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The Role of General Principles in EU Private International Law and the Perspectives of a Codification in the Field

Angelo Davì
Full Professor of International Law
Sapienza – University of Rome

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1. Introduction: the three different categories of general principles relevant for the construction of an EU system of private international law

The role of unwritten general principles within the European system of private international law presently under construction appears as a highly complex theme. This is mainly because European private international law does not limit itself to the pursuit of the traditional aims of this branch of law but also tends to promote the development of political, economic and social integration among the Member States of the European Union. Accordingly, within its framework non only the traditional principles of private international law, but also those pertaining to EU law, and in particular the principles regarding the structure and the functioning of the internal market and those related to the establishment of the area of freedom, security and justice are of relevance. Alongside the said two sets of principles, a role is obviously played also by those general principles of law that are fundamentally common to most legal systems and inherent in any branch of law and, as such, are equally relevant within the domain of EU private international law.

This coexistence of traditional objectives and principles of private international law with those peculiar to the European integration confers on EU private international law a specific identity, which is apt to distinguish it from individual States' private international law systems as well as from the regimes

* Riceviamo e volentieri pubblichiamo.

established in the field by means of international conventions, both of which do not pursue any further aim than a general goal of coordination between the domestic legal systems[1].

2. The general principles of private international law and the general principles of law common to most legal systems

The principles belonging to the first group, that is, the general principles of private international law, are those, well known, that have been developed over the centuries by international legal doctrine. The most relevant of them are the following: the principle of international harmony of solutions, or, rather, according to the more cautious and realistic definition proposed by Wengler, the principle of the minimum of conflicts[2], that is intended to preserve as much as possible the stability and continuity of private legal relationships across borders; the principle of proximity, favouring the application to transnational situations, as a general rule, of the law of the country with which they are more closely connected; the principle of effectiveness, suggesting, inter alia, to take into account the *de facto* power of foreign States to determine the legal status of assets located in their respective territories and therefore subject to their actual control[3]; the taking into consideration, in the drafting of choice of laws rules, of the objectives and of the legal policies pursued by substantive law rules. These principles are not in need of further analysis in this article, since their application in the context of EU private international law does not show significant peculiarities.

The same can be said as concerns the general principles of law common to most legal systems, among which there are to be included, *e.g.*, the principle of equality, implying the exclusion of discrimination not based on objective grounds[4]; the principle of proportionality, to which the ECJ pointed in several

1 See, in this respect, Article 1 of the Statute of the Hague Conference on Private International Law, the most important international institution operating in the field, stating as sole purpose of the Conference "to work for the progressive unification of the rules of private international law".

2 W. WENGLER, *Les principes généraux du droit international privé et leurs conflits*, in *Revue critique de droit international privé*, 1953, p. 51.

3 This principle has been recently implemented under Article 12 of Regulation 650/2012, concerning succession and wills in private international law, according to which the court of a Member State seised to rule on a succession may decide not to rule on one or more of the assets comprised in the estate of the deceased which are located in a third State if it may be expected that its decision in respect of those assets will not be recognized in the third State concerned, as well as under Article 30 of the same Regulation, providing that, where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which impose restrictions concerning or affecting the succession in regard to them, those special rules shall apply irrespective of the law which would be ordinarily applicable to the succession. Similar rules are to be found under Article 13 of Regulation 2016/1103 as well as under Article 13 of Regulation 2016/1104, implementing enhanced cooperation in the areas of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and, respectively, in matters of the property consequences of registered partnerships.

4 As regards EU law, see Articles 8 and 18 TFEU, dealing respectively with the prohibition of discrimination between men and women and the prohibition of discrimination based on nationality within the scope of application of the Treaties; cf also, in broader terms and in a more analytical way, Articles 20-26 of the EU Charter of fundamental rights.

occasions as a limit to the possibility for Member States to oppose their domestic law rules, including mandatory ones, to the exercise of the fundamental freedoms guaranteed by the founding Treaties[5], and some principles of legal interpretation.

It is worth adding that a prominent role among the said principles is played by those which require respect, in every cross-border or transnational situation, for the fundamental rights of the human being as protected, alongside the EU Charter of fundamental rights, by the constitutional traditions common to the Member States and by the European Convention on the Protection of Human Rights and Fundamental Freedoms. These rights, as expressly stated by Article 6, para. 3, TEU, form part of EU law as general principles; particular relevance among them is to be acknowledged to the right of access to justice and to a fair trial as well as to the right to respect for private and family life, in consideration of their extensive implementation, especially through the European Court of Human Rights' case law[6].

3. The general principles of EU law and their role in the development and the completion of the system

A greater role is played by the general principles of European Union law, in that they shape European private international law in its essential and distinctive features. These principles are partly unwritten and partly can be inferred by, or are expressly stated in, the founding Treaties, as for instance some of the «rules of general application» contained in Articles 7 ff. TFEU. Among these, a paramount role is surely played by the principle of mutual recognition, which is to be considered as the guiding principle, or, as stressed in the Presidency Conclusions of the 1999 Tampere European Council, the «cornerstone»[7] of the European judicial area. Founded initially on the well-known *Cassis de Dijon* case law[8], and later developed, particularly as regards the impact of national legislation on economic activities, under Article 100 B, introduced into the EEC Treaty by the Single European Act of 1986, that principle moves from the premise of the equivalence among Member States' legislation. In its implementation in the field of private international law, which, quite to the contrary, presupposes the difference between national legislations as an actual justification for its very existence, the prerequisite of the equivalence among Member States' legislation is however not required, having been replaced by a broader and rather indefinite notion of reciprocal faith among the Member States.

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5 See, *e. g.*, ECJ, Judgment of 23 November 1999, joined cases C-369/96 and C-376/96, *Arblade*; Judgment of 15 March 2001, case C-165/98, *Mazzoleni*; Judgment of 14 October 2008, case C-353/06, *Grunkin and Paul.*

6 On the relevance of domestic and international protection of human rights in the domain of private international law see A. DAVÌ, *Diritto internazionale privato e diritti umani*, in A. DI STEFANO, R. SAPIENZA (eds), *La tutela dei diritti umani e il diritto internazionale*, Napoli, 2012, p. 209 ff.

7 See *EU Bulletin* 10-1999, p. 11, point 33.

8 ECJ, Judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG.*

On this new foundation, the principle in question is at present applicable, first of all, as expressly provided under Articles 67, para. 4, and 81, para. 1 and para. 2, lit. a), TFEU, to the recognition of judicial and extra-judicial decisions, secondly to the «acceptance» of authentic instruments and documents, contemplated by some of the most recently adopted EU instruments in the field[9], and, finally, under the input of case law, to the recognition of personal *status* and family relationships and, thereby, indirectly, to the taking into consideration of the national laws pursuant to which the latter were established[10]. The cornerstone position of the system occupied by the said principle depends on the fact that the mutual recognition of decisions, now operating in an automatic or semi-automatic form, accompanied by the unification of rules concerning jurisdiction and conflict of laws, has ended up creating, in the sectors in which these results have been achieved, a substantially unitary legal area which tends in practice to reproduce almost entirely the situation existing within a single country. This is highlighted also by the exceptional nature of the cases where justifiable grounds occur for a denial of recognition (the actual number of which can be currently estimated, as far as the recognition of judgments is concerned, at less than 10% of their total number).

Among the other general principles of EU law having a direct bearing on European private international law figure essentially the following. First of all, the favour for cross-border mobility of persons, which operates as a veritable propeller of the development of European integration. As noted by one author[11], the presence of this principle has the consequence that in European system of private international law, mobility is an objective to be attained, whereas under the traditional national systems of conflict of laws, as well as under the international conventions adopted in the field, it is simply a prerequisite of their existence and operation. The said principle of favour has clearly inspired the rules contained under Regulation 1259/2010, implementing an enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III). This instrument has, in fact, devoted higher attention to the need to encourage the movement of persons within the European area of freedom, security and justice,

9 Regulation 650/2012 concerning private international law in matters of succession (Article 59); Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Article 58); Regulation 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (Article 58).

10 See in particular as concerns the recognition of the legal personality and capacity of companies, the well known judgments by the ECJ, 9 March 1999, case C-212/97, *Centros*, 5 November 2002, case C-208/00, *Überseering*, 30 September 2003, case C-167/01, *Inspire Art*, followed by further judgments; concerning continuity of personal *status*, the judgment in the case *Grunkin and Paul*, cit. above, fn 5, recently followed by a judgment of 5 June 2018, case C-673/16, *Coman*, relating to the recognition of same-sex marriages.

11 C. KESSEDJAN, *Un code européen au regard des objectifs du droit international privé*, in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (eds), *Quelle architecture pour un code européen de droit international privé?*, Bruxelles, 2011, p. 119.

allowing them to take broadly advantage from the differences existing between the substantive laws of the Member States, than to the need, common to any codification of private international law rules pursued on a multilateral scale, to achieve among the Member States (or at least among those participating to the enhanced cooperation) a goal of legal uniformity likely to ensure certainty and predictability of the applicable law, as well as judicial harmony as among the respective courts[12]. Secondly, mention shall be made of the principle that can be defined, according to the formula explicitly adopted by art. 9 TFEU, of «social protection», or also principle of solidarity, which, *inter alia*, constitutes the foundation of the special choice of law rules protecting consumers and employees under Articles 6 and 8 of Regulation 593/2008 (Rome I). These provisions, as is well known, operate as an exception to the general rule normally subjecting the contract to the law of the country where the party expected to provide the characteristic performance resides, a rule which appears inspired, instead, to the different principle of EU law known as «country of origin» or «home country» principle (*Herkunftslandprinzip*). A further general principle of EU law coming for consideration for our purposes is that of economic efficiency, which may be also inferred from the rule under Article 120 TFEU concerning the coordination between the economic policies of the Member States[13]. This principle presents among its corollaries a significant attitude of favour for party autonomy in the determination of the applicable law, which constitutes one of the main distinctive features of the developing European system of private international law. Party autonomy, besides being a factor likely to promote the establishment of a regime of competition among legal systems, with the well known related advantages and drawbacks, contributes notably, on a more general policy plan, to the development of a social and economic integration of individuals in a common legal area where their subjection to each State's power of control tends to diminish at the same time as their ties to one or another national society lose progressively their importance[14].

[12] See further in this respect A. DAVÌ, *Le renvoi en droit international privé contemporain*, in *Recueil des cours de l'Académie de droit international de la Haye*, vol. 352 (2012), p. 324 ff. The increase in the mobility of European citizens is explicitly labelled by recital 15 of the Regulation as an objective to be attained through this instrument.

[13] See, on the role played by this principle in the EU system of private international law, G. RÜHL, *Allgemeiner Teil und Effizienz – Zur Bedeutung der ökonomischen Effizienskriteriums im europäischen Kollisionsrecht*, in S. LEIBLE, H. UNBERATH (eds.), *Brauchen wir eine Rom 0-Verordnung?*, München, 2013, p. 161 ff.

[14] See, on the role of party autonomy in European private international law, among others, G. RÜHL, *Rechtswahlfreiheit im Europäischen Kollisionsrecht*, in *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen, 2008, p. 187 ff.; with particular regard to family law, T. MARZAL YETANO, *The Constitutionalisation of Party Autonomy in European Family Law*, in *Journal of Private International Law*, 2010, p. 155 ff.; in matters of succession, A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, pp. 45-46; for a more general analysis, J. BASEDOW, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationales Privatrechts*, in *RabelsZ*, 2011, p. 32 ff., and, as concerns the private international law aspects of economic relationships, H. MUIR WATT, *"Party Autonomy" in International Contracts: from the Making of a Myth to the Requirements of Global Governance*, in *European Review of Contract Law*, 2010, p. 250 ff.

The essential functions which the principles at issue can discharge within the framework of EU private international law are of a twofold nature. First of all, possessing mostly a sufficiently general and abstract nature as compared to the specific features of the situations forming the object of the rules dictated in respect of particular subject areas, they are capable of allowing the attainment of a significant degree of systemic coherence. The latter must be intended in essence both in terms of horizontal coherence, that is, across the various instruments so far adopted (*e.g.*, as concerns consumer protection under the Rome I and the Brussels I-*a* Regulation) and in terms of vertical coherence, that is, in terms of conformity of the provisions contained in the EU legal acts with substantive values expressed by rules occupying a higher position in the hierarchy of legal norms. Especially under this second aspect, the principles under consideration allow EU private international law to develop in a direction which is functional to the needs and the spirit of the European integration. Furthermore, the principles in question may also contribute, thanks to the input and, at the same time, the filter provided by the ECJ in its indispensable work of interpretation, to the achievement of the further aim of filling, insofar as possible, the *lacunae* left open by EU private international law. This is due to the aptitude of those principles to provide the Court with the essential points of reference for the discharge of its interpretative, and at times integrative, function. It is almost superfluous to underline that in the present phase of development of this branch of EU law, still largely incomplete and likely to remain so at least for some time on, and where in certain areas rather than of *lacunae* properly so called it is a matter of lack of regulation, the latter function which the said principles are called to perform appears particularly important.

4. The role of general principles and the uncertain perspectives of the adoption of an EU code of private international law

The two above-mentioned functions presently performed by the general principles of law within the framework of EU private international law, that is, to ensure an overall coherence and a conceptual and functional unity of the system, as well as to fill the gaps left open by the rules contained in the existing sectoral instruments, fall within the most typical functions which in written-law countries are usually discharged by a general work of codification. And it is well known in this respect that the idea of undertaking such a work also on the European level has attracted in the last decade the interest of the EU institutions. As early as in 2009, in a communication of 10 June of that year titled «An area of freedom, security and justice serving the citizen»[15], the European Commission included among the priorities of its action the drafting of a code of judicial cooperation in civil matters, confirming in a later communication

[15] COM(2009) 262 final, p. 10, point 3.1.

of 11 March 2014[16] its interest in this project as part of its Justice Agenda for 2020. On its own side, the European Parliament identified, in a resolution dated 7 September 2010, as one of the main needs emerging in this field that of collecting and putting together in a unitary framework the various sectoral instruments adopted up to that time, pointing as a final objective to a general codification of EU private international law[17]. The Parliament eventually entrusted, in 2012, to the Asser Institute in The Hague the carrying out of a study on this topic[18]. From a perspective at least partly similar, the European literature has been discussing extensively for a number of years the opportunity of drafting an EU regulation concerning the general questions of private international law, usually styled «Rome 0 Regulation» or *Rom-0 Verordnung*[19]. Significant obstacles both of a technical and a political nature appear nonetheless to hamper the realization of such projects of codification.

From the one side, one of the most significant difficulties lies in the fact that Article 81 TFEU contemplates two distinct legislative procedures for the adoption of acts concerning judicial cooperation in civil matters: whereas, under paragraph 3 of the Article, measures concerning family law must be adopted by the Council by unanimity and after the simple consultation of the European Parliament, all the other acts are subject, under paragraph 2, to the ordinary legislative procedure, whereby the Council decides by qualified majority and the consent of the European Parliament is required. Since an EU regulation concerning the general part of private international law would obviously need to be applicable in all sectors of the subject in order for it to achieve its unifying function, it would be necessary to find a way to reconcile these two different procedural systems. A solution consisting of the adoption of two distinct regulations «Rome 0», to be applied respectively in the one or the other area, would be contrary to the unitary character that a general codification should possess. This is even more so considering that

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, «The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union», COM(2014) 144 final, p. 9, point 4.2.

17 European Parliament Resolution of 7 September 2010 on the Implementation and Review of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2009/2140(INI)), point 1.

18 X. KRAMER, M. DE ROOIJ, V. LAZIĆ, R. BLAUWHOFF, L. FROHN, *A European Framework for Private International Law: Current Gaps and Future Perspectives*, 2012 (PE 462.487).

19 Among the numerous studies devoted to the subject, see those collected in S. LEIBLE, H. UNBERATH (eds), *Brauchen wir eine Rom O-Verordnung?* (above, fn 13), as well as in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (eds), *Quelle architecture pour un code européen de droit international privé?* (above, fn 11), and the annexed *Embryon de règlement portant code européen de droit international privé*, drafted by P. Lagarde, *ibidem*, p. 367 ff.; see also M. CZEPELAK, *Would We Like to have a European Code of Private International Law?*, in *European Review of Private Law*, 2010, p. 705 ff.; F. M. WILKE, *Brauchen wir eine Rom-0 Verordnung? Eine Skizze anlässlich einer Bayreuther Tagung*, in *GPR – Zeitschrift für Gemeinschaftsprivatrecht*, 2012, p. 334 ff.; S. LEIBLE, *Auf dem Weg zu einer Rom O-Verordnung? Plädoyer für einen Allgemeinen Teil des europäischen IPR*, in *Festschrift für Dieter Martiny zum 70. Geburtstag*, Tübingen, 2014, p. 429 ff.; R. WAGNER, *Do We Need a Rome 0 Regulation?*, in *Netherlands International Law Review*, 2014, p. 225 ff.; G. RÜHL, J. VON HEIN, *Towards a European Code on Private International Law?*, in *RabelsZ*, 2015, p. 701 ff.

the disparity between the majorities required for the approval of the two instruments by the Council as well as the difference in the roles conferred to the European Parliament in their respect would make uncertain the possibility of giving to both acts the same content. A more frequently suggested option consists of adopting through the ordinary legislative procedure a «Rome 0» Regulation not endowed with an autonomous scope of application, to which each sectoral instrument could then make a reference in order for it to apply in respect of the matters governed by the instrument concerned. In respect of this option, however, it would still remain to be decided whether the said references should be of a static nature, that is, referring to this «Rome 0» regulation as it is in force at the time when the reference is made, or, rather, of a dynamic nature, such as to encompass also its possible future amendments, whose contents obviously might not be established in advance. The first solution would be critical in that it could bring about the coexistence of two or more different versions of the same regulation in force at the same time. The second solution would pose serious problems of compatibility between the adoption of such amendments by the ordinary legislative procedure on the one side and the unanimity required for the adoption of acts concerning family law on the other side[20].

There are still various other reasons moving to consider this type of projects difficult to realize or at least premature. To begin with, a European code of private international law should include, or at least take into account, in the regulation of the general issues of the subject matter, also parts of it that have not yet been harmonized and in respect of which it would prove difficult or even impossible to predict exactly the nature and scope of the particular problems that might appear and therefore also the regulatory needs that could arise in relation to them. Consequently, the number of special regimes and exceptions which would need to be contemplated would risk to increase significantly.

Furthermore, in the present context, conferring to a code, even though concerning just the general part of the matter, the characters of unity and coherence which such an instrument should normally possess would risk being in turn made impossible by the high degree of differentiation of Member States' participation to the sectoral acts so far adopted. It is hardly the case of recalling the special position of Denmark, which does not participate to judicial cooperation in civil matters, but nonetheless accepted, by means of an agreement concluded with the EU, to be bound to apply Regulation 1215/2012 (Brussels I-*a*), as well as that held by Ireland and the UK (as long as the latter continues to be a Member State of

[20] It must be recalled in this respect that the possibility provided for under Article 81, para. 3, TFEU, for the Council to adopt, upon a proposal by the European Commission, a decision identifying the family law aspects having cross-border implications which may form the subject of acts adopted by the ordinary legislative procedure *in lieu* of the special legislative procedure contemplated by the same rule (so-called *passerelle* clause) finds a limit in the power granted to each national parliament, to which the said proposal shall be notified, to preclude by its sole opposition the adoption of such a decision. See, concerning the whole of the said problems, F. M. WILKE, *Brauchen wir eine Rom 0-Verordnung?* (above, fn 19); R. WAGNER, *Do We Need a Rome 0 Regulation?* (above, fn 19), p. 233 ff.

the EU), which participate to the adoption of some instruments only, on a case by case basis. It is also worth considering that the difficulty to reach a unanimous consent as requested by Article 81, para. 3, TFEU, for the approval of measures concerning family law has determined the Member States having an interest in the adoption of such measures to implement an enhanced cooperation in order to adopt three (out of five) of the EU regulations so far enacted in this field, which therefore apply just as among a limited number of States[21]. Moreover, a number of these States are parties to international conventions concluded in the framework of the Hague Conference of Private International Law or in other *fora* and, as a consequence, are exempted from the application of the corresponding EU instruments. The prospective EU code of private international law would therefore risk turning out as a variable geometry code, that would achieve only a weak degree of simplification of the existing normative framework.

It should also be taken into account that a codification attempted at this juncture would probably also lack the stability which is normally inherent in the very idea of codification. The steady and fast evolution of EU private international law, testified by the fact that almost all EU instruments adopted up to now far contain a clause for a review of their application by the European Commission in light of a future revision, which for some of those acts has already taken place even more than once (as it is the case for the Brussels Convention of 1968, turned first into Regulation 44/2001 and then into Regulation 1215/2012)[22], has brought to the result that each instrument reflects the stage reached by the relevant *acquis* at the time of its adoption. All this ends up in an inevitably incomplete and provisional nature of the results achieved, making them hardly capable of a durable systematization. An initiative of codification having the ambition to last over time would risk being soon overcome by later developments or, at least, to be in constant need of revision and updating.

Finally, account shall be taken of the fact that some of the general questions of private international law, like the acceptance of *renvoi*, the use of escape clauses, the issues raised by a reference to the law of a State having more than one legal system, and the treatment to be afforded to overriding mandatory rules (*lois de police*), especially if belonging to a foreign law, have received in the various sectoral instruments hitherto

[21] The range of participation to the regulations hitherto adopted goes from the minimum of the 14 original parties to the enhanced cooperation implemented by Regulation 1259/2010 in the area of the law applicable to divorce and legal separation (subsequently raised to 17 thanks to the entry of Lithuania, Greece and Estonia) to the maximum of 28 currently bound by Brussels I-*a* Regulation, passing through the 18 taking part in the two enhanced cooperations in matters of matrimonial property regimes and of property consequences of registered partnerships (Regulations 2016/1103 and 2016/1104), the 25 bound by Regulation 650/2012 relating to succession and the 27 participants in Regulations 593/2008 and 864/2007, concerning respectively contractual and non-contractual obligations. As regards, finally, Regulation 4/2009 in matters of maintenance, the United Kingdom has taken a bifurcated position, having accepted to be bound by this instrument but not by the 2007 Hague Protocol referred to in Article 15 of the former.

[22] As for examples of clauses of the like see Article 27 of Regulation 593/2008 (Rome I), Article 30 of Regulation 864/2007 (Rome II), Article 79 of Regulation 1215/2012 (Brussels I-*a*) and the respective Articles 68 of Regulations 2016/1103 and 2016/1104.

enacted different solutions. These are based on grounds reflecting the peculiarities of each particular matter, and, accordingly, it would certainly not prove easy to subject those questions to a single and unitary set of rules[23].

Even from a political perspective, the general climate does not appear particularly favourable to the carrying out of such a project. Some Member States, among which mainly the common law countries and the Scandinavian ones, are contrary to the idea of a complete codification of private international law even in their domestic legal systems. In fact, these Member States have limited themselves to introducing in their legal systems some sparse statutes concerning specific topics, while preferring to maintain in general terms a flexible attitude and entrust the solution of many questions to their Courts' case law[24]. Besides, even those Member States having enacted comprehensive codifications of the subject have mostly renounced settling certain controversial issues, such as qualification, preliminary questions or the treatment of foreign overriding mandatory rules and it is difficult to expect that in respect of matters which they have left unanswered in their internal legislation, these States would readily find a general consent at the Union's level. Moreover, as it has been observed, a further difficulty lies in the fact that the asymmetrical participation by the Member States to the individual instruments hitherto adopted brings with it as a consequence that, at least in certain cases, those States would consider the problems on which they should reach an agreement from different viewpoints[25]. The widespread attitude of distrust in the prospect to achieve in a reasonable time significant results on the EU level in this direction appears confirmed also from the circumstance that in the last decade a number of Member States have adopted new national codifications of a general nature in the field[26].

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[23] For a discussion of the possible solutions to these and other related problems see F. M. WILKE, *Brauchen wir eine Rom 0-Verordnung?* (above, fn 19), p. 335 ff.; S. LEIBLE, *Auf dem Weg zu einer Rome 0-Verordnung?* (above, fn 19), p. 435 ff.; R. WAGNER, *Do We Need a Rome 0 Regulation?* (above, fn 19), p. 237 ff.; G. RÜHL, J. VON HEIN, *Towards a European Code* (above, fn 19), p. 713 ff.

[24] On the position of Scandinavian countries, members and not members of the EU, concerning the codification of private international law see M. BOGDAN, *Some Nordic Reflections on the Desirability of an EU Code of Private International Law*, in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (eds), *Quelle architecture* (above, fn 11), p. 253 ff. The hostile attitude of the UK towards a codification of private international law had even led it to propose, shortly before resolving to withdraw from the EU, the return to the Member States of the competences relating to judicial cooperation in civil matters conferred on the Union, and, according to press news reported by S. LEIBLE, *Auf dem Weg* (above, fn 19), p. 432, the German government had shown itself available to take such a proposal into consideration.

[25] See in this respect F. M. WILKE, *Brauchen wir eine Rom 0-Verordnung?* (above, fn 19), p. 339; R. WAGNER, *Do We Need a Rom 0 Regulation?* (above, fn 19), pp. 236, 242.

[26] Among the said new codifications mention must be made of the 10th book of the Dutch civil code, entered into force in 2011, the Polish and Rumanian laws of the same year, the law of the Czech Republic of 2012 and the Hungarian law of 2017. Also the literature having discussed the topic has expressed serious scepticism on the feasibility of the prospected European code: see, among others, M. CZEPELAK, *Would We Like to Have a European Code* (above, fn 19), p. 728; M. BOGDAN, *Some Nordic Reflections* (above, fn 24), p. 254; R. WAGNER, *Do We Need a Rome 0 Regulation?* (above, fn 19), p. 242; G. RÜHL, J. VON HEIN, *Towards a European Code* (above, fn 19), pp. 736, 751.

The above considerations lead us to deem it most likely that, at least in the near future, the construction of the European system of private international law will continue to develop without a written regulation of the general part of the subject. After all, one of the main reasons for the substantial success so far obtained by the efforts of unification of the rules applicable in the Member States in this field lies in the pragmatic choice which has been made to proceed step by step, so as to reduce the obstacles endangering the formation of consent, facing them severally and one at a time. While it is true that the adoption of such a *modus operandi* has made it difficult to avoid the occurrence of gaps and the inclusion of frequent repetitions and some inconsistencies in the enacted acts[27], on the other hand it has made it possible to achieve the desired unification in the majority of the most important subject matters in the field. The aforesaid principles will therefore certainly continue to fulfil for a number of years, alongside with some general rules set out in the Treaties as well as with the interpretative function discharged by the ECJ, the task of ensuring the functional unity of the system and the overall coherence of the EU legislative policy in the field, besides filling the gaps left open by the incompleteness of the existing set of rules. This state of affairs should not, however, be considered necessarily an evil, since the drawback inherent in the relative legal uncertainty that it produces may to some extent be outweighed by the higher flexibility and adaptability which the implementation of said principles allows, as compared to the rigidity that characterizes codified law.

[27] See, for an inventory of the said shortcomings, G. RÜHL, J. VON HEIN, *Towards a European Code* (above, fn 19), p. 713 ff.