Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?

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Abstract
In the past two decades, the private international law systems of the Member States have been intensely europeanized. The ensuing transformation could be labelled instrumentalisation. The impact of the rule of non-discrimination, of fundamental rights and, especially, mutual recognition even mark a kind of European conflicts revolution. The author pleads for a balanced approach. On the one hand, in particular in view of its transnational subject-matter, it should be recognized that private international law can make an important contribution to the smooth functioning of the internal market and the achievement of the EC purposes. On the other hand, private international law mustn’t be degraded into an auxiliary instrument of EC law. The author warns for a one-sided approach, to which art. 65 of the EC Treaty could give rise. A broader perspective, which gives fitting recognition to the goals and purposes of private international law and its links with the underlying substantive fields, and which is at the same time adapted to the particular context of EU law, should be developed.

Keywords
EU law; Private International Law; Non-discrimination; Fundamental rights; Mutual recognition

1. Introduction
The most remarkable evolution of private international law in the past two decades appears to have been its swift and intense europeanization. Today, private international law is to a large degree European private international law. Before the nineties of the past century however, and notwithstanding a few exceptions, private international law had not attracted much attention in European law and policy circles. The reasons behind this policy shift seem obvious. Europe strives at the creation and completion of an internal market. In an internal market, persons, goods, services and capital must be able to move across the border. And in order to achieve such transnational mobility, a lot of economic-administrative barriers of both discriminatory and non-discriminatory nature, must fall; moreover, the EU has gradually given more attention, and very much so during the last decade, to the free movement of its citizens, apart from economic transactions.
And of course, the import or export of goods or services and the intra-Community mobility of persons, have private law consequences as well or can be stimulated by precise and pertinent rules of private law or, on the contrary, can be obstructed by particular private law rules. In the EC context, where cross-border situations are at the centre of the attention, the private law rules involved will often touch on private international law. It is important to take into account in that respect that, in transnational situations, both private international law and Community law have the function of delimiting conflicting legal systems.

When reflecting on the status of private international law in the European Union today, one cannot deny that this legal field has undergone the impact of EU law, and in particular EC free movement law. The resulting transformation of the former could be labeled as instrumentalisation, although such denomination shouldn't necessarily be regarded as negative in all respects.

2. Brussels I, Rome I and Art. 65 EC Treaty

In 1997, the Treaty of Amsterdam introduced an express EC competence for private international law. The Europeanization of private international law has however not started in Amsterdam. Earlier, the Brussels Convention of 1968, the Rome Contracts Convention of 1980 and particular choice-of-law or conflicts related clauses in secondary Community law have given proof of the pertinence of private international law for EC purposes. And also the Court of Justice has been aware of the instrumental function private international law can fulfill for the achievement of the internal market, as it has demonstrated e.g. in Ingmar.¹

The Brussels and Rome Conventions have been the most visible, early achievements of European private international law. Yet, and in spite of the fact that both Conventions were clearly linked to the EC integration project – which was particularly visible for the Brussels Convention, as it was based on (current) art. 293 EC and made subject to preliminary references to the Court of Justice – they were not really perceived that way. They had been negotiated, agreed and ratified by the Member States, and bore all typical characteristics of international treaties concluded by sovereign States. Yet, in its very first judgment on the interpretation of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, the Court of Justice characterized the convention as an attempt to facilitate the achievement of the common market.²