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## Selected Issues on Recent Hungarian Private International Law Codification\*\*\*

**Abstract.** This article is the shortened version of the national report submitted to International Academy of Comparative Law. It summarizes and describes the present situation of the Hungarian Private International Law by analyzing the Law Decree No. 13 of 1979 on Private International Law (hereafter referred to as Code). The Law Decree is the first legal instrument in the history of the Hungarian PIL which has been modified significantly with the aim of harmonization with European Law since 2004. The major part of the article deals with defining the different aspects of theoretical approach which provides a profound interpretation of Hungarian PIL in scientific terms. On the other hand, the applied scientific approach serves as a guideline for filling legal gaps in the Hungarian PIL Code. In addition to this, the article gives an overview of the Hungarian judicial application of PIL rules emphasizing the eclectic and contradictory character of the jurisdiction in Hungary.

**Keywords:** Hungarian PIL Code, Hungarian PIL rules, Hungarian jurisprudence, methodology of PIL, qualification, *renvoi*, *ordre public*, mandatory rules, law governing contracts and torts, judicial application

### I. Brief History

Although in the 19th century there was no unified private international law (PIL) in Hungary, there existed rules regarding PIL in certain domestic statutes. Bilateral international agreements played an important role, such as the trade agreement concluded with the USA in 1929, and various other agreements on legal assistance.

In the 20th century, up to the end of the Second World War, regulations regarding private international law continued to appear scattered in various different enactments. This accidental and rather chaotic method of legislation on Hungarian private international law made necessary a comprehensive codification of the law on this field.

In 1948, *István Szászy*, professor of private international law, introduced a draft which regulated in great detail both the general and specific questions of PIL. The draft, which was prepared with excellent scientific erudition, reflected the theoretical achievements of the age as well as Hungarian judicial practice. The political changes taking place at the end of the 1940s in Hungary, namely the communist takeover of political power, had a negative impact on the future of the draft. It was declared anti-democratic, reflecting capitalist values, therefore unacceptable. *Professor István Szászy* was forced to stop teaching and had to

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remain silent for a long time. The question of the codification of Hungarian private international law did not arise for another two decades.

Works of codification were started in 1966 under the conduct of the Legal Institute of the Hungarian Academy of Sciences, and the second draft was completed in 1968. The Ministry of Justice took over the conduct of codification, and by 1970 another draft had been completed. The fourth draft was ready in 1978, accepted in 1979, and made public as Law Decree No. 13 of 1979 on Private International Law (hereinafter referred to as *Code*).

Minor modifications have been made on the Hungarian PIL Code several times. More comprehensive modifications started to take place from the beginning of 2000, primarily with the aim of harmonization with European law. In 2000, sections IX and XI, dealing with jurisdiction and the recognition of foreign judgements, were re-regulated, and they were further modified in 2001, 2002, 2003 and 2004. Hungary has ratified the Convention of 1980 on the law applicable to contractual obligations (hereinafter referred to as *Rome Convention*) in 2006.<sup>1</sup> The last modification took place in accordance with the results of EU unification of private international law. Act No. IX of 2009 is mainly a technical modification with the primary aim of drawing attention to the fact that beside EC Regulation on the law applicable to non-contractual obligations<sup>2</sup> (hereinafter referred to as *Rome II*) and EC Regulation on the law applicable to contractual obligations<sup>3</sup> (hereinafter referred to as *Rome I*) the Hungarian Code can only be applied to a limited extent. The amendments have also introduced a new provision in Section II concerning private individuals; it complemented previous provisions with a further rule regarding the use of name by natural persons.

The structure of the Code is the following: it consists of three big parts and eleven sections. Altogether there are 75 articles dealing with the basic questions of private international law (General and Special Part) as well as with issues regarding jurisdiction and certain procedural questions. Section I, called General Rules, contains provisions concerning the purpose of the law-book and certain basic PIL legal institutions such as qualification, *renvoi*, determination of the content of foreign law, reciprocity, *ordre public* (public policy) clause, and fraudulent connection. The Special Part from Sections II to VIII determines the conflicts rules applicable to persons, law of intellectual property, property law and related rights, obligations, succession, family and labour law. Sections IX to XI contain regulations regarding jurisdiction, procedural law and the recognition and enforcement of foreign judgements. The Code itself is not too long; all the former drafts were longer. Therefore, the regulation of certain questions is rather brief and the definition of certain conflicts law institutions such as incidental question, the definition of international mandatory rules (*lois d'application immédiate*) is missing. These gaps have to be filled by judicial practice, which however does not apply uniform solutions.

The purpose and operation of the Hungarian Code is governed by the Articles 1 and 2. Article 1 states that the Code has a double purpose. First, in cases where elements of foreign private law are involved, it chooses from the conflicting legal systems the one whose substantive law should be applied (substantive law aim). Second, it determines what procedures the court should follow (procedural law aim). An element can be regarded as important foreign element only if it is relevant to the case. If the case contains foreign

<sup>1</sup> Act No. XXVIII of 2006.

<sup>2</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007, 40–49.

<sup>3</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, 6–16.

elements but they are not relevant to the judgement of the case, or if the case does not contain any foreign elements, the Hungarian Code cannot be applied.<sup>4</sup> The Code emphasises its own subsidiarity when it declares in Article 2 that it “shall not apply to matters governed by international treaty”. This provision is in harmony with Hungary’s international obligations.

Naturally, the law sources of the European Community enjoy priority to the application of the Code. The priority of community law applies, e.g. to contract and tort law,<sup>5</sup> where the rules of Rome I and Rome II regulations prevail against the regulations of the Hungarian PIL Code. The scope of the Code extends only to cases which are not included in or regulated by these European instruments.

## II. General Methodology

### 1. Legal Certainty and Flexibility

European – and therefore Hungarian – private international law follows the traditional model based on the system developed by *Savigny*. However, certain important modifications and changes in approach make this system more flexible and less certain. Modern European choice-of-law doctrine introduces flexibility in a number of ways, including alternative references, “soft” connecting factors and escape clauses. As a result, legal certainty and flexibility appear together in recent private international law codifications. *Professor Hay* described the second half of the 20th century as one in which “the tension between predictability and flexibility is the hallmark of conflicts law”.<sup>6</sup> The resolution of this tension presents a dilemma in the development of private international law in the 21st century as well: How would it be possible to find a proper balance between the two principles?

We should therefore raise the question concerning Hungarian codification as well. How and to what extent do legal certainty and flexibility work together in the Hungarian Code? Is there an appropriate balance between the two doctrines? Unfortunately, the negative answer has not changed in the past ten years. As *Professor Burián* stated earlier: “Despite the contrary wishes of Hungarian commentators, the Hungarian PIL codification has put the overwhelming weight on the guarantee of security and foreseeability, and has neglected flexibility.”<sup>7</sup>

<sup>4</sup> The foreign plaintiff is the sole proprietor of a Hungarian Ltd., who is defendant I. The plaintiff has turned to the court because in his/her opinion during the liquidation process the real-estate of the defendant was sold unlawfully to defendants II and III, who are also Hungarian. The Supreme Court stated that concerning the validity of the sales contract the fact that the plaintiff is of foreign nationality is irrelevant, for the sale was concluded between Hungarian parties. Therefore, the application of the Hungarian Code was omitted and the legal dispute was settled based on Hungarian substantive law. (Supreme Court Gf. II. 20. 176/2007/5)

<sup>5</sup> The third regulation is concerned with matters relating to maintenance obligations. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, 1–79.

<sup>6</sup> See Hay, P.: Flexibility versus predictability and uniformity in choice of law: reflections on current European and United States conflicts law. *Recueil des cours*, 226 (1992), 304.

<sup>7</sup> For the reasons more details, see Burián, L.: Hungarian Private International Law at the End of the 20th Century: Progress or Regress? In: Symeonides, S. (ed.): *Private International Law at the End of the 20th Century: Progress or Regress?* The Hague, 2000, 268.

Regarding specific tools ensuring flexibility, the Hungarian legislator has not made any significant steps forward on the “flexibility scale”<sup>8</sup>. The Hungarian PIL Code does not allow the application of escape clauses in general or specific fields and it does not apply so called malleable approaches or similar formulae either. Divergence from the rigid rules is made possible mainly by the alternative reference rules (in more detail in V). As a result of the 2009 modifications, the main connecting factor in contract law, in the case of questions not included in the scope of the Rome I Regulation, has become the “closest connection”. Moreover, the modified Code allows the application of the choice of law in a limited form, concerning name bearing if the person is the citizen of more than one country (see XIII/1). These latter changes are undoubtedly the result of the activities of the European Community in the field of PIL. EU membership has given Hungarian PIL codification a new “impetus” to move towards flexibility: the developing nature of community law has become an important factor in the “quiet evolution”<sup>9</sup>.

## 2. State-Selection and “Conflicts Justice” versus “Content-Oriented Law-Selection” and “Material Justice”

Demand for the enforcement of material justice (material justice deficit) has a central place in works of criticism regarding conflicts law. The line of reasoning goes that it is not permissible to limit private international law to the selection of the applicable law; the material justice of the decision has to be taken into consideration as well.

Instead of delving into the nature of the relationship between the categories listed in the title, we will refer to *Professor Vischer*, who stated that “[t]he aim of traditional bilateral conflict rules is “conflict justice” [*“Kollisionsrechtliche Gerechtigkeit” (Kegel)*] and not primarily the just substantive solution, [...] the substantive result is subjects to control by the *ordre public*”.<sup>10</sup> Thus, conflicts justice requires no more than an allocation of legal relationship to those legal systems in which they have their “seat” (*Savigny*). Of necessity, this mechanism pays no attention to the quality of result it produces. Realizing the phenomenon and its negative consequences, in recent years there has been more and more emphasis on the corrective function of material justice in codified private international systems as well. *Professor Symeonides* has aptly described this process as “conflicts justice tempered by material justice”.<sup>11</sup>

The Hungarian PIL Code actually is viewed as “the bastion of the classical view”,<sup>12</sup> for it consists mainly of traditional conflict-of-law rules (or jurisdiction-selecting rules, as they were referred to by *Cavers*). The resulting blindfold application of conflict rules is traditionally corrected by the *ordre public* exception (ruled by Article 7).<sup>13</sup> The Code

<sup>8</sup> See Symeonides, S. C.: The American choice-of-law revolution in the courts: today and tomorrow. *Recueil des cours*, 298 (2003), 410.

<sup>9</sup> See *ibid.* 407.

<sup>10</sup> Vischer, F.: General course on private international law. *Recueil des cours*, 232 (1993), 93.

<sup>11</sup> Symeonides: *The American choice-of-law revolution... op. cit.* 403–404.

<sup>12</sup> See *ibid.* 400.

<sup>13</sup> The rule that allows both parties in a contract (Hungarian PIL Code Article 24) to select in advance the applicable law is content-oriented rule, but not necessarily result-oriented, and the same can be said about another rule of the Code, which allows both parties to agree to the application of the *lex fori* after the events that gave rise to the dispute (Article 9). In more detail about the theoretical connections, see Symeonides, S. C.: Private International Law at the End of the 20th Century: Progress or Regress? General Report – XVth International Congress of Comparative Law. In: Symeonides, S.

contains very few other exceptions – mainly result-oriented rules – which consider the content of conflicting laws as well.<sup>14</sup> The reason for that is that since its coming into force in 1979, there have been no comprehensive, modernizing modifications on the Hungarian PIL Code. As a result, modern approaches to conflicts law such as the application of alternative connecting factors, flexible connecting factors, escape clauses, choice of law etc. appear very seldom, or not at all in the Code.

However a few above mentioned rules may be found in certain articles, such as those on the following subject:<sup>15</sup>

(a) rules favouring the validity of certain juridical acts:

(i) *testaments*: the article embodying the policy of *favor testamenti* provides that a testament shall be considered formally valid if it conforms to any one of the following five substantive law: the Hungarian law; the *lex personae* of the testator's at either the time of making or the time of death; the law of the testator's domicile or habitual residence at either the time of making or the time of death; the law of the place of making; in the case of immovables, the law of the situs [Article 36 (2)].

(ii) *other juridical acts*: the article embodying the policy of *favor negotii* provides an alternative-reference rule, a contract is formally valid if it conforms to *lex contractus*; *lex fori*, the law of the place of making or where the intended legal consequences are to take effect. [Article 29 (2)]. (We should note that this rule differs in some aspects from Article 11 of the Rome I Regulation.)

b) rules favouring a certain status:

(i) based on the principle of *favor divortii* there is a unilateral rule in the Code, according to which a marriage can be dissolved under the *lex fori* even if the applicable foreign law does not allow dissolution [Article 41 (a)].

c) rules favouring one party:

(i) *choice of law by, or for the benefit of, one party*

*Pre-dispute choice by one party*

Until recently, choice of law was only possible within the field of contracts in Hungarian PIL. However, the 2009 modifications on the Code have changed the situation, for the option of pre-dispute choice by one party has been introduced. The modernization has been made with regard to the decision of the Court of Justice of the European Communities in the *Garcia Avello* case.<sup>16</sup> The new provision concerning name bearing makes it possible that in the case of individuals with dual citizenship (Hungarian and foreign), not only the Hungarian substantive law,<sup>17</sup> but the rules of the relevant foreign country may be applied upon the request of the person in question [Article 10(2)].

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(ed.): *Private International Law at the End of the 20th Century: Progress or Regress?* The Hague, 2000, 39.

<sup>14</sup> See also Burián: *op. cit.* 271.

<sup>15</sup> The aspects of classification are in alignment with the division made by *Symeonides*. See *Symeonides: Private International Law...* In: *Symeonides (ed.): Private International Law... op. cit.* 45–62.

<sup>16</sup> C-148/02. *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613.

<sup>17</sup> See Article 11

(2) If a person has multiple citizenships, and one of his citizenships is Hungarian, his personal law will be the Hungarian law.

*Post-dispute choice by the court*

Regarding questions of delictual liability outside of the scope of the Rome II Regulation (in more detail in XII), the Hungarian PIL Code establishes the rule of *lex loci delicti* as the main rule: it is the law prevailing at the place and time of the tortuous act or omission. However paragraph 2, based on the principle of *favor laesi*, provides that “[i]f it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage occurred” [Article 33(2)]. This rule assigns the choice to the court to be made for the victim’s benefit. Sometimes it happens in Hungarian judicial practice that this rule serves as a hidden device for the application of the *lex fori*.<sup>18</sup>

There is a special provision in the Code with regard to the *infringement of personal rights*. This unilateral rule states that “if the Hungarian law is more favourable for the person suffering the injury in respect of the resultant compensation or indemnification, the claims shall be adjudged according to that law” [Article 10(3)].

In addition, a *rule favouring the child* appears. Regarding the status of the child and its family relationship Article 46 provides that “[t]he Hungarian law shall apply to the family legal status of a Hungarian citizen child or a child residing in Hungary, to the family law relationships between him and his parents, as well as to the obligation of maintenance provided for the child, if it is more favourable for the child”.

(ii) *protecting consumers or employees from the consequences of an adverse choice of law clause*: with regard to the fact that these type of contracts are governed by Articles 6 and 8 of the Rome I Regulation, the former, partly different provisions of the Code were abolished with the 2009 modifications.

Based on the above we can conclude that the rules of the Hungarian PIL Code “bind the hands” of the Hungarian judge regarding the question of allowing the court to consider the content of the conflicting laws and make the choice dependent on that content. These restrictions are presently eased by the law sources of the European Union in the field of PIL and by the decisions of the Court of Justice of the European Communities. In the future, fundamental changes should be introduced by the comprehensive modification and modernization of the Code.

*3. Unilateral Rules and Rules of Immediate Application*

The unilateral conflict norms, similarly to the concept of the statute theory, determine the extent of the application of one’s own laws. In other words, a choice-of-law rule is deemed to be unilateral when it defines the scope of application of the domestic law with respect to foreign element cases only, namely it determines the situations in which a fact of private international law is to be governed by the domestic law. By contrast, the complete (multilateral) conflict norms explicitly determine the law applicable in a particular case, irrespective of whether the process of selection leads to the application of domestic or foreign law. The Hungarian PIL Code, accepting *Savigny’s* approach, states that in private international law cases the complete (multilateral) conflict rules should be applied.

In accordance with the basic concept of the Code, Hungarian jurisprudence holds that the complete conflict norms are more suitable to fulfil the function of PIL, since in a case of conflict judgement can be made on the basis of the law ensuring the fairest decision. The dominant view in the international legislative practice that the overwhelming majority of

<sup>18</sup> See also Burián: *op. cit.* 265.

choice-of-law rules are made up of multilateral conflict norms and therefore the use of unilateral rules is justified only in a limited area, where the State deems it important to give effect to its legal-political considerations, such as the protection of the weaker party in consumer contracts.

We can seldom find unilateral conflict norms in the Hungarian Code, and the prerequisite for the application of these norms is the presence of a domestic interest. For example, Article 16(2) states: “Hungarian law shall apply in cases where, on behalf of a domestic legal interest, the Hungarian court declares a non-Hungarian national to be dead or missing, or determines the proof of death of such person.” Domestic legal interest is involved in the procedure if the legal relations of the missing person in Hungary have to be resolved; for example, if the missing person owns a property in Hungary, and he/she has to be declared legally dead to start the legal process of succession.

There is similar rationale behind Article 50 as well, which prescribes the application of Hungarian law if immediate measures have to be taken in the interest of the custody, support or care of a foreign citizen resident in Hungary. In such case the domestic interest is that the application of Hungarian law ensures fast procedure.

The Code does not specifically deal with the problem of *règles d'application immédiate* and the Hungarian jurisprudence does not seem to be interested in the question either. In my opinion, the reason for that is that in Hungarian PIL the similarities and differences between *règles d'application immédiate* and mandatory rules have not yet been examined from a dogmatic point of view. In most cases, the legal institution is regarded as a sub-branch of *ordre public*. Due to the lack of adequate legal background and legal theory, the practice of its application does not exist either.

#### 4. International Uniformity and Protection of National Interests

The theory of *Savigny*, developed in the middle of the 19th century, is still the cornerstone of the development of European conflicts law regarding its main elements. The equality among domestic laws and the “international uniformity of decisions” (*internationaler Entscheidungseinklang*), which he placed in the centre, still applies. However, the model created by *Savigny* has been further developed, and it is still developing. The differentiation of the connecting factors and the encouragement of efforts aimed at reaching fair decisions have appeared, and there is an increasing emphasis on the enforcement of national interests as well.<sup>19</sup> International uniformity as a laudable and desired goal has remained, but since the second half of the 20th century there has been an increasing demand for the protection of state or national interests, especially in the case of the forum state. Some describe that this is the period when conflicts law has “lost its innocence”.<sup>20</sup>

With regard to instruments serving the protection of national interests, the Hungarian jurisprudence and the PIL Code do “not follow the position of promoting national interests directly by choice of law rules or methods”.<sup>21</sup> Consequently, such rules as the preference

<sup>19</sup> See Burián, L.–Kecskés, L.–Vörös, I.: *Magyar nemzetközi kollíziós magánjog* (Hungarian Private International Law). Budapest, 2005, 74–75.

<sup>20</sup> See Vrellis, S.: Le droit international privé grec à la fin du vingtième siècle: progrès ou recul? In: Symeonides (ed.): *Private International Law... op. cit.* 247.

<sup>21</sup> See Burián: *op. cit.* 266.

given to the forum's or third state's international mandatory rules<sup>22</sup> are not included in the Code. Besides the *ordre public* clause the Code also contains so-called unilateral rules specifically designed to protect forum interests indirectly ("special *ordre public* rules"), e.g. with regard to the dissolution of marriage.<sup>23</sup> According to leading scholars of the subject, this provision of the Code "opens too wide the gate of defence in *ordre public*".<sup>24</sup> The rule which allows the dissolution of marriage even if the conditions required by the applicable foreign law are not satisfied, but according to Hungarian family law they are met, is particularly unreasonable. In this respect, only the part declaring the theoretical possibility of the dissolution of the marriage may be justified, which however could also be concluded from the *ordre public* clause.

Moreover, certain rules of the Hungarian PIL Code indirectly encourage the forum to apply the *lex fori*, thereby promoting the protection of national interests. In Hungarian PIL, the unilateral regulation of *renvoi* (see VIII) or the fact that fraudulent connection is only sanctioned by the Code if it resulted in the application of a foreign law (domestic law has to be applied in case of fraudulent behaviour as well) are regulations promoting a homeward trend, and while their purpose is not the protection of national interest, they can be used as instruments to achieve such a goal as well.<sup>25</sup>

### III. Some General Rules

#### 1. Qualification

Article 3 of the Hungarian PIL Code contains explicit provisions on qualification, which is basically subject to the *lex fori*. Accordingly where there is a dispute about the legal qualification of the facts or relationships to be judged is being disputed, the interpretation of the rules and notions of Hungarian law shall be used by the forum. Thus the law in accordance with most legal systems assumes the prevailing view. As a subsidiary rule the Code declares if a legal institution is not known to Hungarian law, or is known but carries a different meaning or different name, then the judge shall qualify it with regard to the foreign law regulating the legal institution [Article 3(2)]. It is not clearly stated by the above article which foreign law to use for qualification, and it is up to the judge to decide. From the aspect of the purpose of qualification however it can be stated that it can only be derived from legal systems in conflict with each other in relation to the facts of the case. According

<sup>22</sup> In contrast with Article 9 of the Rome I Regulation. In Article 3(4) of the Rome I Regulation besides the protection of national or state interests the protection of Community interests appears as well.

<sup>23</sup> Article 41.

The foreign law applicable to the dissolution of marriage shall apply with regard to the following differences:

a) A marriage may be dissolved also if the foreign law excludes the dissolution of marriage, or the conditions of dissolution are not satisfied according to the foreign law but are satisfied according to the Hungarian law.

b) The question of whether marital life has been completely and irreparably ruined shall be considered even in cases where absolute grounds for divorce are present according to the foreign law.

c) The dissolution of marriage may not be based upon culpability.

<sup>24</sup> See Mádl, F.–Vékás, L.: *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (The Law of Conflicts and Foreign Trade). Budapest, 2004, 421.

<sup>25</sup> Burián: *op. cit.* 266.



to *Professor Burián* on the basis of text interpretation this can be the law of a third country with absolutely no reference to the facts of the case.

According to *Professor Lajos Vékás*<sup>26</sup> the solution based on *lex fori* is unilateral because it starts exclusively from the interpretation of the conflict norm hypothesis while the problem is far more complex than that. Qualification on *lex fori* starts from the principle that conflict norm hypothesis includes all those domestic and foreign legal institutions that are subjects to legal regulation within the substantive law of the forum. *Professor Vékás* suggests breaking with this unilateral and rigid view and instead he proposes to combine the comparative law approach of *Rabel* and the functional interpretation approach of *Kegel*.

In the Hungarian judicial practice *lex fori* is usually applied for qualification.<sup>27</sup>

## 2. *Renvoi*

The Hungarian Code partly adopts the *renvoi*. Under Article 4 the scope of the reference must be interpreted in a narrow sense, thus except for reference back, the conflict rules of the applicable foreign law are not to be taken into account in general, but the rules of foreign law directly governing the matter must apply. Hence the Hungarian Code does not recognise a reference to third law because the foreign conflict rules to be applied can be ignored. The Hungarian forum therefore only accepts the *renvoi* on special occasions when it refers back to the Hungarian law. The general rule on *renvoi* is one of compromise, which does not always promote international harmonisation of decisions under the conflict-of-laws; however it vigorously serves the homeward trend.

In the Special Part of the PIL Code Article 21/A embodied in Act No. XXVII of 2004 which contains a provision of the EC directive on financial collateral arrangements<sup>28</sup> excludes reference back considering ownership and other rights *in rem* recorded on deposit accounts or based on dematerialized securities.

Finally, the rules of Rome Convention, Rome I and Rome II also exclude the application of the *renvoi*, accordingly a Hungarian judge cannot apply this legal institution in case of

<sup>26</sup> Mádl–Vékás: *op. cit.* 96.

<sup>27</sup> There was a dispute between the parties over the terms of financial compensation of the management contract of a company. The plaintiff, a Slovak citizen and the defendant, a company domiciled in Hungary contracted for employment according to the German law on a tacit understanding, which should have required the application of the “*Dienstvertrag*” rules governed by BGB. This contract type is unknown to the Hungarian law, and above all it was misnamed as service relations. Service relations under Hungarian law mean service relations of professional members of the effective armed forces and services. The dispute in the given case however was between the managing director and the company. The Hungarian court had to take a stand on the issue of legal relationship between the parties. The personal law of the company is the Hungarian law, and under the Hungarian company law if the office-holder is in position without legal relations then the agency contract law of Civil Code must be applied. The parties concerned identically stated that between them a civil law relationship was regulated, therefore the court qualified the relationship between them as civil law relationship according to Hungarian law, and then judged the case according to German substantive law (Supreme Court Pkf. 5. 25.918/2008/2).

<sup>28</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002, Official Journal L 168, 27/06/2002 43–50.

these legal relations. There have been no changes recently in the application of the *renvoi* in the Hungarian judicial practice, it invariably occurs very rarely.<sup>29</sup>

### 3. *Ordre Public and Mandatory Rules*

The rules of *ordre public* (public policy) have not changed in the Hungarian legal system in the past decade. The regulation of public policy, in a sense of PIL, can be found in Article 7 of the Code, but Act No. LXXXI of 1994 concerning commercial arbitration (hereinafter referred to as *Arbitration Act*) also contains public policy provisions. Even though the latter is not exactly identical with the concept of public policy as described by PIL, Hungarian judicial practice connects the two. Therefore, we will discuss it in what follows.

The legislator has included in the system of the PIL Code the public policy rules of both private international and procedural law. The public policy clause can be found in the section concerning the disregard of foreign law. Article 7(1) gives a general definition of public policy. It is a general clause, according to which the application of foreign law shall be disregarded where it would violate Hungarian public policy. This definition aims at enforcing the defensive function of the public policy clause. Beyond that, it is the task of judicial practice to fill it with content. The *ordre public* functions as a “shield” against foreign laws, in case the application of which may have a negative impact on Hungarian economic, political or social values. The auxiliary rule of Article 7(2) makes the general clause more precise; the application of foreign law shall not be disregarded solely on the ground that the socio-economic system of a particular foreign state differs from that of Hungary. With that the legislator brings the attention of the forum to the fact that the legal institution cannot be applied with a discriminatory intent.

The PIL Code contains so-called “special public policy rules” related to a given field, which make the elements of public policy more precise for judicial practice in a given field. Such rules are the rules regarding divorce in Article 41a), b), and c); or the consideration of the rules of substantive law, which are the mandatory prerequisites for child adoption based on Article 43(4).<sup>30</sup>

<sup>29</sup> a) A Hungarian male citizen emigrated to France and there he deceased as a French citizen. He left behind some property back in Hungary on intestacy and without direct lineal descendants. His Hungarian citizen siblings lay claim for the estate. The Hungarian notary applied Article 36 of the Code which states that inheritance relations are subject to the personal law of the deceased person that is the citizenship of the devisor. This in our case is the French law but in case of inheritance of immovable the French private international law enacts according to the situs of the immovable (*lex rei sitae*). The Hungarian forum accepted the *renvoi* and applied the Hungarian substantive law of succession. See Burián–Keckés–Vörös: *op. cit.* 19–24.

b) A Hungarian married couple emigrated from Hungary to Switzerland in 1956, where they acquired Swiss citizenship and later they moved back to Hungary. Under Article 39 of the Hungarian PIL Code: “The personal and property relations of the spouses [...] shall be governed by the common personal law of the spouses at the time of lawsuit.” This could be the law of their common citizenship, the Swiss law, but the Swiss private international law rule in such a case determines the law of their common domicile (Art. 54 of IPRG), which could be found in Hungary. Therefore the judge accepted the reference back and applied the Hungarian substantive law. See Mádl–Vékás: *op. cit.* 107.

<sup>30</sup> Former special *ordre public* rules in the area of torts, provided that Hungarian court “shall not establish liability for conduct that is not unlawful under Hungarian law”, and “shall not impose legal consequences not known to Hungarian law”, were repealed in 2009. This amendment of the Code is welcome because Hungarian scholars sharply criticized these strict and one-sided regulations.

According to Article 41, the law applicable in cases of divorce should be determined based on the following three criteria:

a) A marriage may be dissolved even if its dissolution is excluded by the foreign law, or if the conditions of divorce are absent according to the foreign law but are present according to Hungarian law.

b) The question of whether marital life has been completely and irreparably ruined<sup>31</sup> shall be considered even in cases where absolute grounds for divorce are present according to the foreign law.

c) A marriage shall not be dissolved on the ground of fault.

According to the general opinion of leading Hungarian scholars, with this rule the legislator gave too much room for public policy intervention, for, opposed to the general *ordre public* rule, in this case close domestic connection is not a prerequisite. Due to the flexible nature of the public policy clause, the connection of the case to the legal system to be protected is one of the prerequisites for its applicability.

There is also a special *ordre public* rule related to adoption. According to Article 43(4), adoption may not be permitted or approved by the guardianship authority except when it satisfies the requirements of Hungarian law. For example, it is determined by Hungarian family law that only married couples are allowed to adopt in common a child. People living with their partner or in a registered partnership do not have the right to do so. The purpose behind this legal policy is to ensure that the child will be reared in a complete family as well as the creation of a family bond between the child and the adoptive parents. This imperative norm serves the interests of the child and embodies the social and moral values of Hungarian society. The PIL Code makes it more emphatic with a special public policy rule.

The Hungarian international procedural law is characterized by a complex, multi-channel law source, in which the source of law for the judge in a particular case is precisely determined.<sup>32</sup> In Hungarian law, the procedural rules of *ordre public* may be found in Section 11 of the Code as the primary reason for the recognition of foreign judgements. The Hungarian judge always has to take into consideration whether the impact of the recognition and enforcement of the foreign judgement contravenes the fundamental values of the Hungarian legal system such as the basic constitutional principles.

The Hungarian Arbitration Act regulates public policy problems in the field of setting aside of an arbitral award. According to the Hungarian rules this process, with reference to the violation of *ordre public*, may be initiated against a domestic arbitral award. This possibility and the fact that in the rigid system of setting aside of an award causes *ordre public* is a flexible and malleable legal institution had a significant impact on the development of Hungarian judicial practice. The vast majority of the judgements related to

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As *Ferenc Mádl* and *László Burián* pointed out, the application of these rules are unreasonable in cases when both the party responsible for the damage and the injured party are foreigners from the same country and Hungary is only the place where the damage has occurred. In that case, according to *Burián*, the application of the law of his/her country would be more favourable for the injured party. See *Mádl-Vékás: op. cit.* 368–370, and *Burián–Kecskés–Vörös: op. cit.* 239.

<sup>31</sup> Namely this requirement is a cogent rule in Hungarian family law, thus the court always has to examine it in a divorce case.

<sup>32</sup> The Brussels Agreement, the Brussels I and II rules give directives concerning procedural law in *ordre public*, and these rules enjoy priority to domestic law.

the application of public policy were born within the framework of a setting aside proceeding. While there is very little practice of the application of public policy rule in PIL, during setting aside proceedings references are most often made to the violation of public policy. The reason for that is to be found in the nature of the arbitration proceeding: it has only one instance. The indefinability of the content of the concept of *ordre public* further increases the chances for setting aside of an arbitration award, thereby offering the defeated party a last chance to escape the enforcement of the judgement.

Several Hungarian decisions were made in the latter issue. With a few exceptions, references to the violation of *ordre public* were unfounded. All in all, during the examination of the violation of *ordre public* the starting point is always the same, i.e. the theoretical foundations of PIL. This approach has resulted in an interesting situation. Namely, that Hungarian judicial practice does not differentiate between the concepts of PIL and international commercial public policy. These judgements have contributed to a great extent to the development of the contextual outline of Hungarian public policy. They never define directly the contextual components of public policy. Rather, they start out from a negative approach and state which elements do not belong to the narrowly interpreted domain of *ordre public*.<sup>33</sup>

The separation and interpretation of mandatory rules and public policy has not yet happened in Hungarian PIL. The Hungarian regulations do not contain specific reference to the field of mandatory rules. Jurisprudence usually regards mandatory rules as a positive component of public policy, but does not state specifically what requirements a given norm has to meet in order to gain an absolutely mandatory application. This is a question to which the answer will have to be found in the future. No judgement has been made concerning the application of imperative norms so far.

<sup>33</sup> In the following, there is a brief summary about a controversial decision, in which the Supreme Court has declared for the first time that an arbitral award violates Hungarian public policy. The decision was based on an arbitral award of arbitration in which the court rejected the suit of the plaintiff and based on the 32 billion HUF in dispute forced him/her to pay 290 million HUF in legal costs. The arbitral tribunal arrived at this amount in accordance with the requirements of proportionality adjusted to the amount in dispute. The defeated party filed a suit of setting aside of this award at the court, in which he/she found injurious the high legal costs and stated that it violates the values of Hungarian society, therefore it violates the *ordre public*. At the first instance the court found this reference unfounded and stated that even though the amount is unusually high, the arbitral tribunal arrived at the amount in accordance with the laws in force; therefore it does not violate the foundations of economic and social order. Consequently, the award does not violate Hungarian public policy. The plaintiff appealed to the Supreme Court against the final verdict, claiming that the exceedingly high legal costs placed a disproportional burden on the defeated party and violated the value system of society. The Supreme Court found that even though the stipulated amount was in accordance with the law, it could limit the party in his/her right to turn to the court and deprive him/her of essential financial resources. It might also violate the value system of society, and if it remained in force, it would have a negative impact on Hungarian judicial practice. (Supreme Court Gfv. VI. 30.450/2002.)

The decision caused a lot of professional debate. Many people questioned whether the amount of legal costs constitutes part of *ordre public*. It was also in question whether it can restrict the party in his/her right to turn to the court, for it was a firm with considerable capital strength. The most heated debate was about the question of whether a judgement made in accordance with the laws in force can violate public policy.

#### IV. Law Governing Contracts

The freedom of party autonomy in choosing the applicable law to international contracts had already been accepted in Hungarian judicial practice before the birth of the PIL Code. The Code adopts the choice of law possible as the primary connecting factor of the law governing contracts. The laconic provision constructed in 1979<sup>34</sup> was supplemented with a few additions in 2009. According to the new provision: “A contract shall be governed by the law chosen by the parties at the time of contracting or later to the whole or a part only of the contract. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.” (Article 25). The Code, similarly to the Rome I Regulation, mentions primarily the express choice of law and defines the implied choice of law as well. In this last point, however, there is a difference from the definition in the Rome I Regulation. The second sentence in Article 3(1) of the Rome I Regulation is the following: “The choice shall be [...] clearly demonstrated by the terms of the contract or the circumstances of the case.” In the Code it goes as follows: “[...] demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.”<sup>35</sup> In this latter version implied and hypothetical choices of law can be hardly differentiated from each other, while only the former should be permitted.<sup>36</sup>

Regarding the time of choosing a law, it provides the parties the choice of law at the time of contracting as well as after concluding the contract (“at later”). According to the Code, the first time for the choice of law is the time of contracting, but it is also possible for the parties to select the applicable law before concluding the contract, for example within the framework agreement. Regarding the closing time for the choice of law, the beginning of the legal dispute<sup>37</sup> or the end of the evidentiary procedure at first instance<sup>38</sup> are considered in Hungarian legal literature as the theoretical limits. Hungarian judicial practice, as opposed to theoretical positions, permits the choice of law any time until delivering the judgement, even in procedure at the second instance (we should add that in these cases it has always meant the selection of the Hungarian law).<sup>39</sup> Similarly to Article 3(2) of the Rome I Regulation, it should have been settled in the Hungarian PIL Code that the subsequent choice of law, or the changing of the law originally selected shall not prejudice the formal validity of the contract or adversely affect the rights of third parties.<sup>40</sup>

*Depeçage*: Even though the partitioning of a contract, or choosing several laws at the same time (*depeçage*) was possible based on the Hungarian PIL Code, it was the Rome Convention’s entering force that finally clarified the situation.

<sup>34</sup> Article 24.

The law chosen by the parties at time of contracting or later shall be applied to their contract.

<sup>35</sup> It should be noted that the text is the result of the inaccurate translation of the Rome I Regulation.

<sup>36</sup> See Vékás, L.: A nemzetközi magánjogi törvény módosításáról (On the Modification of the Act on Private International Law). *Magyar Jog*, 6 (2009), 322.

<sup>37</sup> *Ibid.*

<sup>38</sup> See Burián–Kecskés–Vörös: *op. cit.* 205.

<sup>39</sup> Supreme Court of Hungary Pf.III.20 895/1992.; Supreme Court of Hungary Pf.VI.22 046/1993.; Supreme Court of Hungary Pf.III.20 998/1995. See Mádl–Vékás: *op. cit.* 348.

<sup>40</sup> The legislator should have been made a provision concerning the question of the validity of the choice of law clause and the enforcement of the cogent rules of the law applicable in the absence of the choice of law against the rules of the chosen law (similarly to Article 3(5) and Article 3(3) of the Rome I Regulation).

The Rome Convention and Rome I Article 3(1) leave to the parties the complete or partial choice of law. The introduction of these rules removed the ambiguity that had been present before in the Hungarian regulation. Because the former rule of the Code regulated in one sentence the choice of law (Article 24), which, besides stating that the parties can choose a law either at the time of contracting or at a later time, contained no further provisions. From this regulation Hungarian jurisprudence<sup>41</sup> concluded that if the Code does not prohibit the partition of the contract, then the parties are free to apply this practice. The same interpretation can be concluded through analogy from Article 30 as well. This Article states: “The governing law of contracts extends to all elements of the contractual relationship [...] and, unless otherwise agreed by the parties or otherwise mandated by this Law-Decree, to any agreement securing the contract (mortgage, suretyship, etc.) as well as to any setoff, assignment and assumption of claims related to the contract.” Interpreting this rule, the parties have the right to agree to the application of several laws to their contract, but the same result can be reached by the simultaneous application of different articles of the Code as well. The latest modification of the Code affects this issue, because in the new Article 25 the *depeçage* is expressed: “The law chosen to either the whole or the part of the contract by the parties [...] shall be applied.”

*Limitations of party-autonomy:* The Code has no specific provisions concerning the laws that may be chosen; therefore the choice of law is theoretically unlimited. It is even possible to choose a law which has no relationship of any kind with either the contract or the parties. In this respect, however, the choice of law clauses are interpreted strictly in Hungarian judicial practice.<sup>42</sup> Taking into consideration the further limitations of the choice of law, the Hungarian PIL Code does not specify any other devices besides the *ordre public* clause. In other words, it has no provisions concerning the enforcement of the imperative rules of the forum or a third state, and does not set any limitation similar to the Article 3(3) of the Rome I Regulation in case of contract where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen.

*Priority of protective law:* These restrictions usually refer to contracts in which one party is perceived to be systematically in a weaker position, most importantly consumer contracts, employment contracts and insurance contracts. In the member states of the European Union these limitations are expressly laid down in the Rome I Regulation, therefore the 2009 modification repealed the relevant rules of the Code.

Finally, as we have mentioned above, it is the result of the decision made by the Court of Justice of the European Communities in the case of *Garcia Avello*<sup>43</sup> that the Hungarian PIL allows the application of the choice of law rule not only in contract law, but on name

<sup>41</sup> *Ibid.* 203.

<sup>42</sup> For example, it “generally” chooses the Austrian law in legal disputes resulting from loan contracts, it does not extend its scope to the collateral contract securing the loan. (Supreme Court of Hungary Pf.I.25.615/2002/11.) In another case the court stated that regarding the choice of law the Code allows “only the selection of the law (legal system) of an explicitly chosen country”. (Metropolitan Court of Appeal Pf.6.20.577/2005/4.) (Thus the forum did not accept the clause “the rules of the Hungarian Civil Code” as an appropriate choice of law on the grounds that it was the choice of a rule, not the choice of a country’s law.)

<sup>43</sup> C-148/02. *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613.

bearing as well. According to Article 10(2), name bearing is governed by the *lex personae* of the individual, but in case of a request made by the individual involved, at the registration of the name of birth the law of that country shall be applied which the individual is a citizen of as well.

In preliminary it can be stated that jurisdiction alone is not a connecting factor in conflicts law. The jurisdiction of the court of a state does not necessarily mean that the substantive law of the given state should be applied. The function of PIL rules is overtly to make it possible for the forum not to use its own law. The rules of jurisdiction do not have a direct impact on the applicable substantive law, and it is true the other way round as well; the fact whether the applicable law is a domestic or a foreign one does not have any impact on the existence of jurisdiction. Consequently, the existence of jurisdiction and the choice of law are two separate issues. Although, the “*qui eligit iudicem eligit ius*” (if you choose a judge, you choose a law) is an old proposition in PIL, this principle does not generally apply in modern PIL. (We should note, however, that the picture is made more subtle by the preamble (recital 12) of the Rome I Regulation, according to which an exclusive choice of forum clause “should be one of the factors to be taken into account in considering whether a choice of law has been clearly demonstrated”.)

In the judgement of international contracts by a Hungarian court, there is a separation between jurisdiction and the selection of the applicable law. The freedom of party autonomy can extend to the choice of the forum as well as to the choice of law. In Hungarian judicial practice these clauses in general, either choice of law clauses or choice of forum clauses, are interpreted rather strictly,<sup>44</sup> but the appropriately phrased or unambiguous clauses, including the arbitration clauses, are treated in the same way.

In sum, we can say that with the EU Regulation coming into force the contract law rules of the Hungarian PIL Code play only a complementary role. Therefore, the demand of the modification of the “old” provisions of the Code was entirely justified. According to the new general rule of the Code, in the absence of the choice of law, the contract should be governed by the law of the country with which it is most closely connected (Article 28). Regarding questions which are not within the scope of the Rome I Regulation, for example the contract of inheritance, marriage settlement, or the scope of the rights of the representative, the trust, the Code contains no specific provisions (which can be a source of problems related to qualification).

Some “old” rules of exception however have remained in the Code, which are the following:

- The law of that state shall apply to contracts concluded on exchanges, at tender negotiations or auctions, in the territory of which the exchange is or the tender negotiation or auction is conducted. [Article 26(1)];
- A contract of association shall be adjudged according to the law of the state, in the territory of which the company pursues its activities. The personal law of the legal entity shall apply to a contract of association founding a legal entity. [Article 26(2)];
- The law governing at the place of performance shall apply to the existence and extent of obligations based upon securities. [Article 27(1)];

<sup>44</sup> For example, the “jurisdiction of Brussels or courts of Brussels” clause was not acceptable, for only “the courts of a state or a certain court” should be selected. (Metropolitan Court of Appeal 14.Gf.41.315/2003.)

– The emergence, devolution, termination and enforcement of contractual rights and obligations based upon bonds issued on the basis of a public loan shall be adjudged according to the issuer's personal law. [Article 27(2)];

– If a security provides the right of disposal over goods, the provisions of this Law-Decree relating to real rights shall apply to the real right effects. [Article 27(3)];

– If a security embodies membership rights, the emergence, devolution, termination and enforcement of the rights and obligations based upon the security shall be adjudged according to the personal law of the legal entity. [Article 27(4)].<sup>45</sup>

To sum up, regarding the selection of the law applicable to contracts (similarly to the rules of delictual liability) it can be stated that at the modification of the Hungarian PIL Code the legislator failed to exploit the opportunity provided for the modernization of the old rules.<sup>46</sup> Therefore, Hungarian courts will remain responsible for the task of harmonizing the Rome I Regulation with the Code until a comprehensive codification is finally made.

## V. Law Governing Torts

In Volume 2 of his work *Private International Law Ernst Rabel* refers to the *lex loci delicti commissi*, developed by canonists and statutists, as a generally accepted principle in torts law. However, significant changes had taken place in the field by the end of the 20th century – beginning of the 21st century. There was a shift in emphasis from the tort-feasor to the injured party, and from injurious activity and personal liability the focus shifted to compensation.<sup>47</sup> This “revolution” (or dethronement), as it was referred to by *Ehrenzweig*, led to the overthrow of the exclusiveness of the *lex loci delicti commissi*.<sup>48</sup> Conflicts law reacted to the above process in various ways: with the application of general clauses, the development of connecting factors differentiated for special delictions and the “loosening up” of traditional connecting factors with rules of exception.<sup>49</sup>

The 2009 modification of the Hungarian PIL Code has had an impact on the rules of the law applicable to questions of delictual liability. According to Act No. IX of 2009, with the modifications the legislator was aiming at the integration of the Rome II Regulation into Hungarian law and the harmonization of domestic regulation with the conflicts regulations of the EU. Therefore, Article 32 of the Code declares the priority of the Rome II Regulation. (Hungarian scholars do not think it should be explicitly stated due to the nature of the law source and to the fact that at the upcoming introduction of new private international law regulations the Code will have to be modified.<sup>50</sup>)

<sup>45</sup> Judicial practice regarding the above mentioned remaining rules is unknown.

<sup>46</sup> Vékás: *op. cit.* 322.

<sup>47</sup> Mádl–Vékás: *op. cit.* 363.

<sup>48</sup> See Ehrenzweig, A. A.: A Counter-Revolution in Conflicts Law? From Beale to Cavers. *Harvard Law Review*, 80 (1966), 377.

<sup>49</sup> Burián–Keckés–Vörös: *op. cit.* 232–234.

<sup>50</sup> This problem appears in contract law as well (Article 24). Hungarian scholars agree that Article 2 stating the subsidiary character of the Code (according to which “This Law-Decree shall not apply in matters which are regulated by international conventions.”) should have been complemented, which as a result would have declared the priority of the regulation as well. This would have given a guidance regarding general questions governed both by the regulations and the Code, such as *renvoi* and *ordre public*. See Vékás: *op. cit.* 322.



The rules of Rome II Regulation and the preservation of the old provisions of the Code resulted in the creation of a two-channel system,<sup>51</sup> which became a source of particular difficulties for the courts. At the determination of the law applicable to torts the Code, in spite of the criticism coming from leading scholars,<sup>52</sup> retained the connecting factor of *lex loci delicti commissi* (Article 33(1)),<sup>53</sup> while the Rome II Regulation follows the connecting factor of *lex loci damni*. The law of the state on whose territory the damage occurred remained in the form of *favor laesi* in the Hungarian Code; in other words, if its application is more favourable for the injured party [Article 33(2)].<sup>54</sup> Therefore, this provision gives the judge a chance to select the proper applicable law in the so called cross-border tort cases, i.e. torts in which the injurious conduct occurred in one country and the injury in another country. The rule of “more favourable law” referred to in the Code cannot be applied selectively, only to certain claims.<sup>55</sup> For example, the application of one Hungarian provision of the non-material damages instead of the otherwise applicable German law on damages for pain and suffering (*Schmerzensgeld*) is not possible on grounds that it is more favourable for the injured party.<sup>56</sup> The Hungarian Supreme Court has rejected the application of *dépaçage*, in contrast with an earlier court decision at a lower forum.<sup>57</sup> The other problem occurring in judicial practice is related to the localization of the place where the damage occurred. In the above-mentioned case the forum regarded the place of indirect consequences as the place of the injurious activity. According to the facts of the case, Hungarian citizens suffered a traffic accident in Germany as a result of a German citizen’s breaking the law; therefore, both the *lex loci delicti commissi*, and the *lex loci damni* in a narrow sense lead to the application of the German law. However, the court interpreted the latter connecting factor in a broader sense and opted for the application of the law of the place of the financial consequences of the injurious activity (which in most cases leads to the habitual residence of the injured party); in other words, the court considered the “more favourable nature” of the application of the Hungarian law.

Following these two general provisions, the Hungarian PIL Code declares two rules of exception. First, if it is justified by the identical social and legal environment the tort-feasor and the injured party domiciled in the same state, then the law of this state should be applied.<sup>58</sup> At this point there is a difference between the Code and the Rome II Regulation:

<sup>51</sup> During the construction of Act No. IX of 2009 the legislator, instead of filling the gaps in the Decree and harmonizing the two (European and domestic) regimes, only followed the principle of *lex minima* and repealed the provisions governed by the Decree or deemed unnecessary for other reasons. See *ibid.* at 324.

<sup>52</sup> See e.g. *ibid.*; Burián, L.: A deliktális felelősség a magyar nemzetközi magánjogban (Torts in Hungarian Private International Law). *Jogtudományi Közlöny*, 3 (1990), 143–168.

<sup>53</sup> Article 33.

(1) Unless otherwise mandated by this Law-Decree, liability for non-contractual damage shall be subject to the law prevailing at the time and place of the tortious act or omission.

<sup>54</sup> Article 33.

(2) If it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage occurred.

<sup>55</sup> Supreme Court of Hungary Pf.III.25.783/2002/5.

<sup>56</sup> As the court states: “Certain concepts or legal institutions cannot be interpreted alone, taken out of context”. *Ibid.*

<sup>57</sup> Metropolitan Court 4. P. 87.230/1981. See Mádl–Vékás: *op. cit.* 391.

<sup>58</sup> Article 33.

(3) If the tort-feasor and the injured party are domicile in the same state, the applicable law shall be of the state concerned.

while the former prescribes the connection of the common domicile, the latter prescribes the connection of the common habitual residence [Article 4(2)], which is more accepted today. Second, in case of tortuous act or omission occurred on a registered vessel or aircraft, *lex bandi* should be applied.<sup>59</sup>

Finally, the Code contains two supplementary-interpretational rules. On one hand, if, under the law of the place of the tortuous act or omission, liability is subject to fault, the existence of culpability may be determined either by the *lex personae* of the tort-feasor, or by the *lex loci delicti commissi*.<sup>60</sup> On the other hand, whether the tortuous conduct consisted in violation of traffic or other safety regulations, it shall be determined according to the law of the place of the tortuous conduct.<sup>61</sup> (We should note that Article 17 of the Rome II Regulation says the same concerning the issue, therefore the provision of the Hungarian Code will not be applied in the future.) Finally, as opposed to the Rome II Regulation [Article 4(3)], the Code does not allow the application of escape clauses which would give place to judicial discretion and thereby ensure flexibility.

A means of “loosening up” the *lex loci delicti* is the choice of law rule, a theory originating from *Raape* and later further developed by *Kropholler* and *Lorenz*. The Hungarian PIL Code, contrary to the modern solution under the Rome II Regulation (Article 14), does not adopt the choice of law rule, even though the party autonomy has been accepted by the Hungarian courts in the field of contractual relations since the beginning of the 20th century. The integration of the choice of law rule among the rules of conflict governing non-contractual relationships has not happened in spite of specific proposals made by scholars.<sup>62</sup> As a sole possibility, Hungarian PIL allows in the general provisions for the parties to request, by mutual agreement, the disregard of the applicable foreign law (Article 9); then the *lex fori* becomes the law applicable to the private international law dispute. However, the meaning of the expression “by mutual agreement” is vague and its judicial interpretation is by no means clear. In the case of a traffic accident caused in Romania by a Hungarian to a Slovakian citizen, the Supreme Court applied the Hungarian law instead of the Romanian law (despite the *lex loci delicti commissi*, *lex loci damni* referred to by the plaintiff in his appeal), stating that with their implicit conduct the parties requested the disregard of the applicable foreign (Romanian) law, for both the complaint of the plaintiff and the pleading of the defendant were based on the Hungarian Civil Code.<sup>63</sup>

There is an important difference between the Rome II Regulation and the Hungarian PIL Code. While the first contains a number of special rules, the latter does not provide separate choice-of-law rules for different types of torts, such as products liability, and environmental torts. We should note, however, that the Code does have provisions concerning the applicable law in case of the infringement of personal rights, although not in

<sup>59</sup> Article 34 (2). This rule is in fact a variety of the *lex loci delicti commissi*.

<sup>60</sup> Article 33 (4).

<sup>61</sup> Article 34 (1).

<sup>62</sup> Burián, L.: *Die Möglichkeiten der Rechtswahl im ungarischen IPR im Bereich des Deliktsrechts, des Erbrechts des Ehegüterrechts und des Arbeitsrechts*. Budapest, 1987; Burián: *A deliktualis felelősség... op. cit.* 143–168.

<sup>63</sup> *Raffai* sees the reasoning as the appearance of the homeward trend, and criticizes it saying that the disregard by mutual agreement can only be an explicit declaration. See Burián–Kecskés–Vörös: *op. cit.* 353. The recognition of the disregard by mutual agreement based on implicit conduct (basically reference to Hungarian law in the procedure) appears in other legal relations (e.g. succession) as well. (Supreme Court of Hungary Pfv.I/a.20.879/2001/5.)

the field of delictual liability. The Hungarian PIL Code calls for the application of the law of the place and the time of the injury, but the principle of “more favourable law” appears here as well, meaning that if the Hungarian substantive law is more favourable for the injured party concerning compensation or indemnification, then that is the law which the judge should apply. We must add that the Rome II Regulation and the Hungarian PIL Code regulate the selection of the law applicable to the violation of intellectual property rights in the same way.

In sum, the above-discussed dilemmas reveal that although the conflict rules of the Code on torts have only a subordinate role due to the Rome II Regulations in force, the Hungarian legislator should have already accomplished the harmonization and modernization of the conflict rules constructed in 1979, thereby avoiding the difficulties arising from the application of the two-channel conflicts law.

## VI. The Hungarian Judicial Application of PIL Rules

In short, the answer to the question of how the Code is applied in the Hungarian judicial practice is the following: it is characterized by contradictions. First of all, as a starting point for our research, we have found that only a few number of verdicts in the field of PIL have been published in recent years. On the other hand, it is a fact that the number of PIL cases to be settled by the court tends to rise. The analysis of the Hungarian judicial practice can be approached from two different aspects:

### 1. How are the provisions of the Code applied?

In case of certain general PIL instruments, such as the application of the rules of qualification, no real problem arises because courts usually follow the principle of *lex fori* (see Chapter IX). On the other hand, in case of other instruments, for example, concerning the present eclectic practice of the *ordre public*, there is no real agreement even on the issue of what elements the Hungarian public policy should include. Another neuralgic point of the judicial practice is the determination of the content of foreign law, which is the overt responsibility of the court, but sometimes they fail to do it. It may result in the unnecessary lengthening of legal procedures,<sup>64</sup> or it may lead to a situation when the parties according to Article 9 ask for the disregard of foreign law by mutual agreement, and consequently the Hungarian law is applied instead. In connection with the above-mentioned Article 9 courts sometimes do not make a difference between the choice of law and the disregard of foreign law, but place an equal sign between them.<sup>65</sup>

### 2. How are the legal gaps filled?

In order to present a typical example of filling gaps, let us mention the judicial practice in connection with the consideration of incidental question. Despite the fact that the issue of incidental question is not settled in the Code, there is agreement in the judicial practice in this matter. According to general practice, it is considered independently, i.e. based on the principle of *lex fori*.<sup>66</sup>

<sup>64</sup> In 2004 in the Karalyos and Huber v. Hungary case (75116/01) the European Court of Human Rights dismissed Hungary in connection with it.

<sup>65</sup> Supreme Court Pf. VI. 21323/1996.

<sup>66</sup> Supreme Court Pf. II. 20.992/1992.

To sum up, the Hungarian judicial application represents a mixed scene in terms of practice. It is the task of jurisprudence to draw attention to the shortcomings as well as to provide adequate and appropriate theoretical solutions for the arising problems. In 2003 a professional discussion started between the representatives of jurisprudence and judicial practice. To serve the harmonization of legal theory and practice, every year a PIL conference is organized by Hungarian law faculties on different issues of Hungarian private international law.