

### A unified and harmonised European law and its impact on third countries

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*V. Behr*

**A UNIFIED  
AND HARMONISED  
EUROPEAN LAW  
AND ITS IMPACT  
ON THIRD COUNTRIES**



*Having transferred the title on visas, asylum, immigration and other policies related to free movement of persons from the third pillar into the Treaty on European Community, the Amsterdam Treaty vested legislative power in the European Community in the fields of international civil procedure and private international law. On the basis of this power, the European Community enacted a series of Regulations, which will soon unify both areas of law. Such unification will not only facilitate legal relations within the European Union but also enhance legal relations with third countries.*

**Key words:** *unification, harmonisation, European Private International Law, European law of International Civil Procedure, European Civil Code.*

**I. Introduction**

It is only 46 years ago that Walter Hallstein, the former first President of the then European Economic Community Commission noted that it might possibly be astonishing that the European Economic Community might give attention to problems of approximation of civil law and law of civil procedure as the Community was mostly focusing on economic and social policies [33]. Meanwhile, half a century later, we do not only discuss approximation of these areas of law within the now European Union. We even discuss unification of civil law and law of civil procedure. And we do not just discuss it but have reached more than piecemeal unification [34, 36] in some of those areas.

As in the beginning competences of the European Economic Community (EEC) were mostly restricted to the customs union and to the establishing of a common market, questioning approximation of law in civil law and civil procedure made sense in the sixtieth. Community legislation almost exclusively was focused on customs and the regulation of the common market — later the internal market.

In order to establish the customs union and to build up a common market a significant amount of unifying legislation was required. When talking about more than 80% of Member States' law being unified, we are mostly talking about this type of implementing legislation, which was enacted by the commission fixing, for instance, import duties [6] or laying down marketing standards [7]. There are thousands of regulations of those two types [29].

We should not underestimate this type of unifying legislation. In principle it was and is necessary in order to establish and maintain the customs union and the internal market. However, in substance it is administrative acts clad in forms of laws. Such regulations are Commission Regulations — now based on Article 288 TFEU — instead of Council Regulations or Regulations of the European Parliament and the Council. It is not the type of legislation Walter Hallstein questioned and I want to address in this article.

The area of harmonization of law we should consider instead is concerned with civil law in general and adjacent law like law of civil procedure and — in the field of international transactions — private international law and law of international civil procedure. As to those areas of law there was little competence and hence little harmonization within the first decades of the European Union. There was some approximation based on EEC directives, notably in the field of commercial law and consumer protection. And there were some powerful conventions like the Brussels Convention on jurisdiction and enforcement [1] and the Rome Convention on the applicable law in contractual relationships [2]. However, those things were selective and incoherent.

Meanwhile the situation has dramatically changed. There is competence of the European Union to legislate in some areas related to civil law. The 1992 Treaty of Maastricht had introduced into the Treaty on European Union a title on visas, asylum, immigration and other policies related to free movement of persons. The 1997 Treaty of Amsterdam had transferred this title from the third pillar of intergovernmental cooperation into the EC Treaty thus conferring power to legislate to the European Community: “Other policies related to free movement of persons” contained provisions on judicial cooperation, which among others gave competence to legislate on international civil procedure and private international law. This was enlarged by the Lisbon Treaties inserting into the TFEU a Title V Chapter 3 on judicial cooperation in civil matters. Article 81 TFEU replacing and amending Article 65 TEC now enables the European Union to develop judicial cooperation in civil matters having cross-border implications including measures for the approximation of Member States’ law [4, par. 1, art. 81]. Such measures must no longer be “necessary for the proper functioning of the internal market”, such necessity only being mentioned as the most typical requirement [4, par. 2, art. 81]. All such measures can be effectuated in what is now called the ordinary legislative procedure [4, par. 1, art. 81] under Articles 289, 294 TFEU except for measures concerning family law, which ask for the special legislative procedure [4, par. 3, art. 81]. Ordinary legislative procedure asks for assent of the European Parliament and the Council. And as there is no special majority requirement as to the assent of the Council, it is only a qualified majority, which is required [3, par. 3, art. 16].

## **II. Approximating and Unifying Civil Law and Contiguous Areas of Law**

### ***1. Unifying Civil and Commercial Law — A Long Way to Go***

In the course of time there was quite some unification or at least approximation of specific areas of civil and commercial law, notably in company law and consumer protection law. Although the competence of the European Union to unify civil law at large was highly questionable, at the end of the last century there even was a strong movement towards developing a European Civil Code. Several resolutions of the European Parliament asked for such a Code or at least for approximation of the civil law [16—18]. Meanwhile such efforts do no

longer aim at speedy unification and at a comprehensive Civil Code but instead at some kind of approximation. And for the time being they are mostly restricted to specific areas of civil law, notably to contract law and tort law. Different from earlier Resolutions of the European Parliament the 2003 Action Plan of the Commission restricted itself to a European Contract Law [7]. And approximation of contract law and tort law is what is mostly discussed now on an academic level. There are a European Group on Tort Law in association with the European Centre of Tort and Insurance Law in Vienna [26], a Study Group on a European Civil Code at the University of Osnabrück [27], a Commission on European Family Law based at the University of Utrecht [25].

The outcome is likely not to be a European Civil Code enacted as a European Regulation but instead something like a model code. The Principles of European Contract Law [21] formulated by the Lando Commission in 1995, 1999, and 2003 aim in this direction as well as the Common Frame of Reference [27]. In the long run they may become basic parts of a European Civil Code. But this will be a long way to go.

## ***2. Unifying Law of International Civil Procedure***

While unifying or approximating civil and commercial law is mostly important for intra-community relations, unifying or approximating law of international civil procedure is important as well for international relations worldwide. And in this area unification and not only approximation of the law is what is happening with remarkable speed.

The Treaty of Amsterdam had conferred competence in the European Union to legislate on international civil procedure [4, par. 4, art. 67, art. 81]. Since Amsterdam civil matters became a Community topic allowing harmonization based on Article 65 TEC. Given this power, immediately legislation in the field of international civil procedure started:

First in 2000 Council Regulation (EC) 1346/2000 [9] on insolvency proceedings was enacted.

Second, Council Regulation (EC) 1347/2000 was enacted, better known as Brussels II Regulation [10]. It unified jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. It was replaced in 2003 by Council Regulation (EC) No 2201/2003.

And third, Council regulation (EC) 1348/2000 set in force unified rules on service of judicial and extrajudicial documents [11]. Among Member States it replaces the Hague Service Convention.

Shortly later in 2001 Council Regulation (EC) 44/2001 was enacted, better known as Brussels I Regulation [12]. It replaced the Brussels Convention unifying jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Again in 2001 Council Regulation (EC) No 1206/2001 [8] set in force unified rules on cooperation in the taking of evidence replacing among Member States the Hague Evidence Convention.

In 2007 Regulation (EC) 861/2007 on small claims procedure was enacted [14].

Within only a few years almost all major areas of the law of international civil procedure were unified.

### ***3. Unifying Private International Law***

Unification of European Private International Law by Regulations based on Article 65 (b) TEC started a little later. Until 2009 there was only the important unification of the private international law of contracts by the Rome Convention [2]. It had become a success, notably due to the fact that a Protocol annexed to the convention vested jurisdiction in the European Court of Justice to enable uniform interpretation of the convention. After Amsterdam Private International Law is step by step unified. The task is not yet finished, but it is in fast and steady progress.

In 2009 Regulation (EC) No. 864/2007 [15, ct. 32] on the law applicable to non-contractual obligations (Rome II) entered into force [15].

Shortly later and still in 2009 Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [13, par. 2, art. 29] entered into force. The Hague Programme, adopted by the European Council on 5 November 2004 [24, par. 3.4.2], had called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations. In 2005 the European Commission presented a draft proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I), which was modified in 2007 by the European Parliament. On 17 June 2008 Regulation (EC) no. 593/2008 (Rome I) was adopted. And on 17 December 2009 it entered into force [13, par. 2, art. 29].

Hence, within only one year significant parts of the private international law relevant to international business transactions have been unified within most of the Member States of the European Union. Further segments are to follow up.

There already exists a Proposal for a Rome III Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning the applicable law in matrimonial matters [22].

There exists as well a Green Paper in preparation of a Regulation on conflicts of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition[22].

And a Regulation on the private international law on succession and wills is prepared as well. In 2005 the Commission issued a Green Paper addressing the private international law on succession and wills [20]. And in October 2009 the Commission presented a proposal for a Regulation on the private international law of succession and wills [23].

## **IV. Open Questions**

Far reaching unification of the law of international civil procedure and private international law may raise quite some questions. I only shall address some of them. And unfortunately I do not have a convincing answer to all of them.

## *1. Substantive Legitimation*

The question of substantive legitimation relates to the division of power between the Union and the Member States. Unification of civil law, law of international civil procedure and private international are not named in the list of objects of exclusive competence of the Union under Article 3 TFEU. They fall under shared competences, which cannot be exercised by the Union but under the principle of subsidiarity, Article 5 (1, 3) TEU. This is where legitimation turns out to be questionable more than occasionally and on more than just corollary.

As Article 5 (3) TEU states: Under the principle of subsidiarity... the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Regulations more or less identically do little more than repeat the text of Article 5 (3) TEU. To give but one example I rely on Regulation Brussels I recital 4. “In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community.” [13, par. 13].

Brussels I and Rome I do not present one single substantive argument. In substance they do not justify anything. And it seems difficult to find a justification for a Regulation, where the Regulation in substance just replaces a pre-existing convention between Member States like in case of Brussels I and Rome I Regulations [29, p. 135—161; 31, p. 69; 34, p. 805] and notably where — like in case of Brussels I — the Regulation itself states that in substance it only wants to resume what was regulated by the convention. However, as to the future development there is some hope. The new Lisbon Treaties have introduced a new mechanism to safeguard the principle of subsidiarity. National Parliaments by now shall ensure this principle by raising their concern in advance [3, par. 2, art. 5; 36, p. 313].

## *2. Unification or Approximation?*

At first glance unification of EU law seems to be the favourable approach. At least it makes access to the law easier. However, measures of the European Union in the field of shared competences must not only comply with the principle of subsidiarity but as well with the principle of proportionality allowing measures only insofar as their content and form does not exceed what is necessary to achieve the goal [3, par. 4, art. 5]. At least as far as civil and commercial law are concerned it is highly questionable whether uniformity is necessary for the proper functioning of the common market. Moreover, there are other caveats as far as civil law is concerned. At least some areas of civil law are closely connected with the historical, social and economic situation in the different Member States. As long as there are significant differences, approximation seems to be the solution to harmoniza-

tion on the one hand and due respect for national peculiarities on the other hand, which according to Article 67 (1) TFEU are to be respected.

What is true to civil law is not necessarily true to international civil procedure and private international law. Those areas of law ask for more technically feasible solutions. They are more open for uniformity, which at the same time reduces the objectionable forum shopping.

### *3. Advantages of Unification by Regulations*

As intra-union relationships switching from conventions like Rome Convention and Brussels Convention to Regulations facilitates further development and uniform application. To give just one example: By transforming the Rome Convention into a Regulation major shortcomings of the convention have been erased. First of all there is a uniform text in all Member States. Different from the Rome Convention the Regulation does not allow reservations. Second, Rome I being a Regulation, it is automatically applicable in Member States without any further transformation needed. Third, future modifications of the regulation again will automatically be applicable within the Member States. And fourth, based on Article 267 TFEU, courts of the Member State, against whose decisions there is no judicial remedy under national law, no longer just **may** but instead **shall** request the Court of Justice to give a ruling in case they consider that a decision on the question is necessary to enable it to give judgment. Hence, uniform interpretation of a uniform text will be better safeguarded.

### *4. Who Profits?*

Final question should be: Who profits from unification of EU law? It is obvious that transactions within the European Union will be facilitated by unified or approximated law. This is true as well to civil and commercial law as well as to international civil procedure and private international law. However, parties from third countries may profit as well, although the amount of profit may differ dependent on which area of law is concerned.

#### *a) Advantages of Unification of International Civil Procedure*

As far as international civil procedure is concerned, there are significant advantages as well within the Union as well as in relation to third countries.

First advantage of unified law of international civil procedure can be a significant reduction of forum shopping. As long as jurisdiction in the Member States is not unified, bases for jurisdiction may vary in the different Member States. By consequence the plaintiff has or at least may have additional options of where to sue. Instead, unified jurisdictional bases of the Member States erase at least part of the options.

Second, unified law facilitates and accelerates access to the courts. Plaintiffs must no longer investigate into different legal systems to find out where to sue or to be sued. There is but one set of provisions to be investigated. Moreover, within the Union this set of provisions is available in your own

language. And similarly decisions of the European Court of Justice on this set of provisions are available in your own language.

Third, unified rules on service may enhance proper and speedy service. The advantages may not be significant taking into consideration that rules already had been unified by the Hague Service Convention. However, at least some further advantages are made.

And Forth, unified rules on taking evidence again will enhance and speed up taking of evidence, even taking into consideration that the Hague Evidence Convention had given some advantages.

Finally and most important, judgments from one Member State will easily be enforced in other Member States as well.

#### *b) Advantages of Unification of Private International Law*

In Member States as well as in third countries advantages of unified private international law in part coincide with those of unified law of international civil procedure. Due to private international law being identical in the Member States and hence leading to the same applicable law wherever in the Union you sue, forum shopping will be reduced. You must no longer look for a forum within the European Union, which will provide an outcome in your favour due to the applicable law. There will be no such forum. And like in the field of law of international civil procedure access to the courts will be easier and faster. You must no longer investigate into different legal systems in order to find out about the applicable law. There is but one set of provisions to be investigated. And as far as member States are concerned again this set of provisions as well as the decisions of the European Court of Justice on this set of provisions are available in your own language.

There is one additional advantage on the new unified private international law, which should not be left out although it did not arrive out of unification but instead on the occasion of unification by a regulation. In substance Rome I can be considered to be the most advanced private international law of contracts of the present time. The regulation significantly improves the Rome Convention, notably by enhancing predictability and certainty as to the applicable law by a distinct commitment to party autonomy in business transactions and by means of an exhaustive catalogue of contracts fixing the applicable law leaving little leeway to ex post determination by courts. Improvement can as well be found in numerous details, e. g. where Rome I gives definitions or at least guidelines to controversial issues like “overriding mandatory provisions”, where it generalizes the random small catalogue of consumer contracts, where it more precisely addresses the place of performance of the employee. Similarly, Rome II can be considered to be the most advanced private international law of non-contractual relationships.

#### *c) Advantages of Unification of Civil Law*

Arguments in favor of unification of European civil law by a European Civil Code are not easily found. At first glance the idea seems convincing that a single civil code may help reduce trade barriers within the Union. However, this would only relate to economic parts of a civil code. And there



is no evidence that the mere fact of different civil codes within the Union really is a trade barrier. To the contrary, the fact that the United States of America can easily live with 50 different civil laws and only some areas of commercial law harmonized — although not unified — clearly demonstrates that there is no really necessity. The widespread use of standard form contracts as well as the fact of elaborate individual contracts additionally may reduce the need for unification.

Lack of competence may be considered an obstacle to unification. Article 114 TFEU probably is not a sufficient base to enact a comprehensive code. The same is true to Article 352 TFEU. However, in case there is a general consensus on the desirability of such a code this obstacle can easily be overcome.

A stronger argument in disfavor of unification may be the fact that the Codes within the Member States at least in part rely on the respective cultural background of the different states. This may easily be overcome in areas like contract law and eventually as well law of non-contractual relationships. But unification of family law and law of succession is probably feasible only when the economic and cultural situation within the different Member States is more adjusted.

There is an additional problem resulting from the fact that practically nowhere the whole of the civil law is collected within the civil code. A unified European Civil Code inevitably would result in frictions within the Member States between the unified Civil Code and the not unified rest of the civil law.

## V. Conclusion

Within about one decade major parts of the law of international civil procedure and private international law have been unified. The task is not yet completed but well on its way to be finished during the next few years. In substance the EU has set new standards for how to accommodate modern private international law to the needs of internationally acting parties. In the outcome parties, courts and practicing lawyers will profit.

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