European Union Private International Law – Role Model or Hegemony?

Caroline Sophie Rapatz, University of Kiel, has just published her German-language Habilitationsschrift on "European Union Private International Law – Role Model or Hegemony? Delimitations and Effects in Relation to National and International Conflict of Laws" (Das Internationale Privatrecht der EU – Vorbild oder Vormacht? Abgrenzungen und Wirkungen im Verhältnis zum nationalen und völkerrechtlichen Kollisionsrecht, Beiträge zum ausländischen und internationalen Privatrecht 139, Mohr Siebeck 2023 (XXVI, 693 p.) The book analyses the consequences of the Europeanisation of private international law (PIL) for the traditional regulatory levels of national and international (treaty and convention) conflict-of-laws rules and for the system of conflict-of-laws as a whole. The author has kindly provided has with the following summary of her insights:

> *Originally, PIL was a national matter: Legal systems provided their own conflict-of-laws rules as a supplement to their substantive private law. In the course of the 20th century, harmonised rules for individual issues or areas of PIL were created through numerous bilateral treaties and multilateral conventions. As specific supplements and narrow exceptions, these could be integrated smoothly into the overall systematic structure of the national PIL concepts. Since the turn of the millennium, however, the unification of PIL in Europe through EU Regulations, directly applicable and replacing the Member States' national rules, has added a new regulatory level – leading to today's complex multi-level system. Within a few years, the EU conflict-of-laws Regulations have cut wide swathes into both national and international PIL, with considerable consequences triggered by their implementation. Simultaneously, the EU Regulations are incomplete with regard to several key issues and an overall system at the European level can only be surmised – it is left to the other*

regulatory levels to provide solutions for the problems caused by these lacunae. On the other hand, an increasingly strong influence of the assertion of European values can be observed.

The monograph examines EU PIL's expansive claim to application vis-à-vis the traditional regulatory levels, focusing on the direct and indirect effects of the European instruments in the current network of conflict-of-laws rules. What consequences does the Europeanisation of various areas of PIL entail for the national conflict-of-laws concepts of the individual Member States and for the existence and the future of PIL treaties and conventions? An in-depth analysis based on representative examples shows that after only a decade, the initial approach to the European unification of PIL through separate, area-specific Regulations is already causing massive difficulties in practice. In the near future, a fundamental reorientation and reconceptualization of EU PIL will be unavoidable.

The introduction (Part I – Das EU-IPR als neue Regelungsebene [EU Conflict-of-Laws as a New Regulatory Level]) places the objective of the study in the current context of academic discussion and outlines its structure and method. The current state of the interplay of national, treaty/convention and European conflict-of-laws rules is presented and the basic relationships between the different regulatory levels established.

The first step of the in-depth analysis explores the direct effects of EU PIL (Part II – Konturen des EU-Kollisionsrechts [Contours of EU Conflict-of-Laws]). The intention for the European PIL instruments to be applied is outlined by their material scope of application. More or less clearly formulated positive demands for application entail a displacement of the Member States' conflicts rules previously applicable; negative delimitations limit each EU Regulation's application with regard to certain issues in favour of national rules, treaties and conventions or other European instruments. Frequently these European gaps are motivated by the endeavour to avoid conflicts – resulting, however, in selective exceptions with regard to problematic aspects.

Due to the primacy of the EU Regulations over the Member States' PIL, the relationship between these two levels focuses on the scope of the different conflicts rules determined at the European level – crystallized in questions of characterisation with regard to individual legal institutions. On the one hand,

under the European Regulations some areas have been expanded considerably compared to the previous understanding in Member States' national PIL, to the detriment of the latter. On the other hand, politically sensitive issues which in principle fall within the material scope of the European PIL instruments are often deliberately excluded from them. This unilateral European determination of the scope of the EU instruments results in a considerable curtailment of the areas left to the national regulatory level – but at the same time the Member States need to close the gaps of the European PIL Regulations, the extent of which is not always clearly determined.

For the relationship between European Regulations and international agreements, an initial practical challenge lies in the identification of the existing bilateral treaties and multilateral conventions. An exemplary overview illustrates the diversity and variety of the conflict-of-laws rules of international origin competing with the EU rules. A remedy to the current information deficit in this regard is urgently needed; a solution might lie in the creation of a European central information platform. The interplay of European and international conflicts rules is subject to a broad spectrum of different coordination mechanism. Generally, it is characterised by the primacy of pre-existing agreements between Member States and Third States over EU Regulations, which necessitates exceptions of varying scope from the EU conflicts rules.

Additional difficulties arise with regard to intertemporal issues as the application of European and national conflict-of-laws rules overlaps in transitional phases and the coordination of the temporal scope of application of European and international instruments is not always entirely smooth.

On the whole, the material scope of application of European PIL proves to be fragmentary. Shifts and gaps on the EU level force the Member States to react within their remaining ambit, the prima facie unaffected conflict-of-laws rules in treaties and conventions are facing highly complex coordination issues in their interplay with the new European rules. EU PIL self-determines its scope of application, motivated by European interests. This proves dangerous in several respects – first and foremost because it hardly takes into account the repercussions that a scope of Europeanisation "according to the EU's taste" entails for the formally unaffected other regulatory levels.

A second step of analysis scrutinises the influences of Europeanisation on national and international PIL that go beyond the European Regulations' direct application (Part III – Wirkungen des EU-Kollisionsrechts [Effects of EU Conflict-of-Laws]). The Member States' conflicts systems cannot limit their reaction to simple deletions, but constantly need to ensure the compatibility of the remaining national rules with EU PIL and fill the gaps of the latter. In the Member States' PIL, various approaches can be identified: an upholding or establishment of independent national conflicts rules, an orientation of the national rules towards their new European context, or a renunciation of national rules in favour of an extended or analogous application of the EU Regulations. A closer look at these mechanisms shows that the issues remaining for the national regulatory level can only be solved with a view to the European developments. In addition to this "pull effect" of European PIL, an increasingly strong influence of EU primary law has to be taken into account. The requirements the ECJ is deriving from the fundamental freedoms have an ever-growing impact on the Member States' national PIL. A primary law duty to recognise (personal) status would lead to a fundamental upheaval of the conception of conflict-of-laws, which could ultimately only be implemented reasonably on the European level. The discussion of controversial questions of legal policy is currently shifting to the establishment of limits for the consequences of the fundamental freedoms for conflict-of-laws rules – which frequently entails the direct confrontation of European and Member State national values. In the meantime, the PIL rules formally remaining at the national level are under the de facto compulsion to adapt to the European circumstances and requirements in all regards and areas: genuine national conflict-of-laws rules are increasingly disappearing.

The impact of Europeanisation on treaty and convention PIL is more subtle, but no less momentous. The unchanged conflicts rules of the international instruments are no longer applied in their original context of national PIL, but now interact with EU PIL. Different approaches led to coordination problems and friction losses; the direct comparison with the modern European rules frequently makes the older treaty and convention PIL appear outdated and disadvantageous. In the case of multilateral conventions, the necessity of a uniform interpretation in all Member States harbours the additional danger of a shift in interpretation caused by European predominance. Concerning the further developments on the international level, the EU holds a considerable

power position. In terms of competence, it increasingly replaces its Member States; in terms of content, reforms and new instruments at the international level only have a realistic chance if they are compatible with EU approaches and values. The EU's participation in multilateral conventions can contribute to a global harmonisation of PIL – but the de facto supremacy of the European positions and the current lack of an effective institutional counterweight are cause for concern. The explosive potential of these imbalances for both legal technique and legal politics should not be overlooked, and more attention granted to the frequently overlooked relationship between the European and international regulatory levels.

In addition, the effects of the Europeanisation of PIL reach beyond conflict of laws – as a look at some exemplary consequences for substantive law and international civil procedure illustrates.

At all levels, EU PIL thus results in extensive "long-distance effects" far beyond the technical scope of its legal instruments. It proves to be a deceptive pretence that the other regulatory levels remain unaffected: in practice, the leeway formally remaining for national, treaty and convention PIL rules is rapidly dwindling. Resistance against the replacement and pulling mechanisms in favour of European approaches and ideas is hardly possible.

These findings lead to the conclusion that the current European approach to unifying PIL by selective legal instruments is not suitable for the future (Part IV – Die Zukunft des EU-Kollisionsrechts [The Future of EU Conflict-of-Laws]). The relationship between the different regulatory levels needs to be redefined with awareness of the far-reaching European influence on all conflict-of-laws areas. In relation to the Member States' PIL, the EU must either exercise self-restraint and permanently leave clearly delineated areas to the national level, or it must resolutely take the step towards full harmonisation. Building on this decision, the international instruments of PIL can then be re-evaluated and restructured in relation to Third States. While a critical review and streamlining of the Member States' inventory of treaties and conventions is desirable, their primacy must not be undermined. For the creation of new global instruments, an active European participation is to be hoped for – but not a unilateral EU dominance. Finally, the first decade of practical application of EU conflict-of-laws has brought to light some need for improvement also within the European regulatory level.

In the 21st century, conflict-of-laws cannot be imagined without EU PIL. At the moment, its relationship to national, treaty and convention PIL is at a conceptual crossroads. In the very near future, the failed approach of individual EU Regulations will have to be replaced by a coherent and flexible model of coordination which takes into account the interests and needs of all participants and regulatory levels.