Rome II: A True Piece of Community Law

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A. Introduction

In a contribution, published recently in the *European Journal of Migration and Law*, I have submitted that the Europeanization of conflict of laws, which is discernible since the nineties of the twentieth century, in fact results in a kind of conflicts revolution, European style. Especially since the introduction of Article 65 in the EC Treaty, we are witnessing a profound transformation of conflict of laws, or private international law, for the EU Member States. This contribution aims to point to some aspects of this transformation and apply them to the Rome II regulation. Its central thesis is that, not only should Rome II be analysed and commented upon from a conflict of laws perspective, but that it is very important to approach it, maybe even in the first place, as a true piece of Community law. Such characterization has a number of important consequences and gives us a particular framework for commenting upon the regulation.

B. Rome II, the European Framework and the Legal Basis Requirement

The Community initiatives regarding private international law have an impressive reach. Secondary Community law on private international law, which has been formally adopted by regulation, is to date binding for 26 Member States (all except Denmark). This is also true for the Rome II regulation, which provides
a pan-European system of choice of law rules for cross-border torts with full supremacy, i.e. full priority over all national Member State legislation. Of course, the priority given by Article 28 of Rome II to existing international conventions, to which one or more Member States are parties, weakens to a certain extent the newly acquired uniformity. Still, one can only confirm that the adoption of the Rome II regulation represents a great step for European conflict of laws – a "major achievement" indeed.

Rome II, as well as all other Community conflict of laws legislation, is characterized by all particularities of EC law, as laid down in the EC Treaty and interpreted by the ECJ. The path of intergovernmental negotiations which is proper to the Hague Conference and which implies that a conflict of laws treaty must be ratified by all prospective treaty States pursuant to their constitutional procedures, has for the EU Member States been replaced by the much faster procedures of a ‘new’ or ‘own’ legal order in which Community institutions have powers under the Treaty to issue binding measures of a legislative nature, benefiting from all the characteristics of Community law (in particular their supremacy and direct effect).

Of utmost importance is that the Community institutional framework rests to a large degree on a strict principle of conferral of powers (Article 5, paragraph 1, EC) associated with a duty to state reasons (Article 253 EC). This might be called a golden rule of EC law: all acts of secondary Community law, i.e. adopted by the Community legislator, must find their legal basis and be in conformity with the EC Treaty. This is also true for the Rome II regulation, which means that this regulation should not be analysed and commented upon solely from a perspective of conflict of laws, but should be examined as EC law on cross-border torts.

Of course, the precise choice of law rules adopted can stir debate. The choice between lex loci delicti and lex loci damni, the subsidiary reference to the parties’ common habitual residence, the rules adopted for specific torts all have their pros and cons and will draw both applause and criticism. But certainly, these choices which the Community legislator has made are in the end reasonably acceptable in a legislative instrument on cross-border torts. Therefore, this contribution doesn’t discuss them as such, but will rather concentrate on the issue of tort choice of law rules in a Community law setting. What are the specific require-

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4 Hay, “Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community’s ‘Rome II’ Regulation” 2007 European Legal Forum 1.