

CORNERSTONES OF EUROPEAN PRIVATE INTERNATIONAL LAW AND INTERNATIONAL FAMILY LAW

CZIEGLER, Dezső Tamás

The subject and aim of the research, the research methods applied

The subject of the research

The dissertation deals with an actual and dynamic developing area, namely with the private international law (further on: „PIL”) and conflict of laws rules on family law issues of the European Union (further on: „EU”). Regulations adopted on these fields determine which law to choose in legal relationships containing relevant international element(s). Since most of the provisions have direct effect, they are binding in Hungary, i.e. before the Hungarian courts too. The work concentrates on the rules on private law and family law. Consequently, we won't pay attention to the collision of other rules like public law or administrative law. Since the European background of the topic may also be of importance, as an introduction the work analyzes the European institutional rules¹ the legislative procedures and the related provisions of the Lisbon Treaty². Secondly, the main part of the dissertation overviews the legislation of the EU on PIL. Beside the adopted laws, the work constues the judgements of the European Court of Justice (further on: „ECJ”) too. Thirdly, it tries to give an outline about the overruled laws of the member states related to EU PIL. Since the European legislation is mainly based on the „common core” or „better law” approaches, it is an interesting question whether the EU provisions adopted are corresponding with the former national rules, or the European legislator creates new and independent, formerly unknown legal rules.

Last but not least, the dissertation discusses those national rules which will stay in effect in the future too and have relevance concerning the decision of cases. Please note that

*Associate professor, head of Department at Eötvös Lóránd University, Director of BA International Studies, Deputy Director of Institute of Political and International Studies

¹ See CZIEGLER, D. T.-HORVÁTHY B.: Az EU tagállamok bel- és igazságügyi együttműködése a Lisszaboni Szerződést követően. In: *Prudentia Iuris Gentium Potestate – Ünnepi tanulmányok Lamm Vanda tiszteletére*. MTA Jogtudományi Intézete, Budapest, 2010. 61-103.; FAZEKAS, J.: Bel-és igazságügyi együttműködés az Európai Unióban. *Európai Tükör - Különszám*, Vol. 14 (2009) No. 3 87-112.

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. HL C 306., 2007.12.17, 1. For further analyses see CRAIG, P.: *The Lisbon Treaty – Law, Politics, and Treaty Reform*. Oxford University Press, Oxford, 2011.; HORVÁTH, Z.-ÓDOR, B.: *Az Európai Unió szerződéses reformja Az Unió Lisszabon után*. HVGORAC, Budapest, 2008.; GRILLER, S.-ZILLER, J. (eds.): *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* Springer, Wien, 2008., DOUGAN, M.: The Treaty of Lisbon 2007: Winning Minds, Not Hearts. *Common Market Law Review*, Vol. 45 (2008) 617-703.



present summary is a very brief and short version about the problems discussed in the work.

Purposes of the work

There were several conditions that led the author to choose a broad research topic like PIL of EU.

Firstly, when he started to deal with private international law, we were before a conflict of laws boom: the provisions brought by EU were fragmented and not satisfactory. There was an ongoing reform that hold out the creation of conflict of laws rules on obligations (i.e. on the law applicable to torts, on the law applicable to contracts). After the regulations were adopted and the reform was realised, orientation among the rules became extremely difficult. Secondly, there was an essential need to have a book that discusses EU PIL as part of European Law. In the Hungarian and international literature there are several other options the authors chose while discussing these topic:

- they expose only one regulation's provisions³ or
- they imply the rules into books dealing with national PIL⁴ or
- they discuss PIL provisions in books written mainly about substantive law problems⁵

All of these methods may be very useful and they all may have practical benefits. However, we were planning to create a work, which analyses the rules as part of EU law. The benefits of this approach are easy to be seen: this way, the relationship of different European rules and their effect to international and domestic provisions can be more accurately discussed. Beyond, if we have a look at the neighbouring areas e.g. at Private International Procedural Law, we can state that the procedural lawyers have published by far more comprehensive works on their field than private international lawyers. This statement is true in connection with the international⁶ and the Hungarian jurisprudence⁷ as well.

³ DICKINSON, A.: *The Rome II Regulation*. Oxford University Press, Oxford, 2009., *Rome I Regulation* (Ed. FERRARI, F.-LEIBLE, S.). Sellier, Munich, 2009.

⁴ BURIÁN, L.-CZIEGLER, D. T.-KECSKÉS, L.-VÖRÖS, I.: *Európai és magyar nemzetközi kollíziós magánjog*. KRIM Bt., Budapest, 2010.

⁵ *Internationales Vertragsrecht – Das internationale Privatrecht der Schuldverträge* (Hrsg. REITHMANN, C.-MARTINY, D.). Verlag Dr. Otto Schmidt, Köln, 2010. 1245-1316.

⁶ KROPHOLLER, J.: *Europäisches Zivilprozessrecht – Kommentar. Internationale Zuständigkeit, Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*. Recht und Wirtschaft, Heidelberg, 2011.

⁷ *Az Európai Unió polgári eljárásjoga* (eds. WOPERA, Zs.). CompLex, Budapest, 2007.; BRÁVÁCZ, O.-né-SZÓCS, T.: *Jogviták határok nélkül: Joghatóság, külföldi határozatok elismerése és végrehajtása polgári ügyekben*. HVG - ORAC, Budapest, 2003.; KENGYEL, M.-HARSÁGI, V.: *Európai polgári eljárásjog*. Osiris, Budapest, 2006. NAGY, CS. I.: *Az Európai Unió nemzetközi magánjoga*. HVG ORAC, Budapest, 2006.;

In summary, the creation of the dissertation had two main aims: to give a practical useful tool for those who want to navigate among the EU provisions, and to provide an earlier not existed handout on EU PIL for the jurisprudence.

Research methods

Since the job was complex, the author has used several methods. Concerning European law analysing the primary sources of EU law, especially the Treaty on the Functioning of the European Union (further on: „TFEU”)⁸ was of great importance. In connection with the regulations the text of secondary sources and the articles published on them were in the center of the research. Lastly, the interpretation of non-codified rules could be found in the judgements of the European Court of Justice and in judgements of member states’ courts. The author tried to use as much of the international literature as he could. Most of these sources are available in Hungary, e.g. in the Library of the Hungarian Parliament. Beside these, he was the scholar of Max Planck Institute for Comparative and Private International Law (*Max-Planck-Institut für ausländisches und internationales Privatrecht*) in Hamburg for six months. During this period he has finished the last parts of the dissertation.

The structure and most important statements of the dissertation

Four chapters as the pillars of the work

The dissertation is set to four bigger chapters and the chapters are divided into several sections. The main chapters are as follows:

- Chapter I.: The background of EU PIL
- Chapter II.: The adopted laws on PIL
- Chapter III.: Self-hiding PIL provisions in the EU law
- Chapter IV.: Summary, final observations and afterword

Content of the chapters

The first chapter is called „The background of PIL regulations of the EU” This chapter overviews the main laws and the history of their adoption. The chapter also analyses the provisions of Section 81 of TFEU on the co-operation of member states in the field of private law.

Polgári eljárásjogi szabályok az Európai Unió jogában – Kommentár a polgári ügyekben való igazságügyi együttműködés keretében elfogadott közösségi normákhoz (eds. WOPERA, Zs.-WALLACHER, L.). CompLex Kiadó, Budapest, 2006.

⁸ Consolidated version of the Treaty on the Functioning of the European Union. 2010.3.30. HL C 83. 47.

The second chapter is called „Certain laws and proposals” This chapter discusses the provisions of the adopted laws and proposals one after the other. Such laws are often called Rome regulations in the legal literature after the 1980 Rome Convention on the rules applicable to contracts⁹. Latter regulations/proposals are the following:

- Rome I regulation¹⁰ on the law applicable to contracts,
- Rome II regulation¹¹ on the law applicable to torts (or to be more specific: to non- contractual obligations)
- Rome III. regulation¹² on the law applicable to divorce (i.e. to the dissolution of marriage and legal separation),

⁹ 1980 Rome Convention on the law applicable to contractual obligations. See BURIÁN, L.: A Római Egyezmény alkalmazásának elméleti és gyakorlati kérdései, valamint az Egyezmény várható reformja. *Közjegyzők Közlönye*, Vol. 1 (2008) No 3 3-19.; SZABÓ, S.: A közösségi jog beékelődése nemzetközi szerződési jogunkba. *Külgazdaság*, Vol. 50 (2006) No 9-10 107-119.; LANDO, O.: The EEC Convention on the Law Applicable to Contractual Obligations. *Common Market Law Review*, Vol. 24 (1987) No 2 159-214.; PLENDER, R.: *The European Contracts Convention*. Sweet and Maxwell, London, 1991.; WILLIAMS, P. R.: The EEC Convention on the Law Applicable to Contractual Obligations. *International and Comparative Law Quarterly*, Vol. 35 (1986) No 1. 1-31.

¹⁰ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Róma I.). HL L 177., 2008. 07. 04., 6. See LEIBLE, S.-LEHMANN, M.: Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I”). *RIW - Recht der Internationalen Wirtschaft*, Vol. 54 (2008) No. 8 528-543.; *Rome I Regulation... i. m.*; WAGNER, R.: Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) – Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung. *IPrax - Praxis des internationalen Privat- und Verfahrensrechts*, Vol. 28 (2008) No. 5 377-386.

¹¹ 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). HL L 199., 2007.07.31.,40. See DICKINSON, A.: *The Rome II... i. m.*; HEISS, H.-LOACKER, L. D.: Die Vergemeinschaftung des Kollisionsrechts der ausservertraglichen Schuldverhältnisse durch Rom II. *Juristische Blätter*, Vol. 129 (2007) No. 10 613-646.; LEIBLE, S.-LEHMANN, M.: Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht („Rom II”). *RIW – Recht der Internationalen Wirtschaft*, Vol. 53., (2007) No. 10., 721- 735.; SYMEONIDES, S. C.: Rome II and Tort Conflicts: A Missed Opportunity. *American Journal of Comparative Law*, Vol. 56 (2008) No. 1 173-218.; WAGNER, GERHARD: Die neue Rom-II-Verordnung. *IPrax – Praxis des internationalen Privat- und Verfahrensrechts*, Vol. 28., (2008) No. 1., 1-17.

¹²Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. HL L 343. 2010.12.29., 10. See FIORINI, A.: Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far? *International Journal of Law, Policy and the Family*, Vol. 22 (2008) No 2 182-186.; GÄRTNER, V.: European Choice of Law Rules in Divorce (Rome III): An Examination of the Possible Connecting Factors in Divorce Matters Against the Background of Private International Law Developments. *Journal of Private International Law*, Vol. 2 (2006) No. 1 99-135.; KOHLER, Ch.: Zur Gestaltung des europäischen Kollisionsrecht für Ehesachen: Der steinige Weg zur einheitlichen Vorschriften über das anwendbare Recht für Scheidung und Trennung. *FamRZ – Zeitschrift für das gesamte Familienrecht*, Vol. 55 (2008) No. 18. 1673-1680.; WAGNER, R.: Vereinheitlichung des IPR in Ehesachen in Europa. *FamRZ – Zeitschrift für das gesamte Familienrecht*, Vol. 50 (2003) No. 12 805.

- Rome IV. proposal¹³ on the law applicable to succession (the proposal mainly deals with procedural law issues),
- Rome VI. regulation¹⁴ and the Hague Protocol¹⁵ on the law applicable to maintenance obligations (beside PIL, this regulation deals with procedural law issues too)¹⁶.

The third chapter called „Self-hiding PIL rules in EU law” focuses on the fragmented and hardly to be found PIL rules of EU law. Such rules can be divided into two main subgroups. Some of them were attached to substantive law provisions, like what happened in the case of consumer law directives. Some others can be found in the practice of ECJ. This chapter discusses the related rules of consumer law, the connection between the inner market and PIL, the recent achievements on the registration of foreign names, the PIL rules of EU corporate law. The fourth, last chapter called „Summary Conclusions” summarizes the author’s views on the future of European PIL. The chapter discusses the present nature of the rules and makes suggestions for future legislation.

¹³ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. COM (2009) 154 final. See DÖRNER, H.-HERTEL, CH.-LAGARDE, P. Rieking, W.: Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht. *IPRax – Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 25 (2005) No. 1 1-8.; JUNGHARDT, A.: Die Vereinheitlichung des Erb- und Testamentsrechts im Rahmen einer Europäischen Verordnung – Rom IV-VO. S. Roderer Verlag, Regensburg, 2009.; MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW: Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Available at: http://www.mpipriv.de/shared/data/pdf/mpi_comments_succession_proposal.pdf (2010. június 1.) Nyomtatott formájára ld. *Rabels Zeitschrift*, Vol. 74 (2010) No. 3;

¹⁴ 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. HL L 7., 2009.1.10., 1- 79.

¹⁵ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Elérhető: http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (2010. május. 31.)

¹⁶ ANDRAE, M.: Zum Verhältnis der Haager Unterhaltskonvention 2007 und des Haager Protokolls zur geplanten EU-Unterhaltsverordnung. *FPR - Familie Partnerschaft und Recht*, Vol. 14 (2008). No. 5 196-202.; BONOMI, A.: Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations Explanatory Report: In. http://www.hcch.net/index_en.php?act=publications.details&pid=4898&dtid=3 (31.05. 2011.); JANZEN, U.: Die neuen Haager Übereinkünfte zum Unterhaltsrecht und die Arbeiten an einer EG- Unterhaltsverordnung. *Familie Partnerschaft und Recht*, Vol. 14. (2008). No. 5 218-221.

Summary of the results

Observations De lege lata

In the following, we will briefly summarize the main relevant statements of the dissertation. Please note, that these statements are by far more more accurately discussed in the work.

EU private international law sets up for itself

If we have a look at the connection between EU PIL and the member states rules on conflict of laws issues, we can set out that European law has a special effect to domestic laws. Normally, in most of the cases, the European Commission chooses between the „better law” and „common core” techniques while codifying new provisions. Both techniques are based on the comparative examination of national provisions.

As the dissertation states, the method used in several legislation processes is a third techniques: EU creates a new law which never and nowhere existed before. In our opinion, the rules of the internal market have a strong effect on our common PIL: the rules of internal market overwrite the national thinking on PIL. The situation remained the same after the adoption of Lisbon Treaty too: formally PIL is not connected to the inner market, but the thinking it represents remains related to it. Consequently, European PIL started to move on like an independent creature: it has its own thinking, own values and own purposes.

Nationality as a connecting factor loses relevance

According to the above mentioned, nationality as a connecting factor is getting less relevant. In several instances nationality as a connecting factor set out by the member states was overwritten by EU's other methods, especially by the choice of law of the parties' habitual residence. This is especially true in the new regulations/proposals on family law and the law of succession. Nationality is getting unimportant in most of these cases: the emphasis is on habitual residence. The legislator is trying to create a new, plural and colorful Europe.

Rights of third country nationals are increasing

In connection with third country nationals, two main tendencies can be shown.

Firstly, the rules of EU law are applicable to third country nationals too, if they have habitual residence in a member state. This means, that the rights granted for EU nationals have to be granted to third country nationals too in several instances.

Secondly, as a special attitude, the EU centralism is also present in Europe. A German court assessed its jurisdiction in a divorce case, in which the children and the wife were living in Sri Lanka and the man was working in Germany. The case had only one

European tie: the man was working in Germany. The decision was intensely criticized in the legal literature¹⁷.

Rights of third country nationals are increasing

Even if we wouldn't expect it, EU centralism has a subversive effect on the fortress of Europe: the laws are applicable to third country nationals too. If we give rights to the citizens of the member states, we have to allow the emergence of these rights for third country nationals too.

Interference to the „intimate life” of the member states

As mentioned before, with some exceptions the European Union has not adopted substantive law provisions on family law and succession law issues. The reason of the lack of such rules is that the EU has no competence on these areas. However, conflict of laws regulations have an effect to substantive law too. A perfect example is the case of maintenance obligations. The concept „maintenance” has divergent definitions in the member states' laws; e.g. in several countries there is no obligation to maintain the brother or sister, while in others it is obligatory. The decision brought in a member state on a maintenance obligation has to be enforced in all other member states, i.e. the substantive rules of a country will have an effect to another countries legal system.

The unification of the substantive law background of member states would be an ideal but maybe utopistic solution to this problem.

Divergent aims: Europeanisation and global values versus aspects of the member states

It is very important to mention, that some values of national laws may be changed by the European legislation based on different, common European values. An example may be the case of divorce: in Malta, divorce is not allowed. On the other hand, the courts of Malta have to recognise and enforce decisions on divorces brought in another country. If Malta joined the application of Rome III. regulation, in certain cases the Maltese courts would have to apply foreign laws on divorce. Most of these laws allow divorce.

In our opinion the changing of values is not problematic. The more important question is, that these new values should be based on a clear list of purposes, that is currently missing.

¹⁷ See JAYME, E.: Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung. *RabelsZ – Rabels Zeitschrift*, (2003) No. 2. 225-226. JAYME, E.-KOHLER, Ch: Europäisches Kollisionsrecht 2006: Eurozentrismus ohne Kodifikationsidee? *IPrax - Praxis des internationalen Privat- und Verfahrensrechts*, Vol. 26 (2006) No. 6 538

Observations - De lege ferenda

Constructing the general part of European PIL

At present, the judgements of ECJ are very important sources on EU PIL. In our opinion finding the answers for some questions in these judgements may be too difficult for practical lawyers. Beyond, there may be inconvenience among the legal sources. To have clear guidelines for future legislation processes and for the legal practice, it would be very important to create the general part of European PIL¹⁸. There are two methods that could be applied to create this system:

EU adopts a regulation which clears the general questions of EU PIL, or EU adopts a kind of „European PIL Code” in the form of a regulation. The regulation on the general part of PIL could be called Rome 0 regulation. In our esteem, the probably better choice would be to create a unified PIL code, that could imply the regulations on procedural questions too. The dissertation accurately examines the areas, where unification would be very important.

Coping with fragmentation

Currently, in Europe there are three layers of sources on PIL:

- national PIL (the „classic” PIL rules)
- international treaties,
- EU rules.

The connection among these layers are complicated. In certain instances international treaties have supremacy over EU law, but in other cases EU law has to be applied against the treaties. In some cases national law has to be applied beside European law. If we would like to have a well structured legal area, it is obvious we should imply the European rules in one regulation. As mentioned before, the impementation of the procedural rules on jurisdiction and recognition and enforcement of judgements (Brussels I. regulation, Brussels IIa, etc.) would also be useful. With this method one of the three layers, the European layer would be unified.

¹⁸ HEINZE, Ch.: Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts, in: *Die richtige Ordnung – Festschrift für Jan Kropholler zum 70. Geburtstag* (Ed. Baetge, D.-von Hein, J.-von Hinden, M.). Mohr Siebeck, Tübingen, 2008. 105-127.; KREUZER, K.: Was gehört in den allgemeinen Teil eines europäischen Kollisionsrechts? In: *Kollisionsrecht in der Europäischen Union – Neue Fragen des Internationalen Privat- und Zivilverfahrensrechtes* (Hrsg. Jud, Brigitta - Rechberger, Walter H - Reichelt, Gerte). Jan Sramek Verlag, Wien, 2008. 1-61.; LEIBLE: Rom I und Rom II... *op. cit.* 49. and *op. cit.* 154. lj.; Max Planck: Comments on Succession...*op. cit.* 5. SONNENBERGER, H. J.: Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR. In: *Die richtige Ordnung...* *op. cit.* 227-246.

Managing the territorial fragmentation

- a) The territorial fragmentation is also a serious problem that can cause the unnecessary difficulty of choosing the applicable rules. First of all, we would suggest to imply correct notifications in the preambles of regulations. At the moment, if a regulation is adopted by EU and a state (e.g. UK) joins this regulation later than the adoption, the opt-in is not signed in the regulation. Beyond, we would suggest to deal somehow with the opt-out of Denmark, UK and Ireland. Of course, the windup of opt-out rights may be a utopistic idea, but EU should try to abolish such rights.
- b) Another serious problem is caused by the allowing anchored co-operation on certain areas. This method may also be able to cause a new kind of fragmentation. We have seen in the case of Rome III. that allowing this method could cause another, even more serious fragmentation. If the newly joining member states will also not be signed in the regulation, the territorial applicability will not be easily reviewed
- c) Codification on the remained rules: Last but not least, the remaining rules of PIL should be codified, at a EU level. The dissertation discusses the relevance and methods of this issue deeply.