27 The New Hungarian Private International Law Code

Something Old and Something New

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Keywords
private international law, codification, general part of the New Hungarian Private International Law Code, legal institutions in the New Hungarian Private International Law Code, EU private international law regulations

Abstract
Since the adoption of Law Decree No. 13 of 1979 on Private International Law (Old Code) both the legal environment of the EU and the Hungarian legal and social background have undergone substantial changes. Without questioning its progressive character, it must be stated that the Old Code wore the imprints of the era in which it was drafted. With the fall of the socialist system, the necessary amendments were made to the system of the Old Code, accelerated by Hungary's accession to the EU. All the above played an important role in the Government's order to begin work on the comprehensive modernization of the Old Code. The Act XXVIII of 2017 on Private International Law (New Code) entered into force on 1 January 2018. The present study focuses on the following topics: the reasons for the revision of the Old Code, the presentation of the relationship between the New Code and EU regulations in the system of legal instruments, and the review of legal institutions in the general part, with special attention to the major changes undertaken compared to the Old Code.

27.1 Introduction

It is characteristic of private international legal relations that they have an international element that relates to the laws of two or more states. The function of classical private international law is to resolve this conflict of laws and determine which national laws must

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be applied. Pursuant to the theory of private international law that evolved by the 20th century, the courts proceeding in such conflicting situations applied the rules of their domestic private international law to determine the applicable law. With the Treaty of Amsterdam this traditional method has been fundamentally altered in respect of the Member States of the EU. The Treaty gave legislative powers to certain institutions of the European Community (today the EU) and created the legal bases for the adoption of several secondary sources of law in private international law.[1] This change substantially reframed the rules of private international law of the Member States. EU regulations have taken over the role of national legislation in several fields, defining uniformly the applicable law, for example in the field of international law of obligations, dissolution of marriages, maintenance and succession. The rules of jurisdiction have also been standardized in civil and commercial matters, as well as in family matters concerning divorce, legal separation, the annulment of marriage, and parental responsibility. The new regulations narrowed down the substantive competence of Member States' national legislations to matters of so-called residual competence.

Since the adoption of Law Decree No. 13 of 1979 on Private International Law (Old Code)[2] both the legal environment of the EU and the Hungarian legal and social background have undergone substantial changes. Without questioning its progressive character, it should be pointed out that the Old Code that it wore the imprints of the era in which it was drafted. With the fall of the socialist system, the necessary amendments were made to the system of the Old Code, accelerated by Hungary's accession to the EU. All the above played an important role in the Government's order to begin work on the comprehensive modernization of the Old Code. The purpose of recodification was to create a new, up-to-date private international law act in line with European and international sources of private international law.[3] The need to revise private international law is not unprecedented. Meanwhile, this complex change affected the entire Hungarian private law and launched a wave of new legislation: the new Civil Code[4] and the New Code of Civil Procedure[5] were adopted and the rules of arbitration were renewed as well.[6]

1 On the questions raised by the influence of the EU on the private international law of Member States, *see* Mátyás Császár, 'Az uniós jogforrások hatása a nemzetközi magánjog általános részére', *Magyar Jog*, 2013/11, pp. 669-679.

2 For the non-official translation of the Old Code, *see* Jürgen Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Vol. 4, Edward Elgar Publishing, Cheltenham, 2017.

3 Government Decree No. 1337/2015. (V. 27.) on the Codification of the new Hungarian Private International Law and on the Foundation of the Private International Law Codification Committee.

4 Act V of 2013 on the Civil Code.

5 Act CXXX of 2016 on the Code of Civil Procedure.

6 Act LX of 2017 on arbitration. For a detailed description on the new Act on Arbitration, *see* István Varga, 'Az új választottbírósági eljárásjog újraszabályozása Magyarországon', *Közjegyzők Közlönye*, 2018/4, pp. 5-22.

The codification work started in the autumn of 2015 with the elaboration of the concept of the law.[7] Act XXVIII of 2017 on Private International Law (New Code)[8] was adopted by the Parliament in the spring of 2017, entering into force on 1 January 2018.[9]

The purpose of this study is to illustrate how EU regulations have set the framework for the New Code and what changes were brought about in the general part of the New Code compared to the Old Code. The part on general provisions is of paramount importance because there is no EU regulation for the conflict of laws concepts regulated under this chapter. Moreover, when EU regulations govern such general conflict-of-law concepts (*e.g.* public policy, overriding mandatory rules *etc.*), they are filled with the meaning gleaned from Member States' private international laws.

27.2 Relationship between the New Code and EU Regulations

In the period since the entry into force of the Treaty of Amsterdam, several EU private international law regulations have been adopted on issues of conflict of laws of obligations,[10] family law,[11] and succession,[12] as well as in the field of jurisdiction and procedural rules

7 The Concept of the New Private International Law Act, at www.kormany.hu/download/c/cf/c0000/NMJ%20TV%20KONCEPCI%C3%93.pdf.

8 For the non-official translation of the New Code, at http://njt.hu/translated/doc/J2017T0028P_20180102_FIN.pdf.

9 For a detailed description of the process of creating the New Code, *see* Katalin Raffai, 'A magyar nemzetközi magánjog megújulása – néhány észrevétel a nemzetközi magánjogi törvény újrakodifikálásáról, különös tekintettel a törvény általános részére', *Külgazdaság – Jogi melléklet*, 2017/5, pp. 53-67. (Raffai 2017a); Imre Mátyás, 'Az új nemzetközi magánjogi törvényről', *Publicationes Universitatis Miskolciensis Sectio Juridica et Politica* 2017, Tomus XXXV, pp. 355-357; Lajos Vékás, 'Az új nemzetközi magánjogi törvényről', *Jogtudományi Közlöny*, 2018/10, pp. 413-414; László Burián, 'Az általános részi jogintézmények szabályozása a régi és az új nemzetközi magánjogi Kódexben', *Közjegyzők Közlönye*, 2018/3, pp. 5-6. (Burián 2018a).

10 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'). Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I').

11 Council Regulation (EU) No 1259/2010 of 29 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III').

12 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ('Succession Regulation').

in civil and commercial law,[13] family law,[14] maintenance and succession[15] laws. These regulations were adopted pursuant to the authorization laid down in Article 81 TFEU. EU regulations are secondary sources of law of general, binding and directly applicable effect that have priority over national private international laws of Member States: they supersede national private international rules on matters falling within its scope. Their emergence brought on an obligation of deregulation for the Member States, irrespective of whether national rules have a similar or different content from these EU regulations.[16]

National legislations thus retain a so-called residual legislative competence, which shall only be applicable in issues of international private law: *(i)* that are explicitly excluded from the substantive scope of the regulations (*e.g.* violation of personality rights are explicitly excluded from the scope of the Rome II Regulation; these rules are to be found under Section 23 of the New Code); *(ii)* that are not regulated by EU regulations (legal gap); [there is no definition, *e.g.* for certain concepts, such as a person's habitual residence; this is defined in Section 3(b) of the New Code]; *(iii)* the main object of which has not been regulated by an EU regulation (general conflict of law institutions, for example, such as classification – Section 4 of the New Code –, or international law on rights *in rem* – Sections 39 to 47 of the New Code); *(iv)* where the Regulation itself authorizes the enactment of supplementary rules (Article 7 of Rome II Regulation; Section 59 of the New Code stipulates that in cases of claims arising from non-contractual obligations, the choice of law can be made not later than in the preparatory stage of the civil procedure); *(v)* where the provisions governing jurisdiction, recognition and enforcement apply only to Member States; thus, the relevant provisions of the New Code are applicable to third States (*e.g.* recognition of a Canadian judgment in Hungary); and *(vi)* rules Hungary does not participate in, in the framework of enhanced cooperation; here again, the domestic rules of private international law must be applied (Hungary is not a party to either the rules on matrimonial property or those on registered partnership property).[17]

13 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ('Brussels I Recast').

14 Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000 ('Brussels IIbis').

15 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ('Maintenance Regulation').

16 Réka Somssich, 'Az új nemzetközi magánjogi törvény és a nemzetközi magánjogi tárgyú európai uniós rendeletek viszonya, kapcsolódási pontjai', *Közjegyzők Közlönye*, 2018/3, p. 30.

17 Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Council Regulation (EU) No 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

EU private international law rules have various effects on the private international laws of the Member States, depending on whether they are conflict-of-law, jurisdictional or mixed regulations. EU conflict-of-law regulations have a universal nature *(erga omnes)*, meaning that the regulation is uniformly applicable (*loi uniforme*) in a given area. It means, that they are mandatorily applicable to all EU and third-state cases, irrespective of any circumstances affecting the factual situation. This results in the same facts being treated according to the same substantive law in the context of EU and non-EU relations, eliminating unjustified duplication of conflict of law rules. Domestic conflict of law rules can only be applied here as 'gap fillers'. By contrast, jurisdictional and procedural rules require only a link with the EU to apply EU regulations, which allows for parallel national procedural rules: different jurisdictional, recognition and enforcement rules can apply within and outside the EU. Some of the regulations, however, lay down rules of universal jurisdiction, not only applicable in relation to EU Member States [*e.g.* Regulation (EU) No 650/2012 of the European Parliament and of the Council – the so-called Succession Regulation]. Yet, the rules on recognition and enforcement apply only to EU Member States, thus there still is a two-way regulatory system on these issues.[18]

The New Code therefore focuses on issues not covered by EU legal instruments of private international law and by international treaties. This is stated in Chapter I of the New Code, under General Provisions. Pursuant to Section 2, the provisions of the Act shall apply in matters that do not fall under the scope of a directly applicable legal act of the EU with general application or an international treaty.[19] This is a formal change compared to the Old Code, which stated its secondary character only in relation to international treaties.[20] The question of how to express the priority of EU instruments was raised by the Codification Committee. The codification methods of Member States do not follow a uniform pattern. The Codification Committee finally decided that the priority of EU regulations needs to be stated in a general way at the beginning of the New Code, thus avoiding the future necessity of incorporating new EU regulations into the text of the Act.

The integration of EU law into the rules of private international law of Member States has also had an effect on the direction of changes. It was expedient to align the national connecting principles of private international law with those contained in EU regulations in order to avoid divergence. On the other hand, legislation remaining within the competence of the Member States was also to be aligned with EU fundamental freedoms (non-discrimination, free movement, freedom of establishment and to provide services *etc.*),

18 The Concept of the New Private International Law Act, paras. 19-21; Vékás 2018, p. 415; Somssich 2018, p. 35.

19 New Code, Section 2 "The provisions of this Act shall apply in matters that do not fall under the scope of a directly applicable legal act of the European Union with general application or an international treaty."

20 Old Code, Section 2 "This Law-Decree shall not apply to any questions regulated by an international treaty."

and it shall be the task of the CJEU to examine the compatibility of these rules with EU law.

The aforementioned factors affected the direction of Hungarian international private law legislation. In line with EU regulations and multilateral treaties established by the Hague Conference on Private International Law, as well as with the changes in the theory of private international law, the New Code took a different approach to several issues. It affords, for example, greater autonomy to parties (choice of law), defending the weaker party (overriding mandatory rules,[21] special jurisdiction rules) and judge's discretion (the principle of the closest connection). On the other hand, it retains the traditions of the Old Code, where justifiable, like in the case of nationality being the main principle of a person's personal law. Finally, it also retains the principle of place of registration for defining the personal law of legal persons.

There is also a mixture of tradition and novelty in the structure of the New Code; the structure follows that of the Old Code. Namely, the New Code is also divided into three major parts: General Part, Special Part and Jurisdiction-Recognition-Enforcement Part. There is, however, a significant change in the structure, owing to the structure of the Civil Code, where the provisions on family law follow the chapter on persons, in contrast with the Old Code, where they were placed at the end of the Special Part. Regulation on guardianship was placed into the chapter on the law of persons, from the chapter on family law, and the intellectual property rights follow the part governing the rights *in rem*. The rules for *de facto* and registered partnerships have been included in a separate chapter. The section on jurisdiction, recognition and enforcement has also changed: the procedural provisions are followed by the rules on the immunity of the State,[22] and those are followed by the rules of jurisdiction. Finally, this part is concluded by provisions on the recognition and enforcement of foreign judgments.

Old and new elements thus alternate in the system of the New Code, and it is to be considered a positive feature that in contrast with the old, strict regulation, the New Code is more flexible, as it gives more flexibility to the parties' choice of law, providing also a broader scope for judicial discretion.

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21 It is debated in the legal literature whether provisions simply protecting private interests may be overriding mandatory provisions. *See* Laura M. van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law', *Erasmus Law Review*, Vol. 7, Issue 3, 2014; Katalin Raffai, 'Protection of Public and Private Interests in the Rome I Regulation – Observations on the Interpretation of Overriding Mandatory Provisions', *Studies in International Economics – Special Issue of Külgazdaság*, 2015/2, pp. 15-33.

22 In the Old Code, the regulation of the state's immunity with regard to the law of persons was placed in Section 17, the rules regarding exclusive jurisdiction were to be found under Section 62/A and the preclusion of jurisdiction was placed under Section 62/B.

27.3 General Part

The following part briefly reviews the main changes in the General Part, especially the new provisions not covered by the Old Code.[23] It should be emphasized, that the Hungarian legislator had in the course of legislation almost the biggest room for maneuver when drawing up the rules of the General Part. The main reason for this is that EU regulations, without exception, regulate two major fields: *(i)* issues specific to the special part of private international law (the law applicable to contractual and non-contractual obligations, divorce, maintenance *etc.*); and *(ii)* jurisdictional, recognition and enforcement issues (civil and commercial matters, divorce, insolvency *etc.*).

In these regulations, general conflict-of-law legal institutions are only regulated indirectly and partially, on a complementary basis (*i.e.* public policy clause, overriding mandatory rules, states with more than one legal system *etc.*). Some of these are only regulated through an exclusion clause (*i.e. renvoi* accepted only under the Succession Regulation). There have been calls for a so-called Rome 0 Regulation to uniformly regulate the general conflict-of-laws legal institutions in the EU. However, research has shown that there is no uniform legislative policy background in the Member States that would support this, without which this aspiration is devoid of reality.[24]

The General Part includes rules of the scope of the law, interpretative provisions, classification, *renvoi*, states with multiple legal systems, rules on the application of foreign law, choice of law, a general escape clause, a general auxiliary rule, a public policy clause, overriding mandatory rules, and provisions on the change of the applicable law. A novel feature of the New Code is that similar to the structure of EU regulations, it placed the definition of basic concepts considered of substantial importance at the beginning of the Act, among the interpretative provisions. Section 3 defines the interpretation of three concepts in the context of this Act: the concepts of court,[25] habitual residence and domicile.[26]

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23 *See* also Burián 2018a; Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions', *Rabels Zeitschrift*, 2018/4, pp. 979-985; Katalin Raffai, 'The New Hungarian Private International Law Act – a Wind of Change', *Acta Univ. Sapientiae, Legal Studies*, Vol. 6, Issue 1, 2017, pp. 124-128. (Raffai 2017b).

24 *See* in detail Stefan Leible & Hannes Unberath (eds.), *Brauchen wir eine Rom 0-Verordnung? Studien zum Internationalen Privat- und Verfahrensrecht.* JWV, Jena, 2013; László Burián, 'Gondolatok az uniós nemzetközi magánjog általános szabályai megalkotásának lehetőségéről és szükségességéről', *in* László Burián & Sarolta Szabó (eds.), *Arbitrando et curriculum bene deligendo. Festive publication in Honor of Éva Horváth's 70th Birthday*, Pázmány Press, Budapest, 2014, pp. 31-44.

25 The court shall mean all authorities which have competence in matters pertaining to the scope of the Act.

26 In the Old Code, it was nationality and residence that were relevant in defining a person's personal law. The principle of residence lost its central in the New Code. The New Code uses the definition of domicile in accordance with the Brussels I Recast regulations, mainly in the framework of rules of jurisdiction in matrimonial property cases. Residence is the place where the individual person resides permanently or with the intention of permanent settlement.

From among these concepts, the principle of habitual residence is of paramount importance, because it is one of the most frequent connecting factor both in EU regulations and in multilateral private international law treaties, and yet, none of these have provided a definition for habitual residence. At the same time, certain judgments of the CJEU have set criteria governing the determination of habitual residence in cross border legal relationships.[27]

The New Code defines the concept of habitual residence to facilitate the application of the law, and it is obvious that the definition was inspired by the judgments of the CJEU. According to the New Code, the habitual residence of a person is the place where the actual center of the individual's life is. When determining the center of life, the facts indicating the intention of the individual concerned shall be taken into account. The legislator attributed a decisive role to habitual residence as a connecting factor in the field of personal law, protection of personality rights, family law, civil and registered partnerships, ensuring herewith the conformity between Hungarian and EU law that was absent earlier on.

27.3.1 Legal Institutions Used in the General Part of Both the Old and the New Code

27.3.1.1 Classification (Section 4)

Classification (characterization, *qualifikation*) is a complex process that must be performed by the acting forum (*i.e.* the court) when applying the law. The problem of classification is hidden in the hypothesis of the conflict-of-law rules. It is for the court to decide when assessing the private international law case what legal relationship it corresponds to, and which legal system governs its terminology. The difficulty stems from the fact that the different legal systems refer to the same legal institutions with different terms which may be classified into different categories. These discrepancies affect the connecting factors and ultimately determine the applicable law. A classic example of classification is whether the surviving spouse's right to usufruct on a property is a matter of matrimonial property or one of succession.

27 The relevant CJEU case-law consists mostly of cases regarding family law and construing a child's habitual residence. For more details *see* Katalin Raffai, 'Az ember személyes jogára vonatkozó szabályok a nemzetközi magánjogi törvényerejű rendeletben és javaslatok a hatályos szabályozás átalakítására', *in* Barna Berke & Zoltán Nemessányi (eds.), *Az új nemzetközi magánjogi törvény alapjai II.*, HVG-ORAC, Budapest, 2016, pp. 48-51. [Berke & Nemessányi (eds.), 2016b].

Most legal systems rely on the principle of *lex fori*, that is, the terminology of national law, which is what both the Old[28] and the New Code[29] impose. This rule was similar in both Codes. The *lex fori* classification is the starting point, yet the new rules are more differentiated than the previous ones. In practice, the biggest problem of classification arises when the Hungarian legal system does not know the given legal institution. The Old Code treated such cases quite vaguely, nevertheless, both scholarly literature and case-law applied the principle of *lex causae* to such situations.[30] Sections 4(2) and (3) of the New Code clarify the application of this legal institution, saying that if a legal institution is unknown to Hungarian law or its function or purpose is different from those under the Hungarian rules, it shall be applied pursuant to the foreign law regulating that legal institution, with special regard to its function and purpose under the foreign law. Section 4(4) draws attention to other instances of classification: "Paragraphs (1) to (3) shall apply accordingly to the determination of jurisdiction and the recognition and enforcement of foreign decisions."

27.3.1.2 Renvoi (Section 5)

Renvoi[31] is one of the most controversial institutions of private international law. The rules of *renvoi* have changed significantly compared to the rules of the Old Code,[32] mainly due to the fact that *renvoi* is excluded in the EU regulations (exclusion of *renvoi*), with the exception of the Succession Regulation. On the other hand, *renvoi* is a convenient tool for pursuing the homeward trend because it gives the court the opportunity to prioritize the application of the *lex fori* principle. The Old Code[33] accepted partial *renvoi* only, that is, foreign law referring back to Hungarian law, a typical case of the homeward trend (see above).[34] The New Code, however, only regards *renvoi* as an exception. It requires both

28 Old Code, Section 3(1) "If the legal qualification of the facts or relationships to be judged in a legal dispute from the aspect of the determination of the applicable law is disputed, the interpretation of the rules and concepts of Hungarian law governs."

29 New Code, Section 4(1) "When deciding which conflict of law rule is to determine the law applicable to the factual situation, the concepts of Hungarian law shall be followed."

30 Raffai 2017a, p. 63; Vékás 2018, p. 417; László Burián, 'A hazafelé törekvés a régi és az új nemzetközi magánjogi kódexben', *in* Ádám Boóc & István Sándor (eds.), *Studia in honorem Gábor Hamza*, Közjegyzői Akadémia Nyomdája, Budapest, 2019, p. 43.

31 The word *renvoi* comes from the French 'send back' or 'to return unopened'. *Renvoi* means that the private international rules of the applicable law refer back to the laws of the original state, while directing means that the addressed law refers to the laws of a third state.

32 Old Code, Section 4 (Second phrase) "If, however, the foreign law refers back to Hungarian law in the question concerned – taking into account this rule – Hungarian law shall apply."

33 Burián 2019, pp. 41-50.

34 For more details on *renvoi see* László Burián, 'A vissza- és továbbutalás szabályozása az új nemzetközi magánjogi törvényben', *in* Péter Darák & András Koltay (eds.), *Ad astra per aspera – Festive Publication in Honour of Pál Solt's 80th Birthday*, Pázmány Press, Budapest, 2017, pp. 75-86.

back and forward referral in cases where nationality is the connecting factor to determine the applicable law, and therefore it accepts the whole *renvoi*.[35]

27.3.1.3 Application of Foreign Law and Establishing Its Content (Sections 7 and 8)

There is no significant change in the application of foreign law in the New Code.[36] Like the Old Code, it treats foreign law as a matter of law and to be applied *ex officio*. However, the Old Code did not provide appropriate guidance as to the criteria to be taken into account by the court when applying foreign law, generating several uncertainties in case-law. Hungary's accession to the London Convention ('European Convention on Information on Foreign Law') relieved much of the difficulties. As the Council of Europe summarized it,

> "Under the terms of the Convention, the Parties undertake to supply information, when problems of foreign law arise into course of legal proceedings, concerning their law and procedure in civil and commercial fields as well as on their judicial system."[37]

In accordance with the London Convention, a new provision was added to the provision on *ex officio* application in the New Code, according to which the provisions of foreign law should be examined by the court in the context of that foreign law, including the legal practice of that foreign legal system.[38] It is the court's responsibility to determine the content of foreign law.

There is no major change regarding evidence on the content of foreign law. The New Code also allows the judge to use different means of proof, such as parties' submissions, expert opinions, or addressing the Ministry of Justice with requests for information. If the content of the foreign law cannot be established within reasonable time, Hungarian law shall be applied as auxiliary law. A newly introduced flexible element of the New Code is that in case the foreign law of unknown content cannot be considered properly under

35 New Code, Section 5(2) "If, by virtue of this Act, the applicable foreign law is determined on the basis of nationality and the conflict of law rule of the foreign law *a)* refers back to Hungarian law, the Hungarian substantive law shall apply; *b)* refers onwards to a different foreign law, the substantive law rules of that law shall apply."

36 For more details on application of foreign law *see* Sarolta Szabó 'Az új nemzetközi magánjogi törvény egyes általános részi kérdéseiről', *Jogtudományi Közlöny*, 2018/11, pp. 451-456.

37 The full text of the Convention is available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062.

38 New Code, Section 7(2) "The court shall interpret the foreign law in accordance with the rules and practices of that foreign law."

Hungarian law, then the closest foreign law to the applicable law should be used as a substitute.

27.3.1.4 Public Policy (Section 12)

The purpose of the public policy (public order, *ordre public, Vorbehaltsklausel, öffentliche Ordnung*) clause in private international law is to protect the fundamental values of domestic substantive law and to ensure the opportunity to refuse the application of a foreign rule that collides with national values. In this case, the domestic law (*lex fori*) shall be applied. Therefore, public policy is a general clause, filled with content by the court enforcing the law.[39] The Old Code did not give a definition for public policy; however, for cases where foreign law proved to be contrary to Hungarian public policy, it automatically mandated the application of Hungarian law.[40] The provisions of the New Code are no different on public policy, however, by clarifying the scope of fundamental values to be protected by public policy – with the protection of constitutional principles expressly among them –, it serves and supports the court that applies the law.[41] Section 12(2) of the Code specifies that the provisions of Hungarian law shall only apply as a substitute in case the violation of public policy cannot be averted in any other way.

It should be mentioned that the earlier provision prohibiting the unsubstantiated disapplication of a right ensured under a different social and economic system has been omitted from these rules. As an awareness-raising provision, this earlier rule bore the mark of the political ideology of the socialist legal system. Thus, with the loss of its former function it was only appropriate to omit it from the New Code.

27.3.2 New Legal Institutions Introduced in the General Part of the New Code

27.3.2.1 Interterritorial Conflict of Law Rules, States with Multiple Legal Systems (Section 6)

There are states where multiple legal systems are in parallel use, especially in federal states, where the separate territorial entities have their own legal systems (*e.g.* the US or Canada). In these states, the facts of private international law cases may be connected to multiple territorial units, which may cause inner collision. As the Old Code did not provide for

39 For a detailed description, *see* Katalin Raffai, 'A közrendi klauzula a nemzetközi magánjogi törvényerejű rendeletben és javaslatok a hatályos szabályozás átalakítására', *in* Berke & Nemessányi (eds.), 2016b, pp. 18-27.

40 Old Code, Section 7(1) "The application of foreign law must be disregarded if it violated Hungarians public order.", Old Code, Section 7 (3) "In place of the disregarded foreign law, Hungarian law shall apply."

41 New Code, Section 12(1) "The foreign law determined by this Act shall be deemed contrary to Hungarian public policy and therefore shall not be applied if the result of its application in the given case would clearly and seriously violate the fundamental values and constitutional principles of the Hungarian legal system."

such cases, it was for the proceeding court to decide which law was applicable. Section 6 of the New Code filled this void by introducing a completely new provision which regulates the so called interterritorial and interpersonal conflicts related to states with multiple jurisdictions. Given that these are not genuine collisions in terms of private international law, the solution to these cases is to apply the national conflict of law rules of the affected state.

There are also states where different laws apply to different groups of persons, which is the so-called interpersonal conflict. In states that apply religious rights (*i.e.* Israel or Muslim states), individuals have different rights to personal status. In such a case, the conflict of law rules of that state determine which law is applicable to that person. In the event that the interterritorial or interpersonal resolution of the conflict is impeded, like where a particular issue is not regulated at all, or its application would not lead to a satisfactory result, the law of the state with the closest connection to the facts applies.

27.3.2.2 General Choice of Law Clause (Section 9) and General Escape Clause (Section 10)

In this section, I briefly introduce two legal institutions that have several similarities in common. Both connecting factors were originally applied in the field of the law of obligations and transposed from there to the General Part, their scope extended. The Old Code allowed both the choice of law clause and the escape clause to be applied with a more limited scope, in the field of contracts only. However, since the drafting of the Old Code, private international law has allowed the parties much more autonomy, who therefore have a much broader opportunity to choose the applicable law.[42] The opportunity for choice of law within a limited scope is provided in family law and law of succession. This approach is followed by the New Code, which, as a novelty, places the clause into the General Part, as a general concept, without restricting its application to the law of obligations. This provision is in line with new trends in private international law and EU regulations. Pursuant to the Rome I Regulation, the act requires that the choice of law must be explicit – and the parties must name the applicable rules unambiguously.[43] However, the autonomy of the parties may not violate the rights of third persons.[44] Another new element

42 *See* Miklós Király, 'A személyek és a felek autonómiája az új nemzetközi magánjogi törvényben', *Jogtudományi Közlöny*, 2018/12, pp. 509-516.

43 New Code, Section 9(1) "Unless otherwise provided by this Act *a)* the choice of law shall be explicit, *b)* the law of the state which would be applicable to the given relationship should the choice-of-law agreement be established and valid, shall apply to the establishment and validity of that agreement; however, the choice of law shall also be deemed established and valid if it complies with the law of the state where the agreement has been concluded."

44 New Code, Section 9(2) "The choice of law may not violate the acquired rights of third parties." *See* Lajos Vékás, 'A törvény szerkezetéről és néhány általános részi kérdésről', *in* Barna Berke & Zoltán Nemessányi (eds.), *Az új nemzetközi magánjogi törvény alapjai I.*, HVG-ORAC, Budapest, 2016, p. 29.

in the General Part of the New Code is the general escape clause (*Ausweichklausel)*, which in a nutshell means that if the judge decides that the facts of the case have a closer connection with another law, he has the possibility to apply that law instead of the originally applicable law.[45] The parties also have the right to request this, in which case it is up to the judge to decide whether to accept and apply the clause. The previous Code only used the escape clause in the chapter on obligations, as an auxiliary connecting factor. Its regulation as a general clause gives more leeway to the court to consider the application of the law that is properly connected to the case. The only limitation to the freedom of the judge guaranteed by the general escape clause is the choice of law by the parties; in such an event, the general escape clause is not applicable.

27.3.2.3 General Auxiliary Rule (Section 11)

One major innovation of the New Code is the introduction of the general auxiliary rule, which allows the court to determine the applicable law even if it is not defined in the Code (legal gap). Its similarity with the general escape clause is that in both cases the law closest to the fact shall be applied. There is a significant difference between their respective functions: in the case of a general escape clause, judicial discretion makes it possible to derogate from the law applicable as the main rule, while in the case of the general auxiliary rule, the judge must fill the legal gap.

27.3.2.4 Overriding Mandatory Provisions (Section 13)

Similarly to the public policy clause, overriding mandatory rules (*Eingriffsnormen*) are also meant to have a protective function. The aim of these substantive rules is the protection of public interest, and there shall no deviation from them. These substantive rules are applied in the service of fundamental political, economic, and social political interests of the relevant country. Therefore, their application is mandatory not only in domestic relations but also in relations affected by foreign facts. If the court finds that the issue of international relevance affects the public interest in Hungary, it disapplies the connecting factors, and automatically applies the overriding mandatory provisions of Hungarian law. The previous Code did not cover the overriding mandatory rules;[46] thus the New Code had to fill this gap, complying also with the EU law (mainly with Rome I and Rome II Regulations).[47] However, the solution of the New Code shows differences in comparison

45 Derogation from EU regulation; in contrast to those rules, it is defined in a general manner, and it is not placed among the rules of the law of obligations.

46 *See* Katalin Raffai, 'Néhány gondolat az imperatív normák szabályozásának szükségszerűségéről', *in* Berke & Nemessányi (eds.), 2016b, pp. 28-44.

47 New Code, Section 13(1*)* "Irrespective of the law determined by this Act, those provisions of the Hungarian law shall apply, from the content and purpose of which it can clearly be established that they are subject to unconditional enforcement in legal relationships falling under the scope of this Act (imperative rules)."

with the Rome I and Rome II Regulations as to the application of overriding mandatory provisions. Section 13(2) of the New Code allows the court to take another state's overriding mandatory rules into consideration as well if they have a close connection to the case and the case could not be decided in their absence.[48]

27.3.2.5 Change in the Applicable Law (Section 14)

Change in the circumstances determining the applicable law is a phenomenon where a substantial circumstance changes in the factual situation of the case and this results in a change in the applicable law. The Old Code did not contain general provisions for a change of circumstances. In the Special Part of the Old Code, however, in the law of persons, in family law, and the law of rights *in rem* for example, there were special provisions governing cases of changes in the applicable law. The New Code contains rules of general character on changes in the applicable law.[49]

27.3.3 Legal Institutions Missing from the General Part of the New Code

A significant change in the New Code is that certain legal institutions of general character from the Old Code were discarded, such as the rules on reciprocity, fraudulent connection (*fraus legis*, evasion of law, *fraude á la loi*), and parties' common request to disregard the applicable foreign law. The Old Code assumed as a general rule that the application of foreign law was not subject to reciprocity, but an Act could, in exceptional cases, provide for considering the question of reciprocity.[50] This somewhat controversial rule has not yielded significant case law, and with the disappearance of the socio-political background that accounted for its introduction at the time,[51] it was no longer justified to keep these rules in the New Code.

Fraudulent connection means that the parties artificially change an element in the factual situation in order to circumvent the law otherwise applicable. The Old Code sanctioned such deceptive behavior by applying the law otherwise applicable. At the same time, it also served by way of a rule of exception as an instrument of the homeward trend. If fraudulent behavior led to the application of Hungarian law, then the Old Code did not

48 New Code, Section 13(2) "The provisions of the law of any other state subject to unconditional enforcement may be taken into account if they are closely connected with the factual situation and are of decisive importance regarding its assessment."

49 New Code, Section 14 "Change in the circumstances determining the applicable law shall only have effect on legal relationships established validly according to the law applicable prior to the change if this Act expressly provides so."

50 The antagonism between the socialist and capitalist legal systems generated several specific regulations both in the General Part and the Special Part of the Old Code. *See* reciprocity at Section 6(2); public policy at Section 7(2).

51 Vékás 2016, p. 24.

sanction fraudulent connection (in that case, Hungarian law had to be applied). The views on fraudulent connection vary in the different jurisdictions, with the connection being mainly sanctioned by the Latin legal systems. Before the adoption of the Old Code this institution was unknown to Hungarian case-law. Being difficult to prove and having no tradition in the Hungarian legal system, the courts did not apply it very often. This justifies why it is not regulated in the New Code.

In civil law legal systems, the application of private international law rules to international situations has always been mandatory for courts, and that can never be optional. This principle contradicts the former Section 9 of the Old Code, which stated that if the parties jointly requested the court to ignore the application of the originally applicable foreign law, Hungarian law should be applied instead.[52] Section 9 was a genuine 'Hungaricum', standing apart from the European legal systems, which all apply the principle of mandatory application of law. This provision is also contrary to EU law where the application of foreign law is not optional; moreover, it is a typical case of the homeward trend.[53] For all these reasons, the Codification Committee decided not to incorporate this institution in the New Code.[54]

27.4 Final Remarks

As mentioned in the Introduction, the goal of recodification was to create a new Act on Private International Law which is up-to-date and in line with European and international sources of private international law. With this objective in mind, the Codification Committee set out to combine traditional elements of Hungarian private international law with modern ones in the General Part. As such, it was the drafting of the General Part of the New Code that meant the most complex legislative task for legislators. In short, legislative change affected three aspects: obsolete rules have been omitted, long-lasting rules have been retained and harmonized with EU law, and several new elements (approaches) previously unknown to Hungarian international private law have been incorporated.

52 Old Code, Section 9 "If the parties request disregard of the foreign law applicable in accordance with this Decree-Law together, in its place Hungarian law – or in case of possibility of choice of law, the law chosen – shall apply."

53 For more details *see* Vékás 2016, pp. 26-28; Vékás 2018, pp. 420-421; Szabados 2018, pp. 990-991.

54 Burián 2018a, pp. 9-10.