Gedächtnisschrift für Peter Mankowski

Herausgegeben von
CHRISTIAN VON BAR
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ARKADIUSZ WUDARSKI

Mohr Siebeck

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Christian von Bar, Oliver L. Knöfel,
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Vorwort

Peter Mankowski, Professor der Universität Hamburg und weltweit bekannter Internationalist, starb überraschend am 10. Februar 2022 im Alter von nur 55 Jahren. Sein Lehrer Christian von Bar, seine Schüler Oliver Knöfel und Arkadiusz Wudarski, und die Freunde Ulrich Magnus und Heinz-Peter Mansel haben sich zusammengefunden, um die vorliegende Gedächtnisschrift herauszugeben, die an diesen großen Kollisionsrechtler und an sein ungewöhnlich reiches Werk und Schaffen erinnert, das insbesondere das Internationale Privat- und Zivilverfahrensrecht der Gegenwart gestaltet hat.

Es fällt immer noch sehr schwer zu verstehen, dass seine unverwechselbare, engagierte Stimme als Wissenschaftler und als Freund sich nicht mehr umgehend zu aktuellen Themen melden wird. Die zahlreichen Nachrufe auf Peter Mankowski zeugen von der tiefen Betroffenheit in der akademischen Welt, die sein früher Tod ausgelöst hat, auch unter den Hamburger Studentinnen und Studenten, die ihren Lehrer verehrten.

Die große wissenschaftliche Lebensleistung Peter Mankowskis reflektieren die Beiträge der 81 Autorinnen und Autoren in den Bereichen Internationales Privat-, Verfahrens-, Insolvenz-, Schieds- und Lieferkettenrecht, Rechtsvergleichung und Einheitsrecht, den zentralen Rechtsbereichen, in denen Peter Mankowski Bleibendes geschaffen hat. Die Beiträge beleuchten die vielen Facetten des bedeutenden wissenschaftlichen Schaffens eines herausragenden Internationalisten, der stets auch die Rechtsanwendung in der Praxis im Blick hatte.

Die Gedächtnisschrift wird in einer Akademischen Gedächtnisfeier der Universität Hamburg an Elisabeth Mankowski, die Mutter Peter Mankowskis, übergeben. Auch sein Vater, Dr. Dietrich Mankowski, hat das Entstehen dieses Buches unterstützend begleitet, ist aber am 9. April 2024 unerwartet verstorben. Seiner gedenken wir ebenso. Wir danken der von Dietrich und Elisabeth Mankowski errichteten Peter Mankowski-Stiftung und ihren Vorständen, Herrn Rechtsanwalt Dr. Sven H. Ahlburg und Herrn Rechtsanwalt Dr. Ronald Steiling in Hamburg, für die Übernahme der Druckkosten des vorliegenden Werkes. Dem Verlag Mohr Siebeck danken die Herausgeber für die vertrauensvolle und angenehme Zusammenarbeit. Unser herzlicher Dank gilt allen Mitarbeiterinnen und Mitarbeitern des Kölner Instituts für internationales und ausländisches Privatrecht, die die Hauptlast der redaktionellen Arbeit trugen, insbesondere Herrn Dr. Aaron Jeschor und Herrn Wiss. Mit. Lorenz Nachreiner, die federführend wirkten, sowie Frau Davina Stock vom Lehr-

stuhl des Mitherausgebers Oliver Knöfel. Zudem danken wir Frau Dr. Svenja Langenhagen, die das Schriftenverzeichnis Peter Mankowskis zusammen mit Oliver Knöfel erstellt hat.

Im Juni 2024

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I. Internationales Privatrecht

European private international law as the civil constitution of the European Union[1]

Javier Carrascosa González

I. Political constitution, economic constitution and civil constitution

Peter Mankowski's writings on European private international law are a legal treasure of immense value. The loss of *Peter Mankowski* has caused deep sadness among scholars of private international law. He will never be forgotten by all private international law experts of his generation. In addition to being an extraordinary jurist, *Peter Mankowski* was a kind and humble person, very pleasant to deal with. His contribution to private international law was outstanding, tremendous in quality and quantity, full of enthusiasm. And it was also a profoundly European contribution. Let these brief pages serve as a modest tribute to his brilliant work.

The concept of "constitution" has always been multidimensional in law. The word "constitution" has had and still has a different meaning for the legislator, for case law, for academic literature and the man on the street. Moreover, it is different in each legal culture, changing from country to country.

Firstly, the political constitution of a country is made up of specific legal rules and institutions of public law. These are the rules that govern the separation of powers and the supreme organs of State power, such as the parliament, the government, the courts of justice, as well as their functioning and the rights of citi-

[1] The author wishes to thank *Umberta Pennaroli* for reviewing this paper in its English version. This contribution has been made possible thanks to the following research groups and actions: (a) Accursio Group: research, teaching and practice of private international law (www.accursio.com / www.facebook.com/accursioDIP [18.03.2023]), directed by *Javier Carrascosa*; (b) Teaching Innovation Group GID 22 "Applied legal science and creative teaching", University of Murcia, Spain (coordinated by *Javier Carrascosa*); (c) European private international law (research group of the University of Murcia E070–05, principal investigator (PI) *Javier Carrascosa*; (d) Europe-Spain Network of Private International Law (http://www.redespañaeuropa.es/ [18.03.2023]), coordinated by *Javier Carrascosa*; (e) This publication is part of the I+D+i PID2021–124298OB-I00, financed by MCIN/AEI/10.13039/501100011033/: "Derecho global y crisis sanitarias: hacia una convención mundial contra las pandemias (CONCOPAN)" "Global law and health crises: towards a world convention against pandemics (CONCOPAN)"; (f) *Lex Artis* (group for the study of art and private international law), coordinated by *Javier Carrascosa*.

zens vis-à-vis the public authorities. This is the political, as well as the traditional concept and meaning of "constitution" – the political constitution of the State.

Secondly, modern academic literature also speaks of an "economic constitution". This refers to the basic legal rules and fundamental institutions governing the economy of a specific society in a particular territory. In Western societies, the economic constitution consists of rules and institutions that implement entrepreneurial freedom and freedom of trade in the framework of a free market economy. Thus, certain anti-trust rules are said to be part of the economic constitution of a State, even if they are not formally enshrined in its Constitution. On the other hand, in the globalisation that engulfs the planet in the 21st century, one may say that there is also a worldwide economic constitution, an idea already suggested by classical writers such as *I. Kant, H. Kelsen, N. Bobbio, J. Habermas*, and many others.[2]

Thirdly, one can also speak of "constitution" in a civil and social meaning. These are the supreme rules that guarantee and enable the correct and orderly functioning of civil society, i.e. the relationships between individual citizens. In this vein, some prestigious French thinkers, such as *R. Cabrillac, L. Favoreu* and *J. Carbonnier*, have underlined that the French civil code of 1804 operates as the true civil constitution of France.[3] According to these writers, the French civil code of 1804 covers the fundamental legal rules allowing the harmonious functioning of French civil society. Most of these rules are not contained in the formal or political constitution of a country, but in other bodies of law. In the case of France, they are said to be contained in the French Civil Code of 1804.

II. The political constitution of the European Union, primary law and private international law

1. The political constitution of the European Union

The European Union lacks a constitutional text in the classical sense of the term. In other words, the European Union does not have a political constitution. Attempts to draft a "Treaty establishing a Constitution for Europe" failed miserably years ago. Strictly speaking, however, that would not have been a proper "constitution" either, but rather an international treaty containing the basic rules for the functioning of the European Union, referred to as the "European Constitution".

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[2] *Sánchez Barrilao*, Revista de Derecho constitucional europeo 2009, 115.

[3] *Cabrillac*, Revue Juridique Thémis 1994, 245; *Favoreu*, in: L'Unité du droit: Mélanges en hommage à Roland Drago 1996, 25; *Carbonnier*, in: Nora (ed.), Les lieux de mémoire, 1986, 309.

The institutional aspects of the government of the European Union, as well as the main rights of European citizens vis-à-vis the public authorities of the European Union, are well protected in the Treaty on European Union (TEU), in the Treaty on the Functioning of the European Union (TFEU) and in the Charter of Fundamental Rights of the European Union drawn up in Nice on 7 December 2000 (2007/C 303/01). In a sense, it is the so-called "primary law of the European Union" that actually operates as the political constitution of the European Union. The ECJ has referred to the Treaties establishing the European Union – more poetically than legally, but with strong argumentative conviction – as the "basic constitutional charter" of the European Union (ECJ 23 April 1986, 294/83, *Les Verts*, No. 23) and has described the European founding Treaties as a "constitutional charter of a Community of law" (Opinion 1/91 on the creation of the European Economic Area, 14 December 1991).[4]

2. *European primary law and European private international law*

European primary law pays limited attention to private international law, one must admit. However, primary law points the way forward to achieve the creation of a European Area of Justice through Articles 67 and 81 TFEU, as *M.A. Michinel Álvarez* rightly emphasises.[5] European private international law is basically encapsulated in the European regulations that have been drawn up between the year 2000 and the present day.[6] Certainly, there are also other rules of

[4] ECJ 23 April 1986, C-294/83, *Les Verts*, [ECLI:EU:C:1986:166] No. 23: "It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty (…)".

[5] *Michinel Álvarez*, Administración & cidadanía: revista da Escola Galega de Administración Pública 2011, 35, 37.

[6] The regulations considered as the central core of European private international law are the following: Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I-bis regulation); Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), known as the Brussels II-ter Regulation; Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III); Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I); Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); Regulation 2015/848 of 20 May 2015 on insolvency proceedings (recast); Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation; Regulation 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Regulation 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and en-

European private international law contained in other legal instruments, such as European directives and international conventions signed by the European Union;[7] nevertheless, it is the set of the above-mentioned regulations which currently operates as the real backbone of European private international law.

III. The Civil constitution of the European Union

One can also speak of a "constitution" in a civil and social sense. In this view, the civil constitution of a specific society consists of the fundamental rules that guarantee and enable legal relationships between individuals. In such a context, an inquisitive and creative legal scholar may wonder what the real "Civil Constitution of the European Union" is, *i.e.* what is the set of essential legal rules that adequately covers the relationships between individuals in the European Union.

1. The public law framework: the European freedoms of movement

The so-called European freedoms of movement operate as an instrument of negative legal integration. These freedoms sweep away the public law obstacles to the free movement of persons, goods, services, companies or capital existing in the law of each Member State, such as, for instance, import and export ceilings, the need for a passport to move from one Member State to another, the need for residence and work permits for nationals of the Member States, or for authorisation to invest capital from other Member States, etc. These are public law rules

forcement of decisions in matters of matrimonial property regime; Regulation 2016/1104 of 24 June 2016 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; Regulation 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters.

[7] Please keep in mind, among other legal instruments, Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Regulation 2020/1784 of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast); Regulation 2020/1783 of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast); Regulation 861/2007 of 11 July 2007 establishing a European Small Claims Procedure; Regulation 1896/2006 of 12 December 2006 creating a European order for payment procedure; Regulation 805/2004 of 21 April creating a European Enforcement Order for uncontested claims; Regulation 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters as well as the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano II Convention), Protocol of 23 November 2007 on the law applicable to maintenance obligations, and Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (HCCH 2007 Child Support Convention).

that set the legal frame of reference for individuals to enter into legal relations with each other. Precisely for this reason, however, they do not cover contracts, torts, family law, rights *in rem*, etc. The importance of the freedoms in the creation of an area of free movement for all European citizens is indisputable; yet they do not, in fact, establish how individuals should relate to each other in the European Union. In plain English, these are not rules of private law.

The European freedoms of movement alone proved to be insufficient to make the European market function properly or to create a genuine European Area of Justice. Without European private international law, there would be no true free movement of persons and production factors in the Union, however much the famous "European freedoms of movement" nominally existed. It is the European regulations on private international law that have brought legal certainty to exchanges in the European Union and have reduced the costs of private international transactions in the Union.

2. European private international law regulations: the real civil constitution of the European Union

European private international law is, as a matter of fact, the real civil and social constitution of the European Union. This is one of the best kept secrets of European law. This assertion is justified for a number of reasons.

a) European private international law as the law of free cross-border trade between individuals

European private international law operates as the key element for cross-border exchanges between private individuals, as *P. Lagarde* writes.[8] European private international law is the law of freedom and progress. European private international law gives legal certainty to international trade and reduces the transaction costs associated with it. European private international law makes trade between individuals legally certain and economically viable. European private international law has made the European Union's legal and economic area more dynamic and flexible; it has made it grow and become more and more effective and efficient. Thus, with *P. Kinsch*, it can be said that although European private international law is undoubtedly private law, it succeeds in achieving a major social and political objective.[9]

European private international law is the law of freedom for individuals. It is the set of rules which guarantees, enhances and implements freedom of trade and movement in a cross-border scenario. It is the law of natural persons and com-

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[8] *Lagarde*, Recueil des cours de l'Académie de droit international de La Haye, 1986, 196, 9, 39.

[9] *Kinsch*, Recueil des Cours de l'Académie de roit international de La Haye, 2019, 402, 9.

panies living an international life. As *M. Giannetti / D.M. Nuti* point out,[10] it is law inspired by two powerful values: (i) freedom of trade and movement for all and (ii) legal certainty for international transactions. The name of that sector of law is private international law. No more, no less.

In this context, the European private international law regulations introduce legal order into the mosaic formed by the private law of each Member State. Such regulations establish the basic legal order of cross-border relations in European civil society. As said above, European regulations provide legal certainty and free international trade for individuals. European private international law operates in three different sectors: (i) international jurisdiction of the courts to deal with private controversies, (ii) the applicable law governing international private situations and (iii) the recognition and enforcement of judgments, decisions and legal situations affecting individuals in the European Union. To that effect, it can be said that international trade and the international life of individuals within the European Union as we know them today exist thanks to European private international law. Although each Member State retains its national substantive private law, as well as its national civil and commercial codes, European private international law accomplishes a major organisational task in European civil society. It is a part of private law that not only fulfils a private function, but also plays a social role.

b) European private international law as an element of integration of the inhabitants of the European Union

There is no such thing as a European civil code; European substantive private law exists only in certain areas; and yet, European private international law is an undeniable reality. It unites the various peoples and Member States that make up the European Union and unites all persons living and working in the Union even more closely. All European citizens, without exception, benefit from the freedom of movement guaranteed by European private international law, as well as from secure and economically beneficial exchanges for all. Everyone has the same right to free movement. This element unites, merges and binds together all nationals of the Member States of the European Union and all those who operate in the European area of justice and in the internal market. European private international law unites Europeans, as explained by *M.V. Carausan.*[11] European private international law is the law of the united Europe. The Union lacks a unified Civil code but it falls back on a set of private law rules common to all inhabitants of the Union and its name is European private international law.

[10] *Giannetti/Nuti*, The European Social Model and its Dilution as a Result of EU Enlargement, TIGER Working Paper Series No. 105, July 2007, http://dx.doi.org/10.2139/ssrn.1031908 (last accessed: 10.01.2024).

[11] *Carausan*, Juridica 2011, 59.

European private international law regulations make people feel more European without losing their connection with their Member State. Good laws unite people, and indeed European private international law unites people living and working in the European Union. They all feel they are part of a common project: a united Europe in which free movement is a reality, and in which, precisely because of this, freedom and progress for all are also a reality.

In this sense, European private international law respects diversity, as each citizen of the Union retains his or her nationality and each Member State maintains its own laws. At the same time, however, European private international law involves and commits all individuals operating in the European Union to a common project of freedom, growth, development; in short, to a project of progress. In this perspective it is worth recalling that European private international law regulations are applicable to all individuals living and operating in the European Area of Justice and not only to the holders of European freedoms of movement, i.e only to nationals of the Member States of the European Union.

European private international law provides geographical cohesion for the Union. Europe is still legally fragmented by the national laws of each Member State; nevertheless, thanks to European private international law, it is possible to affirm – with all the necessary caveats – that the law governing a divorce, a contract, a tort, or a succession upon death involving foreign elements is always the same, regardless of which court hears the dispute. European private international law regulations operate as a set of rules that connect the citizens of all Member States on the basis of mutual trust. The European Union is made stronger by European private international law rules, as it has been pointed out by *J. Meeusen.*[12]

On the other hand, with a system that is common to all Member States, European private international law is the perfect synthesis that brings together, under the umbrella of this common legal project, countries of Common law and Roman legal tradition. Similarly, European private international law has absorbed traditions, mechanisms, institutions and concepts from the national private international law of the different Member States. It has converted these "national solutions" into "European solutions" of private international law.

Consider, as an example, the so-called French "national interest", which has now become the European doctrine of national interest, as it can be seen in Article 13 Rome I.[13]

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[12] *Meeusen*, American journal of comparative law 2019, 637.

[13] Article 13 Rome I: "Incapacity. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence".

Another example is *renvoi* as provided for in Article 34 European Succession Regulation, which has been built on the mould of Article 13 of the Italian Private International Law Act 218/95.[14] The Italian *renvoi,* which in turn was a legacy from the French tradition, has now become a European *renvoi*.

The clauses preventing the application of foreign laws which do not provide for divorce or which regulate it in a discriminatory manner have been taken from Spanish and Italian private international law and translated into Article 10 Rome III.[15]

European private international law has even incorporated legal traditions from Swiss conflict-of-laws, as can be seen in Article 4.2 Rome I. This provision embraces the Swiss doctrine of characteristic performance and gives it a new scope, as it has been explained by academic literature.[16] European private international law thus draws on the extensive and rich tradition of private international law from all over Europe.

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[14] Article 13 Law 218/1995 *(riforma del sistema italiano di diritto internazionale privato)* 31 May 1995, as ammended, *Gazzetta ufficiale della Repubblica Italiana* 3 June 1995, 68. See updated text: https://e-justice.europa.eu/content_which_law_will_apply-340-it-es.do?member=1 (18.3.2023): "Rinvio. 1. Quando negli articoli successivi è richiamata la legge straniera, si tiene conto del rinvio operato dal diritto internazionale privato straniero alla legge di un altro Stato: a) se il diritto di tale Stato accetta il rinvio; b) se si tratta di rinvio alla legge italiana. 2. L'applicazione del comma 1 è tuttavia esclusa: a) nei casi in cui le disposizioni della presente legge rendono applicabile la legge straniera sulla base della scelta effettuata in tal senso dalle parti interessate; b) riguardo alle disposizioni concernenti la forma degli atti; c) in relazione alle disposizioni del Capo XI del presente Titolo. 3. Nei casi di cui agli artt. 33, 34 e 35 si tiene conto del rinvio soltanto se esso conduce all'applicazione di una legge che consente lo stabilimento della filiazione. 4. Quando la presente legge dichiara in ogni caso applicabile una convenzione internazionale si segue sempre, in materia di rinvio, la soluzione adottata dalla convenzione".

[15] See Article 107 Spanish Civil code as drafted by *Ley Orgánica* 11/2003, 29 September, OJ 234, 30 September 2003. Current wording of this legal provision is due to *Ley* 15/2015, 2 July. See also Article 31.2 *legge* 218/1995 (Italy): "2. La separazione personale e lo scioglimento del matrimonio, qualora non siano previsti dalla legge straniera applicabile, sono regolati dalla legge italiana".

[16] The evolution of the characteristic performance theory from its origins as a Swiss creation to a European legal rule may be followed in *Baratta*, Il collegamento più stretto nel Diritto internazionale privato dei contratti, 1991; *Magagni*, La prestazione caratteristica nella Convenzione di Roma del 19 giugno, 1980, 1989; *Villani*, Rivista di Diritto internazionale privato e processuale 1993, 513; *Carrillo Pozo*, El contrato internacional: la prestación característica, 1994; *Carrascosa González*, in: Esplugues Mota/Palao Moreno (eds.), Nuevas fronteras del Derecho de la Unión Europea. Liber amicorum José Luis Iglesias Buhigues, 2012, 459; *Carrascosa González*, in: Calvo Caravaca/Blanco-Morales Limones (eds.), Globalización y Derecho, 2003, 87.