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## UNWELCOME FOREIGN LAW

### Public policy and other means to protect the fundamental values and public interests of the European Community

#### 1. Points of departure

Public policy has been called an ‘unruly horse’<sup>1</sup>, a ‘substitute for thinking’<sup>2</sup>, a ‘double-edged sword’<sup>3</sup>, a ‘disturbing element’<sup>4</sup>, a ‘passe-partout’.<sup>5</sup> This variety of metaphors not only suggests that the legal concept we are dealing with is difficult to capture in a descriptive statement but also that it has a somewhat ignominious reputation. Both suggestions are borne out by the way the doctrine of public policy is incorporated in national, international and European legislation. On the one hand, no efforts are made to define the contents and operation of the doctrine. At best, the words ‘public policy’ are followed by the French expression ‘*ordre public*’ in brackets, which is hardly any help. On the other hand, we are invariably admonished to keep in mind that the doctrine may only be used in the rarest of cases. The phrase ‘manifestly incompatible with public policy’ is meant to qualify this device as an *ultimum remedium*.

Despite its intractable character, there is widespread consensus on the essence of public policy as a tenet of private international law. Nowadays, there is general agreement that public policy is meant to ward off foreign law if the result of its application would violate fundamental domestic values or public interests. Its function is therefore limited to the displacement or negation of foreign law, and in that respect it has a negative effect. Some decades ago, many systems of private international law also attributed a positive role to public policy (hence the ‘double-edged sword’) by subjecting some legal issues exclusively to forum law, even if the case was so closely connected with another country that, normally, it would be governed by foreign law. Since the acceptance of the doctrine of ‘special allocation’ (*Sonderanknüpfung*), and the acknowledgement of the special nature of ‘*lois*

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1. *Richardson v. Mellish*, 2 Bing. 228 [1824]; 34 All ER 258 [1824], *per* Burrough J.

2. Monrad G. Paulsen & Michael I. Sovern, Public Policy in the Conflict of Laws, 56 *Col. L.Rev.* 969-1016 (1956), at p. 987.

3. J.P. Verheul, *De openbare orde als tweesnijdend zwaard*, inaugural lecture, Leyden 1978.

4. Henri Batiffol & Paul Lagarde, *Droit international privé*, Volume I, 8th ed., Paris 1993, p. 569: ‘Sans doute la notion introduit un élément perturbateur dans le jeu des règles de conflit ...’

*d'application immédiate*' or 'overriding mandatory rules' in the latest EC jargon, the expression 'positive public policy' is no longer current. Still, as we shall see, its function has survived in some unilateral choice-of-law rules, notably in the area of international family law. Where the phrase 'public policy' is used in contemporary conflicts legislation, however, it only refers to its negative function.

### 1.1 *Scope of this article*

Thus, public policy provisions in present or future EC instruments designating the applicable law may be assumed to serve as a corrective tool, allowing a final check on the contents and effects of the law to be applied. However, to appreciate the effectiveness of this tool, it will be useful to examine it in the context of the choice-of-law process as a whole, as there may be no need for public policy if there are other instruments to protect fundamental values and interests of the forum state. After a short description of the doctrine of public policy in general (§§ 1.2-1.4) I will therefore briefly survey other policy-oriented devices, as conceived in the current EC proposals on choice of law (§§ 2-2.5). Of necessity, this digression will lead us to other areas than family law and succession, if only to assess the effectiveness of future regulations in these fields where the protection of national and European values and interests is concerned. That is why I cannot ignore the policy-based provisions in the Rome I and Rome II proposals. Next, I will address the question of whether a distinction could be made between national and European concerns that deserve to be taken into account in the ultimate decision on the law to be applied, how such European concerns can be identified, and to what extent they should be allowed to override the initial choice-of-law result (§§ 3-3.7).<sup>6</sup>

I will confine myself to public policy and other protective devices as they are used in the choice-of-law process, *i.e.* the determination whether a legal issue is governed by a rule of forum law or foreign law. Other areas of conflicts law in which public policy may be used as a shield, notably the area of recognition and enforcement of foreign judgements, will not be explored, even though I surmise that a broader view would expose both interesting parallels and surprising disparities.

Finally, the impact of public policy – as a choice-of-law device – on the external relations of the European Community will not be highlighted. As I hope to make clear in the final section of this article, I do not think that in matters of family law and succession the role of public policy is determined by the difference between intracommunity cases and those in which a third state is involved.

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5. Franz Kahn, *Abhandlungen zum internationalen Privatrecht*, Vol. 1 (1928), p. 499: 'Jede Ausnahme von einer sonst geltenden Regel, jede speziellere neu sich bildende Kollisionsnorm, jede Abänderung, Umformung einer bestehenden pflegt eingeführt zu werden mit jenem *passé-partout des ordre public*.'

6. I apologize to the many authors who have contributed to the vast wealth of literature on (European) public policy for citing only a few of them. Not only have I not been able, for lack of time or library resources or linguistic skills, to go through all of their texts but I also wanted to take a fresh look at the problem, thinking it through for myself without being influenced too much by the views of others.

There may be one (questionable) exception to this proposition, but I doubt that it will be included in any of the proposed regulations on choice of law.

### 1.2. *Public policy can only be deployed to preclude the application of foreign law*

As we already saw, our first point of departure is the fact that public policy is used as a corrective. It may be deployed if application of the law identified in the choice-of-law process would lead to intolerable results from the perspective of the forum state. This implies that public policy can only be used to correct the outcome of the choice-of-law process if it turns out that the case is governed by foreign law. Application of the *lex fori* is not supposed to lead to results that would be intolerable to the forum community, and even if it does the remedy must be found in substantive forum law, not in the doctrine of public policy.

### 1.3. *Public policy is most frequently used to correct the forum's choice-of-law rule*

The second point of departure is a little less straightforward. Since public policy is supposed to be an *ultimum remedium*, we will have to assume that it can only be used if application of foreign law would be *repulsive to essential values* of the forum community or *detrimental to the forum's public interests*. The problem, here, is not only the definition of essential values and public interests but also a delineation of the situations in which those values and interests are at stake. These two aspects come together in what has been called the 'relativity' of public policy: whether or not foreign law should be rejected depends on the intensity of the forum connection (*'Inlandbeziehung'*). If the community of the forum state is hardly affected by the application of foreign law – which implies that the forum connection is slight – there is less reason to invoke public policy than there is in situations in which the case is more closely connected with the forum state – which implies that the forum state has a stronger interest in the outcome. In short, the public policy test should be performed along a sliding scale, marked by degrees of *'Inlandbeziehung'*.

It has always struck me as odd that the same rule of foreign law could be deemed repulsive in one case and not in another. This paradox has led me to the conclusion that public policy can be used either as an instrument to gauge the quality of foreign law – in my view its original function – or as a means to redress inadequacies in the operation of the forum's choice-of-law rules. That is why I submit that there is no room for relativity in cases in which the application of foreign law would violate a fundamental principle of justice<sup>7</sup> as perceived by the forum community. A rule prohibiting interracial

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7. Cf. the classic description of public policy by Justice Cardozo in *Loucks v. Standard Oil Co. of New York* 224 N.Y. 99, at 111, 120 N.E. 198 at 202 (1918); '[T]he courts do not close their doors, unless help would violate some fun-

marriages is repulsive and should not be applied in any country supporting human rights, regardless of the forum connection. Where application of foreign law would offend fundamental values upheld by the forum state, there is a limit to our tolerance. Here, the public policy criterion should be absolute.

In many cases, however, public policy is not invoked to justify the displacement of a morally offensive rule of foreign law but to protect the public interests of the forum community. If the case is only slightly connected with the forum state, it is unlikely that the forum's public interests are harmed or affected by the application of foreign law. There are situations, however, in which the forum connection may be too weak to warrant the application of forum law but strong enough to give the forum state an interest in the final result. If the application of foreign law would have a harmful effect on the forum's public interests – which implies that there is more than a fleeting forum connection – public policy may be used to ward off the threat. Here, its use is not determined by moral indignation but by a concern for the public interests of the forum community, which, in turn, is determined by the intensity of the forum connection. In these situations, public policy does not function as an instrument to gauge the quality of foreign law but as a choice-of-law device. It is not used to express our disapproval of foreign law but as a means to correct a choice-of-law result dictated by a conflicts rule that is blind to the interests at stake.

#### 1.4. *The function of public policy can be performed by policy-oriented conflicts rules*

There would be no need for this 'relative' function of public policy, I submit, if the choice-of-law process would not focus on geographical factors alone but if it would also take account of the substantive interests of the parties and states concerned. While I am not a proponent of the policy-oriented approaches to conflicts of law that were advocated in the United States in the 1960's<sup>8</sup>, I am convinced that conflicts law can no longer operate on the basis of proximity<sup>9</sup> alone and that it should abandon

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damental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'

8. I am referring to the American 'conflicts revolution' led by Cavers, Currie, Ehrenzweig, Leflar, Von Mehren, Trautman, and Weintraub, all advocating some form of interest analysis as an alternative for the traditional jurisdiction-selecting method. In the Restatement (Second) of Conflict of Laws (1971), an attempt was made to combine a policy-oriented approach with a geographical 'most significant relationship' criterion. While the American courts were not unwilling to experiment with the new theories, their current approaches to choice of law have proved to be eclectic. Cf. Eugene Scoles, Peter Hay, Patrick Borchers & Simeon C. Symeonides, *Conflict of Laws*, 3d ed., St. Paul, Minn., 2000, p. 102 ff.

9. The principle is also known as 'the principle of the closest connection', a literal translation of what is known in Germany as the *Grundsatz der engsten Beziehung*, in France as *principe de proximité*, in the Netherlands as *begin-sel van de nauwste verbondenheid*. In England, the notion that the applicable law is determined by a preponderance of geographical contacts is summed up in references to the 'proper law'. In the United States, the courts refer to 'the most significant relationship' (the criterion laid down in the Restatement Second), or to the 'center of gravity'. All these expressions are supposed to refer to the country with which the case is (or is supposed to be) most closely connected in a *geographical* way, not because of any *interest* any country may have in the outcome of the case. In practice, however, the principle of proximity may be used to disguise a preference for forum law, based on the interests of the forum in the (substantive) outcome of the choice-of-law process. Open-ended choice-of-law rules based on the principle of the closest connection have proved to be conducive to 'creative contacts counting'.

any pretense of being ‘neutral’.<sup>10</sup> Where the mandatory character of substantive forum law supports a policy of protecting specific public or private interests, that policy should be reflected in its choice-of-law rules as well.

It can hardly be denied that this notion is gradually being accepted in contemporary conflicts law.<sup>11</sup> Otherwise, there would be no room in the Rome Convention on contractual obligations for special choice-of-law rules for consumer transactions and employment contracts.<sup>12</sup> Policy-oriented solutions have also been adopted in the Hague Conventions on child protection and the protection of adults<sup>13</sup>, maintenance obligations<sup>14</sup>, and agency<sup>15</sup>, generally resulting in the designation of the law of the state that may be deemed to have a preponderant interest in the application of its law<sup>16</sup> – not necessarily the state with which the case is most closely connected in a geographical sense. In most European systems of conflicts law, particularly in the area of family law, there are now rules offering a choice between various alternatives, which is determined by the substantive result to be achieved.<sup>17</sup> Furthermore, there are provisions, both in international conventions and in national conflicts laws, giving priority to ‘overriding mandatory rules’ of the forum state, also known as ‘*lois de police*’, or

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10. Cf. Th.M. de Boer, Forum Preferences in Contemporary European Conflicts Law: The Myth of a Neutral Choice, in: *Festschrift für Erik Jayme* (eds. Heinz-Peter Mansel *e.a.*), Band I, München, 2004, p. 39-55.
  11. Cf. Dieter Martiny, Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht, in: *Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag* (eds. Michael Coester *e.a.*), München, 2004, p. 523-548, at p. 539 ff.
  12. Article 5(3), which refers to the law of the consumer’s habitual residence, and Article 6(2)(a), referring to the place of employment, are not based on the principle of proximity. In fact, they translate the *function* of the corresponding substantive law (protection of the consumer or, respectively, the employee) into a connecting factor that is meant to afford the structurally weaker party the same level of protection he would enjoy in a domestic case. The choice-of-law principle underlying this type of conflicts rule is sometimes referred to as ‘protection principle’. It should be borne in mind, though, that the party to be protected may go *unprotected* if his/her domiciliary law (or the law of the place of work in case of employees) does not afford any protection at all. That is why I prefer to use the expression ‘principle of functional allocation’. Cf. Th.M. de Boer, The EEC Contracts Convention and the Dutch Courts: A Methodological Perspective, *Rebels Zeitschrift* 1990, p. 25-62.
  13. Article 2 Hague Convention of 1961 and Article 15 Hague Convention of 1996 refer to forum law, which will generally coincide with the law of the child’s habitual residence, as this is the Conventions’ primary ground for jurisdiction. The result is the application of the law of the country that may be deemed to be most concerned with the child’s welfare. The same construction is used in Article 13, in conjunction with Article 5, Hague Convention on the International Protection of Adults of 2000.
  14. Article 4 Hague Convention on Maintenance Obligations of 1973, which refers to the domiciliary law of the maintenance creditor rather than to the law of a country with which both the creditor and the debtor have a connection. See, however, the exception of Article 15, which is squarely based on the principle of proximity.
  15. Article 6 Hague Convention on Agency of 1978, referring to the law of the agent’s business establishment or habitual residence.
  16. In Europe, there has been some confusion about the meaning of ‘governmental’ (or state) interests. See, e.g. Gerhard Kegel, The Crisis of Conflict of Laws, 112 *Recueil des Cours* 95-263, at p. 180 ff. (1964). What is meant is the interest of a national community, represented by the state, both in the well-being of the community as a whole and in the welfare of its citizens and residents.
  17. Alternative reference rules are usually based on the so-called ‘favor principle’ (*Günstigkeitsprinzip*): if a predetermined result cannot be achieved by the law first referred to an alternative law may be applied. See, e.g. Article 1 Hague Convention on the Form of Testamentary Dispositions and Article 9(1) Rome Convention 1980 (validity of forms). Other examples can be found in Articles 5 and 6 Hague Convention on Maintenance Obligations of 1973, and in Article 13 Proposal for an EC Regulation on matters relating to maintenance obligations (COM (2005) 649; see also text preceding footnote 35. In Germany, Article 20(1) *EGBGB* is just one of many examples of a favor-inspired choice of law. In the same vein: Article 72(1) Swiss statute of 1989; in the Netherlands: Article 4 *Wet conflictenrecht afstamming*.

‘Eingriffsnormen’, or ‘norme di applicazione necessaria’.<sup>18</sup> They have in common that they are meant to safeguard the public interests of the forum community as expressed in its substantive law, provided those interests are affected in the individual case.<sup>19</sup> Finally, public interests of the forum state can also be protected by unilateral conflicts rules, obviating the need for corrections with the help of public policy in its negative function. Such rules are usually found in international family law, particularly with regard to (the form of) marriage, divorce, registered partnership, and adoption.<sup>20</sup> In some of these rules, the reference to *lex fori* may be restricted to situations in which the applicable foreign law fails to meet a minimum standard of forum law, as, for instance, a choice-of-law rule referring to *lex fori* if the applicable foreign law does not allow marriage<sup>21</sup> or divorce.<sup>22</sup> In such rules, notions of public policy (both positive and negative) are mixed with one or more favor-inspired choice-of-law alternatives, so as to achieve a result that meets a basic standard prevailing in the forum state.

As a result of all these innovations, there is now less need for the blunt axe of public policy than there was in the days when mechanical and strictly neutral choice-of-law rules dictated results that were clearly inappropriate, even in terms of proximity.<sup>23</sup> It remains to be seen, however, whether the developing private international law of the European Union can take account of fundamental values and public interests without the need for the rather crude instrument of public policy. The first question to be addressed, then, is to what extent the proposals of the European Commission allow a policy-oriented choice of law.

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18. E.g. Article 7(2) Rome Convention 1980; Article 16 Hague Convention on Agency 1978; Article 16 Hague Convention on Trusts 1985; Article 17 Hague Convention on the International Sale of Goods 1986; Art. 18 Swiss Statute on Private International Law 1989; Article 20 Belgian Statute on Private International Law 2004; Article 34 *EGBGB*; Article 17 Italian Statute on Private International Law 1995.
  19. Because of this proviso, the doctrine of overriding mandatory rules can be distinguished from the concept of ‘positive’ public policy, which gives priority to forum law in any case, even if the forum connection is so slight that the forum state’s public interests are not affected.
  20. See, e.g., Articles 13(3) and 17(2) *EGBGB*; Articles 34(1), 38(3), 41(3), 44(3), 61, 72(2), 72(3), 77 Swiss Statute on Private International Law 1989; in the Netherlands: Article 1 *Wet conflictenrecht geregistreerd partnerschap*; Article 4(2) *Wet conflictenrecht afstamming*; Article 4 *Wet conflictenrecht huwelijk*.
  21. E.g. Article 13(2) *EGBGB*, subject to the condition that one of the parties is a German resident or national, that the parties have made an endeavor to comply with the requirements of the applicable foreign law, and that the foreign prohibition would violate the freedom of marriage, particularly where it prohibits a divorced person to remarry.
  22. E.g. Article 61(3) Swiss Statute on Private International Law 1989: if the parties have a common nationality and their national law does not allow divorce, or only under ‘extremely strict conditions’ (*unter ausserordentlich strengen Bedingungen*), Swiss law applies, provided that one of the spouses is a Swiss citizen or has resided in Switzerland for at least two years.
  23. Before the advent of interest analysis in the United States, rigid application of the *lex loci delicti* rule, was often rectified with the help of public policy. See, e.g., *Kilberg v. Northeast Airlines, Inc.* 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In France, on the other hand, the Cour de Cassation invited much criticism by refusing to deploy public policy to displace the Spanish *lex loci delicti* in a tort case between two French parties domiciled in France: *Lautour v. Guiraud* (Cass. Civ. 25 May 1948, S. 1949, 1.21; D. 1948, 357, *Rev. crit. d.i.p.* 1949, 89). The supremacy of the *lex loci delicti* rule was confirmed in *Kieger v. Amigues* (Cass. Cass. Civ. 30 May 1967, *Rev. crit. d.i.p.* 1967, 728; *Clunet* 1967, 622) and *Luccantoni* (Cass. Civ. 1 June 1976, *J.C.P.* 1979 II, 19082; *J.D.I.* 1977, 91).

## 2. *An examination of the EC choice-of-law proposals*

Since the Treaty of Amsterdam, the European Commission has launched a number of proposals meant to promote ‘the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction’, as Article 65 EC Treaty prescribes. So far, they have resulted in two regulations on jurisdiction and the recognition and enforcement of judgments – the Brussels I and Brussels II (bis) Regulations – but as far as the harmonization of the rules concerning conflicts of laws is concerned, EC legislation is still underway.<sup>24</sup> A quick inventory of the Commission’s plans and proposals covering choice-of-law issues results in the following list:

- proposal for a regulation amending Regulation (EC) No 2201/2203 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters;<sup>25</sup>
- proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;<sup>26</sup>
- proposal for a regulation on the law applicable to contractual obligations (‘Rome I’);<sup>27</sup>
- proposal for a regulation on the law applicable to non-contractual obligations (‘Rome II’);<sup>28</sup>
- green paper on succession and wills;<sup>29</sup>
- green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition.<sup>30</sup>

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24. There is no need to discuss Directive 2006/123 on Services in the Internal Market, as Article 3(2) specifically excludes all questions of private international law, in particular choice-of-law issues with regard to contractual and non-contractual obligations. I have also left out the regulations (already in force) on insolvency (1346/2000), service of documents (1348/2000) and evidence (1206/2001), as they are primarily meant to further cooperation between member states and do not cover choice-of-law issues. The scope of the public policy provision in the insolvency regulation is limited to recognition proceedings.

25. COM (2006) 399, 17 July 2006; 6258/07 JUSTCIV 26 (draft by the German Presidency, 13 February 2007).

26. COM (2005) 649, 15 December 2005; COM (2006) 206, 12 May 2006 (commentary on the articles of the proposal); 16830/06 JUSTCIV 287, 20 December 2006 (draft by the Finnish Presidency and the incoming German Presidency).

27. COM (2005) 650, 12 October 2005; 13853/06 JUSTCIV 224 CODEC 1085, 12 October 2006 (draft by the Finnish Presidency); 16353/06 JUSTCIV 276 CODEC 1485, 12 December 2006 (draft by the Finnish Presidency and the incoming German Presidency).

28. COM (2003) 427, 22 July 2003 (original proposal); COM (2006) 83, 21 February 2006 (amended proposal); 9751/06 JUSTCIV 137 CODEC 531, 25 September 2006 (Common Position adopted by the Council); COM (2006) 566, 27 September 2006 (Communication from the Commission to the European Parliament concerning the Common Position of the Council).

29. Com (2005) 65, 1 March 2005. A summary of responses and a discussion paper for a public hearing that took place on 30 November 2006 can be found on [www.ec.europa.eu.justice\\_home](http://www.ec.europa.eu.justice_home).

30. COM (2006) 400, 17 July 2006.



## 2.1. Divorce and legal separation

The first proposal on my list, the one on matrimonial matters, adds a new chapter to the Brussels II bis Regulation. In the near future, the Regulation will not only cover jurisdiction, recognition and enforcement, and cooperation between central authorities, but it will also determine the law applicable to divorce and legal separation, both in intracommunity cases and in cases involving a third state.<sup>31</sup>

If the parties have not chosen the applicable law themselves (from a list of four alternatives), divorce and separation will be governed by the law of the country with which the spouses are deemed to be most closely connected, either on the basis of their common habitual residence, or, failing that, their last common habitual residence if one of the spouses still resides in that state, or failing that, their common nationality (or, in the case of the United Kingdom and Ireland, their common ‘domicile’). In all other cases, forum law applies.

Considering the fact that divorce is a rather sensitive matter, I am surprised that the Commission has chosen to formulate a ‘neutral’ choice-of-law rule based on the principle of proximity, with a lex fori stop-gap. As a result, member states supporting the *favor divortii* may be obliged to resort to public policy – Article 20(e) in the Commission’s proposal – if the law designated by the prospective regulation does not allow divorce at all<sup>32</sup>, or only under very strict conditions. In this respect, the proposal does not only run counter to the private international law of the member states adhering to the principle that divorce is primarily governed by forum law, but also to the lex fori exception, as provided by the choice-of-law rules of other member states, in cases in which divorce would not be possible under the applicable foreign law.<sup>33</sup> It is clear that the proposal does not take account of any policies underlying the substantive divorce laws of the member states. If it turns out, in an individual case, that there is a conflict between the applicable foreign law and the forum’s fundamental views on marriage and divorce, there is no other remedy but the proposal’s public policy provision.<sup>34</sup>

Apparently, the Commission’s proposal did not meet with the approval of the Committee on Civil Matters nor with that of the national delegations. At any rate, the Presidency’s draft of 13 Febru-

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31. Curiously, the proposal does not explicitly state that the territorial scope of its choice-of-law rules is universal. However, the Explanatory Memorandum – Article 20(c) – leaves no doubt that ‘the conflict-of-law rule can designate the law of a Member State of the European Union or the law of a third State’. A provision to this effect has been included in the draft by the German Presidency dated 13 February 2007, *supra*, footnote 25, Article 20(c), replacing a provision on the application on foreign law.

32. For instance: a Dutch woman is married to a citizen of Malta, where the spouses had their last common habitual residence until the woman moved back to the Netherlands. After six months, she will have access to a Dutch court to petition divorce (Article 3(1)(a), 5th indent, Brussels II bis). Under the proposed Article 20b(a), the court would have to apply the law of Malta, which does not allow divorce.

33. E.g.: Article 17(1) *EGBGB*; Article 55(3) Belgian Statute on Private International Law 2004.

34. If I have correctly understood the information on Cypriot law I found on the Internet, it may refer to the divorce law of the Orthodox Church of Cyprus, allowing divorce on various grounds, one of which is ‘immoral or disgraceful behavior’. This includes the situation in which a wife stays away from home overnight without her husband’s consent. Wives cannot advance this ground, as husbands have the right to stay away from home as they please.

ary 2007 offers two options in which the decisive role of *lex fori* is reinforced. The first option allows application of forum law ‘where the law applicable pursuant to [the previous paragraphs] does not provide for divorce’. The second option, suggested by the French delegation, is based on the doctrine of facultative choice of law: *lex fori* applies unless either one of the spouses has requested application of another law, which could be either the law of their (last) common habitual residence or the law of their common nationality. Adoption of the first option would obviate the need for a public policy exception in case the applicable law does not allow divorce at all. Under the second option, the applicability of such a law can only be countered with the help of public policy. In either case, it remains questionable whether a law that only allows divorce under unusually strict conditions – particularly if it is the law of another member state – could be rejected on the same ground.

## 2.2. Maintenance obligations

The next proposal to be discussed is the one on maintenance obligations. The choice-of-law issue is covered by Articles 12-21, a surprisingly detailed treatment in comparison with the two provisions on divorce choice of law in the proposal on matrimonial matters. Here, Article 18 makes it clear that the scope of the proposed regulation is universal. In the absence of a choice of law by the parties (Article 14), maintenance obligations are governed by the law of the creditor’s habitual residence: Article 13(1). This provision, copied from Article 4 of the Hague Convention on Maintenance Obligations 1973, is based on the principle of functional allocation<sup>35</sup> rather than the principle of the closest connection. The *favor* principle underlies Articles 13(2)(a), 13(2)(b) and 13(3), all three of them alternative reference rules allowing the choice of a law that does recognize a maintenance obligation where the primarily designated law does not. Article 13(2)(b) even allows the creditor to opt for the application of *lex fori* – supposedly more favorable than the law of his/her habitual residence – provided that the debtor is a resident of the forum state. It is clear, therefore, that the proposal supports a substantive policy protecting the maintenance creditor.<sup>36</sup>

Nevertheless, the proposal does contain a public policy provision, probably meant to justify the non-application of a law that would cause too much hardship on the maintenance debtor, as it is

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Other (member) states are likely to consider such a ground as offensive to the principle of equality between men and women, hence contrary to the forum’s public policy.

35. *Supra*, footnote 12.

36. There is one exception: if under the applicable law the debtor would be obliged to support a person other than a child, a vulnerable adult, or an (ex-)spouse – say a parent, a brother or sister, a cousin – he/she may oppose the claim on the ground that there is no such obligation under the law of their common nationality, or in the absence of a common nationality, the law of the country in which the debtor is habitually resident: Article 15(1). In case of maintenance obligations between spouses or ex-spouses, the debtor may oppose the claim on the ground that there is no maintenance obligation under the law of the country ‘with which the marriage has the closest connection’. See also, *infra*, footnote 64 and accompanying text.

hardly possible – considering the combination of jurisdictional alternatives in Article 3 ff.<sup>37</sup> and the favor-inspired choice-of-law rules of Article 13 – that the creditor would be unable to obtain maintenance at all. However, Article 20 restricts the public policy exception to situations in which the law of a non-member state applies: ‘The application of a provision of the law of a Member State designated by this Regulation shall not be refused on such a [public policy] ground’. This novel addition expresses an unshakeable belief in the fundamental fairness of the maintenance laws of the member states. While I do not want to be unduly skeptical, I fail to see on what grounds this belief is based, given the fact that maintenance has not been a topic of European harmonization. At any rate, the provision could be considered discriminatory vis-à-vis non-member states. In the draft by the Finnish Presidency and the incoming German Presidency, the restriction has been deleted, which brings Article 20 into line again with the public policy provisions in all other proposals on EC choice of law.

### 2.3. Contractual and non-contractual obligations

I shall be brief in my discussion of the two proposals for regulations outside the area of family law, colloquially known as the ‘Rome I’ and ‘Rome II’ regulations. In all of the drafts that have been published so far, we encounter various policy-oriented choice-of-law rules, for the benefit of consumers and employees in Rome I<sup>38</sup>, and for the protection of the victims of environmental damage<sup>39</sup> and – possibly – the victims of defective products<sup>40</sup> and unfair competition<sup>41</sup> in Rome II. Express policy

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37. Articles 3, 4 and 5 confer jurisdiction on the *forum rei*, the *forum actoris*, the court exercising jurisdiction in proceedings to which maintenance is an ancillary matter, the court chosen by the parties, and the court before which the defendant enters an appearance without contesting its jurisdiction. Cf. Articles 2, 5(2), 23 and 24 Brussels I Regulation.

38. Articles 5(1) and 6(2)(a) Rome I proposal; cf. Articles 5(3) and 6(2)(a) Rome Convention 1980. Another manifestation of the principle of functional allocation can be found in the brand-new provision of Article 7(1) Rome I proposal, referring to the law of the country in which the agent has his habitual residence. Cf. Article 6(1) Hague Convention on the Law Applicable to Agency 1978. In the draft by the Finnish Presidency and the incoming German Presidency, the proposed provision on agency has been deleted.

39. The provision on product liability, as originally proposed by the Commission (Article 4 = Article 6 of the amended proposal), refers to the law of the victim’s habitual residence, subject to a foreseeability exception. The Council has opted for a cascade of connecting factors coinciding with the country in which the product was marketed, subject to a foreseeability provision and a ‘manifestly closer connection’ exception. That implies that the Council’s solution (Article 5 Common Position) is dominated by the principle of proximity instead of the principle of functional allocation underlying the Commission’s proposals. Still, the primary connecting factor laid down in Article 5 Common Position refers to the victim’s habitual residence.

40. Article 7 Rome II proposal (hardly changed in the Common Position) is obviously based on the *favor* principle as it allows the victim of environmental damage a choice between the law of the place of injury (*lex loci damni*) and the law of the country in which the event giving rise to the damage occurred.

41. Article 6(1) Common Position refers to the law of the country where competitive relations or the collective interests of consumers are (likely) to be affected. The rule reflects a concern for the public interest of the country ‘where competitors seek to gain the customer’s favor’ (Explanatory Memorandum accompanying the Commission’s original proposal, p. 16) and for the private interests of local competitors and consumers: the country where the competition takes place has an interest in the regulation of its markets according to its own standards, while private parties have an interest in being protected by the same rules as those applying in domestic situations. In this respect, Article 6 is clearly based on the principle of functional allocation. This is confirmed by the fact that Article 6(4) Common Position does not allow the parties to choose the applicable law themselves.

considerations have found their way into the provisions on overriding mandatory rules<sup>42</sup>, public policy<sup>43</sup>, and the precedence of Community law.<sup>44</sup> They all merit closer inspection, as they could shed some light on the scope of ‘European’ public policy in matters of family law and succession as well.

Contrary to the proposals on divorce and maintenance, both Rome I and Rome II contain provisions giving precedence to ‘overriding mandatory rules’, defined in the latest draft of Rome I as ‘provisions the respect for which is regarded as crucial by a country for safeguarding *its public interests, such as its political, social and economic organisation*’.<sup>45</sup> In the latest drafts of both Rome I and Rome II, contrary to the Commission’s proposals, the scope of this provision has been limited to overriding mandatory rules of the *forum* state, probably in an attempt to mollify the United Kingdom and other member states objecting to the bilateralization of the doctrine of *Sonderanknüpfung*.

To appreciate their effect on the external relations of the European Union, the texts on overriding mandatory rules should be read in conjunction with two other, seemingly unrelated, provisions in Rome I and Rome II. In the first place, if in an intracommunity case the parties have chosen the law of a non-member state, that law will not be applied if it runs counter to rules of Community law, ‘as implemented in the Member State of the forum, which cannot be derogated from by agreement’.<sup>46</sup> There would be no need for this provision if there would be no difference between ‘overriding’ and ‘ordinary’ mandatory rules of Community law<sup>47</sup>, as the provisions on overriding mandatory rules are sufficient to let them override the applicable law, whether or not it was chosen by the parties. It must be assumed, then, that not all Community law is meant to protect the Community’s public interests and that some of its mandatory rules may be meant to protect private interests only.

The second provision that has a bearing on the relationship between the *lex causae* – whether chosen by the parties or not – and Community law can be found in the original Rome I and amended Rome II proposals, where it says: ‘The Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which ... (c) lay down rules to promote the smooth operation of the internal market’.<sup>48</sup> As I read these provisions, it could mean that *any* rule of

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42. Article 8 Rome I proposal; Article 12 Rome II (original proposal), Article 13 (amended proposal), Article 16 (Common Position).

43. Article 20 Rome I proposal; Article 22 Rome II (original proposal), Article 23 (amended proposal), Article 26 (Common Position).

44. Article 22 Rome I; Article 23 Rome II (original proposal), Article 3 (amended proposal), Article 27 (Common Position).

45. The words in italics were added in the draft by the Finnish Presidency and the incoming German Presidency.

46. Article 3(5) Rome I; Article 14(3) Rome II (Common Position). In the original proposals, the Commission went much further. In this situation, a parties’ choice of the law of a non-member state ‘shall be without prejudice to the application of such mandatory rules of Community as are applicable to the case’ (Article 3(5) Rome I proposal); ‘mandatory rules’ are defined in Article 3(4) as ‘rules which cannot be derogated from by contract’. Article 10(3) Rome II prescribed that a choice by the parties ‘shall not debar the application of provisions of Community law’. In the latter formula, Community law is apparently deemed to be mandatory *per se*.

47. Although the provisions on overriding mandatory rule do not explicitly refer to Community law, but only to ‘the law of the forum’, Community law must be considered as part of forum law.

48. Article 22(c) Rome I proposal ; Article 3(d) Rome II (amended proposal). In the *original* Rome II proposal, Article 23 did not refer to the smooth operation of the internal market. Instead, it gave precedence to ‘mandatory rules of

Community law could supersede the law designated by the Regulation, as the smooth operation of the internal market can be considered the primary goal of all EC legislation adopted so far. If so, European law would always take precedence over the law of a non-member state if it is incompatible with any substantive rule laid down in a regulation or directive. To the extent that the public policy provisions in both regulations are meant to safeguard the values and interests of the European Community, they would have been made virtually redundant by the adoption of the Commission's suggestion. In the latest versions of Rome I and Rome II, the references to rules promoting the smooth operation of the internal market have been deleted. If the Council has its way, only EC conflict-of-law rules for 'particular matters' will be excepted.

#### 2.4. *Succession and matrimonial property*

Returning to matters of family law and succession, I have not much to say about policy considerations that may find their way into the provisions of future choice-of-law regulations on these topics. As far as I know, no draft proposals have been published, and at this time one can only speculate on their contents. Neither the Green Paper on matrimonial property nor the one on succession addresses the issue of public policy. As far as matrimonial property is concerned, there does not seem to be a great need for policy-oriented choice-of-law devices. A general public policy exception will probably suffice – just in case.

The most sensitive issue in a choice-of-law instrument on succession appears to be the question of whether or not the statutory right to a *réserve héréditaire* – the portion of an estate reserved for the near relatives of the deceased – should be governed by the *lex causae*, or by an exceptional choice-of-law construction upholding such rights, if need be, against the *lex causae*. The reserved portion used to be sacrosanct in most civil law countries, and perhaps it still is in some of them. That is why such countries are likely to qualify their substantive rules on this topic as 'overriding mandatory rules', or why they may be inclined to reject a foreign law which does not attribute a similar right to the near relatives of the deceased, particularly if the beneficiaries are nationals or residents of the forum state. However, the reactions to the Commission's call for responses to its Green Paper on succession and wills do not show much support for a special regime. The response by the *Groupe européen de droit international privé* seems to express the prevailing opinion: 'The reserved portion is governed by the law applicable to succession and should not be subject to international public policy or overriding mandatory rules.'<sup>49</sup> In a summary of the responses<sup>50</sup>, the Commission observed that most respon-

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the Community and the Community public policy exception', whatever that may be, as well as to 'specific principles of the internal market relating to the free movement of goods and services' (Explanatory Memorandum, p. 29).

49. *Réponse du GEDIP au livre vert de la Commission européenne sur les successions et testaments*, response to question 10: [http://ec.europa.eu/justice\\_home/news/consulting\\_public/successions/news\\_contributions\\_successions\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions_successions_en.htm).

dents were relatively unconcerned about the possibility that a testator could abuse his freedom of choice or change his habitual residence just to disinherit the *héritiers réservataires*. The testator's autonomy is likely to be restricted to the choice of a law with which there is an obvious connection, particularly the deceased's national law, and a change of residence will probably have no effect if the new habitual residence does not meet certain standards as to its duration and the resident's intentions. It is further noted that recent law reform in the field of succession tends to reduce the primacy of the reserved portion, at least with respect to beneficiaries who are not, or no longer, dependent on the testator. Again, a general public policy provision might suffice to redress patently unacceptable results.

## 2.5. *Summing up*

- We have seen that all drafts discussed provide for a general public policy escape. The proposal on maintenance is the only one prohibiting the invocation of public policy as a defense against the law of another member state. In the other proposals, public policy is not subject to such restriction. If the latest draft of the maintenance proposal were to be adopted, none of the four instruments would preclude the deployment of public policy in intracommunity cases.
- Overriding mandatory rules of the forum are covered by a special provision in the Rome I and Rome II drafts only, not in the proposals on the law applicable to divorce and maintenance. This implies that protection of the public interests of the forum state in matters of divorce and maintenance can only be achieved by the invocation of public policy, and, as far as maintenance is concerned, only to displace the law of a non-member state if the Commission will have its way.
- Community interests can be taken into account – under Rome I and Rome II – if they are deemed to be expressed in overriding mandatory rules, as Community law should be considered as an integrated part of forum law. The proposals on divorce and maintenance only allow the advancement of Community interests by deployment of the public policy exception as a defense against foreign law.
- All proposals discussed, except the one on divorce, contain 'hidden' public policy provisions. Disguised as 'neutral' choice-of-law rules they are based on the principle of functional allocation or the *favor* principle, which means that the connecting factor is a translation of the policies and interests underlying the corresponding substantive law rather than an expression of the principle of proximity. It must be assumed, therefore, that the member states have some

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50. *Ibid.*: *Audition publique 'Successions et testaments', Bruxelles 30 novembre 2006, Résumé des réponses au livre vert.*

policies and interests in common.<sup>51</sup> There is a definite concern for the interests of the maintenance creditor, consumers, employees and (victims of damage to) the environment.

- Curiously, the Rome I and Rome II drafts contain considerably more policy-oriented provisions, hidden or not, than the proposals on family law. Considering that substantive family law, especially in the field of divorce, is permeated with public policy considerations, one would assume that the proposed conflicts rules would reflect more concern for the values and interests of the forum state. The absence of such reflection in the Commission's proposal on divorce not only suggests that the differences between the (divorce) laws of the member states are significant but also that those differences can only be bridged by strictly neutral choice-of-law rules. So far, apparently, no common European policies have developed in these fields.

### 3. *The fundamental values and public interests to be protected by public policy*

The next question concerns the fundamental values and public interests which are meant to be protected by the public policy provisions in the EC proposals on choice of law. Is there, apart from national values and interests, a distinct category of *European* values and interests? Or do the values and interests of each member state necessarily coincide with those of the European Community? If so, does that mean that the exception can only be invoked against the law of non-member states?

#### 3.1 *National values and interests*

Even if there were a distinct category of 'European' values and interests, the EC proposals on choice of law do not preclude the invocation of public policy where only the forum's domestic interests are at risk. Since the territorial scope of all proposals discussed is universal, it stands to reason that public policy may be used as a shield against the law of a non-member state if its application would be detrimental to the interests of the forum state, even if no Community interest would be at stake. In my opinion, even the law of another member state cannot be impervious to a public policy defense if it threatens the national values and interests of the forum state. It should be noted that both the Commission's proposal on maintenance and an earlier draft of its proposal on divorce limited the use of public policy to situations in which the law of a *non*-member state applies. The Commission did not maintain this limitation in the final text of its proposal on divorce, and it was deleted in the Finnish and German Presidencies' draft of the proposal on maintenance. Neither one of the original Rome I and Rome II

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51. In the German Presidency's version of the 'Rome III' proposal, which I would rather name 'Brussels II *ter*', the right to obtain a divorce is guaranteed – in the first option – in a *lex fori proviso* appended to Article 20(b). If adopted, this escape clause would express a common European policy supporting the possibility of divorce, at least in principle.

proposals suggested this kind of restriction. It would seem, then, that there is a (growing) consensus on the scope of the public policy exception: it can be invoked in any situation in which application of the designated law – whether the law of a member state or a non-member state – would have an intolerable effect in the forum state.

It is clear, then, that the public policy provisions in the EC proposals on choice of law are meant to protect national values and interests, and that they do not (and as far as the maintenance proposal is concerned: should not) discriminate between the laws of other member states and those of non-member states. Do those values and interests coincide with *European* values and interests? Or is there a specific *European* public policy, meant to protect the values and interests of the European Community as such? And, if so, are the courts of the member states obliged to protect those interests if the applicable foreign law – probably, but not necessarily, the law of a non-member state – does not run counter to the national interests of the forum?

### 3.2. *Is there a difference between the values and interests of the forum and those of the EC?*

I would say that there is no difference between national and European values and interests where human rights and fundamental freedoms are concerned. All member states are parties to the European Convention on Human Rights and subscribe to the Charter of Fundamental Rights of the European Union. If a rule of foreign law does not satisfy the standards laid down in these instruments its application should be denied, even if the case is only slightly connected with the EU. Conversely, a foreign rule that cannot be faulted on that score should be applied by the courts in all member states. Yet, there could be differences of opinion, even among member states, whether or not a rule of substantive law offends European fundamental values. The Charter on Fundamental Rights prohibits any discrimination based on sexual orientation. This would seem to imply that the courts in the European Union should refuse to apply a foreign law that denies maintenance to a creditor who was married to, and divorced from, a same-sex spouse, or, conversely, that public policy cannot be invoked against a foreign law that does provide for maintenance in such a case.<sup>52</sup> I wonder if such impartiality may be

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52. For instance: a Dutch-Polish same-sex couple has been married and divorced in the Netherlands. During their marriage they were habitually resident in Poland. In accordance with Article 14(b) of the maintenance proposal, they had chosen Dutch law to govern their maintenance obligations. After the Dutch partner has returned to the Netherlands, he claims maintenance from his ex-spouse in a Polish court. The applicable law would be Dutch law, under which the maintenance claim should be granted. Leaving aside the restriction on public policy proposed by the Commission, I could imagine that a Polish court would be reluctant to apply Dutch law. Perhaps it would not even need public policy to circumvent the application of Dutch law by refusing to recognize the maintenance obligation as arising from a ‘marriage’ within the meaning of Article 1. Conversely, if the Polish partner would sue his ex in the Netherlands and there were no agreement on the applicable law, a Dutch court would probably apply Dutch law as *lex fori* pursuant to Article 13(2)(b). In that case, the debtor might want to rely on the escape offered in Article 15(2), asserting that their marriage was most closely connected with Poland and that he has no maintenance obligation under Polish law. Would a Dutch court then be justified in invoking public policy to escape application of Polish law?



expected from the judiciary in all member states, including those where same-sex marriages are considered morally offensive.

Assuming that, despite such doubts, the member states cherish more or less the same ideals with respect to the protection of human rights and other fundamental values listed in Article I-2 of the Treaty establishing a Constitution for Europe, the only typical 'European' values and interests I can think of that may require protection by public policy and other private international law devices are rooted in the objective of establishing 'an area of freedom, security and justice without internal frontiers and an internal market where competition is free and undistorted'.<sup>53</sup> Obviously, furthering this objective goes beyond national interests. In that respect, the free movement of persons, goods, services and capital, as well as free and undistorted competition must be considered as essential European interests that should be protected by national courts, even if the forum state is not, at least not directly, concerned with the outcome of the litigation. Even if a distinction can be made between 'national' and 'European' interests, the member states are obliged – if only on the ground of Community loyalty – to defend the interests of the European Community as if they were their own.

### 3.3. *Identifying 'essential' European interests*

Of course, the European Union has loftier goals and higher aspirations than just the removal of national barriers to the free movement objectives of its internal market. It aims to promote peace, social justice, solidarity between generations, the rights of children, scientific and technological advance and sustainable development, etcetera. Its values include respect for human dignity, freedom, democracy, and the rule of law. Impressive as these proclamations may be, their translation into rules that affect the legal relations between private parties has not much progressed beyond regulations and directives concerning the internal market and free competition. That is why I find it difficult to use them as guidelines in identifying essential 'European' values and interests that justify the non-application of a disagreeable foreign law. For instance, it could be argued that a law allowing the dismissal of employees at the age of 65 conflicts with the solidarity between generations, or with the prohibition of discrimination on the ground of age. Yet, as long as the Community allows the member states to maintain such age limits, their courts can hardly be expected to reject a foreign rule that leads to the same result as their own. That is why I also have my doubts about the impregnability of substantive laws that are in line with European values as enunciated in the EC Treaty or the European Constitution – such as the prohibition of discrimination on the ground of sexual orientation – but have no foundation in secondary sources of European law. If the application of such laws runs counter to *national* values and interests – so far unaffected by European legislation – a refusal to apply them on the ground of na-

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53. Article I-3(2) Treaty establishing a Constitution for Europe. Cf. Article 3(1)(c), 3(1)(g) and article 61 EC Treaty.

tional public policy may even be justified. Conversely, it is hard to imagine that a national court would reject a foreign law – even the law of another member state – that does not hurt forum policies and might even be identical to the corresponding domestic law, on the sole ground that it violates Community principles.

If this is true, the only European values and interests to be upheld against the application of foreign law – to the extent that they do not coincide with the national values and interests of the forum – are those that are embodied in EC regulations and directives.<sup>54</sup> In my view, the member states cannot be obliged to defend values and interests which are not their own, on the strength of EU aspirations alone. This implies that, even in the relations between member states, public policy can be used to ward off application of non-harmonized law that does not conform with the forum state's basic standards. Conversely, application of the law of another member state cannot be refused if it conforms with European standards, as expressed in regulations and directives.

#### 3.4. *Does every provision of European law embody an essential European interest?*

Since the focus of this article is on 'European' public policy in matters of family law and succession, I could conclude that there is no secondary EC legislation boosting the protection of Community interests in these fields, hence no special role for public policy, and leave it at that. Yet, I should like to take my analysis one step further, beyond the boundaries of non-harmonized law, if only to see what will happen if the Community would be allowed to pursue the approximation of the substantive laws of the member states in these sectors as well.

Even if the member states are not obliged to defend European public interests against foreign law if they have not been embodied in substantive European law it could be asked whether a violation of *any* rule of Community law calls for a public policy defense. Or should a distinction be made between rules that do and rules that do not express a fundamental European policy? If so, there could be no objection to the application of a foreign law that contravenes a rule of the latter category.

An answer to this question could be found, perhaps, by drawing a parallel between the public policy exception and the doctrine of overriding mandatory rules. Apart from human rights issues, both approaches tend to achieve the same goal: they are meant to protect our own public interests against the interest a foreign state may have in the application of its law. The 'relative' function of public policy measures the effect of applying a foreign rule against the intensity of the forum connection, which is essentially the same as assessing the forum's interest in the application of its law under the doctrine

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54. Cf. Sylvaine Poillot Peruzzetto, The exception of public policy in family law within the European legal system, in: *International Family Law for the European Union* (eds. Johan Meeusen *e.a.*), Antwerpen/Oxford, 2007, p. 288 ff., §§ 17 and 20, citing ECJ 27 September 1988, case 81/87 (*Daily Mail*) in support of the proposition that the influ-

of overriding mandatory rules. Thus, it would seem there is a connection between overriding mandatory rules and the forum interests that are protected by public policy when threatened by foreign law. The rules in which those interests have found expression are none other than the forum's overriding mandatory rules.

As noted before, the Rome I and Rome II proposals distinguish between overriding mandatory rules of the forum state and 'provisions of Community law ... which cannot be derogated from by agreement'. It follows that some rules of Community law must belong to the category of 'ordinary' mandatory rules, which only take precedence over the designated law if it was chosen by the parties, and then only in the situation described in Articles 3(5) and 6(1) Rome I, or Article 14(3) of the Council's Common Position on Rome II. They do not claim application, obviously, if the applicable law is designated by objective factors rather than by the will of the parties. It may be assumed, therefore, that mandatory rules of this kind do not express a fundamental European policy. It follows, I submit, that public policy cannot be invoked to prevent the application of a foreign rule that contravenes European rules of this kind, whether they were laid down in regulations or implemented in substantive forum law.

That leaves us with the question which provisions of European law qualify as overriding mandatory rules – or rules embodying public interests that may require the invocation of public policy – and which do not. Part of the answer may be found in the ECJ's ruling in the *Ingmar* case.<sup>55</sup> While this decision neither sheds any light on the choice-of-law approach the ECJ adopted to support its decision (if it was based on any choice-of-law reasoning at all), nor on the extent of its holding, it is clear that the Court gave precedence to the Agency Directive as implemented in the law of the United Kingdom. Unless contracts of agency are to be equated with employment contracts, which implies that *Ingmar Ltd.* could not be deprived of the protection afforded by its local law, the decision can only be explained – from the perspective of private international law – in terms of the doctrine of overriding mandatory rules. It is questionable, however, whether the *Ingmar* ruling applies to *all* cases in which a member state is involved, regardless of its interest in the outcome, and whether it gives precedence to *all* rules of secondary Community law, regardless of their objectives.

In my view, a rational interpretation of *Ingmar* – in line with the Commission's concern for a smooth operation of the internal market – only requires that Community law be given priority if its objectives are actually furthered by its application. If the Agency Directive is meant to protect commercial agents on the one hand and to further the operation of the internal market and free competition on the other, neither the United Kingdom nor the Community could be said to have an interest in the

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ence of Community principles on national public policy 'should not be too strong' in non-harmonized areas, notably family law.

55. ECJ 9 November 2000, C-381/98, Jur I-9305 (*Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*). At stake was the applicability of the British implementation of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (*O.J.* 1986 L 384, p. 17), affording compensation to agents on termination of agreements with their principals.

application of its law if Ingmar had been active as an agent in a *non-member* state. In other words, even if a rule of Community law qualifies as an overriding mandatory rule, its precedence over the *lex causae* should be determined by its actual effect in light of the Community interests it is meant to protect. It should not be applied if those interests are not at stake.

However, I do not think that all Community law is meant to protect *essential* Community interests. If that were true no distinction could be made between regulations or directives that can claim precedence over the *lex causae* and those that cannot, and we have seen that this distinction is actually made in the Rome I and Rome II proposals. In my view, the distinction depends on the objective of the rule in question. If a mandatory rule of Community law is primarily meant to protect the private interests of groups of individuals, such as commercial agents, employees or consumers – thereby advancing the Community’s public interests only indirectly – it should not be treated as an overriding mandatory rule, nor should it be used as an indication that European public policy should be invoked against a foreign law whose application would mostly hurt the interests of an individual. I admit that it is difficult to square this proposition with the *Ingmar* decision, but it is supported by the latest drafts of Rome I and Rome II, in which ‘rules to promote the smooth operation of the internal market’ are no longer given precedence.

In my opinion, the only European rules that do deserve the status of overriding mandatory rules – and could be seen, therefore, as guidelines for the invocation of European public policy – are those that are *primarily* meant to protect European public interests. Most of these rules are likely to have a public law character. Just like the forum’s public law seldom has any bearing on the outcome of civil litigation, the cases in which the public interests of the European Community are actually at stake will be relatively rare. Examples could be found in contracts in violation of EC legislation in which some act or transaction is declared illegal. If the parties have chosen the law of a non-member state, it should be displaced if the case is within the scope of the EC rule at issue.<sup>56</sup>

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56. For instance: implementation of Directive 2003/33 of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products has led to prohibitions of tobacco advertising on radio, in the press and other publications, except for publications intended exclusively for professionals in the tobacco trade and publications printed and published in third countries. An action for damages for breach of contract brought by an American advertiser against a European newspaper, or vice versa, is likely to be denied by a court in a member state where such advertising is illegal. A choice-of-law clause designating the law of a non-member state will probably be overruled by EC (public) law as implemented in the forum state.

### 3.5. *The free movement of persons*<sup>57</sup>

I have asked myself whether the principle of the free movement of persons or the principle of European citizenship – both of them firmly embedded in the primary sources of European law – could supply an argument for or against the use of public policy by the national courts of the European Union, particularly in matters of family law. Without a doubt, both principles embody European public interests. Does that mean that application of the law of another member state should be refused if it would impede the free movement of persons? Or, conversely, would a court be obliged to apply the law of another member state, regardless of its contents, because rejection on public policy grounds would prevent a European citizen from moving freely within the European Union?

Given that public policy cannot be used as a shield against the forum's own law, I have tried to come up with an example in which the application of the law of another member state to an issue of family law would result in an impediment to the free movement of the person or persons concerned. Perhaps I am biased, or unimaginative, or both, but I cannot think of any situation in which such danger could present itself in a *choice-of-law* context. How could the designation and application of a foreign law, or its replacement by forum law on public policy grounds, affect the free movement of persons? Whether or not a divorce will be granted, a maintenance claim upheld, an adoption allowed, a name changed, paternity established, etcetera , etcetera – the application of law X or law Y *as such* does not affect the freedom of movement of the persons involved. Whatever the outcome of the choice-of-law process, public policy will not be needed to safeguard the principle of free movement. It is only at a later stage that European principles may come into play and that recourse to public policy may be needed to uphold them.

The freedom of movement can be impeded if the *status quo* created in one member state, either by operation of law or by judicial decision, is not recognized in another. If one of the spouses in a same-sex marriage concluded in the Netherlands is not permitted to join his partner working in Germany<sup>58</sup>, the public policy question focuses on the recognition of same-sex marriages concluded abroad, not on the law governing this kind of relationship. The same is true if an unmarried couple has legally adopted a child in one member state, while they would not be allowed to do so in another.

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57. The link between the free movement of persons and conflicts law (including choice of law) is forged in Title IV (Articles 61-69) EC Treaty covering 'visas, asylum, immigration and other policies related to free movement of persons'. Measures intended to further those policies include 'improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases' and 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction': Article 65.

58. Verwaltungsgericht Karlsruhe 9 September 2004, *IPRax* 2006, p. 284, refusing to recognize a Taiwanese man, married to a Dutchman working in Germany, as a 'spouse' within the meaning of Regulation 1612/68 on the freedom of movement for workers within the Community. For an opposite result, see: Tribunal administratif du Grand-Duché de Luxembourg 3 October 2005, no. 19509 (same-sex marriage concluded in Belgium; Malagasy spouse of

Non-recognition of the adoption will then result in an obstacle to free movement. In short: it is not the outcome of the choice-of-law process that could be a threat to the principle of mobility but the refusal to recognize rights and obligations established in another member state in accordance with its own law or the law of third state. That is why, probably, the Brussels II bis Regulation does not allow non-recognition of a divorce judgment rendered in another member state on the sole ground that the divorce could not have been granted under its own law.<sup>59</sup> However that may be, it will be clear that the freedom of movement is much more dependent on the acceptance of a legal relationship created elsewhere than on the application or non-application of the designated law.

### 3.6. *Public policy as a means to preclude the application of the law of another member state*

It will be remembered that public policy cannot be invoked against application of the forum's own law. If there would be a European civil code, or if the private laws of the member states – including family law, the law of succession, and property law – would be fully harmonized, it would not make too much of a difference, in intracommunity cases, which forum had jurisdiction and which member state's law would apply. The case could be treated as a 'domestic' European case, to be decided by a 'domestic' European court, sitting either in France or in England, in Italy or Estonia, just like a domestic case in the Netherlands can be decided by a court in Amsterdam, Utrecht or Maastricht. If the approximation of the laws of the member states had progressed this far, public policy could no longer be deployed against the law of another member state. However, we have not nearly reached this stage. The ongoing harmonization process may have had a profound impact on various sectors of civil and commercial law but many other sectors have been left untouched. A European civil code, if desirable at all, is still a long way off.

Thus, resort to public policy in intracommunity cases should not be precluded, I think, in areas where the substantive laws of the European Union have not been, or cannot be, harmonized.<sup>60</sup> In those

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Belgian national working in Luxembourg is entitled to family life, and should therefore be permitted to take up residence in Luxembourg).

59. Article 25 Brussels II bis. Prof. Meeusen has argued that this restriction should be abolished, as the existing differences between the substantive family laws in Europe, particularly in the field of divorce, are still substantial enough to justify a public policy intervention: Johan Meeusen, *Op weg naar een communautair internationaal familie(vermogens)recht? Enkele Europeesrechtelijke beschouwingen*, Report for the annual meeting of the Netherlands International Law Association 2006, *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, no. 133, p. 56 ff. While I see a discrepancy between this argument and Prof. Meeusen's endorsement of the principles now dominating European conflicts law (coordination, certainty and predictability, proximity, and the like), I fully agree with his views on the role of public policy in matters of international family law.

60. It is questionable whether the public policy exception should be used to refuse the application of the law of another member state if that state has failed to implement a European directive. I am inclined to agree with Kurt Siehr, *Internationales Privatrecht, Deutsches und Europäisches Kollisionsrecht für Studium und Praxis*, Heidelberg 2001, p. 488, who argues that public policy is not an appropriate instrument to achieve harmonization. See also: Martiny, *supra*, footnote 11, p. 538: 'Ein Mitgliedstaat braucht nicht über den anderen zu wachen.' *Contra*: Marc Fallon, *Libertés communautaires et règles de conflits de lois*, in: *Les conflits de lois dans le système communautaire* (eds. A. Fuchs *e.a.*), Paris, 2004, pp. 31-80, at p. 75. See also: Jan Kropholler, *Internationales Privatrecht*, 6th ed., Tübingen, 2006, § 36 III 2c, on the ground that loyalty to the Community (*Gemeinschaftstreue*) requires the deployment

areas, the divergences between the laws of the member states may be so wide that a court can hardly be expected to apply the law of a sister state if it fails to satisfy the forum's minimum standards. By contrast, there are areas of substantive law in which the differences between the laws of the member states have been reduced to the limits of European Directives, which implies that they are at least within the limits of European public policy. It is hardly conceivable that a harmonized rule of substantive law will be rejected on the ground that it violates the forum's fundamental values or public interests. Given this distinction between harmonized and non-harmonized law, I find it rather surprising that the proposal for a regulation on maintenance obligations prohibits the use of public policy in intracommunity cases, while the Rome I and Rome II proposals allow it without this restriction. One would think that there is less need for public policy in areas where the law to be applied and the law of the forum have been aligned by harmonization than there is in areas where such alignment cannot (yet) be achieved. There are still huge differences between the laws of the member states with regard to divorce and maintenance – as there are with regard to most other topics of family law, as well as succession – some of which the forum community will refuse to accept. It is in this area that the European Union has barely begun to realize its goal of creating an 'area of freedom, security and justice'. If it is impossible, at this time, to harmonize European family laws the adoption of uniform choice-of-law rules may be the next best solution. However, uniform choice of law does not eliminate any of the differences between substantive laws. That is why we still need a device to keep out unwelcome foreign law, even if it is the law of one of our EU sister states.<sup>61</sup>

### 3.7. *Public policy as a means to preclude the application of the law of a non-member state*

As we have seen, there are several ways to preclude the choice of a foreign law whose application would threaten the forum's public interests. Some choice-of-law rules may be based on 'hidden' public policy considerations ensuring the application of *lex fori* or a foreign law that favors a predetermined result. The doctrine of overriding mandatory rules provides another means of safeguarding forum interests. In the context of European choice of law, there are provisions excluding the law of a non-member state if that law would fail to meet minimum standards laid down in European substantive law.<sup>62</sup> We have also seen that the latest Rome I and Rome II drafts restrict the parties' freedom of

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of public policy in such cases. Yet, Kropholler's view is based on the assumption that all other preconditions for a public policy intervention are fulfilled, including the condition that *fundamental* values or *public* interests are threatened. This might not often be the case. For instance: it is hard to see why a foreign rule allowing the consumer four days to withdraw from a contract without penalty, while it should be seven days according to the directive, should jeopardize the public interests of the Community or the forum.

61. In the same vein: Johan Meeusen, System shopping in European private international law in family matters, in: *International Family Law for the European Union* (eds. Johan Meeusen *e.a.*), Antwerpen/Oxford, 2007, p. 274, § 78.

62. Such provisions can be found in various directives, notably the directives on consumer protection. See, e.g., Article 9 Directive 94/47 of 26 October 1994 on timesharing; Article 7(2) Directive 99/44 of 25 May 1999 on certain aspects of the sale of consumer goods; Article 12(1) Directive 2002/65 of 23 September 2002 concerning the distance

choice in cases in which there are no factual connections with the (non-member) state whose law they would want to choose. Furthermore, in the original Rome I and Rome II proposals there were provisions ensuring the application of rules of Community law meant ‘to promote the smooth operation of the internal market’.

As things stand now (March 2007), an undisguised public policy defense against the law of a non-member state will seldom be necessary under the Rome I and Rome II regulations, not only because the laws that may govern an issue sounding in contract or tort are not quite likely to violate human rights or fundamental freedoms<sup>63</sup>, but also because the provisions on overriding mandatory rules would seem to leave sufficient room for the protection of national and, particularly, European public interests.

While the provisions on overriding mandatory rules in the Rome I and Rome II proposals may diminish the need for a general escape device, the proposals in the field of family choice of law do not offer a similar way to circumvent the application of unwelcome foreign law. This is explained, perhaps, by the fact that the interest the Community may have in promoting the free movement of persons has not been translated, so far, into European legislation aimed at the unification or harmonization of substantive family law. Thus, there are no specific rules of forum law which could be said to express an overriding European policy to be advanced irrespective of the designated law. As we have seen, the proposal on maintenance does contain some ‘hidden’ policy provisions either supporting the maintenance creditor, or protecting the debtor from obligations he would not have under the law of another country with which the case is closely connected.<sup>64</sup>

The proposal on divorce, on the other hand, does not feature any policy-based choice-of-law rules, although there now seems to be some discussion on the feasibility of a provision allowing the application of *lex fori* if the designated law does not allow divorce at all. For the time being, it would seem that the general public policy exception of Article 20(e) is the only means by which the application of the designated foreign law can be prevented. Since the territorial scope of the proposed regulation is universal and its choice-of-law rules are based exclusively on the principle of the closest connection, European courts will be frequently compelled to apply a foreign divorce law. It may be assumed that none of them will be prepared to apply a law that does not offer men and women the same

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marketing of consumer financial services. Generally speaking, these provisions require the member states to ensure that, whatever the applicable law may be, the consumer is not deprived of the protection afforded by the Directive, provided the transaction is closely connected with one or more member states.

63. As far as Rome II is concerned, public policy may still be needed to escape an award of punitive damages, or – if the provision on violation of privacy is reinstated – to defend the right to freedom of information against a foreign *lex causae* that is less tolerant towards the media.

64. The latter provisions are, or were, thought to obviate the need for public policy as a shield against the law of another member state; *cf.* the Commission’s commentary on the articles of the maintenance proposal, Article 20: COM (2006) 206, 12 May 2006. However, since Article 15 allows the debtor to oppose a maintenance claim whether or not it is based on the law of a member state, it is difficult to see why the public policy exception was not ruled out altogether if this was the only ground for the proposed restriction. In the latest draft of the proposal, *supra*, footnote 26, the restriction has been deleted.



opportunities to obtain a divorce.<sup>65</sup> But there could be other reasons why a court may not want to apply the designated foreign law, even if it is the law of a member state. Depending on the prevailing attitude towards divorce in the forum state, a court may be inclined to resort to public policy either to ward off a foreign law it considers too liberal, or a law that is deemed to be too harsh. A Dutch court may be averse to applying a divorce law that does not permit divorce at all or only under unusually strict conditions, while a court in Malta may be reluctant to grant a divorce under Dutch law, which only requires a unilateral declaration by either husband or wife that their marriage has irretrievably broken down. In both cases, the court's decision may be influenced by the intensity of the spouses' connection with the forum state<sup>66</sup>, but I do not think that it would (or should) make any difference whether or not the offensive law is the law of another member state or that of a third state. As long as the European Community has not taken a stand on European divorce policy, I submit, all foreign divorce laws, including those of the member states, should be submitted to the same public policy standard.

#### 4. Conclusion

Public policy, as a concept of private international law, is hard to define. It is even harder, I found, to define it in terms of European choice of law, and to determine the limits of its application in intra-community cases. It is clear that policy considerations have not only influenced the choice of connecting factors in some provisions of the proposed Rome I, Rome II and maintenance regulations but have also resulted in restrictions on party autonomy, in provisions giving precedence to overriding mandatory rules, and in exceptions in favor of (minimum) EC standards. If, despite these precautions, an unwelcome foreign law must be applied, a general public policy exception may serve as a safety net.

In the context of European choice of law, it is quite difficult to determine the scope of the public policy exception. While I have little doubt that it can be used to ward off a foreign law whose application would run counter to the fundamental values and public interests of the forum state, it is less clear whether or not there is a specific 'European public policy' requiring the defense of 'European' values and interests, to the extent that they do not coincide with those of the forum. I have argued that they do coincide, by and large, where human rights and fundamental freedoms are concerned. With regard to other public interests, I think some distinctions can be made on the basis of the difference

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65. As, for instance, a law that distinguishes between husband and wife with respect to the divorce grounds (*supra*, footnote 34) or the evidence (e.g. of adultery) they have to adduce. Another example is the unilateral dissolution of a marriage as a prerogative of the husband, notably the 'talaq' divorce of Islamic law. Application of such a law would violate the principle of equality between men and women, to which all member states subscribe.

66. Whether application of foreign law will have an effect that justifies the invocation of public policy, is measured against the degree of 'Inlandbeziehung'; *supra*, § 1.3. That is why article 61(3) Swiss statute on private international law ties recourse to Swiss law to a fairly close connection of one of the spouses with Switzerland: *supra*, footnote 22.

between, on the one hand, harmonized and non-harmonized law, and between overriding mandatory rules and ‘ordinary’ mandatory rules on the other. In those areas in which the European legislature has not (yet) transposed its concern for European public interests into regulations and directives, the courts of the member states are free to ignore those interests if they do not coincide with their own. They are not obliged, in my opinion, to reject the law of a non-member state on the strength of European aspirations alone, nor can they be expected to apply the non-harmonized law of another member state if it runs counter to national interests. Conversely, it must be assumed that harmonized law is per definition in line with European public policy, which implies that it cannot be rejected on national grounds.

The distinction between two types of mandatory rules may help us to identify the European public interests that deserve to be protected with the help of the public policy exception. It is submitted that European rules which are primarily meant to protect the private interests of groups of individuals do not qualify as overriding mandatory rules, hence do not support the invocation of public policy against a foreign law whose application would hurt European public interests only indirectly. For that reason, I would not be in favor of provisions giving precedence to Community rules promoting ‘the smooth operation of the internal market’, as they tend to elevate *all* secondary Community law to the plane of overriding mandatory rules. In this light, the *Ingmar* decision could be criticized for being overly broad.

To the extent that European law is *directly* concerned with the public interests of the Community – which makes it rather unlikely that it has any bearing on the outcome of civil litigation – it will be indicative of a European public policy that must be upheld, if need be, against foreign law, either with the help of the provisions on overriding mandatory rules or by resort to the general public policy exception.

Since European legislation on private international law is meant to advance the free movement of persons, it could be thought that this principle will dominate the choice or rejection of a substantive rule of decision. In my view, however, the free movement of persons is not affected by the choice-of-law process as such. Mobility can only be impeded by a refusal to recognize legal relationships validly created in another member state, under its own substantive law in domestic cases or in accordance with its rules of private international law in cross-border situations. Therefore, the principle of free movement may determine the (non-)deployment of public policy with regard to recognition of foreign decisions or vested rights, but it has no bearing on public policy as a bar to the application of foreign law.

I can see no reason why the law of another member state should be impervious to the public policy exception, unless it has been harmonized. It would seem that the less progress has been made in the approximation of national laws, the more need there is – in the relations between member states – for a public policy escape, and vice versa. Since substantive family law has not been harmonized at all, it is surprising that the Commission wanted to curb the use of public policy in its choice-of-law pro-

posals on maintenance and divorce, while no such restriction was contemplated for Rome I and Rome II. Furthermore, there is less need for a general public policy clause if the designation of the applicable law is influenced by (undisguised or hidden) policy considerations. Since the proposed regulation on divorce choice of law is based exclusively – so far – on the neutral principle of proximity, the public policy exception is the only means to escape the application of unwelcome foreign law, regardless of its EU origin.

Public policy is an elusive concept. As I found out writing this contribution, it is all the more elusive when studied in its European dimension. While it was once difficult to determine which national values and interests were substantial enough to warrant the deployment of public policy, we now have to be alert to the possibility that European public interests may be at stake as well, even if they are hard to define. Where the relativity of public policy once required only an assessment of the forum's interest in the outcome of the case, nowadays the impact of a decision to apply foreign law should also be measured against the interests of the Community as a whole. In sum: riding the unruly horse of public policy in the arena of European choice of law requires a good deal more than basic horsemanship.