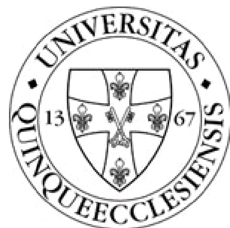
SUNICOP 

Working paper

SUNICOP 26/2012

Presented in Osijek, Croatia

Contemporary legal challenges: EU – Hungary – Croatia

16-18 February 2012

This working paper is the draft version of the paper presented in the Conference.
Suggested reference of the working paper:
László Kecskés – Kolos Kovács – Mirela Župan: PUBLIC POLICY IN NATIONAL AND EUROPEAN PRIVATE INTERNATIONAL AND PROCEDURAL LAW. SUNICOP 26/2012, http://sunicop.eunicop.eu/publications.html

PUBLIC POLICY IN NATIONAL AND EUROPEAN PRIVATE INTERNATIONAL AND PROCEDURAL LAW*

1. Introduction

The discipline of private international law enables extraterritorial application of law and thus symbolizes the willingness of states to engage in international cooperation. However, states tend to embrace this kind of openness to foreign legal systems only under the condition that there are certain corrective mechanisms aimed at protection of their respective legal systems.[1] The institute of public policy,[2] which is common to all legal orders, is traditionally the most prominent institute when it comes to protection of national legal orders.[3] It provides the competent national body with the possibility to refrain from application of conflict-of-law rules or an applicable foreign law while taking account of the compatibility of the applicable foreign law (*lex causae)* with the public policy of the law of the competent forum (*lex fori)*.[4] This way, the public policy clause corrects conflict-of-laws equity, which is, according to its definition, blind to the material outcome (or in other words, it is blind toward legal result from the viewpoint of substantive law)[5] in cases when the fundamental principles of a society or a public interest are in jeopardy.[6]

2. Comparative Analysis of the Public Policy Clause

2.1. Croatian Legal Order

The Croatian legal order has integrated the public policy clause in several regulations, having it differently formulated but retaining its original sense. For the purpose of differentiating between substantive and procedural public policy, the following discussion first deals with conflict with substantive public policy and then with conflict with procedural public policy.

I. Substantive Public Policy

Having regard to the Croatian Private International Law Act (hereinafter: PIL Act),[7] public policy is included in the conflict of laws system as well as in the system of recognition and enforcement of foreign judgements. This PIL Act has played the role of the fundamental regulation in dealing with situations with international elements for 30 years. The Croatian

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[1] J. Kramberger Škerl, 'European Public Policy (with an Emphasis on Exequatur Proceedings)', *Vol. 7/3 Journal of Private International Law* (2011) pp. 461-490, at p. 461.

[2] It appears with the following terms: ordre public, ordine pubblico, public policy, exception d'ordre public, öffentliche Ordnung, orden público. K. Siehr, 'General Problems of PIL in Modern Codifications', *Vol. VII. Yearbook of private international law* (2005) pp. 17-61, at. p. 53; for comparative owerview od public policy clauses see: C. Esplugues, 'General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe', in C. Esplugues, et.al., eds., *Application of Foreign Law* (Münich, Sellier 2011) pp. 3-95, at pp.73-74.

[3] T. Varadi, et.al., *Međunarodno privatno pravo* [Private International Law] (Beograd, Službeni glasnik, 2007) p. 151.

[4] K. F. Kreuzer, 'Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechtes', in B. Jud, ed., *Kollisionrecht in der Europäischen Union* (Wien, Jan Sramek 2008) pp. 1-63, at p. 45.

[5] F. Vischer, 'General Course on Private International Law at the Hague Academy of International Law', *Vol. 232 Recueil des Cours* (1992) pp. 9-256, at p. 100.

[6] T. de Boer, 'Unwelcome foreign law: Public policy and other means to protect the fundamental values and public interests of the European Community', in A. Malatesta, et.al., eds., *The External Dimension of EC Private Interational Law in Family and Succession Matters* (Milano, Cedam 2007) pp. 295-330, at p. 298ff.

[7] Private International Law Act, Sl. SFRJ 43/82, 72/82, NN RH 53/91.

legal system, like most civil law systems, stands on the principle of the cogency of conflict of laws rules, implying that courts are obliged to mandatory application of a foreign law – *ex offo*. The exception to this rule is the possibility of not applying the foreign law which conflict of laws rules refer to, if ''the effect of the former would be contrary to the foundations of the system of government stipulated by the Constitution of the Republic of Croatia'' (Article 4). The text of the above Act was included in the Croatian legal system in 1991. Inappropriate reference, from the viewpoint of the respective doctrine, to provisions of the Constitution was acceptable to some extent at the time when the constitution of the former Yugoslavia seemed to be comprehensive in terms of the number and scope of its provisions. However, once the new Croatian constitution had been adopted, the nomotechnical formulation of the Croatian public policy clause appeared to be too narrow.[8] At that previous times, the legislators did not want to constrict the contents of the public policy. On the contrary, they tried to outline the public policy substance using the descriptive method.[9] What arose therefrom was the interpretation that beside the fundamental values of the (now Croatian) legal system protected by the Croatian Constitution, the scope of Article 4 would also include the fundamental legal principles of conventional law such as the European Convention on Human Rights (hereinafter: ECHR).[10] This way, the narrowly formulated Article 4 acquired satisfying proportions regarding the scope and content of the protected subject. What is curious is that when trying to define the content of public policy in 1982, the legislator failed to involve *terminus tehnicus*''public policy'' in the text of the appertaining provision! One should state that *pro futuro* the autochthonous Croatian act on private international law will retain this mechanism of protection of the national public policy, but the formulation of the referring provision is surely going to be more contemporary.[11]
The public policy clause is particularly evident in Article 184 paragraph 1 of the regulation which is *lex specialis* concerning air navigation relations with an international element.[12] Here one can clearly notice a certain lack of consistency of Croatian regulations since the respective ordinance regulating maritime navigation is not familiar with this provision.[13]
The Croatian legal system has embraced the public policy clause via international treaties as well. Bilateral treaties do not contain it, but the Hague Conference on private international law does include the formulation ''manifestly contrary to the public policy of the forum'' in its Conventions, and many of them being ratified are part of positive Croatian legal order.

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[8] See M. Živković, 'Opšte ustanove međunarodnog privatnog prava i Zakon o rješavanju sukoba zakona sa propisima drugih zemalja – pogled dvadeset godina kasnije i de lege ferenda' [General institutes of private international law and Private International Law Act – viewed twenty years later and de lege ferenda] in M. Živković, ed., *Dvadeset godina Zakona o međunarodnom privatnom pravu* [Twenty years of Private International Law Act] (Niš, Pravni fakultet Niš 2004) pp. 17-32, at p. 26.

[9] M. Dika, et.al., *Komentar Zakona o međunarodnom privatnom i procesnom pravu* [Comentary on Private International Law Act] (Beograd, Nomos 1991) p. 15.

[10] European Convention on Protection of Human Rights and Fundamental Freedoms, NN – MU br. 6/99. K. Sajko, *Međunarodno privatno pravo* [Private International Law] (Zagreb, Narodne novne 2007) p. 26.

[11] Thesys for Private International Law Act of 2001. foresaw a these 5. "Foreign law is not applied if it's effect would be contrary to the public policy of Croatia. Foreign court and arbitral rulings would not be recognized if in the course of it's issuing the fundamental procedural rules, that form part of Croatian public policy, were not respected." Sajko, et.al., 'Teze za Zakon o međunarodnom privatnom pravu' [Thesys for Private International law Act] in K. Sajko, et.al., eds., *Izvori hrvatskog i europskog međunarodnog privatnog prava* [Sources of croatian and european private international law] (Zagreb, Informator 2001) p. 265.

[12] Zakon o obveznim i stvarnopravnim odnosima u zračnoj plovidbi [Act on obligatory and proprietary relations in air navigation] NN 132/98, 63/08. (hereinafter: ZOSOZP)

[13] Pomorski zakonik (Maritime Act), NN 181/04, 76/07; 146/08. It is notable that both acts recognize the institute of fraus legis, as they both contain a separate provision on it's prohibition. Compare art. 987 of the Maritime Act with art. 184. ZOSOZP.

Despite the fact that they give importance to the public policy clause, all these provisions still remain incomplete since the term of public policy is not defined by these regulations. This can be seen as a blanket legal clause, content of which is complemented by the judges in the courts.[14] Numerous dimensions of public policy happen to be the topic of vivid academic discussions: proximity, relativity, discretion, functions, content/scope of protection and restrictions on its application.[15]

The first dimension foresees potential termination of foreign law application if it comes to a situation which is somehow linked with a domestic legal system and application of a foreign law might have permanent effects on the country (*Inlandbeziehung*). Application of the public policy clause could depend on the extent to which it affects a national legal system or to which a national legal system is interested in the case.[16] The intensity of the link and necessary joint features of a case and the forum has to be assessed on every concrete occasion.[17] If the intensity is low, then it comes to mitigated or softened application of public policy. Furthermore, due attention is paid to the effects of the application of foreign law abroad, although these effects could not have come into existence in the forum country by applying the respective foreign law. Reduced intensity often appears in cases when a legal relation emerges abroad and, in a concrete case before a forum judge, the issue appears in the course of preliminary question.[18]

The second dimension refers to the function of public policy. Undoubtedly, public policy has two functions, the negative and the positive one. The institute of public policy is frequently linked with the negative function of public policy, while the positive function thereof refers to norms of immediate application (*lois d'application immediate*).[19] Croatian regulations use public policy for correction of an inacceptable foreign law which is overruled in its application. The legislator did not define all the provisions precisely, so concrete implications of the application of the public policy clause are not completely clear: Which law shall be applied instead of an inacceptable foreign norm? Court does not have the *denaio justice* option and must deal with the case. Even though comparative doctrine could detect clear arguments that some other rule *lex causae* is to be applied instead of an inacceptable foreign law, our doctrine denotes application of the adjustment method as contrary to provisions of Article 9 of the PIL Act stipulating that a foreign law shall be applied in the sense and concepts contained therein. Therefore, instead of an incompatible foreign norm, one shall apply the corresponding norms of domestic law.[20]

The third dimension refers to the content of public policy. In this context, public policy is said to be relative – which should be interpreted as the syntagma that the content of public policy is subject to changes in time and space, i.e. it differentiates between states.[21] Therefore, assessment of conflict is made at the moment of issuing a decision on the merits which disqualifies a foreign law.[22]

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[14] Sajko, et.al., eds., loc.cit. n. 11, p. 265.

[15] S. Mills, 'The Dimensions of Public Policy in Private International Law,' *Journal of Private International Law* (2008) pp. 201-236.

[16] Sajko, et.al., eds., loc.cit. n. 11, p. 261; Varadi, op.cit. n. 3, p. 157.

[17] K. Siehr, 'Kollisionen des Kollisionsrechts', in *Festschrift für Hans Jürgen Sonnenberger* (Munich, C. H. Beck, 2004) pp. 211-226, at p. 223; de Boer, loc.cit. n. 6, p. 299; Mills, op.cit. n. 15, p. 210.

[18] Dika, op.cit. n. 9, p. 19; Sajko, loc.cit. n. 11, pp. 262-263.

[19] Dika, op.cit. n. 9, p. 17; Sajko, loc.cit. n. 11, p. 263ff; Vischer, op.cit. n. 5, p. 102; J. Meeusen, 'Public policy in European PIL', in A. Malatesta, et.al., eds., *The External Dimension of EC Private Interational Law in Family and Succession Matters* (Milano, Cedam 2007) p. 331-335, at.p. 332; de Boer, loc.cit. n. 5, p. 296.

[20] Dika, op.cit. n. 9, pp. 18-19; Sajko, loc.cit. n. 11, p. 264; Varadi, op.cit.n.3, p. 161; Mills, loc.cit. n. 15, p. 208.

[21] J. Bloom, 'Public Policy in Private International Law and Its Evolution in Time', *50 Netherlands International Law Review* (2003) pp. 373-399.

[22] Dika, op.cit. n 9, p. 19; Sajko, loc.cit. n. 11, p. 269.

II. Procedural public policy

The institute of public policy affects the sphere of procedural law where it prevents foreign judicial decisions and arbitral awards, contrary to the foundations of domestic procedural law, from having effect in the respective country. The content of procedural public policy can be derived from provisions of the Croatian Constitution, e.g. the right to appeal (Article 18), equality before courts (Article 26). Everyone has the right, within a reasonable timeframe, to a just decision on their rights and liabilities by an independent and impartial court established in compliance with the law (Article 29); everyone is guaranteed security and confidentiality of personal information (Article 37).[23]

This sphere of protection of the Croatian legal order is also dispersed into several legal regulations. The basic regulation, the PIL Act, comprises a provision on protection of the domestic public policy which has found its place in the segment of recognition and enforcement of foreign decisions. In such case, court *ex officio* monitors possible violation of substantive and procedural public policy (Article 90 of the PIL Act).[24] Beside this general provision, the PIL Act additionally regulates concrete procedural irregularities which would be inacceptable from the viewpoint of the domestic public policy (Article 88 of the PIL Act).[25] If these two provisions are compared, the difference arises from the fact that court *ex officio* caters for violation prescribed by Article 91, while considering Article 88 paragraph 1, court inspects a situation if a party files an appertaining appeal in this regard.[26]

Violation of procedural public policy with respect to the field of international legal aid is also regulated by the Civil Procedure Act.[27] As far as arbitration is concerned, the Arbitration Act (hereinafter: AA) foresees that court, in the appeal procedure, shall *ex offo* cancel the arbitral award if it is contrary to the public policy of the Republic of Croatia.[28] Then, court, in the procedure of recognition and enforcement of the arbitral award, shall *ex offo* examine if the recognition or enforcement is in compliance with the public policy of the Republic of Croatia.[29] These provisions of the AA have the same purpose as Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration as well as Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[30] There is a relatively clear consensus on the content of the public policy which needs to be protected.[31]

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[23] Ustav Republike Hrvatske [Constitution of Republic of Croatia] NN no. 85/10 – clarified text.

[24] Dika, op.cit. n. 9, pp. 300-305; Sajko, loc.cit. n. 11, p. 270.

[25] Art. 88. „1. The Croatian court will refuse to recognize and enforce a foreign judgment in on a complaint the person against whom the decision is made it determines that the person could not participate in the proceedings because of irregularities in the proceedings. 2. In particular, it will be deemed that the person against whom the foreign court judgment is issues was not able to participate in the proceedings because the claim, decision or conclusion by which the procedure was initiated đ was not personally delivered or which had not even attempted delivery, unless that person engaged into discussion about the merits of legal matter at first degree trial.

[26] Sajko, loc.cit. n. 11, p. 271.

[27] It determines that the court would decline legal aid to a foreign court if the subject of a request is a act/procedure that violates Croatian public policy; it also determines that the act that is a subject of a foreign court's request can be performed in a way required by the foreign court, if that procedure would not be incompatibile with Croatian public policy. Zakon o parničnom postupku [Civil Procedure Act] NN no. 53/91, 91/92, 112/99, 88/01, 117/03, 02/07, 84/08, 123/08, 57/11. Art. 181. s. 2, Art. 182. s. 2.

[28] Zakon o arbitraži [Arbitration Act] NN 88/01, Art. 36. s. 2 b.

[29] Ibid, art. 40.

[30] New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. Sl SFRJ, MU no. 11/1981, NN MU no. 4/1994.

[31] Compare: P. Lalive, 'L'ordre public transnational et l'arbitre international', in G. Venturini and S. Bariatti, eds., *Liber Fausto Pocar* (Milano, Giuffre Editore 2009) pp. 599-611, at p. 608; and H. Sikirić, 'Javni poredak kao razlog za poništaj arbitražnog pravorijeka' [Public policy as a reason for arbitral award anullment] *59/2-3 Zbornik PFZ* (2009) pp. 225-268 at p. 229.

What is worth mentioning is that bilateral treaties are familiar with the procedural public policy clause. For instance, Article 57 item c of the 1968 Treaty on Mutual Legal Transactions made between Hungary and Croatia stipulates that recognition or enforcement is denied if an award is contrary to the public policy of a respective country.[32]

III. Public Policy in the Croatian Judicial Practice

It has already been stated that this blank norm is filled by the judges. The doctrine clearly propagates that the public policy clause shall be interpreted in a restrictive fashion and applied carefully.[33] This represents an obvious conflict with public policy, an exceptional remedy when it comes to extremely severe violation thereof.[34] In spite of only few articles on the relating judicial practice, the existing decisions may indicate particular regularities and tendencies when applying the public policy clause.[35] With respect to an appeal for cancellation of an arbitral award pursuant to Article 36 paragraph 2 of the AA, the difference between national and international public policy becomes easily noticeable.[36] The reasoning (revised) of the Supreme Court in the same case and in the same context is straightforward too and it explicitly states that the concept of public policy cannot be identified with mandatory rules.[37] Explanation of the High Commercial Court follows this direction as well: ''...public policy does not represent the totality of mandatory legal provisions, but it comprises only those regulations which are aimed at safeguarding fundamental legal values (social, moral and economic) of the public policy of a country (in this case, it is Croatia) or at challenge of its legal order".[38] In the practice of Croatian high courts we can track some common practice: all pose a requirement that reference to violation of public policy is supported with reference to the violated principle.[39] Moreover, courts demand an explanation of the relevance of the violated principle for the public policy of the Republic of Croatia and of the significance of the violation for the same policy.[40]

[32] Contract between SFRJ and People's Republic Hungary on reciprocal legal transactions, Sl. SFRJ 3/1968; NN MU 13/97.

[33] Dika, op.cit. n. 9, p. 19.

[34] I. Grbin, *Priznanje i izvršenje odluka stranih sudova* [Recognition and enfocement of foreing judgements] (Zagreb, Informator 1980) pp. 116-117; Varadi, op.cit. n. 3, p. 156.

[35] High Commercial Court (hereinafter: HCC); Supreme Court of Croatia (hereinafter: SCC), all of the decisions are available through IUS-INFO database <www.ius-info.hr>

[36] „...and that public policy is not violated because there is no violation of fundamental principles embodied in international public policy.... all of the violations that plaintiff is claiming regard to the violation of mandatory rules as a internal public policy are not reasons that the courts is entitled to review in the procedure of arbitral award annulment." HCC, XXV Pž-1574/04-6 of 12. December 2006.

[37] „.... for a appraisal of this prerequiste (namely on contrarity to public policy) it is relevant only if the award violates the fundamental principles of internal public policy, and not if the legal provisions of mandatory nature are properly implyed – which is a question in domain of proper application of material law – and for which reason the arbiral award cannot be annuled; SCC no. Revt 74/07-2 of 7 October 2009. The same is stated in the decision CSS – Gž 2/08 of 20 March 2008.

[38] HCC LI Pž-2264/06-3 of 4 April 2007.

[39] „....the court had determined that this does not violates some principle of Croatian public policy; ...and a plaintiff repetedly (both in the claim and a review) identifies mandatory rules with the notion of public policy, yet not stating concretely which principle of Croatian public policy would be violated." No. Gž 19/10-2 of 19 August 2010.

[40] „description of a decision ....contains marely declarations without adequate explanation... decision does not contain an interpretation of the public policy notion in the context of factual situation of a case. Rationale of a decision in that part is reduced only on a statement that arbitral council, while applying art. 342 Civil Procedure Act, made a manifest breach of basics principle of CPA, but without clearly pointing to a concrete principle of PA that would be violated, what is the importance of that principle for Croatian public policy and what is the significance of such breach for Croatian public policy". HCC LI Pž-2264/06-3 of 4 April 2007.

2.2. Hungarian Legal Order

In the law literature it is a wide range known view that public policy both contains substantive and procedural aspects and these are making effect mutually on each other. This phenomenon in the Hungarian law could be well described with the development of public policy's notion of Hungarian private international procedural and substantive law. In the state before the entry force of Law-Decree No. 13 of 1979 on International Private Law we can find the positive law basis of public policy's notion firstly in procedural rules allowing the refusal of recognition and enforcement of foreign decisions which are being contrary to public policy.[41]

I. Procedural public policy

The notion of public policy in Hungarian legal system appeared relatively late and with firmly narrowed meaning-content. Act I of 1911 on civil procedure (1911 Pp.) did not contain the notion of public policy, but it's meaning derived from § 414 5th point "the decision of a foreign court shall not be recognized as a valid, if the recognition of the decision is contrary to a domestic judgment-at-law, public moral or the purpose of an inland act."[42]

More than fifty years later, as a result of modification of the Act III of 1953 on Civil Procedure (hereinafter: Pp) in 1967,[43] the expression "public policy" firstly appeared in Hungarian procedural law – although only as a part of the detailed reasoning of the modification.[44] In the case of international related disputes Pp opened the door to nullification only, if the judgment was contrary to the Constitution or a Hungarian mandatory rule. In the case of disputes relating to domestic corporations – it was enough for nullification if the decision is contrary to a mandatory provision of a norm (ius cogens). In this sense, public policy was equal with the Constitution, imperative norms and, in a certain extent, a whole bulk of ius cogens. This three-parts regulation was put down when the fundamental rules of arbitral procedure – already together with notion of public policy – was built into the Pp as a single chapter in 1972.[45] From that time, till the Hungarian Act LXXI of 1994 on Arbitration entries into force of 13 December in 1994, one could annulls with reference to Pp § 362 (1) c) just those arbitral awards which were "contrary to the Constitution or an overriding mandatory rule of Hungarian law (public policy)." By this definition it can be stated that the Hungarian notion of public policy were getting narrowed to imperative rules in the judicature of courts.[46]

Since 1 July 1979, the entry into force of Law-Decree No. 13 of 1979 on International Private Law, the possibility has been opened for recognition and enforcement of any foreign decisions without the requirement of an existing international bi or multilateral convention between Hungary and the state of that foreign court which has rendered the decision. Among

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[41] L. Kecskés and Z. Nemessányi, 'Magyar közrend – nemzetközi közrend – közösségi közrend' [Hungarian public policy – international public policy – community public policy] *7 Európai Jog* (3/2007) p. 26.

[42] I. Balla, *Tételes magyar nemzetközi magánjog* [Itemized Hungarian international private law] (Budapest, 1928) p. 25.; L. Burián, 'Gondolatok a közrend szerepéről' [Thoughts on the function of public policy] in D. Kiss and I. Varga, eds., *Magister Artis Boni et Aequi. Studia in Honorem Németh János* (Budapest, ELTE Eötvös Kiadó, 2003) p. 108.; Kecskés, and Nemessányi, loc.cit. n. 41, p. 27.

[43] Law-Decree No. 40 of 1967. See: A. Badó and J. Bóka, *Európa kapujában. Reform, igazság, szolgáltatás* [In the gate of Europe. Reform, justice, service] (Miskolc, Bíbor Kiadó, 2002) p. 91.

[44] Miklós Világhy constructed the substantive law content of public policy clause by this procedural rule. See: M. Világhy, *Bevezetés a nemzetközi magánjogba* [Introduction into the international private law] (Budapest, Tankönyvkiadó Vállalat, 1971) pp. 59-62.; Burián, loc.cit. n.42, p. 109.

[45] See: Law-Decree No. 26 of 1972 on the modification of Civil Procedure Act. See also: Badó and Bóka, op.cit. n.43, p. 91.

[46] Ibid. p. 91.; Kecskés and Nemessányi, loc.cit. n. 41, p. 27.

other reasons the § 72 (2) of Law-Decree declares that "(a)n official foreign decision shall not be recognized, if: a) doing so would violate public order in Hungary;".

The rules of recognition and enforcement covered by the Law-Decree have become subsidiary toward European Union (hereinafter: EU) law by the accession of Hungary to the EU. From that time, because of the supremacy of EU law, the Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) has had primary applicability in relations existing between Member States concerning with recognition and enforcement. Article 34 of Brussels I implies the public policy clause: "(a) judgment shall not be recognized: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought". The main difference between the Hungarian and Brussels I regulation is the requirement of "manifestly contrary". This criteria narrows the discretionary movement of a Member State court when rendering a decision on refusing recognition of a foreign judgment because the Member State court is bounded to concretizes the notion of "manifestly contrary". ECJ judgments could be served as a good strongpoint for a Member State court in the concretization of this requirement. Our point of view that via this method ECJ can harmonizes the legal thinking and judicial practice concerning with public policy at least to the extent which can provides a common theoretical background for refusing the recognition of a foreign judgment rendered by a Member State court on the ground that it is "manifestly contrary to the public policy in the Member State in which recognition is sought".[47]

The Hungarian Act LXXI of 1994 on Arbitration – similar to New York Convention (1958) and UNCITRAL Model Law (1985) – does not define the public policy. Relating to § 55 (2) of the Act "(a)n action for overturning the arbitration award may also be filed alleging that: (…) b) the award is in conflict with the rules of Hungarian public policy."

Thus Hungarian courts got free hand to characterize the new notion of Hungarian public policy. However – till near past – it had not been so many changes in the practice opposite to the state was before Hungarian Arbitration Act.[48] State courts took the necessary dogmatic backgrounds from the Hungarian legal literature, which is – near uniformly – in favour of the tight interpretation of public policy.[49] In addition, other factors occurred that state courts seemed to be reluctant from rendering a judgment on directly any general principle in default of a norm including a concrete and special regulation. Whatever it can be stated, that the confliction of public policy always presuppose a regulation infringing public interest. It covers anyway guarantee-like rules defined by the Constitution and the infringement of constitutional fundamental rights and obligations. Beside this, other legal regulations could be part of this subject matter if they directly defend the foundations of economic and social order. The fact in itself, that a foreign decision or an arbitral award is contrary to a domestic legal regulation or applies it improperly, even does not give a sufficient ground for annulling the decision. As a summary, we can state that the infringement of a legal regulation is a necessary but not sufficient requirement to refer upon public policy.[50]

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[47] S. Franc, 'Art. 34', in U. Magnus, and P. Mankowski, eds., *Brussels I Regulation. European Commentries on Private International Law* (München, Sellier – European Law Publishers, 2007) pp. 568-579.

[48] L. Kecskés, '„Jó lovassal a nyeregben a zabolátlan ló is megfegyelmezhető." A közrend fogalmáról két bírósági határozat alapján' [„With a good man in the saddle, the unruly horse can be kept in control." On the concept of public policy, on the basis of two court orders'] in I L. Gál and Sz. Hornyák, eds., *Tanulmányok Dr. Földvári József professzor 80. születésnapja tiszteletére*. [Papers in honor of Professor József Földvári's 80th Birthday] (Pécs, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2006) p. 137.

[49] The most cited decision of the Supreme Court (BH 1997/489) in this subject matter is the one of those few ones which contains citations on law literatures. See F. Mádl, and L. Vékás, *Nemzetköz magánjog és nemzetközi gazdasági kapcsolatok joga* [International private law and economic relations] (Budapest, Közgazdasági és Jogi Könyvkiadó, 1992) pp. 131-132.; Badó and Bóka, op.cit. n. 43, p. 91.

[50] Kecskés and Nemessányi, loc.cit. n. 41, pp. 27-28.

Nevertheless, regarding the latest Hungarian legislation, we emphasize that our latest statement seems to be refuted. Namely the Act XVI of 2003 on Agricultural Market Organization was added by § 8/B with effect on 1st of January in 2012: "(b)y the § 55 (2) b) of Act LXXI of 1994 on Arbitration an arbitral award shall be regarded as a contrary of public policy if it obliges the producer, who is unable to serve the self-produced agricultural product in whole or in part because of force majeure (vis maior), to replace, purchase the missing agricultural product or instead of it to provide other service or guarantee for the purpose of performance." The regulation clearly defines those situations in which cases an arbitral award shall be regarded as a contrary to public policy. Therefore the reference of cited legal regulation made by party who is seeking for annulment can be a sufficient ground to declare judgment as a contrary to public policy.

II. Substantive public policy

Public policy rules from a substantive law perspective, in the field of private international law, will come to play when the forum of trial although has found the applicable law but before making any further procedural movements forum is bound to discover whether application of foreign law is contrary to own public policy or not. The Law-Decree on Hungarian International Private Law is ruling this situation as follows: "§ 7 (1) The application of foreign law shall be disregarded if it conflicts with the Hungarian public order. (2) The application of foreign law cannot be disregarded merely because the social and economic system of the foreign state is different from that of the Hungarian. (3) The Hungarian law shall apply in place of the disregarded foreign law." Concerning with this regulation two comments seemes to be important to be mentioned: (I) firstly, paragraph (1) defends the Hungarian public policy in the widest possible range, but paragraph (2) provides an interpretational crutch for the forum when declares that only the existing unequivocal differences between public policies of the forum and the state of applicable law are in themselves not a sufficent ground for disregarding the foreign law. This interpretation well reflects to our previous statements, namely a foreign decision or a foreign applicable law ought to be regarded as a contrary to public policy if it infringes guarantee-like rules defined by the Constitution or other legal regulations if they directly defend the foundations of economic and social order. (II) secondly, paragraph (3) is the appearance of a classic private international law phenomenon, the so called "nach Hause treiben" ("endeavoring to home"). This phenomenon covers those situations when interference has emerged between the application of foreign law and lex fori and the legislator chooses the simplest way to solve the problem by choosing lex fori instead of interfered foreign law. In this respect substantive public policy rule goes further than the procedural one because it not just declares that the application of foreign law shall be disregarded if it conflicts with the Hungarian public policy (similar to the refusal on recognition and enforcement) but also gives solution by pointing out the applicable law, namely the lex fori.[51]

Since the entry into force of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)[52] and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)[53] Hungarian substantive public policy rules have become subsidiary towards Regulations on those fields which are covered by the scope of

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[51] L. Burián, et.al., *Európai és nemzetközi kollíziós magánjog* [European and Hungarian conflicts-of-laws] (Budapest, Krim Bt., 2010) pp. 128.131.

[52] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations. Effective from: 17 December 2009 except for Article 26, which shall apply from 17 June 2009.

[53] Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations. Effective from: 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

them. Rome Regulations have modified the function and structure of substantive public policy. The Law-Decree § 7 has become subsidiary towards the so called "general clause of public order" of Regulations. Rome I contains it in Article 21, Rome II contains it in Article 26 but the two texts are the same in wording: "(t)he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum." We can achieve up by this wording the intention of EU legislator to create a common theoretical and legal background for procedural and substantive public policy within the EU. The wording i.e. "manifestly incompatible" is not only a reminiscence of the wording of Brussels I Regulation Article 34 i.e. "manifestly contrary", but a real legislative intention to create consistency between the three legal manner. Therefore we emphasize that forums of Member States must take into account the ECJ interpretation on public policy (procedural public policy) in private international law cases in order to ensure the recognition and enforcement of a judgment rendered upon a case in which the foreign applicable law of a Member State was disregarded by the forum on the ground that it was manifestly incompatible with the public policy of the forum.[54]

III. Public Policy in Hungarian Judicial Practice

It is well outlined from previous analyses that unlawfulness in Hungarian law is the condition sine qua non of the notion of infringement of public policy. It has become a dogma that the infringement of public policy could be declared just within the notion of unlawfulness and just those cases which are concerning with momentous unlawfulness. Therefore we consider the Hungarian Supreme Court judgment under No. Gfv.VI.30.450/2002 as a particularly important one, where the Court spectacularly breached the mentioned dogma. This judgment of the Supreme Court has caused a considerable confusion in the Hungarian legal thinking as regards public policy. The Supreme Court judgment significantly upended Hungarian legal thinking regarding public policy.[55] It stated namely not less than that (part of) an arbitral award may be contrary to public policy and so null and void which is otherwise lawful, i.e. not contrary to the law.[56]

In the lawsuit initiated against the defendant seeking the annulment of an arbitral award, pursuant to a request for revision submitted by the plaintiff against final judgment No. 22.G.75.451/2001/20 of the Metropolitan Court, dated December 11, 2001, the Supreme Court, as court of revision, based

[54] J. Harris, 'Mandatory Rules and Public Policy under Rome I Regulation' in F. Ferrari, and S. Leible, eds., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Münich, Sellier-European Law Publishers, 2009) pp. 269-342.; F. Pocar, 'Some Remarks on the Relationship between the Rome I and Brussels I Regulations' in Ferrari, and Leible, eds., Ibid. pp. 343-348.; See also: K. Raffai, 'A szerződéses kötelmekre alkalmazandó jog meghatározásáról szóló Római Egyezemény és Róma I. rendelet közrendi szabályai' [Public policy rules of Rome Convention and Rome I Regulation on the law applicable to contractual obligations] in G. Palásti and I. Vörös, eds., *Európai kollíziós kötelmi jog: A szerződésekre és a szerződésen kívüli kötelmi viszonyokra alkalmazandó európai jog* [European conflict of laws rules relating with law of obligations: Applicable law on contractual and out-of-contractual relations] (Budapest, Krim Bt., 2009) pp. 92-118.

[55] However, this is not the first judgment rendered by the Supreme Court in the matter of the setting aside of an arbitral award which has been criticized by the legal literature. László Burián made critical comments on the decision No. Gf. VI. 30848/1997/8 of the Supreme Court, published under number BH 1997.489. See: Burián, loc.cit. n. 42, p. 122.

[56] According to an old famous saying public policy „…a very unruly horse, and when you once get astride it you never know where it will carry you". Richardson v. Mellish (1884) 2 Bing. 228. (1824-1834 All Er Rep. 258. Almost 150 years later Lord Denning said however so that „With a good man in the saddle, the unruly horse can be kept in control". Lord Denning in: Enderby Town Football Club Ltd. v. The Football Association Ltd. 1971. See: Kecskés, loc.cit. n. 48, p. 130.

upon a hearing held on September 30, 2002, delivered its judgment under file No. Gfv.VI.30.450/2002/6 on October 7, 2002. Under this judgment, the Supreme Court partly modified final judgment No. 22.G.75.451/2001/20 of the Metropolitan Court, annulled arbitral award No. VB. 99164, dated April 2, 2001, of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry and ordered the plaintiff to pay the defendant the amount of HUF 290,000,000 (two hundred and ninety million Forints) as litigation costs, deeming such to be contrary to public policy. The Supreme Court, as court of revision, in its judgment presented the following train of thought and reasoning. As material grounds for the violation of public policy, amongst other things, the plaintiff referred to the fact that the total amount of the attorney fees awarded by the Arbitration Court to the benefit of the defendant was so excessive that it not only imposed a disproportionate obligation on the losing party, but it was also contrary to the value judgment of society and, therefore, violated public policy. According to the final first instance judgment of the Metropolitan Court, the court is not entitled to revise the litigation costs specified by the arbitral tribunal, as such specification constituted a substantive aspect of the arbitral award. The amount of the litigation costs is not contrary to any law, and cannot be considered as injurious to the fundamental economic and social order. Therefore, the Metropolitan Court considered that it could not be established that the arbitral award was contrary to public policy.

The plaintiff based its request for revision on the inconsistent consideration of evidence. In considering such request, the Supreme Court, as court of revision, started from the fact that jurisprudence strives to define the social interest to be protected by public policy on the basis of various considerations. Constitutional provisions do not cover all those social purposes which are to be protected in such manner. Fundamental human rights and moral requirements also qualify as such social purposes.[57] The essence of public policy is that the law intends to protect and enforce, by all means, the institutions and principles falling within the concept of public policy.[58] Public policy – similarly to the general value judgment of the law – is a category of varying content, both in respect of time and space, and is always subject to specific social-economic system and political and moral thinking.[59]

Starting from the above referenced theoretical basis, according to the position of the court of revision, the actual occurrence of infringement is not a requisite element in respect of the establishment of the fact that the arbitral award is contrary to public policy. The general value judgment of

[57] See Jogi Enciklopédia [Legal Encyclopedia] (Budapest, KJK-Kerszöv Jogi- és Üzleti Kiadó Kft, 1999) p. 371.
[58] Mádl and Vékás, op.cit. n. 49, p. 119.
[59] Ibid. p. 122.

society is one of the elements of public policy. Therefore, if an arbitral award is contrary to the value judgment of society, it may be established that such award is contrary to public policy, as society is to be protected from the enforcement of such award.

The Supreme Court pointed out that the award of HUF 290 million for litigation costs by the arbitral tribunal to the plaintiff was the highest award for litigation costs recorded in Hungary in lawsuits between Hungarian parties, according both to the appellate court and the plaintiff's statement, which statement was uncontested by the defendant. This amount was specified by the arbitral tribunal as consideration, "attorney fees", for the legal services provided during the approximately 16 month long lawsuit, which had a value of HUF 32 billion.

Decree of the Hungarian minister of Justice No. 12/1991./IX.29./IM., effective at the time of the rendering of the arbitral award, stipulated the value of the case as the initial basis for the determination of the amount of the attorney fees. In addition to the value of the case serving as the basis for the determination, established court practice also considers time and labor requirements, as well as the quality of the actually performed legal services.[60] However, as the Supreme Court pointed out, in the case of a substantial amount being in dispute, the legal fees determined as a percentage of such ammount may be so excessive, that it is disproportionate to the legal services that may be performed.

According to the position of the Supreme Court, as court of appeal, the specific decision, supported by judicial practice and referenced above, also emphasizes that despite the fact that the law does not stipulate an amount as an upper limit for attorney fees, even in the case of lawsuits where the amount claimed is extraordinarily high, the court should avoid the determination of legal fees which are unacceptably excessive, in the view of accepted public opinion. In cases with an extraordinarily high value, even keeping within the limit of 5% of the amount claimed, the court may not specify attorney fees in an amount large enough to prevent the parties from exercising their right to go (i) before a court, seek a remedy or put the losing party in a financially awkward position and (ii) contravene the value judgment of society.

The revision court established in its judgment that the court of first instance failed to consider the above described aspects. Therefore, it came to the inconsistent conclusion that the award of the arbitral tribunal regarding the stipulation of attorney fees in the amount of HUF 290 million was not contrary to Hungarian public policy.

[60] See Decision published under No. BH. 1996/321 regarding the determination of attorney fees in cases of an extraordinarily high value.

According to the position of the revision court, even with a view to the HUF 32 billion value of the case at hand, the HUF 290 million attorney fee was disproportionately excessive consideration, as compared to the highest quality work that may have been performed by the legal representative of the successful defendant during the 16 preceding months. Upholding the attorney fees award will have an undesirable negative effect on the established Hungarian judicial practice constituting a part of the legal system. Consequently, it is also contrary to Hungarian public policy.

With regard to the aforementioned, the Supreme Court, as court of revision, pursuant to Section 275/A(2) of the Pp. (Act on Civil Procedure), reversed the unlawful part of the final first instance judgment, and annulled the provision of the arbitral tribunal award deemed contrary to Hungarian public policy and ordered the plaintiff to pay to the defendant litigation costs in the amount of HUF 290 million. Pursuant to Section 56(2) of the Vbt., in the event of the establishment of a ground for annulment, the judgment of the ordinary court is to be restricted solely to the annulment of the arbitral award. Therefore, the ordinary court may not make any statements regarding the actual amount of the litigation costs. Pursuant to Section 275/A(1) of the Pp. (Act on Civil Procedure), the court of appeal upheld all the other aspects of the final judgment which complied with the applicable law.

The plaintiff requested the annulment of the entire arbitral award in the given case valued at HUF 32 billion. However, the Supreme Court, as court of revision, considered the plaintiff's claims to be well-founded only in respect of the annulment of the provision establishing the litigation costs in the amount of HUF 290 million. This meant that the extent to which the case pending before the Metropolitan Court, as court of first instance, was judged to be favorable to the plaintiff was so insignificant that it did not justify the reduction of the amount of the litigation costs determined by the court of first instance – having regard also to the fact that the plaintiff was required to pay a procedural duty based upon the value of the case established on the basis of the principal subject matter of the proceeding, and as regards such principal subject matter the plaintiff did not win the lawsuit.[61]

In theoretical point of view we do not agree with the reasoning of the judgment rendered by the Supreme Court as a revisionary Court, namely the infringement of a legal regulation is not a mandatory required part of the declaration that an arbitral award is contrary public policy. This standpoint is namely based upon such a legal point of view in which the notion of public policy (intern public policy) does not located within the frames of a certain legal system. However, in our conception, the notion of public policy existing within the theoretical frames of a certain legal system, therefore the infringement of legal system – i.e. the infringement of a certain legal regulation of the legal system – is an inevitable condition for the infringement of intern public policy. Public policy is namely the core of such values which characterize a legal system.

3. Public Policy in Judgments of European Court of Justice

Public policy in EU law does not function as a significant motive for national restrictive measures opposing, otherwise superior, EU law rules, but occasionally it can result in refusing the recognition and enforcement of (civil court) decisions rendered in other member states. Public policy in the EU law, and in national legal systems also, is an institution that involves both substantive law and procedural law elements. Nevertheless, in EU law the institution of

[61] The arbitral panel of three arbitrators complied with the provisions of the judgment of the Supreme Court. However, in a letter, the contents of which corresponded to the conceptual elements described in the next section, it notified the Supreme Court as to its principal points of contention with respect to the arbitral award.

public policy has multiple functions. As a rule it prefers prevailing mostly the values of national domestic laws of the member states, however sporadically, it does the same with EU law. Public policy can be conceived as an ever-moving slider connected to the institutional axle of primacy of EU law. The various legal techniques and rules based on public policy perform an „elevator-like" vertical operation, lifting and sinking between the level of EU law and the level of national domestic laws of the member states. During this vertical operation, sometimes elements of member state domestic laws are lifted up to the level of EU law, sometimes the application of EU law by national courts and tribunals, especially the important EU law principles of this application, such as direct effect, direct applicability and primacy of EU law are emphasized and strengthened.

3.1. Eco Swiss Judgment

Questions of public policy appeared in the judicature of the European Court of Justice in 1999 in the ECO Swiss case.[62] In Eco Swiss, the High Court of Netherlands, the Hoge Raad der Nederlanden made a reference to the ECJ under Article 234 of the post-Amsterdam EC Treaty, asking whether a domestic court is obliged to grant a claim for annulment of an arbitral award if the award infringes Article 81 of the post-Amsterdam EC Treaty. The ECJ ruled that the award must be annulled if the domestic court's procedural rules require it to annul on the grounds of breach of national rules of public policy. The ECJ's ruling confirmed that Article 81 is a rule of public policy under EC law. An arbitral award that infringes Article 81 should suffer the same consequences as an award that infringes any other rule of public policy of the domestic court, such as a refusal to recognize and enforce the award.

In the Eco Swiss judgment the ECJ helped primary EU law to prevail by stating that: "Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85 of the EEC Treaty (Article 81 of post-Amsterdam EC Treaty). That provision constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of the internal market. Also, EU law requires that questions concerning the interpretation of the prohibition laid down in Article 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling."[63]

The provisions of Article 85 of the EEC Treaty (Article 81 of post-Amsterdam EC Treaty) may be regarded as a matter of public policy within the meaning of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.[64]

A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.[65]

Eco Swiss gave rise to a de facto duty on arbitrators to consider competition law issues in order to avoid the award infringing public policy and being refused recognition and enforcement. This is reinforced by the general duty of arbitrators to issue valid and enforceable awards. However, strictly speaking, the ECJ's ruling in Eco Swiss referred only to Article 81 and only equated an infringement of that article with a breach of public policy. This means that it is unclear whether infringement of another competition law aspect of the

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[62] ECJ, Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] *ECR* 3055.
[63] Ibid. para. 37.
[64] Ibid. para. 39.
[65] Ibid. para. 41.

EC Treaty or of relevant secondary legislation would constitute a breach of public policy. Whether an arbitrator has a prima facie duty to apply competition law issues, even where they have not been raised by the parties and are not included in the substantive law of the contract, is the subject of academic debate. The general consensus is that there is a prima facie duty to do so, at least for an arbitrator who is sitting in an EU member state. However, even critics of the theory that arbitrators have such an unequivocal duty agree that arbitrators have a duty in practice (a de facto duty) to apply competition law issues. This is the inevitable conclusion to be drawn, at least in respect of arbitrations having a seat within the EU, from the European Court of Justice's ruling in Eco Swiss China Time Ltd v Benetton International NV.
The ECJ in Eco Swiss expressly preserved member states' procedural autonomy over the review of awards on grounds of public policy. As a result, the courts of a member state are only required to review an award's compatibility with competition law if its national procedural rules provide for review of an award on grounds of public policy. The extent of that review is also to be determined by the state's procedural laws. The only caveat imposed by the ECJ is that those laws do not render excessively difficult or virtually impossible the exercise of rights conferred by EC law.

3.2. Krombach Judgment

Krombach judgment of the European Court of Justice rendered in 2000[66] seems to have a central and significantly important role in the chain of ideals of its judicature in connection with public policy. ECJ declared its theoretical interest towards public policy issue in this judgment. In its later decisions the ECJ used to refer to the Krombach case regularly. The starting point of the arguments of the ECJ in these later cases used to be parallel with the bottom-line of views expressed in Krombach. In this judgment the ECJ emphasized that its task is to review the limits of the notion of public policy in the domestic laws of the EU member states. While the Contracting States in principle remain free to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention (Article 27, point 1 of the Brussels Convention of 1968. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State. The public policy of the member state in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.[67]

3.3. Maxicar Judgment

In the Maxicar judgment[68] the European Court of Justice in 2000 analyzed the concept of public policy in economic matters. ECJ underscored that while the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1 of the Convention, to determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State. Recourse to the clause on public policy in Article 27, point 1 of the

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[66] ECJ, Case C-7/98 *Dieter Krombach v. André Bamberski* [2000] *ECR* 1935.
[67] Ibid. paras. 22, 23, 32.
[68] ECJ, Case C-38/98 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento* [2000] *ECR* 2973.

Brussels Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognized as being fundamental within that legal order.[69]
Maxicar and Mr Formento wished the Court to define the concept of public policy in economic matters. In particular, they wished it to confirm that EU law, and in particular the principle of free movement of goods and freedom of competition, supports the approach taken by Italian law, which, unlike French law, does not recognize the existence of industrial property rights in spare parts for cars, and to declare that that approach is a principle of public policy in economic matters. The French and Netherlands Governments, and the Commission, after noting that the preliminary issue is whether and to what extent the Court of Justice has jurisdiction to rule on the concept of public policy in the State in which recognition is sought used in Article 27, point 1 of the Convention, argue in favour of a narrow interpretation of the concept, which should only be applied in exceptional instances. An alleged error in interpreting the rules of EU law is not sufficient, they maintain, to justify recourse to the clause on public policy.[70]
The court of the state in which enforcement is sought cannot, without undermining the aim of the Brussels Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or EU law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the EEC Treaty (Article 234 of post-Amsterdam EC Treaty), affords a sufficient guarantee to individuals.[71]
European Court of Justice in the Maxicar judgment decided that Article 27, point 1 of the Brussels Convention must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognizing the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.[72]
In this case, what has led the court of the State in which enforcement was sought to question the compatibility of the foreign judgment with public policy in its own State is the possibility that the court of the State of origin erred in applying certain rules of EU law. The court of the State in which enforcement was sought is in doubt as to the compatibility with the principles of free movement of goods and freedom of competition of recognition by the court of the State of origin of the existence of an intellectual property right in body parts for cars enabling the holder to prohibit traders in another Contracting State from manufacturing, selling, transporting, importing or exporting such body parts in that Contracting State.[73]
The fact that the alleged error concerns rules of EU law does not alter the conditions for being able to rely on the clause on public policy. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law. Since an error of law such as that alleged in the main proceedings does not constitute a

[69] Ibid. paras. 27, 28, 30.
[70] Ibid. paras. 24, 25.
[71] Ibid. para. 33.
[72] Ibid. paras. 27, 28.
[73] Ibid. para. 31.

manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought, the reply to the third question must be that Article 27, point 1 of the Convention must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognizing the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.[74]

3.4. Gambazzi Judgment

In Gambazzi judgment[75] in 2009 the European Court of Justice tested certain procedural instruments of common law (such as freezing order, disclosure order, unless order, default judgment) with regard to the requirements of the public policy concept. It is also significantly interesting in connection with this case, that problems of public policy occurred on the basis of the parallel application of Brussels Convention and Lugano Convention. It happened so because the defendant of the original case (Mr Gambazzi) was a Swiss citizen and resident and the judgment of the High Court of Justice (England and Wales) rendered against him was requested to be recognized and enforced almost in the mean time at a Swiss and a Italian court.

At the request of Daimler Chrysler Canada Inc. ('Daimler Chrysler') and CIBC Mellon Trust Company ('CIBC') in July 1996 the High Court of Justice (England and Wales) Chancery Divison issued a freezing order against Mr Gambazzi (Swiss citizen). By that freezing order he was prohibited from dealing with his assets in order to safeguard the enforcement of a future judgment. In February 1997, at the request of Daimler Chrysler and CIBC, the English court issued an amended version of the freezing order, with additional instructions under which Mr Gambazzi was required to disclose information regarding his assets and to submit certain documents also relating to the main proceedings (disclosure orders). Mr Gambazzi did not comply with the obligations under the disclosure orders, or at least not in full. Thereupon, at the request of Daimler Chrysler and CIBC, the English court issued a further order (unless order). In this order Mr Gambazzi was notified that unless he complied with the terms of the orders and disclosed the requested information by a certain date his defence submissions in the main proceedings would not be taken into consideration and he would be prohibited from taking further part in the proceedings. Mr Gambazzi brought various appeals against the freezing order, the disclosure order and the unless order without any success. Even after a repeated unless order he failed to comply with his obligations in full within the prescribed period of time. The English court considered it as a contempt of court and excluded him from the proceedings (debarment), as notified in the unless orders. In the original main process Mr Gambazzi was then treated as a defendant in default. By a default judgment of 10 December 1998, the High Court of Justice ordered him to pay Daimler Chrysler and CIBC damages of CAD 170 million and CAD 71,6 million and a further USD 130 million.[76]

Daimler Chrysler and CIBC, plaintiffs of the original process, wished to have that judgment enforced in Italy. By order of December 2004, the Corte d'Appello di Milano (Court of Appeal, Milan) declared enforceable the English judgment and the order by which Mr Gambazzi was ordered to pay damages. Mr Gambazzi appealed against this order. He claimed that the High Court judgment cannot be recognized in Italy, on the ground that this is contrary to public policy within the meaning of Article 27, point 1 of the Brussels Convention, because it was made in breach of the rights of the defense and of the adversarial principle. By order of

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[74] Ibid. paras. 32, 34.

[75] ECJ, Case C-394/07 *Marco Gambazzi v. DaimlerChrysler Canada Inc.,CIBC Mellon Trust Compan*y [2009] *ECR* 2563.

[76] Ibid. see paras. 1-19.

27 June 2007, the Corte d'Appello di Milano, which was hearing the appeal, decided to stay the proceedings and referred questions to the European Court of Justice asking for a preliminary ruling. In this application the Italian court asked essentially, whether the court of the state in which recognition and enforcement is sought may reject the recognition and the enforcement of the High Court of Justice on the ground of breach of public policy as the defendant was prevented from exercising his rights of defense.

In that context, the parties to the main proceedings refer to a judgment of 9 November 2004 of the Tribunal fédéral (Federal Supreme Court) (Switzerland). By that judgment, that court dismissed an appeal brought by CIBC and DaimlerChrysler against a decision of the Tribunale d'appello del cantone Ticino (Court of Appeal of the Canton of Ticino, Switzerland) which refused to recognize and enforce in Switzerland the High Court judgment against Mr Gambazzi on the basis of Article 27, point 1 of the Lugano Convention. The Tribunal fédéral held that Mr Gambazzi's exclusion from the High Court proceedings was not contrary to Swiss public policy, but considered that other circumstances, to which the national court did not refer in the present proceedings, nevertheless justified the application of the public policy clause.[77]

In accordance with the declaration by the representatives of the governments of the states signatories to the Lugano Convention which are members of the European Communities, it is appropriate that the ECJ pay due account to the principles contained in that Tribunal fédéral judgment and, in application of Article 1 of Protocol 2 on the uniform interpretation of the Convention, the national court is to pay due account to those principles. In that regard, it must be pointed out that the Swiss Tribunal fédéral referred, to give substance to the public policy clause, to the right to a fair trial and the right to be heard, principles to which the ECJ itself referred earlier in its Krombach judgment. With regard to the specific assessment of the conflict with Swiss public policy carried out in the present case by the Tribunal fédéral in its abovementioned judgment, it should be noted that that assessment cannot formally bind the Italian national court. That is especially true in this case because the latter court must carry out its assessment with regard to Italian public policy. In order to fulfill its task of interpretation, it is for the ECJ to explain the principles which it has defined by indicating the general criteria with regard to which the national court must carry out its assessment. To that end, it must be stated that the question of the compatibility of the exclusion measure adopted by the court of the state of origin with public policy in the State in which enforcement is sought must be assessed having regard to the proceedings as a whole in the light of all the circumstances.[78]

By the interpretation of Article 27, point 1 of the Brussels Convention, the ECJ answered the referred questions in Gambazzi judgment as follows: "…that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard."[79]

4. Contemporary Challenges in Application of the Institute of Public Policy: Hungarian Reality and Croatian Near Future Perspectives

[77] Ibid. see para. 35.
[78] Ibid. paras. 36, 37, 38, 39, 40.
[79] See also L. Kecskés and K. Kovács, 'Test of certain common law procedural law instruments int he practice of European Court of Justice', in T. Drinóczi and T. Takács, eds., *Cross-border and EU legal issues: Hungary-Croatia* (Pécs – Eszék, PTE-Állam és Jogtudományi Kar, 2011) pp. 291-297.

In the last decade, the greatest controversies in the field of private international law have been connected with public policy – more precisely with "the European public policy".[80] Several issues have brought to the controversies, but they are all trying to find an answer to the following question: what is actually the content of the European public policy, what makes it different from national public policies, what values are we talking about here? The concept of "European public policy" includes values originating from the ECHR and EU law, "[It involves] the gradual merging of the values of the 'two Europes,' the seat of human rights and the union of economic interests."[81]
The public policy clause is part of legal heritage and has been integrated in conflict-of-laws rules and in procedural law.[82] This aspect reflects the core of the issue of the relation between the fundamental principles of private international law and EU law.[83] In fact, the development of human rights protection on a global and regional level has generated significant changes in a broader legal domain. The integration of the EU Charter of Fundamental Rights with the binding part of the Treaty of Lisbon[84] sets special challenge to all EU policies in terms of a serious approach to systematic and efficient protection of human rights. Simultaneously, economic integration based on the so-called Four Freedoms keeps on promoting these freedoms while also supplementing them with the fifth freedom – the so-called freedom of movement of decisions! Promotion of these two freedoms is basically compatible, but there is a danger of their conflict. How to harmonize fundamental principles included in public policies of all civilized nations with the basic values of the European Union is a burning issue.[85] This issue can be simply shown in a concrete case of European international family law. Positioning of protection of public policy is disputable within the framework of growing private international family law.[86] In fact, the divergence of national substantive regulations is highly relevant in this segment and texts written within the scope of corresponding conflict-of-laws rules[87] have universal application – which means that if conflict-of-laws rules refer to the law of a non-member state, the latter shall be applied. Since substantive law is not harmonized within the framework of EU law, there is no system of European family law which serves as a basic point for control of acceptability of a foreign law. Further in the text, solutions with respect to the scope of application and acceptability of the public policy clause in family law cases are proposed.[88] Within the sphere of national public policy protection, the

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[80] L. Fumagali, 'EC Private International Law and the Public Policy Exception – Modern Features of a Traditional Concept', *Vol. VI Yearbook of Private international law* (2004) p. 171; M. Fallon, 'L'exception d'ordre public face a l'exception de reconnaissance mutuelle', in G. Venturini, et.al., eds., *Liber Fausto Pocar* (Milano, Giuffre Editore 2009) pp. 331-341.
[81] H.M. Watt, 'Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions' *36 Texas International Law Journal* (2001) p. 539.
[82] For all of the sources see: S. Bariatti, *Cases and Materials on EU Private International Law -Studies in Private International law* (Oxford, Hart Publishing 2011) pp. 214-227.
[83] Fallon, loc.cit. n. 80, p. 331.
[84] Treaty amending the Treaty on European Union and the Treaty establishing the European EU, signed in Lisbon, 13 December 2007, OJ C306/07. In force as of 01 December 2009.
[85] Kramberger Škerl, loc.cit. n. 1, p. 497.
[86] M. Župan, 'European judicial cooperation in cross border family matters' in Drinóczi, and Takács, eds., loc.cit. n. 79, p. 621, at. p. 630, -647; de Boer, op.cit. n. 6; S.P. Peruzzetto, 'The Exception of Public Policy in Family Law within the European Legal System', in J. Meeusen, et.al., eds., *International Family Law for the European Union* (Antwerpen, Intersentia 2007) pp. 279-301.
[87] At the moment iti s the Protocol on the law applicable to maintenance which is applied according to the art. 15 of the 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, and Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ L 343/10.
[88] M. Harding, 'The Harmonisation of Private International Law in Europe: taking the character out of family law?' *Vol. 7. No. 1. Journal of Private International Law* (2011) pp. 203-229, at. p. 206, 215; H.J. Sonnenberger,

need for application of the public policy clause is emphasized by substantive family law regimes which are inacceptable due to the following aspects: a) in relation with Islamic family law which interferes with the contemporary perception of the equality of man and woman[89] - polygamy, getting rid (dismissal) of wives, child marriages;[90] b) the rights and liabilities arising from same-sex marriages.[91] There is still a gap between national and EU values: whereas on one hand, one can tolerate that national courts are not willing to acknowledge a same-sex marriage, on the other hand, the same courts violate a fundamental European value – freedom of movement of people![92] It is indicative that protection in the field of international family law is provided by frequently used rules of immediate application and conflict-of-laws rules that take account of, by functional reference, the result of the reference belonging to the area of substantive law.[93] Their application substitutes application of the public policy clause.[94] All in all, contemporary circumstances require a compromise between honouring cultural diversity on one side and the standards of human rights protection on the other side.[95] The next issue is focused on abolition of exequatur, which brings to a new perception of the public policy clause. Regarding application of the public policy clause aimed at facilitated recognition and enforcement of foreign decisions, one can differentiate between the "first generation" of regulations such as the Brussels I Regulation which restrains application of public policy (by introduction of the term "obviously (clearly)" contrary which does not appear in the 1968 Brussels Convention) and the "second generation"[96] which terminates both exequatur and public policy control. The most numerous controversies are related to the proposal of amendment of the Brussels I Regulation. As a result of the previous models of termination of exequatur, the regulation makers and scientists are not unanimous on the following issue: how to achieve free movement of decisions (by terminating exequatur) and, at the same time, retain a certain mechanism for control of decisions of other member states?[97] Termination of exequatur is to a great extent challenged by the academics,[98] particularly since the accompanying regulations put a heavy burden on national enforcement

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'Wandlungen und Perspektiven des familienrechtlichen ordre public', in R. Freitag, et.al., eds., *Internationales Familienrecht für das 21. Jahrhundert* (München, Sellier 2006) pp. 29-53.

[89] Protected with Art. 5. of the Protocol No. 7. on ECHR.

[90] C.G. Beilfuss, 'Islamic family law in the European Union', in Meeusen, et.al., eds., loc.cit. n. 86, pp. 425-438, at. pp. 431-434.

[91] M. Župan, 'Registered partnership in the EU', in N. Bodiroga, ed., *Invisible minorities in law* (2012) to be published.

[92] Peruzzetto, loc.cit. n. 86, p. 286.

[93] For difference between factual and functional allocation see: M. Župan, *Pravo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu* [Closest connection principle in Croatian and European private international contract law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2006) p. 18.

[94] De Boer, op.cit. n. 6, pp. 300-302.

[95] See Resolution of the Institut de droit international „Différences culturelles et ordre public en droit international privé de la famille", dostupno na < http://www.idi-iil.org/idiE/resolutionsE/2005_kra_02_en.pdf >; «Malta declaration": proceeding the Third Malta Judicial Conference on Cross-Frontier Family Law Issues Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law 26 March 2009. <http://www.hcch.net/upload/maltadecl09_e.pdf>

[96] The term is invented by S. Pabst, in T. Rauscher, ed., *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Münich, Sellier 2010) note 46.

[97] P. Beaumont and E. Johnston, 'Can exequatur be abolished in Brussels I whilst retaining a publiy policy defence?', *Vol. 6. No. 2. Journal of Private Intenational Law* (2010) pp. 249-279; P.F. Schlossser, 'The Abolition of Exequatour Proceedings – Including Public Policy Review' *Heft 2. IPRax* (2010) pp. 101-104.

[98] M. Dieter, 'Recognition and Enforcement of Foreign Judgement', in J. Basedow, et.al., eds., *Japanese and European Private International Law in Comparative Perspective* (Hamburg, Mohr Siebeck, 2007.) pp. 377-402, at. p. 388.

law which actually 'floats' beyond the scope of the unification of the EU![99] The possibility of rejection of recognition of a decision of another member state due to conflict with the fundamental principles of the right to a fair trial represents an important innovation of the Brussels I Regulation.[100] The recital of the proposal to amend the Brussels I Regulation reaffirms the thesis that all the values arising from Article 47 of the EU Charter of Fundamental Rights are protected, which implies that this also refers to Article 6 of the European Convention on Human Rights and Fundamental Freedoms.[101] It is notable that this kind of amendment completely neglects the protection of substantive public policy, while the justifiability of this attitude is also questionable.[102] According to the UNALEX database and a 2007 study,[103] the public policy clause referring to Article 34 paragraph 1 of the Brussels I Regulation has been involved in 178 judicial decisions.[104] Research has shown that despite relatively often reference to violation of public policy, the judicial practice of member states has been rather moderate – only 25 judgments have specified violation of public policy and most of them (23) relate to violation of procedural public policy. Only two of those decisions have determined violation of substantive public policy.[105] The EU Court has made several relevant decisions which provide national courts with a clear instruction on interpretation and application of the public policy clause in the *acquis* discourse.[106] The restrictive interpretation contained in decisions of the EU Court, which has been accepted by national courts too, has become an incentive for the radical proposal to amend Brussels I Regulation that is aimed at ultimate elimination of this mechanism, supporting this standpoint with the fact that it is not needed by member states anymore![107] There are different opinions on this issue, some advocate preservation of the clause in recognition and enforcement mechanisms and some propose transfer of this objection from the exequatur phase (recognition and enforcement) to the enforcement phase.[108]

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[99] M. Župan, 'Ukidanje egzekvature u europskom pravu: nekoliko odabranih pitanja' [Abolishing the exequatur in European law: several selected issues] *17 Pravo i porezi* (2008) pp. 65-74. A further difficulty is related to the model of the abolition of exequatur in the Regulation on maintenance, where the expression of the provisions of Article 19 considerably differs from the provisions of the other EU instruments that have abolished exequatur, as it gives into the hands of the defendant the right to autonomously appeal against national court decisions. This regulation impinges into national procedural law, as the mere fact that the subject matter and it's enforcement are potentially of cross-border nature, qualifies the matter for invoking the protection of public order! Undoubtedly, the internal jurisdiction derived from Art. 81 TFEU should have had no such connotations. For details see: E. Jayme, 'Neue Wege im Internationalen Unterhaltsrecht: Parteiautonomie und Privatisierung des ordre ublic' *Heft 4 IPRax* (2010) pp. 377-378, at. p. 378; B. Gisell and F. Netzer, 'Vom grenzűberschreitenden zum potenziell grenzüberschreitenden Sachverhalt – Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht' *Heft 5 IPRax* (2010) pp. 403-409.

[100] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec 14th, 2010, COM (2010) 748 final, Art. 46.

[101] Ibid, recital 24.

[102] G. Cuniberti and I. Rueda, 'Abolition of Exequatur – Adressing the Commission's Concerns' *Bd. 75 Rabels Z* (2011) pp. 286-316., at p. 313.

[103] B. Hess et.al., 'Report on the Application of the Regulation Brussels I in the Member States' *Study JLS/C4/2005/03* available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf

[104] See: UNALEX.

[105] S. Corneloup, 'The public policy exception in Brussels I practice' *1 The European legal forum* (2011) pp. 23-26., at p. 23.

[106] A.F. Lowenfeld, 'Jurisdiction, Enforcement, Public Policy and res judicata: the Krombach Case' in T. Einhorn, et.al., eds., *Intercontinental cooperation through private international law : essays in memory of Peter E. Nygh* (The Hague, T.M.C. Asser Press 2004) pp. 229-248, at.p. 242.

[107] A.R. Vazques, 'Review of the Brussels I Regulation: Complete abolition of exequatur?' in B.C. Díaz, et.al., eds., *Latest developments in EU private international law* (Intersentia, 2011) pp. 153-172, at. p. 161 ff.

[108] Cuniberti and Rueda, loc.cit. n. 102; Beaumont and Johnson, loc.cit. n. 97.

5. Conclusion

The public policy clause has been broadly applied in the Croatian and Hungarian normative system of private international law. The referring norm implies no legal definition, but its content, function and restrictions are shaped by practice, on a certain territory and within a certain period of time. Despite the above facts, the public policy clause is a general conflict-of-laws rule that should be applied exceptionally and carefully and only in cases when violation of domestic law is obvious and inevitable.

The elaborated judicial practice suggests that courts do pay due attention to fundamental values of the system, but they considerately detach domestic from foreign public policy and, accordingly, pretty restrictively apply the public policy clause.

The key role of public policy exception was traditionally tied up to protection of national legal order. Recently the focus has changed - public policy more often refers at protection of European and international sources, what indicates towards amendment of the public policy character.