes the conditions and procedure for the recognition and enforcement of decisions and authentic instruments in the field of inheritance, introduces into circulation the European Certificate of inheritance, as well as protects the rights of heirs and the creditors of the testator.

Conclusions.

Summarizing the above-stated facts, we can distinguish three peculiarities of the development of the PIL in the EU: 1) a gradual transition from internationalization to Europeanization; 2) evolution in the direction of reducing the “flexibility” of collisional regulation of contractual relations due to a greater certainty in the application; 3) before 1999 the main source of unification was the international convention, but after this date the standard source of unification of the PIL becomes the regulation.

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