HUNGARIAN PRIVATE INTERNATIONAL LAW

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I. Introductory Remarks

The end of a century offers an excellent opportunity to look back at the past and analyze trends of the near and not so near future. The coming year, the year 2000, is not only the last year of the century, but at the same time the end of a millennium. This double anniversary gives us lawyers, representatives of different fields of legal science, a special opportunity to review past developments, face contemporary problems, and make predictions about the future. I am sure that many studies will analyze the history of the different branches of law and attempt to say something about present and future tasks.

It is probably only a coincidence that the first volume of this *Yearbook on Private International Law* is being published in the last year of the twentieth century. A lawyer dealing with the history, present, and future of private international law cannot review one thousand years; however, the year 1999 is not a meaningless date for a continental lawyer dealing with problems of private international law. This year we celebrate the hundred and fiftieth birthday of modern European Private International Law that began with Savigny's basic work, the 8th volume of the *System des heutigen Römischen Rechts*, first published in 1849.

The scientific approach to Hungarian private international law – as a separate branch of law – dates back about one hundred and twenty years. The author of the first scholarly analysis of Hungarian PIL was an Austrian lawyer named Johann Vesque von Püttlingen. Written in German, his book dealt with problems of Austrian and Hungarian PIL in 1878.[1] Hungarian practicing lawyers soon discovered the importance of this new branch of law, and the Hungarian Association of Lawyers gave floor to discussions and papers about PIL-related problems. The well-known lawyer Rezsö Dell`Adami presented the first serious paper on problems of Hungarian PIL in 1889 and the Association of Lawyers initiated the first book on PIL in the Hungarian language, published in 1893.[2] Two other works marked the growing importance of PIL[3] during the rather short period of peaceful development prior to World War I.

The painful consequences of World War I for Hungary – the loss of two thirds of its territory and one third of its population – gave new impulses to the development of both public and private international law. Although the number of laws containing rules relating to private international law increased significantly by the end of the nineteenth century, as did the importance of international

[1] VESQUE VON PÜTTLINGEN J., *Handbuch des in Österreich-Hungarn geltenden Internationalen Privatrechts mit besonderer Berücksichtigung des Staats- und Völkerrechts*, Wien 1878.

[2] SZÁNTÓ M., *Nemzetközi magánjog különös tekintettel hazai viszonyainkra*, Budapest 1893.

[3] WITMANN E., *Nemzetközi és időközi magánjog*, Budapest 1902, and FERENCZY A., *A nemzetközi magánjog kézikönyve*, Budapest 1911.

agreements, PIL remained above all a judge-made law in Hungary. The development of private international law was decisively influenced by the practice of the Hungarian Supreme Court, the *Curia*. The *Curia*`s leading decisions – most of them dated prior to World War I – created the basis for choice-of-law rules in the most important fields of private international law, especially contracts and torts. For example, as early as 1903, the *Curia* declared that the courts should apply the *lex rei sitae* in legal relationships concerning the law of property.[4] Only two years later it laid down the principle of party autonomy in contractual relationships;[5] and in the same decision it declared the principle of *lex loci delicti commissi* applicable in cases concerning tortious liability.[6]

It soon became evident, however, that all the problems emerging in the course of everyday practice could not be resolved by the courts without a solid scientific and statutory background. Since serious efforts to create a Code on private law had proved unsuccessful between the two world wars, realistic lawyers could not seriously believe that a PIL Code would soon come into existence.

In this situation the role of legal science became more important than ever. Fortunately, Hungarian legal science was then on a level comparable to other European countries. A young and ambitious professor of the Péter Pázmány University of Budapest, István Szászy – at the same time professor at the Hague Academy of International Law – developed a sophisticated system of Hungarian Private International Law with a wide comparative basis. In his famous book on Private International Law, published in 1938, he not only presented a systematic analysis of Hungarian legal practice but also developed a theoretical doctrine of Hungarian PIL based on a comparative research of all important theoretical questions, including the role of *ordre public*, characterization, *renvoi*, the role of reciprocity, etc.

Aware of the difficulties in legal practice caused by the absence of an act on private international law, Szászy prepared a draft of a PIL code in 1948.[7] This draft, which represented the views of its author and the level of legal science of that age, contained a general and a specific part, as well as very thorough comments by the author. It could have become the first PIL code in Hungary; however, again it was history that interfered.

The communists came to power in 1948 and their ideology and views were mostly contrary to the ideas embodied in Szászy`s draft. The following years of the cold war endangered the very existence of PIL as a scientific discipline at the universities. Szászy was soon forced to retire and a new 'socialist' – in fact Marxist – era followed. Based almost entirely on the doctrine and views of Soviet legal

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[4] Decision No. 4726/1903 cited by SZÁSZY I., *Nemzetközi Magánjog*, Budapest 1938, p. 250.

[5] Decision 7674/1908 cited by SZÁSZY I. (note 4), p. 243

[6] Decision 7674/1908 cited by SZÁSZY I. (note 4), p. 341

[7] SZÁSZY I., *Magyar nemzetközi magánjog. Törvénytervezet és indokolás*, Budapest 1948.

science, socialist PIL became a 'tool in the hands of socialist lawyers in the fight against the capitalist world.' For example, *renvoi* served as a means to enable socialist courts to use their own law in cases where their choice-of-law rules would have rendered a capitalist law applicable. Since the function of o*rdre public* was to defend the socialist legal order, it was considered unnecessary among socialist countries since their social and economic systems were basically the same. Thus the whole construction of PIL seemed to be temporary, serving mainly the interests of the socialist countries in their foreign trade dealings with the capitalist world.

Fortunately, this orthodox Marxist approach gave way to more realistic approaches in the late fifties and early sixties as confrontation was gradually replaced by peaceful co-existence. Recognizing the importance of foreign trade and the needs of international business, Hungarian politicians called, among other things, for an effective and modern private international law. A similar phenomenon could be observed in most socialist countries. As Professor Šarčević correctly observes:

> 'Despite the powerful influence of politics and ideology on all spheres of life, conflicts scholars were under considerably less ideological pressure than their colleagues in other fields of law.'[8]

This is surely true in the case of Hungary where foreign trade with western countries always played an important role in the economy. The 'forced accommodation of soviet patterns in, among others, the field of private and economic law'[9] became less and less characteristic.

In the early sixties, a new tendency appeared during the so-called consolidation of the Kádár regime. Developing 'slowly at first, but then more vigorously', this tendency favored 'the preservation of party autonomy, contracts and market relationships at the expense of central planning.'[10] These trends, which increased in force and effect with the economic reforms of the late sixties, also had consequences for legal practice and legal science. Contacts to western countries kept lawyers open to western ideas and solutions. Again law had to become more than a simple tool in the hands of the ruling class in the struggle between political classes. Jurisprudence had to be rediscovered and restored. As Professor Ferenc Mádl, one of the representatives of this emerging legal science, said some years ago:

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[8] ŠARČEVIĆ P., 'The modernization of private international law after World War II', in: *Perspektiven des Internationalen Privatrechts nach dem Ende der Spaltung Europas* (VON BAR Ch. ed.), Köln (etc.) 1993, p. 14.

[9] MÁDL F., 'Lex mercatoria, Unification of law, the Hague Conventions and Hungary', in: *Conflicts et harmonisation. Mélanges en l'honneur d'Alfred E. Von Overbeck* (STOFFEL W.A. and VOLKEN P. eds.), Fribourg 1990, p. 292.

[10] See MÁDL F. (note 9), p. 293.

> 'In this climate, harmonization of certain elements of substantive law in East-West context could, and did materialize. For this to take place, the conservative rejection of comparative law had to be overcome, and theoretical justification of the 'rationality' of East-West comparison had to be developed.... This comparative law attitude and activity [...] resulted in conditions which could successfully promote the above mentioned harmonizing effect to preserve the *ius commune* values of Europe in Hungary.'[11]

In 1960 the Civil Code of Hungary (Law No. IV/1959) came into force. This Code, which – with many modifications – is still in force, did not include rules on private international law. However, a provision did explicitly provide for the application of earlier, mainly prewar norms and customs of private international law. This situation lasted until the Code on Private International Law entered into force on 1 July 1979.

II. The Codification Process

The codification of private international law commenced shortly after the adoption of the Civil Code. One may ask why almost two decades passed before for the PIL Code came into force. There are many reasons for this. The evolution of the Hungarian economic and legal systems was always characterized by ups and downs during the years of communist rule. The struggle between orthodox and liberal, retrograde and progressive forces did not end until the final collapse of the system at the end of the eighties. In academic circles a new generation appeared whose members were educated, had some international and comparative legal training at western universities, and were free of Marxist dogmas and preconceptions. Among others of this new generation, Ferenc Mádl concentrated his efforts on the creation of a modern code of private international law. He had some allies among young representatives of governmental circles, especially Gábor Bánrévy at the Ministry of International Trade, as well as among old and middle-aged professors such as István Szászy and László Asztalos. As mentioned above, lawyers dealing with the legal aspects of foreign trade and international economic relations were under considerably less ideological and political pressures than their colleagues in domestic law, thus making it possible to overcome the obstacles. Preparing different versions of drafts based on the latest results of comparative law and the best traditions of Hungarian legal science proved less difficult than trying to influence the final political decisions at top levels of the communist party and government.

Despite basic changes in the historical, political, economic, and legal situations, Hungarian lawyers emphasized the importance of legal continuity. Commenting on the history of the codification process in 1982, Ferenc Mádl

[11] See MÁDL F. (note 9), p. 293.

recognized István Szászy's 1948 draft as the first draft of the PIL Code. In regard to Szászy's draft, he wrote among other things that '[the] draft was a sort of a private venture, the theoretical anticipation of the demands of later years, offering forms ripened in the scientist`s quietness to meet the demands expected.'[12]

This continuity, however, did not mean that the second draft had much in common with Szászy`s private draft of 1948. The differences were partly due to general changes as well as developments in the doctrine and practice of private international law between 1948 and the mid sixties. The fact that new trends were taken into consideration can be seen, for example, in the adoption of a broader concept of party autonomy. Instead of Szászy's restricted concept of party autonomy which does not permit the choice of a law outside the scope of the dispositive rules of the law applicable by the choice by the parties, the new (second) draft provided that the free choice of the parties includes not only the dispositive, but also the mandatory rules of the chosen law, thus allowing the parties to place their contract completely under the regime of the law of their choice. On the other hand, this concept of party autonomy prevailed only in the law of obligations, as a result of which the second draft no longer tolerated party autonomy in labor contracts and matrimonial relationships. Such restrictions were due to the Marxist concept of law, which strictly separates family law and labor law from civil law matters, thus preventing the parties from gaining control over their family and labor relations. Another change is the difference between the old and new concept of the law applicable to the *lex personae* of legal entities. The traditional approach of Hungarian PIL and the principle also embodied in Szászy's draft followed the continental model that provides for application of the law of the seat. The new concept laid down in the second draft provides that the place of incorporation shall apply. While this change was not motivated by ideology, the authors of the second draft were convinced, that '[b]oth logically, and in respect of the social and economic substance of the particular institution, in this sphere of issues the prevalence of the principle of incorporation should be considered to be the most adequate solution.'[13]

There are, however, a few examples that prove that the second draft followed some of the solutions of the 1948 draft. For instance, Szászy`s draft contained a much broader concept of the law of the flag than was usual in the traditional practice of the *Curia*. The *lex bandi* became a regular exception used in the law of property, in the law of contracts and in the law of torts as well, whenever the relationship in question was connected to ships and aircraft outside one's national territory.

Without denying a certain continuity with the concepts in Szászy`s draft, the official view emphasized the differences rather than the similarities, particularly differences in ideology and the legal approach. In this sense, the new

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[12] MÁDL F., 'Introduction', in: *Law Decree n° 13 of 1979 on Private International Law* (Publication of Ministry of Justice of the Hungarian Peoples Republic), 1982, p. 11.

[13] See MÁDL F. (note 12), p. 39.

Hungarian PIL Code was said to be based on the new socialist branches of substantive law: the Family Law Code of 1952 and the Civil Code of 1959. (The Labor Code did not enter into force until 1967). According to the official reasoning, without the said system of socialist substantive law system 'the codification of private international law would have meant something like construct[ing] a roof for the top of a building which had not yet been erected.'[14]

In spite of this socialist characteristic, one must admit that the second draft was a progressive piece of legal draftsmanship. Like the 1948 draft, it also was the product of workshops of legal scholarship, however, one that took account of the demands of practice. The second draft was not created by a brilliant lonely scholar but was the result of team effort. The codification committee was organized within the framework of the Institute of Political and Legal Sciences of the Hungarian Academy of Sciences. As characterized by Ferenc Mádl, one of the decisive personalities of the codification committee, the second draft 'consisted of 11 Chapters and 87 fairly short sections, with comprehensive but not too elaborate regulations expressing the relatively fair harmony of the frames of principle and dogmatic definiteness.'[15]

Thus far the codification process seemed to be successful; however, the success achieved by reputable scholars was considerably slowed by less capable, but more influential political forces. On the surface the changes appeared to be only organizational in nature; however, in a communist country there are no pure professional questions. Codification is an important political issue. Thus the work continued under the auspices of the 'competent organ for codification, the Ministry of Justice.'[16] The Ministry set up another committee and prepared the so-called official draft. Completed in 1970, the third draft contained 131 sections. Although somewhat longer, it preserved many of the values and principles embodied in the second draft.

At this stage the process of codification was interrupted and nothing happening until 1977. During these seven years Hungarian lawmakers were busy with constant economic reforms. The efforts failed to bring about the expected results; however, in the late seventies no one dared to question the effectiveness of the whole system. In 1977, shortly after the completion of the most far-reaching modification of the Civil Code, the codification of private international law was again placed on the agenda. The fourth draft, drawn up by a newly created codification committee under the auspices of the Ministry of Justice, presented a new version of the planned code. Theoretically, the committee 'had to preserve the values of the earlier drafts and consider experience gathered in Hungary and abroad after the drafting of the projects, the consequences in the merits and inferences drawn from the international conventions concluded by Hungary, while endeavouring to meet the demands of life, the possible extent of the clarity of

[14] See MÁDL F. (note 12), p. 12.
[15] See MÁDL F. (note 12), p. 13.
[16] See MÁDL F. (note 12), p. 13.

economic drafting of the structure and lucidity in the text.'[17] Since the text of this fourth draft did not change considerably during the following legislative activity, one can judge by reading the Code whether the above-mentioned goals and aims were achieved. Critics of the Code who had the opportunity to compare the 1970 draft and the final version of 1978 almost unanimously agree that in many respects the solutions and provisions of the final version are weaker. The radical reduction of articles from 131 to 75 meant that the provisions often fail to provide sufficient regulations for the practice, thus resulting in numerous problems of interpretation that cannot be easily resolved by the courts. Moreover, the official reasoning is often too laconic, failing to explain why certain solutions were adopted in the Code.

During the past two decades since the Code entered into force on 1 July 1979, many studies have criticized its weak points, making *de lege ferenda* proposals. Such scholarly works have helped the courts interpret the provisions of the Code, but thus far have not influenced the legislation. The two modifications of the Code, both of which were adopted in 1997 and entered into force in 1998, concern the harmonization of the Hungarian legal system with that of the European Union. As will be shown later, these modifications did not correct the shortcomings of the Code. On the contrary, I am convinced that they have caused further problems that will soon have to be dealt with in the practice.

In October 1998 the new government decided to launch a program to propose extensive revisions of the Civil Code. There is some hope that this time both the Civil Code and the PIL Code will be revised simultaneously. This, however, is only a plan that cannot be realized before 2002. Therefore, this study will analyze the actual provisions of Law No. 13/1979 on Private International Law, hereinafter referred to as the Code or the PIL Code.

III. Some General Characteristics of the Code

The Hungarian PIL Code is a typical child of its age and birthplace. Prior to the political changes of the late eighties and early nineties, the Hungarian Code was usually characterized by one *ephiteton ornans*: it was called a *socialist* code. Looking back at that age, one cannot be quite sure what the adjective *socialist* really meant, except that it was the Code of a country having a centralized planned economy and an antidemocratic political structure with the Marxist communist party at the top. In this context *socialist* was never an adequate term as it was used for all totalitarian regimes in very different contexts. Using the word *socialist* became a habit among Hungarian (and other East and Central European) lawyers, yet it was not easy to find common characteristics of socialist laws with the exception of a few generalities. As mentioned above, there was a certain period in the fifties when Marxist scholars tried to construct a new 'socialist' private international law; however, these efforts had no real effect in the long run. Now we

[17] See MÁDL F. (note 12), p. 14.

tend to laugh at arguments, for example, those of socialist scholars who were convinced that Private International Law was an inadequate name for the conflict of laws in a socialist country. Instead it was suggested that *Rechtsanwendungs-gesetz*, the name of the PIL Code in the former GDR, would perhaps be a suitable 'socialist' name. These scholars were right when they called this expression 'socialist'; namely, there was a decree of 1942 in national socialist Germany called the *Rechtsanwendungsverordnung*.[18]

I do not deny that the legal systems of the Soviet dominated countries of Central and Eastern Europe had numerous common characteristics; however, they were much more pronounced in public law than in civil law. In fact, the smallest number of common characteristics could be found in the law of conflicts. As I pointed out at a conference held in Osnabrück in 1992 on the effects of the transition on the theory of private international law and conflicts rules in Eastern Europe, the differences between the PIL systems of Eastern and Western countries were significantly smaller than most of us had thought. One of the reasons for the similarities is perhaps the common goal of private international law, i.e., the search for adequate substantive solutions for private law disputes having links to more legal systems. This goal, called *der internationale Entscheidungseinklang* by Savigny, was and still is the leading principle of continental systems of private international law.

As I mentioned above, there are some characteristics common to the PIL systems of the former socialist countries. To start with the positive ones, it can be said that most of them were 'surprisingly well done'.[19] This means that the codes were professionally made and tended to contain conservative solutions that were reliable though not really original. Friedrich Juenger, often a hard critic of continental choice-of-law systems, was right when he observed that 'in Eastern Europe the field of conflicts... conveys the impression of a fertile and well ploughed, if somewhat monotonous farmland.'[20] It is true that Eastern and Central European systems, including the Hungarian Code, never did prefer 'revolutionary' approaches. Instead they chose conservative, traditional solutions, preferring legal certainty to elasticity. It is no coincidence that Hungarian and other 'socialist' scholars have perhaps always placed too much emphasis on the doctrine that courts cannot and de facto do not have any role in the process of law-making. This doctrine was a Marxist paraphrase of the roman maxim of *praetor ius facere non potest*. In fact, the courts – and above all the Supreme Court – did have a rather important role in the development of the legal system. Sociologically they not only applied, but also developed the law. This, however, was not characteristic of private international law after 1979. The Hungarian drafters of the Code did not

[18] BURIÁN L., 'Die Konsequenzen des Umbruchs für die Theorie und für das positive Kollisionsrecht', in: *Perspektiven des Internationalen Privatrechts nach dem Ende der Spaltung Europas* (note 8), p. 81.

[19] See ŠARČEVIĆ P. (note 8), p. 22.

[20] Cited by ŠARČEVIĆ P. (note 8), p. 22.

give too much freedom to the courts in the choice-of-law process. There are only a few so-called general clauses allowing the courts real discretion in their decision-making. Moreover, there is no general escape clause in the Hungarian Code, thus generally preventing Hungarian courts from correcting the rigidity of traditional choice-of-law rules.

Another typical feature of the Hungarian Code is the perhaps too strong 'homing instinct', a not really hidden preference for the *lex fori* over the application of a foreign law. *Heimwärtsstreben,* as Nussbaum called it, is as old as private international law. However, in my opinion and that of most Hungarian experts of private international law, the Hungarian Code favors *lex fori* too often and too directly. By using some institutions of the General Part such as the so-called *fraudulent connection* and *renvoi*, it endangers the final goal, i.e., application of the appropriate law.

As mentioned earlier, Hungarian private international law follows the traditional continental approach set forth by Savigny. In other words – and this is again a distinctive feature of the Hungarian Code, it prefers 'conflicts justice' to 'material justice'. This means that in Hungarian PIL the function of choice-of-law rules is to determine the applicable law, without regard to the substantive content or quality of the law applied. Based on this, one could say that Hungarian PIL does not care whether the law applied as a result of this 'jurisdiction selecting' method resolves the individual case 'fairly'. However, the problem is more difficult. Hungarian PIL has always – even prior to the codification – tried to combine the two premises. According to the views of leading Hungarian scholars, conflicts justice and material justice are not entirely antagonistic notions.[21] Although the task of private international law, and thus that of the Code as well, is to determine which law shall apply to a multistate legal dispute, the application of properly defined choice-of-law rules generally ensures that the applicable law leads to a fair substantive solution of the particular case.

From this it follows that material justice can be achieved to some extent by the application of properly defined choice-of-law rules. The concept of the Code reflects this view. The problem, however, arises that a codified body of conflicts rules, especially one with mainly rigid solutions, can hardly react to changes in the substantive law and the concept of material justice. The mere fact that the Hungarian Code, which is now twenty years old, functioned quite well without any modifications until last year (the first modification of the Code entered into force on 1 March 1998) suggests that its choice-of-law solutions are well founded. On the other hand, it cannot be denied that by now there are many problematic parts, thus casting doubt on whether the Code can function in this form in the coming decades. The following section contains an analysis of the content of the Code and

[21] VÉKÁS L., *A nemzetközi magánjog elméleti alapjai*, Budapest 1986, p. 89; MÁDL F., 'Values versus legal security in private international law', in: *Acta Iuridica Scientiarum Hungaricae* 1987, pp. 355-381.

the solutions provided by its choice-of-law rules. Emphasis is placed on the problematic points of the Code and attempts to propose possible solutions.

IV. The Hungarian PIL Code

The field of private international law is not free of paradoxes. The first paradox is that the name itself designates a branch of domestic law. This paradox, however, does not cause problems because lawyers are not misled by the name. Hungarian PIL must deal with yet another paradox: If Hungarian lawyers mention the Code, they all know that it exists in the form of a Law decree, a legal source belonging to the 'socialist' law of the past. I think that the mere existence of this legal source – whose name and nature are a contradiction – can say a lot to us about the real nature of 'socialism' in that part of Europe. Although Law decrees were adopted by a special gremium, the so-called Presidential Council of the People's Republic, they had the same force as 'normal' laws enacted by Parliament. When the system changed, this legislative body ceased to exist, as a result of which Law decrees will disappear sooner or later from the Hungarian legal system. Nonetheless, a Law decree was not an adequate form for a Code, even in the socialist past. In fact, as the title implies, Law Decree No. 13. 1979 does not claim to be a Code although it is *de facto* a Code. It can be designated as such because in this case it fulfills the generally acknowledged function of a Code: it regulates the respective field of law in its entirety.

A. General Provisions

The General Part (General Provisions: Articles 1-9) contains provisions on the general institutions of private international law: the purpose and the scope of the regulation, the priority of international treaties over internal conflicts regulations, characterization, *renvoi*, ascertainment of foreign law, reciprocity, the non-application of foreign law and related to this, the public policy clause, fraudulent connection and a provision not usually characteristic of a 'socialist' code: the possibility for the parties to ask the court to disregard the applicable law, which means the indirect choice of the *lex fori*.

As far as the purpose of the Code is concerned (Art.1), the determination of the applicable law, the designation of the jurisdiction of Hungarian courts and provisions on procedural rules, there are no objections. Under the present conditions, however, the first introductory sentence may be somewhat disturbing with its unnecessary political declaration expressed in a characteristic cliché from past decades. Namely, all the above-mentioned functions are to be fulfilled 'with a view to development of peaceful international relations.' There can be no doubt that such a Code would serve peaceful purposes. On the other hand, it surely does not serve the development of all kinds of international relations in a general way.

Article 2 stipulates the priority of international treaties. This provision serves clarity and is self-evident. The Hungarian Code does not mention

international treaties in the Specific Part, as e.g. the Swiss Code does. Thus the forum must examine in every case whether there is an international treaty in force dealing with the issue in question. The priority of international treaties over the Code has also been upheld by the Hungarian Supreme Court, which ruled, *inter alia*, that 'since the protection of copyright is also governed by international treaty, the Law Decree on Private International Law is inapplicable by virtue of Art. 2 of the Code.'[22]

1. Qualification

Most experts agree that qualification (characterization) is a problematic issue that can hardly be resolved by legislative provisions. Hungarian legal science has thoroughly analyzed the different arguments for and against the traditional and new approaches. In the Hungarian legislator`s view, the courts need the guidance of express provisions about qualification. The traditional method of using the *lex fori* is set forth in Article 3(1). Since application of the *lex fori* is not possible in cases where an institution is unknown to Hungarian Law and is difficult to apply when the institution in question differs from the Hungarian one, Article 3(2) provides that in such situations 'the foreign law governing the legal institution shall also be consulted.'

The provision on qualification seems somewhat overcomplicated. One thing is sure: The process of qualification must begin with the *lex fori*. If the legal institution to be qualified is not known to the *lex fori*, qualification should be conducted according to the *lex causae*. This is the actual interpretation of the said rule by present theory. As far as qualification according to the *lex fori* is concerned, the prevailing interpretation seems to be correct. On the other hand, it is not clear whether institutions unknown to the *lex fori* should be qualified according to the *lex causae*. What if the foreign law governing the respective institution is not the *lex causae* but a third law? In my opinion, the third law should serve as the basis for qualification in such cases.

The above provisions do not provide real guidance to Hungarian courts in regard to the problem of qualification. In simple cases such guidance is not needed, and in complicated cases it is useless.

As far as court practice is concerned, on the basis of a case decided by the Budapest Municipal Court,[23] I can say that the courts use the *lex fori* for the primary qualification and that this then leads to the *lex causae*. If the given institution has a different meaning in the *lex causae*, the courts try to correct the primary qualification according to the *lex causae*. Thus it seems that the courts have realized the weakness of the above provision and use their own discretion. In any case, no revision has yet been initiated on the grounds of an incorrect qualification by the court.

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[22] Decisions of the Hungarian Supreme Court (BH) 1992.631.

[23] *Tebimpex v. Agraria* (unreported).

2. Renvoi

The doctrine and practice of *renvoi* has undergone many changes in Hungary in the course of the century. Customary PIL at the beginning of the century acknowledged *renvoi*, as did separate acts and international agreements ratified by Hungary (e.g., the 1930 Geneva Treaties on the Bills of Exchange and Promissory Notes). Nevertheless, the courts and other authorities did not apply *renvoi* in the first decades of the twentieth century.

As far as theory is concerned, the majority was against *renvoi* prior to World War II. Arguments favoring *renvoi* were not accepted and the view was held that it causes uncertainty.

This view changed during the Marxist period of Hungarian PIL in favor of the above-mentioned argument that non-acceptance of *renvoi* often results in the application of foreign law instead of the *lex fori*. Such approach led to the overwhelming acceptance of *renvoi.* Although some authors rejected *renvoi* in the early years of codification, they remained in the minority.[24]

As for the actual provisions of the Code, they tend to reflect the theoretical contradictions. Nevertheless, the final solution follows the arguments favoring *renvoi* only in cases where it leads to the application of the *lex fori*. Namely, the Code accepts *renvoi* but rejects reference to another legal system. This rather unique solution is an example of the 'homing instinct' referred to above.

Modern Hungarian theory criticizes this solution yet remains basically in favor of *renvoi,*[25] upholding the prevailing view that *renvoi* can promote uniformity in decision-making. Most representatives would welcome a modification of the present rules to permit a double reference to another legal system. I personally think that the Swiss or the Czech solution could serve as a model for Hungarian legislators.

Renvoi does not play an important role in court practice. In fact, no cases of *renvoi* have been reported. There is, however, a non-reported case in the late seventies in which Hungarian law was applied via *renvoi.* This case involves real estate in Hungary owned by a French national who was born in Hungary but had lived in Paris for 30 years. Under Hungarian law, the law applicable to succession is the *lex personae* of the deceased. Hence, French law was applicable since the personal law is the *lex patriae*. According to the French choice-of-law rules, matters involving real estate are governed by the *lex rei sitae* of the real estate in question. Thus the French choice-of-law rules referred back to Hungarian law.[26]

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[24] See RÉZCEI L., 'A visszautalás', 25 *Jogtudományi Közlöny* 1970, pp. 151-160.

[25] MÁDL F./VÉKÁS L., *The Law of Conflicts and of International Economic Relations* (Akadémiai Kiadó), Budapest 1998, pp. 91, 92.

[26] The *Sándor Farkas* case cited by: BURIÁN L./KECSKÉS L./VÖRÖS I., *Magyar Nemzetközi Kollíziós Magánjog* (VÖRÖS I. ed.), Budapest 1997, p. 22.

3. The Role of Reciprocity

Hungarian courts apply foreign law in conflicts cases whenever their own choice-of-law rules point to the application of foreign law. This raises the theoretical question why choice-of-law rules lead to the application of the law of another sovereign. As mentioned earlier, this is the only way to achieve uniformity in decision-making irrespective of the forum. The application of foreign law is not a gesture; it is not based on the *comitas gentium* or any kind of reciprocity. These views are clearly articulated in the general rule in Article 6(1) of the Hungarian Code that states: 'Unless otherwise provided by law, the application of foreign law does not depend on reciprocity.'

If reciprocity is required by law, it is presumed to exist until the contrary is proved. There are, however, some exceptions where reciprocity cannot be presumed but has to be proved. These situations do not concern the application of foreign law, but rather procedural institutions. For example, proof of reciprocity is required for legal assistance to be provided in the absence of an international treaty (Art. 68) and for the enforcement of foreign court decisions not based on an international treaty (Art. 74). In such cases the Minister of Justice issues a declaration confirming the existence of reciprocity; such declaration is binding on the courts and other authorities.

4. Ascertainment of the Content of Foreign Law

An important issue with serious practical consequences is the question whether foreign law is to be applied *ex officio* or only at the request of the parties. Another important question closely connected to the previous one concerns the proof of foreign law. Most scholars share the view that there is a close link between the applicability and the proof of foreign law. This is probably the reason why these two issues are regulated in the same provision (Art. 5) of the Code.

As regards the first question, Hungary adheres to the classical continental approach: The courts and other authorities have to apply foreign law *ex officio*. Hungarian legal literature does not emphasize the question whether foreign law has to be treated as law or fact.[27] The question, however, is answered impliedly. The application of foreign law *ex officio* implies that at least theoretically there is no difference between the application of foreign and domestic law. Both are laws, not facts. It has to be admitted, however, that – in the words of an English professor: '[…] even if a country regards foreign law as law, it will not necessarily treat it on a par with forum law: it is law, but law of a different kind.'[28]

From the point of view of the court, the most important difference between the application of domestic and foreign law concerns the ascertainment of the

[27] See MÁDL F. (note 12), p. 34.

[28] See HARTLEY T. C., 'Pleading and proof of foreign law: the major European systems compared', 45 *I.C.L.Q.* 1996, p. 272.

content of the law. Since domestic law belongs to the daily routine of any court, ascertaining the content of the law is usually not a complicated issue. If a court fails to apply its own law correctly, the consequence is judicial review by the appellate courts. Since the application of foreign law cannot be based on the maxim *iura novit curia,* as a rule, the forum has to prove the content of the foreign law. According to Hungarian PIL, the court may rely on its own knowledge of the content of the foreign law. The wording of Article 5(1): 'The court or other authority shall ascertain *ex officio* the foreign law unfamiliar to it [...]' implies that the court can use its own knowledge of the foreign law to be applied. This, however, is a rare exception. In most cases courts are not familiar with the content of foreign law, and thus they must prove its content. Although the task of obtaining evidence on the content of a foreign law relates to law and not to facts, as in a 'normal' lawsuit, the Code does not require the court to use certain methods or means to this end. In this regard, the Code mentions only the most common methods, such as obtaining an expert opinion, considering the evidence submitted by the parties, obtaining information from the Minister of Justice.

The principles mentioned above are confirmed by the practice of the Supreme Court. For example, the Supreme Court recognized the freedom of the courts to obtain evidence on foreign law in its statement that the court of first instance 'may invite expert opinion, but may also accept any statement made or evidence presented by one of the parties and not challenged by the other party' (Pf. III. 20 No. 998 of 1996). In another decision the Supreme Court not only repeats its statement with respect to the Budapest City Court as court of first instance, but also emphasizes that it is the duty of the court to ascertain the content of the foreign law: 'The Budapest City Court, unfamiliar with Austrian law, must proceed *ex officio* to ascertain the foreign law, may invite expert opinion, but may also accept any statement made or evidence presented by one of the parties and not challenged by the other party' (Pf. III. 20 No. 474 of 1992).[29]

The possibility of obtaining information about the content of the foreign law from the Minister of Justice is mentioned in both the PIL Code and the Code of Civil Procedure (Art. 200).

Obtaining information about the content of a foreign law is often a difficult task. International agreements can assist authorities in this respect. Bilateral agreements of legal assistance between Hungary and other countries, most of which were signed prior to 1990 with former socialist countries, are still in force. As far as multilateral treaties are concerned, Hungary is party to the 1968 European Convention on the Mutual Promotion of the Exchange of Legal Information. This Convention entered into force in Hungary in 1990 [adopted by Decree No. 50/1990 (III. 21) of the Council of Ministers].

[29] See the citations by MÁDL F./VÉKÁS L. (note 25), p. 100.

5. Public Policy

Public policy (*ordre public*) has always been regarded in Hungarian doctrine as a means of defending the domestic legal system against obvious and offensive attacks by the applicable foreign law.

Hungary has always followed the doctrine of so-called 'effective impact'. Accordingly, the view prevails that the role of public policy is to prevent the application of any foreign legal norm that in its particular effect would have the impact of violating the fundamental constitutional principles of Hungarian law. As a leading Hungarian textbook put it:

> 'In the adjudication of private international law cases this endeavour is expressed by the fact that the forum does not apply foreign norms offending its public policy or, more accurately, it disregards the foreign norms, which in their particular effect would violate public policy. Thus with a view to defending public policy, the law deviates if need be, from the path indicated by its conflicts rules, excluding application of the foreign law invoked by the conflicts norms where it would be at variance with its own basic principles.'[30]

The Hungarian Code mentions the institution of public policy (Art. 7) in the part on the non-application of foreign law. Two other institutions – fraudulent connection (Art. 8.) and a request by the parties to refrain from applying the foreign law (Art. 9) – are also dealt with here. Article 7 does not provide a definition of public policy, stating only that 'foreign law shall be disregarded where it would violate Hungarian public policy' (Art. 7(1)).

Para. 2 of the same Article provides that 'the application of foreign law shall not be disregarded solely on ground that the social-economic system of a particular foreign state differs from that of Hungary.' This provision clearly expresses the Hungarian legislator's view that public policy cannot be used for discriminatory purposes. Moreover, it can be applied only in regard to certain provisions of a foreign law that violate public policy *in concreto* and not in regard to any provision of the legal system in general. This is also indirect proof of the relativity of public policy. Originally – prior to 1989-90 – the institution of public policy provided protection against discrimination by the legal systems of western countries. Since then it serves as a means of protecting countries without a democratic political system and free market economy. Pursuant to the doctrine and practice, violations of public policy have to be weighed by the courts in each individual case. Apart from extraordinarily strong attacks against the constitutional order of the forum, the so-called *Binnenbeziehung* to the constitutional order plays a decisive role. Hungarian practice and doctrine do not share the views of theorists

[30] See MÁDL F./VÉKÁS L. (note 25), p. 104.

who maintain that such a distinction cannot be made on the basis of the extent to which a given case is connected to the constitutional order of the forum state.[31]

There is no such harmony between Hungarian practice and doctrine when it comes to the question of applying the *lex fori* instead of the non-applicable foreign law. In this regard, the Code clearly provides in Article 7(3) that 'Hungarian law shall be applied instead of the disregarded foreign law.' As in most countries, the *lex fori* is applied by the courts when a foreign norm is disregarded as non-applicable because of a violation of public policy.

The provision authorizing the application of the *lex fori* as a subsidiary law has been criticized by some commentators. In their opinion, one should first attempt to fill the gap by the usual methods (analogy, etc.) with an eye to the foreign legal system concerned.[32] If the attempt fails or the applicable foreign law is to be disregarded in its entirety, then and only then is the application of the subsidiary law admissible.

As indicated above, using public policy as a defense for discrimination is inadmissible. A violation of public policy never renders the entire legal system inapplicable, just the legal provision in question. This means that theoretically a subsidiary law could hardly ever be used on the grounds of public policy. Even if the entire legal system were to be declared inapplicable, theorists do not advocate automatic application of the *lex fori.* Instead, they prefer to apply the rule of a legal system similar to the law in question, one that serves the same purposes and does not violate public policy. For example, instead of a French rule that violates public policy, a similar provision of Belgian law should be applied, since French and Belgian private law have much in common.

Others hold that the court should try to find a subsidiary connecting factor referring to another legal system that also has a sufficiently close connection to the given case. The English version of the last edition of the leading Hungarian textbook cites the following example: 'If, for instance decision by the law of nationality is impossible, application of the law of domicile should be attempted.'[33]

These theories never had a great echo in practice, not even before the Code entered into force. Since then, the question awakens interest primarily among scholars. The application of the *lex fori* in response to a violation of public policy has almost no practical relevance whatsoever. While public policy is not a frequently applied legal institution in Hungary, the main reason for this is probably the fact that the Code operates with so-called special public policy rules in situations where a violation of public policy is most likely to occur. These rules render Hungarian law applicable.

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[31] SCHWANDER I., *Einführung in das Internationale Privatrecht, Allgemeiner Teil*, St. Gallen 1990, p. 226.

[32] See MÁDL F./VÉKÁS L. (note 25), p. 108.

[33] See MÁDL F./VÉKÁS L. (note 25), p. 108.

6. Application of Mandatory (Peremptory) Norms of the Forum

Although the Code does not contain any provision on the application of mandatory norms of the forum, Hungarian doctrine clearly differentiates between the use of the public policy clause as a negative defense of the basic principles of the *lex fori* and as a positive defense used to invoke the application of mandatory norms of the forum.

Mandatory norms are substantive rules of law of the *lex fori* that require absolute unconditional application by the forum. While such rules are also found in branches of classical private law (civil law, family law, labor law), most of them are in administrative and finance law (e.g., foreign exchange regulations, export and import controls, etc.).

The defense of public policy by mandatory norms is regarded as positive because, instead of simply preventing the application of foreign norms likely to be contrary to public policy, they go a step further and require their own unconditional application. Hungarian doctrine has not paid much attention to the operation of mandatory norms. Generally speaking, the application of mandatory norms of the forum is regarded as a mechanism that blocks the system of choice-of-law rules. The foreign law that would otherwise be applicable according to the choice-of-law rules must be superseded by mandatory norms of the forum. Thus the value-order of the *lex fori* is protected not only negatively by not allowing the foreign legal norm be applied, but also positively by requiring the mandatory norm of the forum to be applied. At the same time this means that no subsidiary law is needed.

Hungarian doctrine and practice have not yet been confronted with the problem of applying mandatory norms that are neither part of the *lex fori* nor of the *lex causae.*

However, as a result of efforts to harmonize (voluntary adaptation)[34] Hungarian choice-of-law rules with those of the EU, this problem will soon emerge in Hungary as well.

7. Fraud and Optional Application of the Lex Fori *instead of the (Foreign)* Lex Causae

A special reason for the non-application of foreign law is the concept of fraud in Hungarian PIL. Article 8(1) of the Code states: 'The foreign law shall not be applied where a foreign element is artificially or fraudulently created by the parties (fraud), with a view to avoiding the otherwise applicable law.' According to para. 2 of the same Article, *fraude à la loi* is sanctioned by restoring application of the

[34] BURIÁN L., 'Voluntary Adaptation to Community Law in Fields Not Covered by the Europe Agreement', in: *On the State of the EU Integration Process – Enlargement and Institutional Reforms* (MÁDL F. ed.), Budapest 1997, pp. 342-346.

original applicable law: 'In the event of fraud the controlling law shall be that which is otherwise applicable under this Law-Decree.'

Although not all private international law systems sanction fraud in the conflict of laws, no objections can be made to this institution in general.[35] As for the Hungarian regulation of the fraudulent connection, it is not particularly successful. From the practical point of view, the problem of proof arises: How can one prove intentional evasion of the applicable law? Surely it is not easy to determine whether a change in the parties' domicile has occurred with the intention of evading the applicable law.

Another problematic point concerns sanctioning fraud by the parties. Fraud will be sanctioned only when a connection to a foreign law has been created fraudulently (artificially). In such cases, the law shall be applied that otherwise would have been applied had the fraud not occurred. Theoretically this can be either the *lex fori* or a foreign law. But why are fraudulent connections to Hungarian law not sanctioned? The answer is probably not a theoretical one: the (not so much) hidden tendency of the homing instinct appears as a way of 'sanctioning' *fraude à la loi*.

This sanctioning seems not only to be one-sided but also unnecessary. Parties wishing to avoid the application of an applicable foreign law by a Hungarian forum can – pursuant to Article 9 – request by agreement to disregard the foreign law applicable under the Law decree.[36] If the parties submit such a request, the Hungarian court will apply the *lex fori*. In view of this the question arises why parties choose the more difficult way of artificially creating a connection to Hungarian law or pretending that such a connection exists if they can simply request the court not to apply the applicable law. Such inconsistencies should be avoided in a comprehensive Code.

One last thought about the parties' option to request that the (foreign) applicable law be disregarded. Instead of simply providing that the applicable foreign law shall be disregarded, Article 9 stipulates that '[the governing law] shall be Hungarian law or in choice of law situations the law selected by the parties.' In my opinion, the parties' option to request the court to disregard the foreign applicable law (and practically to apply the *lex fori* instead), which positively formulated amounts to an optional application of the *lex fori,* has much in common with the institution of party autonomy. When party autonomy exists (only in contractual relationships under Hungarian law), the parties may select the applicable law.

Accordingly, they have the positive right not only to disregard the applicable law but also to select another law instead. The selected law may be either foreign or Hungarian. Fortunately, the imprecise mentioning of the two

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[35] In Hungarian theory Szászy expressed the view, that there is no need for the separate treatment of the fraud, since this problem can be solved by the public policy clause. See SZÁSZY I., *Nemzetközi Magánjog*, Budapest 1938, p. 140.

[36] According to the view of Šarčević, Art. 9 is a unique solution among socialist laws. See ŠARČEVIĆ P. (note 8), p. 23.

different institutions in Article 9 does not cause problems in legal practice, it only disturbs theoretical clarity.

At the end of our analysis of the general institutions regulated by the Code it can be said that there are surely some problematic issues, such as the unfortunate solutions with respect to *renvoi* and fraud in the conflict of laws. As a whole, however, the general provisions serve the legal practice in a positive way. The next part of the study focuses on some problematic issues in the specific part: the provisions on contracts and torts.

B. The Law of Contracts

1. Party Autonomy

As stated earlier, the approach to contractual relationships underwent considerable changes in the years which elapsed between the publication of Szászy's draft and the second draft of the mid sixties. Changes such as the acceptance of the party autonomy in its 'conflicts' sense instead of the 'substantive' approach are not reflected in the provisions of the Code. This in itself would not cause problems since theory and practice unanimously follow the 'conflicts' concept. On the other hand, problems arise mainly because the provision on party autonomy is too laconic: It fails to provide any orientation about the possibilities and limitations with respect to the choice of the applicable law.

The Code contains only one sentence on party autonomy in Article 24: 'The law chosen by the parties at the time of contracting or later shall be applied to their contract.' This left numerous questions to be answered by legal scholars in an attempt to provide adequate orientation for court practice. These questions are dealt with below.

a) Is Party Autonomy Subject to Time Limitations?

The wording of the Code is imprecise as regards when and how long the parties are free to exercise their right to select the law to govern a contract. As far as the first possible moment of selecting the governing law is concerned, no one denies that the parties are free to agree on the law to govern their contractual relationship *pro futuro*. Hungarian theory treats the choice of law itself as an agreement. Consequently, the parties may agree on the governing law prior to entering into the actual contractual relationship.

Similarly, the provision says nothing about the last possible moment the parties can exercise their choice of law. The wording 'at the time of contracting or later' gives way to different interpretations. Earlier editions of the leading Hungarian textbook expressed the view that the parties may exercise their right of party autonomy up until the beginning of court proceedings.[37] In my opinion, the

[37] See MÁDL F./VÉKÁS L., *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga*, 3d revised ed., Budapest 1993, p. 419.

choice of law can also be made during the proceedings, however, prior to the closing of the taking of evidence in first instance. The court practice goes even further. The Supreme Court has not only permitted the choice of law during first instance proceedings (Pf. VI.22046/1993) but also in appellate proceedings (Pf. III.20895/1992).[38]

b) Must the Chosen Law Have a Connection with the Contract or the Parties?

Although the Code does not answer this question at all, it is obvious that the parties may stipulate a law having no bearing on the concrete transaction. It often happens in Hungarian practice that the parties choose a 'neutral' law well known by both parties, as a result of which neither party has the advantage of applying of its own law.

c) Must the Choice of Law Be Made Expressly or Is an Implied Choice of Law Acceptable?

Again the Code does not contain any provision on this matter.[39] Both theory and practice agree, however, that an implied choice is also possible. In theory this goes back to the above-mentioned concept that choosing a law is in itself a contract of the parties (a so-called *Verweisungsvertrag*). In theory it is clear that contracts can be concluded not only by express provision or agreement but also impliedly by *factum concludens.* Thus it follows that the possibility of an implied choice of law by the parties cannot be denied. In practice, however, an implied choice of law is a rare exception. Direct provisions in the Code specifying the conditions for qualifying a choice of law as implied would encourage more frequent use of this legal institution.

d) Can the Parties Select More Than One Law to Govern the Contract?

This question raises two different questions, neither of which is answered by the Code. The first and perhaps less complicated question is whether more laws operate one after the other. In other words, can the parties specify that the contract shall be governed by one law up to a certain point and thereafter by another law? The answer here is clearly affirmative. Namely, such situation can be deemed a modification of the contract with respect to the chosen law. Since a contract can always be modified with the consent of the parties, such a modification of the chosen law has to be admissible. In this context, it is important to note that there are certain limitations in regard to modification of the original choice of law

[38] Cited by MÁDL F./VÉKÁS L. (note 25), p. 372.

[39] A thorough analysis of these questions see MÁDL F., 'Die Parteiautonomie im ungarischen internationalen Privatrecht', *Acta Iuridica Scientiarum Hungaricae* 1989, p. 293.

(protection of third parties' interests and protection of the formal validity of the contract).

The second and more complicated question is whether more than one law can be selected to govern the contract at the same time. In other words, is a scission of the contract (*depeçage*) possible? This problem has not yet arisen in practice. Generally speaking, theory is not against scission of the contract. This positive approach is based on an analogy of the choice-of-law rules provided by the Code for situations where there is no choice of law by the parties.[40]

In this respect, the Code provides in Article 30 that more than one law can be applied to different institutions of the contractual relationship. If it is possible to apply more than one law in the absence of a choice of law, it follows that it should also be possible for the parties to designate more than one governing law when making their choice of law. There are, however, certain risks involved with *depeçage.*

e) Are the Substantive Provisions of the Chosen Law Static or Dynamic?

As regards the application of the substantive provisions of the chosen law, the question arises as to which provisions are to be applied: those in force at the time the choice of law was made or those in force when the court decides the dispute. Theory and practice agree that, as a rule, the choice of law cannot 'freeze in' the law at the time of the choice. The parties select the law as a constantly changing mechanism of rules and legal practice. Though there is nothing said about this problem in the Code, the view prevails that the freedom of choice also includes the possibility not to take account of changes occurring in the chosen law after the time of the choice. This, however is a rare exception not used in practice.

f) What Are the Limits and Scope of Party Autonomy?

This question has several aspects, some of which are answered directly or indirectly by the Code, while others remain uncertain. The first important limitation follows from the structure of the Code that treats party autonomy as a valid institution only in regard to contracts in the field of the law of obligations. It does not extend to non-contractual relationships, labor contracts, matrimonial property regime, inheritance, etc.

Following tradition, preliminary questions such as the legal and disposing capacity of the parties are not covered by party autonomy.

The Code contains no express provisions on the application of *renvoi* in connection with contractual relationships. Although several authors abroad contend that the absolute freedom of the parties in choosing the governing law calls for the acceptance of *renvoi* in matters involving choice of law by the parties, Hungarian theory and practice agree that party autonomy excludes the application

[40] See MÁDL F. (note 39), p. 296.

of *renvoi*. It would be useful, however, to clarify this issue by an express provision in the Code.

g) Special Limitation of the Scope of the Chosen Law in Consumer Contracts

A new and not very successful limitation of party autonomy appeared as a consequence of the 1997 modification of the Code in respect of consumer contracts. It can be deemed unsuccessful because it limits party autonomy in such a way that the relevant provision of the Code (Art. 24) formally remained entirely in effect.[41] The limitation is not laid down in the Code, but in Law No. CXLIX of 1977 containing provisions on the modification of the Civil Code with respect to certain provisions on contracts, above all those relating to general conditions. The said Law contains the following provision:

> 'If the parties have chosen according to the rules of Hungarian private international law a foreign law to govern their consumer contract, in spite of the choice of the foreign law the regulations of the Hungarian law on protection of consumer contracts shall be applied, provided that the application of Art. 28/A of the Law Decree No.13. 1979 on private international law – in lack of a choice of law by the parties – would lead to the application of Hungarian law.'

With this one-sided conflicts rule the Hungarian law limits the parties' freedom to choose the governing law in cases where the consumer's domicile or habitual residence is in Hungary at the time of the conclusion of the contract. This is namely the precondition for the application of Hungarian law in the absence of a choice of law by the parties. The provision can be regarded as one-sided because it does not limit the scope of the chosen law in cases where Hungarian law would not apply in the absence of a choice of law by the parties.

The solution chosen by the Hungarian legislator is not in harmony with the one adopted by the Rome Convention. The ideal way of limiting the scope of party autonomy in consumer contracts would have been to limit the chosen law, regardless whether it is foreign or Hungarian, in favor of the consumer protection provisions of the law of the country of the consumer's domicile or habitual residence in cases where the contract is closely connected to that law. This would have required modifying the provisions of the Code on party autonomy, as well as restructuring the provisions on the law applicable to contracts, modeled on the structure adopted by the Rome Convention. Instead of modifying the entire chapter on contracts, the Hungarian legislator simply incorporated a new article (28/A) containing a special rule on the law governing consumer contracts in the absence of a choice of law by the parties.

[41] See BURIÁN L., 'A fogyasztóvédelem az új nemzetközi magánjog szerződési szabályok tükrében', 44 *Magyar Jog* 1999, p. 11.

2. *Choice-of-Law Rules on the Law Applicable to Contracts in the Absence of a Choice of Law by the Parties*

The Code introduced new rules for determining the law applicable to contracts in cases where the parties have failed to make a choice of law (so-called rules of 'the otherwise applicable law'). According to the old practice of the *Curia,* the courts applied either the *lex loci contractus* or the *lex loci solutionis*. Having devoted a large part of his research to the analysis of this particular topic, Szászy complained in 1938 that '[o]ur private international law does not have another area characterised by so many contradictions and so little consequence, than just this field of the law.'[42]

The Code adopted in essence the approach of the 'characteristic performance'. The following view is expressed in the leading Hungarian textbook in regard to the approach taken in the Code: 'In determining the connecting factors the Hungarian law bases itself on the general need to have a legal relationship determined by the law within whose jurisdiction its economically, socially and legally most characteristic element is realized....'[43]

Unfortunately this approach resulted in a set of rigid rules. Instead of using the general rule of the 'closest connection' as in the Rome Convention, the Code provides a catalogue of types of contracts (Art. 25, litt. a-m) designating the law governing each type as the law of the party delivering the characteristic performance. For example, the law governing a sales contract is the law of the country where the seller had its domicile or habitual residence at the time of contracting; the law governing a contract of lease or tenancy is the law of the country where the lessor had its domicile or habitual residence etc. Thus the Code renders only one governing law for contracts of sale, lease, tenancy, contracts for the exploitation of rights under copyright protection, contracts for the exploitation of industrial property rights, contracts of deposit, agency, commission, commercial representation, carriage and forwarding, banking and credit transactions, insurance contracts, loan contracts, and contracts of donation (gift).

Since neither the law of contracts nor the general provisions of the Code provide for an escape clause, the court must apply the designated governing law in all cases, even if the circumstances of the case indicate the application of another law. The above solution prefers security to elasticity.

Not all types of contracts are subject to the rule of characteristic performance. For instance, the Code departs from the rigidly applied principle of the characteristic performance in contracts of construction and contracts of maintenance. In addition to certain types of contracts, the exceptions also include contracts connected with special objects such as real estate contracts which are governed by the *lex situs* and contracts entered into on a stock exchange, in public tender negotiations and sales by auction, all of which are governed by the *lex loci*

[42] See SZÁSZY I. (note 35), p. 310.

[43] See MÁDL F./VÉKÁS L. (note 25), p. 374.

contractus. The exceptions also include company contracts, obligations based on securities, bonds etc.

The newest exception is the law governing consumer contracts in the absence of a choice of law by the parties. As mentioned above, this exception is an adaptation of the respective provisions of the Rome Convention. Since the provision limiting the parties' choice of law with respect to consumer contracts is not incorporated into the Code, the precise circle of the consumer contracts affected by the exception is defined here, not in connection with limitation of the choice of law. No case law has yet been reported as the new limitation entered into force on 1 March 1998.

When determining the law governing such contracts, the closest connection of the contact to a certain law (e.g., the close connection of real estate contracts to the *lex rei sitae*) outweighs the importance of other connecting factors such as the domicile or habitual residence of the party delivering the characteristic performance.

Practically speaking, when applying the rules of the Code, the courts must first determine whether the contract falls under one of the exceptions. If so, the exceptional rule shall apply in determining the governing law. If not, the court shall determine whether the contract is listed in the catalogue of contract types in Article 25. If it is mentioned there (e.g., a 'normal' sales contract), the court shall apply the law specified by that article (e.g., in the case of a simple sales contract, the law of the seller's domicile or habitual residence).

While applying the above-mentioned rules of the Code (usually referred to as the first two steps), the court has practically no discretion to take account of the strength of the connection to the otherwise applicable law. When applying the rules of the third step to determine the law governing atypical contracts (contracts with characteristic performances by both or all parties, if there are more), the court must establish whose performance is the most characteristic and apply the law of the country where that party has its domicile, seat or habitual residence (Art. 29, first sentence).

There are situations where the governing law cannot be determined by either of the aforesaid methods (e.g., a contract of exchange of goods where the performance of both parties is equally characteristic). In this case, and only in this case can the court apply the law deemed to have the closest connection with the particular contract.

Having reviewed the provisions of the Code on contractual relationships, it seems rather obvious that some are imprecise, others too detailed and rigid. In particular, the provision on the freedom of choice is imprecise, the provisions on the governing law in the absence of a choice by the parties too detailed and rigid. The court must go through all the 'steps' and has practically no discretion to honor special circumstances.

The new provisions on consumer contracts have created new contradictions. While there is no express limitation of the parties' freedom of choice in the Code, the practically one-sided limitation in favor of consumers having a domicile or

habitual residence in Hungary is set forth in a separate law. As a result the Code no longer regulates the entire body of conflicts provisions. The only way out of this unfortunate situation would be to undertake a systematic recodification of all conflicts provisions.

C. The Law of Torts

The provisions of the Code on the choice-of-law rules relating to non-contractual liability are no less problematic than those on contracts. Before commencing with our analysis of the present provisions and practice, let us take a look at the past.[44]

Prior to World War II, the practice of the *Curia* emphasized the application of the *lex loci delicti*. The only exception occurred in claims brought by foreign nationals against Hungarian tortfeasors on the basis of a foreign law. The maximum remedies in such cases could not exceed the damages prescribed by Hungarian law.

Although Szászy did not agree with the above limitation, he proposed a similar solution in his draft. The only exception to the *lex loci delicti* rule in Szászy's draft is in the case of torts committed on board of registered aircraft and ships. Here he proposed application of the law of the flag.

During the period of codification important new elements were introduced in theoretical discussions about the law applicable to torts. While the conservative wing preferred the traditional choice-of-law rule of the *lex loci delicti,* others – above all Ferenc Mádl – proposed new solutions that were more elastic.[45] Mádl, who wrote a series of important studies during the second half of the sixties, proposed basic reforms of traditional private international law favoring a 'better law' solution.[46] In his opinion, the traditional rule of the *lex loci delicti* did not function well because it made the applicable law to a great extent dependent on coincidence.

For instance, accidents are typical torts of the twentieth century and the place of an accident is fortuitous. Thus fortune or misfortune plays a large role in determining the applicable law and consequently the adequate compensation for damages arising from the accident. Since achieving adequate compensation is the main goal of tort law, Mádl reasoned that it is much too important to be dependent on such circumstance. Therefore, he proposed application of the law that could guarantee adequate compensation for the injured party.

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[44] For a detailed analysis of the conflicts of law of torts in Hungary see BURIÁN L., 'A deliktuális felelösség a magyar nemzetközi magánjogban', 45 *Jogtudományi Közlöny* 1990, pp. 150-159.

[45] See MÁDL F., 'Új szakasz a magyar nemzetközi magánjogban?', 9 *Állam és Jogtudomány* 1968, pp. 285-317.

[46] See MÁDL F., 'Vívódás a valósággal a magyar nemzetközi magánjogban', 10 *Állam és Jogtudomány* 1969, pp. 65-94.

According to Mádl's proposal, the applicable law was to be selected by the court from the laws connected to the tort. The selection was to be made on the basis of the above considerations. His proposal, however, was only a theoretical model without concrete proposals for the text of a choice-of-law rule.

Others went even further and proposed application of the law of the tortfeasor or the law of the injured party. The choice between the two would depend on which law would grant more compensation to the injured party.[47]

1. The Applicable Law Prescribed by the Code

The choice-of-law rules adopted by the Code do not really reflect the theoretical debates of the sixties and early seventies. Following the conservative solution, the main rule provides that the law of the place where the tort occurred shall be applied (Art. 32(1)).

I am convinced that the possibility to apply the law of the place where the damages occurred instead of the law of the place where the tortious act was committed, when the former is more favorable for the injured party (Art. 32(2)), is not really an exception.

The only exception, namely the application of the law of the common domicile of the tortfeasor and the injured party (Art. 32(3)), does not in itself guarantee the required elasticity.

Not all lawyers dealing with conflicts aspects of torts find the solutions adopted by the Code inadequate. The English version of the leading Hungarian textbook says the following:

> 'The Hungarian regulation may be considered to offer a modern but moderate solution: while following the... trend of development instead of the rigidity and exclusivity of the *lex loci delicti commissi*, it seeks legal certainty by determining the alternative forms of solution in the Code itself. Room is left, of course, for judicial consideration but the law defines its scope, thus giving a more predictable answer to those looking for the applicable law.'[48]

Application of the *lex loci delicti* with the only exception being the law of the common domicile surely provides more predictability than those of systems applying flexible solutions. No one would prefer an American type of 'non-rule' based solely on the court's interpretation of the circumstances. On the other hand, the present provisions are not satisfactory either.

Some European conflicts rules, such as the Swiss, offer an optimal solution based on different types of torts, applying the most adequate substantive law to

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[47] See VÖRÖS I., 'A kétoldalú jogegységesítés jelene és perspektívái', 11 *Állam és Jogtudomány* 1970, p. 536.

[48] See MÁDL F./VÉKÁS L. (note 25), p. 389.

each type. In the event of a new codification, the Hungarian legislator should consider incorporating flexible choice-of-law rules such as these. The introduction of a limited party autonomy in cases involving non-contractual liability should not be excluded either.

The application of the rigid and often inadequate *lex loci delicti* rule to almost all kinds of torts is not the only weakness of the present Hungarian choice-of-law rules on tortious liability.

As mentioned earlier, the *lex fori* played an important role in prewar court practice, limiting compensation in cases where the tort occurred abroad and the tortfeasor was a Hungarian national.

This solution was the Hungarian version of Article 12 of the German EGBGB, the so-called *privilegium germanicum*. Although criticized by almost all theorists, it remained part of the Hungarian court practice and was also adopted by Szászy in his 1948 draft. Representatives of the Marxist theory vehemently criticized the above rule,[49] although they preferred the application of the *lex fori* to an even greater extent.

This goes back to the doctrine of the Soviet theory advocated by Pereterskij who said the following about the role of the Soviet *lex fori*:

> 'If damages caused abroad are claimed in a lawsuit, the foreign law (the *lex loci delicti*) can be applied only when the act of the defendant is unlawful according to Soviet law too. It would be contrary to the socialist principles if a Soviet court would find the plaintiff liable for an act which is not unlawful according to Soviet law.'[50]

The above standpoint was accepted by the postwar Hungarian doctrine. According to this concept, a successful claim for damages based on a foreign law presupposes that the act is unlawful under Hungarian law. Hungarian lawyers extended the above doctrine to include even the legal consequences (amount and types of damages).

The contradiction is obvious. Marxist doctrine condemned special treatment of the Hungarian tortfeasor when the tortious act was committed abroad and the *lex fori* was Hungarian law, while at the same time favoring an even stronger privileged *lex fori* over a foreign *lex loci delicti*. The ideological background, however, was different. The main aim of the original preference for the *lex fori* was to protect the Hungarian tortfeasor against claims unknown to Hungarian law or unproportional according to the standards of Hungarian law. The Marxist preference for the *lex fori* resulted in the application of the law of the forum not only in the above situation, but also in all cases where the *lex fori* and the *lex loci delicti* were different. The *lex fori* had to be applied and the *lex loci delicti* ignored in cases where both the tortfeasor and the injured party were foreigners and the

[49] RÉCZEI L., *Nemzetközi magánjog*, 3d ed, Budapest 1961, p. 274.

[50] Cited by RÉCZEI L. (note 49), p. 275.

case had no connection to Hungarian law except that the tort was committed in Hungary. Such a weak connection to the forum law does not rectify special application of the *ordre public* in most cases (e.g., traffic accidents).

This raises the question why there was such an overwhelming preference for the *lex fori*. The Soviet views about lawfulness and just compensation might have been a rational explanation for the application of the Soviet *lex fori.* In many aspects the Soviet legal system followed substantially different ideals and goals than all other legal systems of the world. But the same attitude can hardly be justified more than half a century later in Hungary. Why did the Hungarian Code adopt the same model, and why does it still favor the *lex fori* in the same manner today?

The answer to the first question is simple. The second draft contained the traditional provision favoring a Hungarian tortfeasor in cases involving a foreign *lex loci delicti*. Article 50(2) of the 1968 draft read as follows: 'If the tortfeasor is a Hungarian national, the measure of its liability cannot be more serious than it would be according to Hungarian law.'

This provision was modified by the third draft in 1970. The modified version cited below became part of the Code in 1979:

> Article 34(1): 'A Hungarian court shall not establish liability for conduct not considered unlawful under Hungarian law.'
>
> Article 34(2): 'A Hungarian court shall not, on the ground of liability for damages, establish legal consequences unknown to Hungarian law.'

As stated above, the third draft was prepared by the Ministry of Justice. Thus it can be assumed that the reasons for the modification were clearly political: It was imperative to follow the Soviet model. The main point of contention was the recognition of non-physical (moral) damages. While prewar Hungarian court practice knew and recognized non-physical damages, the orthodox Marxist ideology rejected them. The authors of the 1970 draft intended to exclude the recognition of non-physical damages based on a foreign *lex loci delicti* in all cases. The outcome, however, is a paradox: The 1978 modification of the Civil Code recognized non-physical damages once again, as a result of which they were not excluded by the Hungarian *lex fori* after 1 March 1978. Somehow the drafters of the PIL Code forgot about the consequences. When the Code entered into force 15 months later, it contained (and still does to date) the obsolete preference for the *lex fori*. In my opinion, the institution of public policy suffices to guarantee proper protection against excessive sanctions of a foreign *lex loci delicti* (e.g., punitive damages). Hungarian private international law should no longer provide special protection by resorting to compulsory application of the *lex fori.*

2. A Few Words About the Court Practice in Delicts

Since very few cases have been reported and none of them involves delicts, the following analysis is based partly on the latest Hungarian textbook by Ferenc Mádl and Lajos Vékás, partly on my own analysis of the practice in the eighties.

Mádl and Vékás draw a basically positive picture, maintaining that 'the general rules, including the *lex loci delicti commissi*, are followed by Hungarian judicial practice (both old and new) without problems.'[51]

My own research about ten years ago[52] showed that in most cases Hungarian courts apply the *lex loci delicti* rule when the tort was committed in Hungary. It follows that application of the *lex loci delicti* automatically means application of the *lex fori*. However, when the tort was committed abroad, the courts often simply ignore the *lex loci delicti* rule without even invoking the 'more favorable' law as the ground for the application of Hungarian law. My analysis included 25 cases adjudicated in first instance between 1985-1988 at the Budapest Central District Court. The Court invoked the conflicts rules only in two cases, one of which was based on the main rule of the Code, the other on the Hungarian – East German treaty on legal assistance. In 19 cases the court applied Hungarian law in traffic accidents that occurred in Hungary, however, without invoking the choice-of-law rules. Thus the result might have been correct, but it is uncertain whether the Court was actually aware of the necessity to apply the Code. This fear seems not to be without grounds, since the same Court that applied Hungarian law 'automatically' in tort cases where the tort was committed in Hungary also applied Hungarian law in cases where the torts were committed abroad. In three cases where the torts were committed in former Yugoslavia, the Court applied Hungarian law, although the application of the *lex loci delicti* rule would have required the application of Croatian law since the torts occurred in Dalmatia.

The above picture shows that Hungarian Courts do not apply the 'simple' *lex loci delicti* rule correctly, not to mention the more difficult provisions. Of course, the conclusion of the above analysis cannot be that we need more sophisticated rules. As we have seen, the courts have problems even with the simple ones. There are initiatives calling for thorough reform of that part of the choice-of-law rules too. At present, it remains unclear when the proposals will be able to be materialized. It seems that the recodification cannot be postponed in the long run. And since the new millenium is knocking at our door, we can be sure that the old Code will accompany us for awhile in the first years of the next century as well.

V. Closing Remarks

The above study could not deal with all the current problems in Hungarian private international law. Attempting to draw a general picture, it presented the historical

[51] See MÁDL F./VÉKÁS L. (note 25), p. 391.
[52] See BURIÁN L. (note 44) p. 156.

background and analyzed some of the important problems of the PIL Code in force today. We have reviewed the General Part but could necessarily touch only upon a limited number of important questions arising in the Specific Part. Numerous open questions remain that will have to be answered in the next few years, i.e., at the beginning of the next century.