

# General Principles of European Private International Law

## European Monograph Series

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VOLUME 95

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*In memoriam Hannes Unberath*



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## CHAPTER 14

# *Ordre Public* (Public Policy)

Wolfgang Wurmnest\*

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### §14.01 INTRODUCTION

Public policy (*ordre public*) is a fundamental institution of private international law. Choice-of-law rules are traditionally tailored to lead to the law with the closest connection to a case and not necessarily to the ‘best law’.<sup>1</sup> Therefore, both national<sup>2</sup> and European<sup>3</sup> choice-of-law rules allow judges to decline the application of a foreign rule to avoid unacceptable results. All of the (modern) Hague Conventions on matters of private international law also follow this principle.<sup>4</sup> Such a safety valve is necessary in order to arrive at solutions in line with the forum’s perception of justice and

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\* The author would like to thank Gill Mertens and Nils Lund for their help in translating this contribution.

1. Kegel/Schurig, *Internationales Privatrecht*, § 2 I (9th ed., Beck 2004); Unberath, in: *Muslims im säkularen Staat – Untersuchungen anhand von Deutschland und Österreich*, 83, 86 (Haedrich [ed.], Boorberg 2009).
2. See, e.g., Art. 21 Belgian Private International Law Act of 2004 (English translation in 70 *RabelsZ* 358–397 [2006]); Art. 6 German Introductory Act to the Civil Code (English translation available at: [http://www.gesetze-im-internet.de/englisch\\_bgbeg/englisch\\_bgbeg.html](http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html)); Art. 16 Italian Private International Law Act of 1995. For a comparative perspective see Bucher, *L’ordre public et le but social des lois en droit international privé*, *Rec. des Cours* 239 (1993-II), 9, 22 et seq.; Mosconi, *Exceptions to the Operation of Choice of Law Rules*, *Rec. des Cours* 217 (1989-V), 9, 23 et seq. The historical roots of the *ordre public* are highlighted by Lagarde, in: *International Encyclopedia of Comparative Law*, Ch. 11-2 et seq. (Lipstein [ed.], vol. III/1, Mohr Siebeck 2011).
3. See Art. 21 Rome I Regulation; Art. 26 Rome II Regulation, Art. 35 Succession Regulation.
4. See Art. 24 of the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption of 29 May 1993; Art. 22 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 Oct. 1996. For further references see Kreuzer, *Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechts?*, in: *Kollisionsrecht in der Europäischen Union*, 1, 44 with n. 157 (Jud/Rechberger/Reichelt [eds.], Jan Sramek 2008). The very first Hague Conventions did not contain a public policy clause. It was only after World War

fairness.<sup>5</sup> The application of foreign law – in the words of *Leo Raape*, the famous ‘leap in the dark’<sup>6</sup> – is thus never made without a lifeline, even though it is of course generally recognised that not every slight difference between foreign and domestic law can be used to avoid the application of foreign law.

Foreign law may only be disregarded if such application is ‘manifestly incompatible’ with the forum’s public policy.<sup>7</sup> Recourse to the *ordre public* is thus limited to exceptional cases.<sup>8</sup> This limitation is necessary, as the institution of public policy is the ‘enfant terrible’<sup>9</sup> in an orderly choice of law system: Excessive use of the *ordre public* negatively affects the international consistency of decision-making and may also undermine the principle of the closest connection.<sup>10</sup> It is, therefore, no surprise that *Friedrich Karl von Savigny* already noted that the exact delimitation of its boundaries ‘may be the most difficult task of this doctrine’.<sup>11</sup>

This task has still not been solved in full, although today the discussion is dominated by other issues than at the time this doyen of modern private international law was writing. Modern discourse focuses on European influences on the public policy doctrine and possible restrictions on its application in relation to the application of the law of another EU Member State. These issues are also important with respect to any future European regulation that might codify the General Part of Private International Law. For me – as probably for most scholars from countries with comprehensive private international law codifications – there is no question that the development of such a legal text is desirable to structure the law, to eliminate redundancies, and to

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If that the public policy exception became an integral part of the Hague Conventions, see van Loon, *The Hague Conference on Private International Law: Asser’s vision and an evolving mission*, NIPR 2012, 358, 359.

5. Gaudemet-Tallon, *Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l’arc-en-ciel)*, Rec. des Cours 312 (2005), 9, 273: ‘L’exception d’ordre public ... est une manifestation éclatante d’une préoccupation de justice matérielle.’; *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)*, (2002) 2 AC 883, 1078 at 18 (HL) per Lord Nicholls of Birkenhead: ‘[C]ourts ... must have a residual power ..., to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness ...’.
6. Raape, *Internationales Privatrecht*, 90 (5th ed., Vahlen 1961). The original language of the quote is: ‘Sprung ins Dunkle’.
7. This expression can be found in recent Hague Conventions and all European Regulations on choice of law.
8. Cheshire/North/Fawcett, *Private International Law*, 140 (14th ed., Peter North 2008); Gaudemet-Tallon, *supra* n. 5, 9, 274; Vlas, *Public Policy in Private International Law and its Continuing Importance*, in: *A Commitment to Private International Law: Essays in Honour of Hans van Loon*, 621, 624 (The Permanent Bureau of the Hague Conference on Private International Law (ed.), Intersentia 2013) (‘ultimum remedium’); von Bar/Mankowski, *Internationales Privatrecht*, § 7 at 259 (vol. I, 2nd ed., Beck 2003).
9. Mayer/Heuzé, *Droit international privé*, at 206 (11th ed., LGDJ 2014).
10. Kinsch, *La ‘sauvegarde de certaines politiques législatives’, cas d’intervention de l’ordre public international?*, in: *Liber amicorum Gaudemet-Tallon*, 447 (Azzi et al. [eds.], Dalloz-Sirey 2008). Some even fear that the *ordre public* may be used as tool for an ‘imperialistic’ legal policy, see Chedly, *L’ordre public en droit international privé, Instrument de chauvinisme, d’imperialisme ou d’universalisme?*, in: *Impérialisme et chauvinisme juridiques, Rapports présentés au colloque à l’occasion du 20e anniversaire de l’Institut suisse de droit comparé*, 149, 167 (Schulthess 2004).
11. Savigny, *System des heutigen römischen Rechts*, 32 (vol. VIII, Veit 1849) (The original language of the quote is: ‘...vielleicht die schwierigste Aufgabe in dieser ganzen Lehre’).

ensure that European choice of law rules are applied uniformly.<sup>12</sup> Such a ‘General Part’ must be accompanied by wide-ranging ‘Special Parts’ covering all major areas of law.<sup>13</sup> As *Rolf Wagner* has shown in his contribution to this publication, the *ordre public* is a natural candidate for a ‘Rome 0 Regulation’<sup>14</sup> and, therefore, it comes as no surprise that it was incorporated in the so-called Lagarde draft of a future General Part of a European Private International Law Code.<sup>15</sup>

The complex structure of the European law-making powers makes it, however, rather difficult to develop such a General Part.<sup>16</sup> In addition, states such as the United Kingdom, which do not have a comprehensive codification in the field of private international law, will certainly voice severe reservations with regard to the elaboration of such a regulation. However, to ameliorate the public policy reservation, it is not strictly necessary to enact a General Part of a European Private International Law Code. Significant improvements in the law (apart from eliminating redundancies) could also be achieved by reforming existing regulations.

Against this background, this chapter first scrutinises to what extent a public policy control is still appropriate. As will be demonstrated, a restriction or even elimination of the public policy device is not an option. Therefore, a closer examination of the most important elements of this control device and selected codification issues

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12. Concurring Kieninger, *Das Europäische IPR vor der Kodifikation?*, in: FS f. von Hoffmann, 184, 192 (Kronke/Thorn [eds.], Gieseking 2011).
  13. Jayme/Kohler, *Europäisches Kollisionsrecht 2006: Eurozentrismus ohne Kodifikationsidee?*, IPRax 2006, 537, 541; Reichelt, *Zur Kodifikation des Europäischen Kollisionsrechts – am Beispiel des ‘ordre public’*, in: *Europäisches Gemeinschaftsrecht und IPR*, 5, 7 (Reichelt [ed.], Manz 2007); Siehr, *Die Kodifikation des Europäischen IPR – Hindernisse, Aufgaben und Lösungen*, in: *Kollisionsrecht in der Europäischen Union*, 77, 93 et seq. (Jud/Rechberger/Reichelt [eds.], Jan Sramek 2008); Sonnenberger, *Randbemerkungen zum Allgemeinen Teil eines europäischen IPR*, in: FS f. Kropholler, 227 (Baetge/von Hein/von Hinden [eds.], Mohr Siebeck 2008). On the historical roots of the codification movement see Jayme, *Die Kodifikation am Beispiel der kollisionsrechtlichen Parteiautonomie*, in: *Kollisionsrecht in der Europäischen Union*, 63, 67 et seq. (Jud/Rechberger/Reichelt [eds.], Jan Sramek 2008).
  14. See *supra* § 4.05 [C].
  15. Article 135 Lagarde draft (75 RabelsZ 673 et seq. [2011]) states: ‘L’application du droit étranger est exclue si elle conduit à un résultat manifestement incompatible avec l’ordre public du for, en particulier si elle est incompatible avec les droits garantis par la charte européenne des droits fondamentaux. Cette incompatibilité s’apprécie en tenant compte, notamment, de l’intensité du rattachement de la situation avec l’ordre juridique du for.’ Also a much older draft for a European Private International Law Code embraced the public policy exception, see Frankenstein, *Projet d’un code européen de droit international privé* (Cambridge University Press, 1950). The draft produced by Frankenstein contained not only a wide general clause, as common in modern codifications. In order to ensure a strict interpretation of the public policy doctrine, Art. 12 of the draft stated the principle that a judge could only rely on the public policy defence to disregard the application of foreign law if this is expressly permitted by other provisions of the draft. The draft then refers to public policy doctrine in over seventy articles and also standardises their effects in Art. 13. On the background and the design of this regulatory technique, see Frankenstein, *ibid.*, 11 et seq. On earlier attempts to harmonise national rules of private international law, see Czepelak, *Would We Like to Have a European Code of Private International Law?*, ERPL 2010, 705, 706 et seq.
  16. See *supra* § 4.02, § 4.03.

will be discussed subsequently.<sup>17</sup> My intention is to show that we do not need a ‘conflicts revolution’, but rather a smooth evolution of the law in order to codify the existing European influences on the (national) *ordre public*. Further, I will assume that the legal text termed in this book as the ‘Rome 0 Regulation’ is intended only to unify choice of law rules and not the rules of civil procedure, which contain a public policy device within the context of judgment recognition. Therefore, I pay only fleeting attention to procedural issues.<sup>18</sup>

## §14.02 NECESSITY OF PUBLIC POLICY CONTROL

Let me start with the question of whether we still need the public policy device in European private international law. The purpose of this device is to preserve legal concord,<sup>19</sup> in that foreign provisions that are contrary to basic values of the forum law are not applied.<sup>20</sup> Therefore, the public policy reservation (*Vorbehaltsklausel*) acts as a correction mechanism in the interest of the law of the forum.<sup>21</sup> It is a safety valve designed to counteract undesired consequences of ‘value-blind’ reference procedures.<sup>22</sup> From a legal policy perspective, this sensible safety valve can only be given up or restricted if the underlying basic values of the foreign and national laws are at least very similar.<sup>23</sup> Only under such circumstances can one exclude a conflict between the concepts of foreign and domestic law.

### [A] Third States

It is for this reason that an elimination or restriction of the public policy device with respect to the application of the law of a country that is not an EU Member State is not

17. This contribution focuses solely on the Rome I Regulation, the Rome II Regulation, the so-called Rome III Regulation and the Succession Regulation. It does not cover the Maintenance Regulation, which refers to the conflict rules of the Hague Maintenance Protocol.

18. On the Commission’s attempts to roll back public policy control for the recognition and enforcement of judgments see Hess, *Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts*, IPRax 2011, 125, 128; Martiny, in: *The Max Planck Encyclopedia of European Private Law*, 1395, 1398 (Basedow/Hopt/Zimmermann/Stier [eds.], Oxford University Press, vol. II, 2012).

19. Moldovan, *L’ordre public en droit international privé*, 10 (Édouard Duchenin 1932) (‘L’ordre public a une fonction éminente qui est de préserver la paix sociale.’); von Bar/Mankowski, *supra* n. 8, § 7 at 258 (‘[Ohne *ordre public*] produzierte man Spannungen innerhalb der eigenen Rechtsordnung und relativierte eigene fundamentale Grundwerte.’).

20. Bucher, *La dimension sociale du droit international privé*, Rec. des Cours 341 (2009), 9, 172; Gebauer, *Ordre public (Public Policy)*, in: *The Max Planck Encyclopedia of Public International Law*, 1008 (Wolfrum [ed.], vol. VII, Oxford University Press 2012).

21. Barel/Armellini, *Diritto internazionale privato*, 89 et seq. (7th ed., Giuffrè 2012); Kropholler, *Internationales Privatrecht*, § 36 II (6th ed., Mohr Siebeck 2006); Mosconi, *supra* n. 2, 9, 30 et seq.

22. von Bar/Mankowski, *supra* n. 8, § 3 at 74; Unberath, *supra* n. 1, 83, 91.

23. On the roots of the idea that an abolition or restriction of the *ordre public* may only be considered if the different legal orders share the same fundamental values, see Mansel, *Die kulturelle Identität im internationalen Privatrecht*, in: *Pluralistische Gesellschaften und Internationales Recht* (Berichte der Deutschen Gesellschaft für Völkerrecht), 137, 183 (Nolte et al. [eds.], C. F. Müller 2008).

an option. Private law rules may differ significantly in jurisdictions across the world and, therefore, one cannot exclude the possibility of foreign legal concepts conflicting significantly with domestic values.<sup>24</sup> Also in the future, private international instruments must therefore incorporate the public policy doctrine with respect to the application of laws from third states.<sup>25</sup>

## [B] Intra-EU Cases

### [1] *Abolition of the Ordre Public?*

The idea of abolishing the public policy device where a judge is supposed to apply the law of another EU Member State merits greater consideration. This limitation could be based on the consideration that private law in the EU is becoming increasingly harmonised, and existing divergences are therefore diminishing in the long term. Against this background, the repression of the *ordre public* in the field of the recognition and enforcement of EU-judgments is high on the Commission's agenda. The rollback of the *ordre public* at the stage of enforcement of a title is rooted in the idea of simplifying the free movement of EU-judgments within the internal market.<sup>26</sup> The legitimacy of this decisive step is based above all on the existing '[m]utual trust in the administration of justice in the Member States'.<sup>27</sup> Recently, the Commission has also taken the first steps to extend this principle to private international law. Accordingly, with respect to the choice of law rules regarding maintenance, it had proposed that the public policy device should be excluded when applying the law of another EU Member State,<sup>28</sup> but was

24. von Hein, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, ZEuP 2009, 6, 23; Martiny, *Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht*, in: FS f. Sonnenberger, 523, 541 (Coester/Martiny/Prinz von Sachsen Gessaphe [eds.], Beck 2004).

25. Concurring von Hein, *supra* n. 24, 6, 23; Leible, *Rom I und Rom II: Neue Perspektiven im europäischen Kollisionsrecht* (Vorträge und Berichte des Zentrums für Europäisches Wirtschaftsrecht No. 173), 67 et seq. (Zentrum für Europ. Wirtschaftsrecht 2009).

26. The European Enforcement Order Regulation, the European Order for Payment Procedure Regulation and the European Small Claims Procedure Regulation therefore do not contain a public policy reservation. During the negotiations on the recast of the Regulation No. 44/2001 the Commission also sought to exclude the public policy reservation with regard to the enforcement of foreign judgments that are incompatible with domestic rules of domestic substantive law (cf. Art. 38, Art. 46 of the 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, COM(2010) 748 final), but was not able to see this approach adopted (cf. Art. 45(9)(a) Regulation No. 1215/2012).

27. Recital 18 Regulation No. 805/2004; Recital 27 Regulation No. 1896/2006.

28. See Art. 20 Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 15 Dec. 2005, COM(2005) 649 final as well as Communication from the Commission to the Council and the European Parliament – Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 12 Jun. 2006, COM(2006) 206 final, 5 et seq. This proposal has received sharp criticism, see de Boer, *Unwelcome Foreign Law: Public Policy and other Means to Protect the Fundamental Values and Public Interests of the European Community*, in: *The External Dimension of EC Private International Law in Family and*

unable to see this approach adopted.<sup>29</sup> The idea of the abolition of the public policy reservation in any future Code of Private International Law with respect to single market issues also finds some support in legal writing.<sup>30</sup>

However, abolishing the public policy doctrine for single market purposes would be a step in the wrong direction. Activities of the EU to harmonise many areas of law have increased, but we are far from having a substantial synchronisation of private law in Europe.<sup>31</sup> Nothing much will change in this respect in the medium term. Thus the laws of EU Member States are not so similar that we can entirely dispense with controls on the application of law.<sup>32</sup> The necessity of the public policy device is particularly significant in the areas of family and inheritance law, as in these fields the views in the EU Member States on basic legal principles differ significantly. Nothing demonstrates this better than the fact that the adoption of a proper Regulation on choice of law in divorce cases failed because some states valued the right to have fast and uncomplicated divorce, whereas others tended to oppose the institution of divorce.<sup>33</sup> In the end, the so-called Rome III Regulation could only be enacted by making use of the enhanced cooperation procedure, and to date only fifteen EU Member States participate. The debates during the negotiations on the Succession Regulation were also quite controversial.<sup>34</sup>

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Succession Matters, 295, 308 (Malatesta/Bariatti/Pocar [eds.], CEDAM 2008); G. Rühl, *Rechtswahlfreiheit im europäischen Kollisionsrecht*, in: FS f. Kropholler, 187, 207 et seq. (Baetge/von Hein/von Hinden [eds.], Mohr Siebeck 2008); M. Stürner, *Europäisierung des (Kollisions-)Rechts und nationaler ordre public*, in: FS f. von Hoffmann, 463, 478 et seq. (Kronke/Thorn [eds.], Giesecking 2011).

29. The adopted text contains a public policy device according to traditional standards, see Art. 15 Maintenance Regulation in conjunction with Art. 13 Hague Maintenance Protocol.
30. Kreuzer, *Die Europäisierung des Internationalen Privatrechts*, in: *Gemeinsames Privatrecht in der europäischen Gemeinschaft*, 373, 445 (Müller-Graff [ed.], Nomos 1993).
31. On this development, see Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict Laws*, Rec. des Cours 340 (2009), 271, 322 et seq.; Zimmermann, *The Present State of European Private Law*, 57 Am. J. Comp. L. 479 et seq. (2009).
32. Leible, *supra* n. 25, 68 et seq.; M. Stürner, *supra* n. 28, 463, 478 et seq.; the importance of the ordre public to safeguard national values is stressed by Struycken, *L'ordre public de la communauté européenne*, in: *Liber amicorum Gaudemet-Tallon*, 617, 632 (Azzi et al. [eds.], Dalloz-Sirey 2008): '... il faut laisser aux États membres la possibilité de conserver jalousement le droit d'invoquer leur propre ordre public comme le noyau de leur ordre juridique respectif, l'une des expressions de leur identité nationale'. The more progress the EU makes in the harmonisation of national laws, the less need there is – in the relations between EU Member States – to apply the *ordre public* and vice versa, see de Boer, *supra* n. 28, 295, 329. The invocation of the *ordre public* against a foreign rule implementing European law is not permitted, see Fumagalli, *EC Private International Law and the Public Policy Exception: Modern Features of a Traditional Concept*, YbPIL 6 (2004), 171, 178.
33. On the disputes that arose in the course of the negotiation see Jänterä-Jareborg, *Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe*, in: *Japanese and European Private International Law in Comparative Perspective*, 317, 339 et seq. (Basedow/Baum/Nishitani [eds.], Mohr Siebeck 2008); Kohler, *Einheitliche Kollisionsnormen für Ehesachen in der Europäischen Union: Vorschläge und Vorbehalte*, FPR 2008, 193, 195 et seq.; Schurig, *Eine hinkende Vereinheitlichung des internationalen Ehescheidungsrechts in Europa*, in: FS f. von Hoffmann, 405 (Kronke/Thorn [eds.], Giesecking 2011).
34. See C. Heinze, *Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts*, in: FS f. Kropholler, 105, 126 (Baetge/von Hein/von Hinden [eds.], Mohr Siebeck 2008).

Even an abolition of the *ordre public* for special areas of law – such as in contract law – where this reservation is of practically no significance,<sup>35</sup> is not recommended as it cannot be ruled out that national private laws may be designed very differently with respect to certain issues of contract law.

In conclusion, the abolition of the public policy device for intra-EU cases should be rejected. Even though recourse to the public policy device may soften the uniform application of European choice of law rules, this effect must be accepted for the protection of the forums' fundamental perceptions of fairness and justice.

## [2] *Soft Application?*

If one does not wish to go so far as to abolish the public policy reservation for intra-EU cases in its entirety, or at least for certain areas of law, one could consider applying the public policy doctrine in a softened form. It was suggested that courts may only resort to the public policy reservation with extreme care when the choice of law rules demand the application of the law of another EU Member State, whereas their discretion to refuse the application of legal concepts of non-EU states was deemed much larger.<sup>36</sup> Such a differentiation is, however, neither supported by the wording of the public policy clauses in the Regulations, nor can it be derived from principles of European Union law.<sup>37</sup> From a legal policy perspective, a general privileging of EU legal systems also makes no sense. The decision to resort to the public policy reservation cannot depend on the consideration from which national jurisdiction the legal provision that is contrary to the forum's basic values is derived. Things are different if a higher-ranking principle prescribes the preference of legal provisions of EU Member States in comparison to rules from third states.<sup>38</sup> Yet in this case the preferential treatment is not based on the fact that the legal provision is derived from a state in the same legal community, but from the fact that a foreign legal provision may not contravene standards set forth by EU law. Outside such cases, resort to the public policy

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35. On the minor importance of the *ordre public* in contract law cases, see Sonnenberger in: *Münchener Kommentar zum BGB*, Art. 6 EGBGB at 15 (5th ed., Beck 2010). One reason for the decreased importance of the public policy doctrine with regard to contractual claims is the fact that numerous special protective instruments have been developed (overriding mandatory rules, special conflict rules for the protection of the weaker party to a contract etc.) to ensure that domestic concepts of fairness and justice will prevail, see von Bar/Mankowski, *supra* n. 8, § 7 at 278; Renner in: *Rome Regulations, Commentary*, Art. 21 Rome I at 2 (Callies [ed.], 2nd ed., Kluwer Law International 2015); Thorn, in: *Europäisches Zivilprozess- und Kollisionsrecht*, Art. 21 Rom I-VO at 10 (Rauscher [ed.], Sellier 2011).
36. von Brunn, *Der europäische ordre public*, NJW 1962, 985, 988; a similar point was raised by Iversen, EG-Richtlinien und Internationales Privatrecht, in: *Europäisches Gemeinschaftsrecht und Internationales Privatrecht*, at 1020 (Brödermann/Iversen [eds.], Mohr Siebeck 1994).
37. von Hein, in: *Münchener Kommentar zum BGB*, Art. 6 EGBGB at 173 (6th ed., Beck 2015); such a differentiation is also rejected by Martiny, Gemeinschaftsrecht, ordre public, zwingende Bestimmungen und Exklusivnormen, in: *Europäisches Gemeinschaftsrecht und Internationales Privatrecht*, 211, 229 (von Bar [ed.], Heymanns 1991); Moersdorf-Schulte, in: *PWW BGB Kommentar*, Art. 6 EGBGB at 8 (Prütting/Wegen/Weinreich [eds.], 9th ed. Luchterhand 2014).
38. Martiny, *supra* n. 37, 211, 229 et seq. On the influences of European law on the *ordre public* see *infra* §14.03[B].

reservation should be based on the same principles irrespective of whether the judge scrutinises a legal rule of another EU Member State or of a third state.<sup>39</sup>

### [3] *Application Only at the Request of a Party?*

If it is not sensible to abolish the *ordre public*, one could consider putting its application entirely in the hands of the parties. The Legal Committee of the European Parliament suggested such a proposal for the Rome II Regulation. The Committee proposed that a judge should not be entitled to apply the public policy reservation ex officio (as it is currently the European standard), but only at the request of a party.<sup>40</sup> One could even consider introducing such a rule for third state cases in order to better accommodate the cultural background of the parties in dispute.<sup>41</sup> If two persons from a foreign culture litigate before a domestic court, and in this respect agree to apply a foreign rule incompatible with the forum's underlying concepts of justice, one can rightly pose the question as to why the judge should deny such a request. An example could be the application of a discriminatory rule in succession law, by which a daughter – on the basis of her gender – inherits less than her brother, regardless of the testator's will. If the daughter accepts this rule for cultural reasons and if the parties dispute about whether certain assets should be included in the inheritance, a justification is required as to why the court must intervene ex officio in order to set aside the discriminatory rule by recourse to the public policy reservation.<sup>42</sup>

Such a justification can, however, easily be developed. A legal system should not allow the implementation of basic values to be left to the disposition of parties.<sup>43</sup> In

39. Spickhoff, *Der ordre public im internationalen Privatrecht*, 90 (Luchterhand 1989).

40. Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), 27 Jun. 2005, A6-0211/2005, Amendment 50, 36.

41. On the aspect of cultural identity in private international law, see Jayme, *Identité culturelle et intégration: le droit privé postmoderne*, Rec. des Cours 251 (1995), 9, 167 et seq.; Jayme, *Kulturelle Identität und Kindeswohl im internationalen Kindschaftsrecht*, IPRax 1996, 237 et seq.; Jayme, *Zugehörigkeit und kulturelle Identität*, 24 et seq. (Wallstein 2012); for a critical view, see Mankowski, *Kulturelle Identität und Internationales Privatrecht*, IPRax 2004, 282 et seq.

42. In the law of civil procedure this issue is addressed under a different heading in the context of judgment recognition. It is argued that the public policy control should only apply ex officio if state interests are affected (e.g., when there is a violation of competition law). In contrast, public policy violations only affecting the interests of the parties (interests of justice) should only be considered at the request of the affected party, see Geimer, in: *Europäisches Zivilverfahrensrecht*, Art. 34 EuGVVO at 62 et seq. (Geimer/Schütze [eds.], 3rd ed. Beck 2010). The majority view (at least in the German literature) argues, however, that courts shall apply the public policy reservation ex officio, see Gebauer, in: *Zivilrecht unter europäischem Einfluss*, Ch. 27, at 171 (Gebauer/Wiedmann [eds.], 2nd ed., Boorberg 2010); Hess, *Europäisches Zivilverfahrensrecht*, s. 6 at 192 (C.F. Müller 2010); Kropholler/von Hein, *Europäisches Zivilprozessrecht*, vor Art. 33 EuGVO at 6 (9th ed., Recht und Wirtschaft 2011). According to Art. 45(1)(a) Regulation 1215/2012, the recognition of a judgment shall only be refused 'on the application of any interested party'.

43. Dickinson, *The Rome II Regulation*, at 15.11 (Oxford University Press 2008); Jakob/Picht, in: *Europäisches Zivilprozess- und Kollisionsrecht*, Art. 26 Rom II-VO at 2 (Rauscher [ed.], Sellier 2011); Mosconi, *supra* n. 2, 9, 80.

fact, state bodies should protect such underlying values.<sup>44</sup> Furthermore, where there is an application requirement, the legal system must ensure that the parties are aware of the possibility of calling on the public policy reservation. Such knowledge can be assumed if the parties are represented by a lawyer. But as this is not always the case, in individual cases the application requirement may lead to parties accepting foreign rules without being aware of the possibilities open to them, even though they may have decided differently if they had known about their right to challenge the application of the foreign law.<sup>45</sup>

From these considerations, the application requirement – that in effect found no place in the Rome II Regulation – should not be made the basic rule in European private international law. Instead judges should retain the power to make recourse to the public policy doctrine *ex officio*.<sup>46</sup>

### [C] Summary

The General Part of a European Private International Law Code should contain a public policy reservation that gives a judge the power to apply it *ex officio*. The considerations leading to the rejection of a foreign rule should, in principle, not differ according to the origin (another EU Member State or a third state) of the rule in question. Given that in future the *ordre public* will also be a necessary component of private international law, the following section explores the foundations of this reservation.

## §14.03 FOUNDATIONS OF THE PUBLIC POLICY RESERVATION

### [A] Negative and Positive Function of the *Ordre Public*?

The core function of the *ordre public* is defence against foreign laws where their application would lead to unacceptable results from the forum's viewpoint. All

44. See in general G. Rühl, *supra* n. 28, 187, 207 et seq.; Mosconi, *supra* n. 2, 9, 80; see also Stürner, *supra* n. 28, 461, 479 (the public policy reservation does not protect individual rights, but shall preserve core values of the legal order in the interest of the public).

45. See Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II') (presented by the Commission pursuant to Art. 250(2) of the EC Treaty) of 21 June 2006, COM(2006) 83 final, 5.

46. The *ex officio* application of the *ordre public* in European private international law is generally accepted in German literature, see Martiny, in: *Münchener Kommentar zum BGB*, Art. 21 Rom I-VO at 2 (6th ed., Beck 2015) (regarding the Rome I Regulation); von Hein, in: *Rome Regulations, Commentary*, Art. 26 Rome II at 24 (Calliess [ed.], 2nd ed., Kluwer Law International 2015); Leible/Lehmann, *Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ('Rom II')*, RIW 2007, 721, 731 (regarding the Rome II Regulation). The same holds true for the Rome III Regulation and the Succession Regulation. An *ex officio* application does not preclude the possibility that a foreign rule that is contrary to the domestic public order might still apply in narrow circumstances if the party that would be negatively affected by that rule agrees with its application, see *infra* §14.03[C][1].

national choice of law rules,<sup>47</sup> and also those of the Rome Regulations,<sup>48</sup> attribute this ‘negative function’ to the public policy reservation. The General Part of a European Private International Law Code should also assign this function to the *ordre public*.

Further, some want to attribute a positive function to the *ordre public*. The positive function should secure the application of such norms of the national law that are regarded as particularly important. This function, which historically can be traced back to French law,<sup>49</sup> pays particular attention to provisions that have social or economic policy objectives.<sup>50</sup> Such provisions of the forum shall be enforced regardless of the content of the foreign law. The refusal of the application of the foreign rule is in a way the ‘consequence of this wish’.<sup>51</sup> However, more recently the unconditional application of norms of the *lex fori* that bypass the traditional choice of law system has no longer been seen as part of the public policy doctrine. Against the background that numerous legal systems have codified the overriding effect of certain mandatory rules of the forum, the positive effect was largely decoupled from the public policy doctrine, and is today regarded as an issue of overriding mandatory rules.<sup>52</sup> Also, the question of whether rules of European law demand application of their own will, for example in the field of EU competition law,<sup>53</sup> can be grouped into this category, as well as the *Ingmar*<sup>54</sup> case law.<sup>55</sup>

As the function once assigned to the positive public policy is now being taken up by other institutions of private international law, this concept has become practically

47. See Dicey, Morris & Collins, *The Conflict of Laws*, at 5-002 (15th ed., Sweet and Maxwell 2012), (regarding English law); Lagarde, *Recherches sur l'ordre public en droit international privé*, 2 et seq. (LGDJ 1959) (regarding French law); Pocar, *Il nuovo diritto internazionale privato italiano*, 43 (2nd ed., Giuffrè 2002) (regarding Italian law); Spickhoff, *supra* n. 39, 13 et seq. (regarding German law). See also Bucher, *supra* n. 2, 9, 28.

48. See Hausmann, in: *Staudinger*, Art. 21 Rom I-VO at 9 (Sellier de Gruyter 2011); Thorn, in: *Palandt*, Art. 21 Rom I-VO at 1 (74th ed., Beck 2015) (regarding the Rome I Regulation); Junker, in: *Münchener Kommentar zum BGB* Art. 26 Rom II-VO at 1 (6th ed., Beck 2015) (regarding the Rome II Regulation). The same holds true for Art. 12 Rome III Regulation and Art. 35 Succession Regulation.

49. Kropholler, *supra* n. 21, § 36 I. Precursors of the positive *ordre public* can however be found in the statute theory that prevailed in medieval times, see Basedow, *Die Verselbstständigung des europäischen ordre public*, in: FS f. Sonnenberger, 291, 297 (Coester/Martiny/Prinz von Sachsen Gessaphe [eds.], Beck 2004).

50. Jayme, *Methoden der Konkretisierung des ordre public im Internationalen Privatrecht*, 28 et seq. (C.F. Müller 1989); Kropholler, *supra* n. 21, § 36 I.

51. Basedow, *supra* n. 49, 291, 297.

52. Basedow, *supra* n. 49, 291, 298; de Boer, *supra* n. 28, 295, 296; Gebauer, *supra* n. 20, 1008, 1009; Jayme, *supra* n. 50, 29 et seq.; Junker, *Internationales Privatrecht*, at 273 (Beck 1998); Kropholler, *supra* n. 21, § 36 I.

53. In more detail Francq/Wurmnest, *International Antitrust Claims under the Rome II Regulation* in: *International Antitrust Litigation*, 91, 107 et seq. (Basedow/Francq/Idot [eds.] Hart 2012).

54. *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.* Case C-381/98, ECR I-9305 (ECJ 2000).

55. It is submitted that in case the choice of law rules of the Rome I Regulation call for the application of the law of a third state, mandatory rules of EU secondary law can only be applied if provided by Art. 9 or Art. 3(4) Rome I Regulation. An application of Art. 21 Rome I Regulation, i.e., the *ordre public*, is usually excluded; for a contrary view, see Siehr, *Der ordre public im Zeichen der Europäischen Intergration: Die Vorbehaltsklausel und die EU-Binnenbeziehung*, in: FS f. von Hoffmann, 424, 427 (Kronke/Thorn [eds.], Gieseking 2011) (arguing that the *Ingmar* case concerns a question of public policy).

meaningless for the modern public policy reservation.<sup>56</sup> Recently, some commentators have sought to maintain the positive function of the public policy doctrine. They point out that the positive function is required in order to apply domestic law instead of a foreign rule.<sup>57</sup> Indeed, the reliance on the public policy doctrine may lead to the application of the *lex fori*. In this event, it achieves exactly the result the positive public policy intends. However, the *lex fori* will not be applied in all cases, as a consequence of the negative function of the *ordre public*. The gap caused by the *ordre public* might also be filled by a provision of the foreign legal order. And even if one has to rely on the *lex fori* to fill the gap caused by the *ordre public*, this should not be characterised as a primary function of this reservation, but rather as a reflex of the prohibition against applying the foreign legal rule. For this reason, any future General Part of a European Private International Law Code should continue to recognise a primarily negative function for the public policy doctrine.

## [B] National or European *Ordre Public*?

### [1] *The Lex Lata*

Let me now turn from the function to the content of the *ordre public*, and to the debate about its ‘Europeanisation’. According to the general public policy provisions enshrined in the European Regulations, a judge may refuse the application of a foreign provision ‘if such application is manifestly incompatible with the public policy (*ordre public*) [...] of the forum’.<sup>58</sup> As the emphasis is on the values of the forum state, the prevailing opinion is that even in European conflict of law rules the public policy doctrine is essentially a national concept.<sup>59</sup> In contrast, Jürgen Basedow has pointed out that the general case law of the Court of Justice of the European Union in fact shows an independent supplementary and correctional function of European public policy. However, this European *ordre public* is (still) of a fragmentary character and must often ‘dress in the garments of national public policy’.<sup>60</sup>

56. Gebauer, *supra* n. 20, 1008, 1009; Junker, *supra* n. 52, at 273; Kropholler, *supra* n. 21, § 36 I; Mansel, *Allgemeines Gleichbehandlungsgesetz – persönlicher und internationaler Anwendungsbereich*, in: FS f. Canaris, 809, 826 (Heldrich et al. [eds.], vol. I, Beck 2007); Martiny, *supra* n. 24, 523, 540. For a more cautious view Jayme, *supra* n. 50, 30 (public policy reservation keeps a positive function for residual cases, in which mandatory rules do not apply). For a rejection of the positive function see von Hein, *supra* n. 37, Art. 6 EGBGB at 4.

57. Thorn, *supra* n. 35, Art. 21 Rom I-VO at 9; see also Kegel/Schurig, *supra* n. 1, § 16 I (positive and negative function cannot be strictly separated from each other); Spickhoff, *supra* n. 39, 115 (positive and negative function are two sides of the same coin).

58. See Art. 21 Rome I Regulation, Art. 26 Rome II Regulation, Art. 12 Rome III Regulation, Art. 35 Succession Regulation (emphasis added).

59. Leible/Lehmann, *supra* n. 46, 721, 734; Martiny, *supra* n. 24, 523, 531 et seq.; Schulze, in: *NomosKommentar*, Art. 26 Rom II at 2 (Hüßtege/Mansel [eds.], 2nd ed., Nomos 2015); Spickhoff, in: *Kommentar zum BGB*, Art. 21 Rom I-VO at 1 (Bamberger/Roth [eds.], 3rd ed., Beck 2012); M. Stürner, *supra* n. 28, 463, 464 et seq.; Thorn, *supra* n. 48, Art. 21 Rom I-VO at 4; Vlas, *supra* n. 8, 621, 624–625.

60. Basedow, *supra* n. 49, 291, 318 (The original language of the quote is: ‘Der immer noch fragmentarische Charakter des europäischen Rechts und sein langsames Wachstum bringen es

In my opinion, there is not much of a difference between the two positions. The dispute should, therefore, not be overstated. Under the European *lex lata*, the dominating perspective is certainly on the law of the forum. As a starting point, the Member States are therefore free to determine what public policy requires in line with their own standards. In addition, it seems difficult to find uniform European standards to fill the public policy reservation, as views on fairness and justice vary greatly between the national legal orders.<sup>61</sup>

However, this does not mean that Member States have free reign when delimitating the public policy doctrine. Rather, the public policy reservation is affected by European values. Therefore, one can – and this is undisputed – witness a certain enrichment of the formerly purely national public policy doctrine,<sup>62</sup> which is supplemented and given a ‘European gloss’.<sup>63</sup> The European values, which are to be followed by national judges, result mainly from the European Convention on Human Rights (ECHR),<sup>64</sup> the Charter of Fundamental Rights of the European Union,<sup>65</sup> the fundamental freedoms of the EU<sup>66</sup> and general legal principles developed by the Court of Justice of the European Union (ECJ).<sup>67</sup>

The enrichment of the national public policy should not be envisaged as if European law is solely adding a few dabs of European colour to a field of flowers representing national values. Such a picture would be misleading. The underlying European values are also setting barriers for national courts with respect to the application of the public policy reservation. The application of the public policy

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mit sich, dass der europäische ordre public erst allmählich in das Bewußtsein breiterer Juristenkreise tritt. Gewiss genügt es in vielen Fällen, ihn gleichsam in das Gewand des nationalen ordre public schlüpfen zu lassen, und oft muss dies sogar geschehen, weil die maßgebliche kollisionsrechtliche Rechtsquelle nur einen nationalen ordre public anerkennt.’).

61. Leible, *supra* n. 25, 71 et seq.

62. M. Stürner, *supra* n. 28, 463, 464.

63. Leible, *supra* n. 25, 72 (Ordre public wird ‘europäisch aufgeladen’); see also von Bar/Mankowski, *supra* n. 8, § 7 at 271 (‘europäisch angereichert’); von Hein, *supra* n. 37, Art. 6 EGBGB at 153 (‘Europäisierung des ordre public’); Thorn, *supra* n. 35, Art. 21 Rom I-VO at 5 (‘unionsrechtliche Prägung’).

64. van Houtte, *From a National to a European Public Policy*, in: Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren, 841, 852 (Nafziger/Symeonides [eds.], Transnational Publishers 2002); Leible/Lehmann, *supra* n. 46, 721, 734; Martiny, *supra* n. 24, 523, 533 et seq.; Thorn, *supra* n. 48, Art. 21 Rom I-VO at 4. On the European influences on the national ordre public see Renfert, *Über die Europäisierung der ordre public Klausel*, 105 et seq. (Lang 2003); Thoma, *Die Europäisierung und die Vergemeinschaftung des nationalen ordre public*, 34 et seq. (Mohr Siebeck 2007). Pursuant to Art. 6(3) of the EU Treaty, the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are regarded as general principles of EU law.

65. See Recital 58 Succession Regulation as well as Art. 135 Lagarde draft.

66. Leible/Lehmann, *supra* n. 46, 721, 734; Reichelt, *supra* n. 13, 5, 11; Schulze, *supra* n. 59, Art. 26 Rom II-VO at 6; Spickhoff, *supra* n. 59, Art. 21 Rom I-VO at 2; Thorn, *supra* n. 48, Art. 21 Rom I-VO at 4.

67. Jayme, *Ein internationales Privatrecht für Europa*, 37 (Decker und Müller 1991). For further European influences, see M. Stürner, *supra* n. 28, 463, 464 et seq.

reservation may not contravene European law. To continue the metaphor, EU law also is functioning as the gardener, cutting back uncontrolled growth in the application of the public policy reservation. In this respect the *European* public policy doctrine has a sort of corrective function that limits the *national ordre public*.

That European law is defining the outer boundaries of the public policy reservation can be seen from the cases decided by the ECJ on public policy control in the field of recognition and enforcement of foreign judgments under the Brussels I Regulation. In *Krombach*, the ECJ permitted national judges to classify violations of the ECHR as violation of the procedural public policy reservation set out in Article 27(1) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (now Article 34(1) Regulation no. 44/2001/Article 45(1) Regulation no. 1215/2012).<sup>68</sup> This case concerned a civil proceeding in conjunction with a criminal trial. Although the defendant, Mr Krombach, was ordered to appear before the court in person, he did not do so. The French court applied the contempt of court procedure in force at that time, which barred even Mr Krombach's lawyer from appearing on behalf of his client in contempt. As consequence, the court ordered Mr Krombach to pay damages to the family of his victim without hearing any defence.<sup>69</sup> The German *Bundesgerichtshof* wanted to refuse enforcement of the judgment due to violation of the procedural *ordre public*, as Mr Krombach had been unable to defend himself effectively before the French court. This point of view was affirmed by the ECJ, which clarified that national courts are entitled to evaluate breaches of the ECHR as a violation of public policy.<sup>70</sup>

In *Gambazzi*, the ECJ went one step further. For the first time, the Court gave a positive interpretation of when a deviation from European values should be regarded as violation of public policy. This case concerned the exclusion of a defendant for contempt of court in proceedings before an English court. The Court held that the exclusion of the defendant from the proceedings is the most serious restriction possible on the rights of the defence. Consequently, such a restriction should be considered a violation of the public policy reservation unless it satisfies the 'very exacting requirements' of a sound administration of justice.<sup>71</sup> To assess whether the exclusion was justified, the Court argued in favour of a proportionality test, which the national court should carry out by taking into account the specific circumstances of the proceedings.<sup>72</sup> The *Gambazzi* decision leaves no doubt that the Court is prepared to make recourse to European values in order to define the boundaries of the procedural *ordre public*. Indirectly, this delineation also determines the content of the public policy reservation.

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68. *Krombach v. Baberski*, Case C-7/98, ECR I-1935 (ECJ 2000).

69. Article 630 Code de procédure pénal stated at the time of the trial: 'Aucun avocat, aucun avoué ne peut se présenter pour l'accusé contumaux'.

70. *Krombach v. Baberski*, Case C-7/98, ECR I-1935 at 38–45 (ECJ 2000).

71. *Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, Case C-394/07, ECR, I-2563 at 33 (ECJ 2009).

72. *Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, Case C-394/07, ECR, I-2563 at 33–34 (ECJ 2009).

The ECJ later confirmed these guiding principles in *Apostolides v. Orams*<sup>73</sup> and *Trade Agency Ltd. v. Seramico Investments Ltd.*<sup>74</sup>

It is generally expected that the Court will apply these principles when interpreting the *ordre public* provisions laid down in European private international law.<sup>75</sup> The constant increase of European choice of law rules will, therefore, enable the ECJ to increasingly delineate the boundaries, and thereby the content, of the public policy reservation. However, the *Gambazzi* and *Apostolides/Orams* cases have also demonstrated that until now the ECJ has shown remarkable judicial restraint in defining the (procedural) public policy doctrine by making recourse to European values. It is not expected that the Court will abandon this position when interpreting the public order reservation laid down in the regulations on choice of law. Nevertheless, in the long term there will be an ever-increasing overlapping of European values and national public policy doctrines.<sup>76</sup>

A national court that does not find any violation of national values in applying foreign law must, therefore, always check if refusal to apply the public policy reservation is compatible with European standards. If this is not the case, the foreign law must not be applied by virtue of European standards.

The delimitation of European boundaries also operates in the reverse direction. If a national court wishes to refuse the application of foreign law with reference to national public policy, it must always verify if this is in accordance with European law. In other words, the primacy of European law can force a national court to apply the law of another EU state against its national values.<sup>77</sup> For example, if one were to look at the unequal treatment of same-sex partnerships under inheritance laws as a violation of a

73. *Apostolides v. Orams*, Case C-420/07, ECR, I-3571 at 56–57 (ECJ 2009): ‘While the Member States remain in principle free, by virtue of the proviso in Art. 34(1) of Regulation No 44/2001 [Art. 45(1) of Regulation No 1215/2012], to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter of interpretation of that regulation .... Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from another Member State ...’.

74. *Trade Agency Ltd. v. Seramico Investments Ltd.*, Case C-619/10, EU:C:2012:531 at 49 (ECJ 2012).

75. It is common to apply the ECJ’s case law on the procedural *ordre public* when interpreting the *ordre public* in the regulations on private international law, see Nordmeier, *Chapter 37: Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I)*, in: *Zivilrecht unter europäischem Einfluss*, at 136 (Gebauer/Wiedmann [eds.], 2nd ed., Boorberg 2010); Renner, *supra* n. 35, Art. 21 Rome I at 27; A. Staudinger, *Rechtvereinheitlichung innerhalb Europas: Rom I und Rom II*, *AnwBl.* 2008, 8, 15; M. Stürner, *supra* n. 28, 463, 472; Pfundstein, *Pflichtteil und ordre public*, 337 et seq. (Beck 2010).

76. M. Stürner, *supra* n. 28, 463, 472.

77. See, e.g., recital 58 Succession Regulation: ‘Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (ordre public) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.’; see M. Stürner *supra* n. 28, 463, 472.

fundamental European value, a state whose laws did not recognise the inheritance rights of a same-sex partner could not rely on the public policy reservation to refuse the application of the law of another EU Member State that permits inheritance by the surviving same-sex partner.

**[2] ‘Rome 0 Regulation’**

The sketched boundaries already apply with respect to the diverse Rome Regulations in force. Though none of the reservation clauses contained therein make reference to European standards, it is to be expected that the European influence will continue to grow by increased references to the ECJ for a preliminary ruling. If the European law is partly influencing the content of the public policy doctrine, then this fact should be reflected in the wording of the *ordre public* provision to be incorporated in a ‘Rome 0 Regulation’. This reservation should contain a reference to European law, if only to reach national judges who often do not have daily contact with European choice of law rules.<sup>78</sup> More precisely, the reservation clause should be supplemented to state that a violation of European values must also be taken into account when interpreting the *ordre public*. Therefore, reference should be made to both the Charter of Fundamental Rights of the European Union and the ECHR, as these legal texts represent the most significant European fundamental values.<sup>79</sup> This supplement would clarify that the public policy reservation is enhanced by European values. That legal provisions with European provenance can also restrict national public policy need not necessarily be included in the *ordre public* of the ‘Rome 0 Regulation’ provision reservation clause, as national judges must in any case interpret and apply the law in conformity with European rules.<sup>80</sup> However, a corresponding note could be included in the recitals of the ‘Rome 0 Regulation’.

**[C] Abstract Review versus Control of Results**

**[1] Lex Lata**

According to the traditional view, the public policy doctrine can only correct a reference to foreign law if the application of the foreign rule in the particular case would lead to untenable results (‘result control’).<sup>81</sup> There is thus no abstract review of foreign legal rules. In consequence, a foreign rule whose structure is incompatible with domestic values must be applied if its application in the particular case leads to an

78. Sonnenberger, *Grenzen der Verweisung durch europäisches internationales Privatrecht*, IPRax 2011, 325, 332.

79. Siehr, *supra* n. 55, 424, 436. In contrast, Art. 135 of the ‘Lagarde draft’ makes reference only to the Charter of Fundamental Rights of the European Union.

80. Basedow, *supra* n. 49, 291, 319.

81. Dicey, Morris & Collins, *supra* n. 47, at 5-002 (regarding English law); von Bar/Mankowski, *supra* n. 8, § 7 at 265; Kropholler, *supra* n. 21, § 36 II 1 (regarding German law); Mayer/Heuzé, *supra* n. 9, at 211 (regarding French law); see generally also Gebauer, *supra* n. 20, 1008, 1010.

acceptable result. This principle is currently enshrined in all ‘general’ public policy reservations of the Rome Regulations.<sup>82</sup>

This approach makes sense, and should also be retained in the future. A reform of the European private international law should in addition clarify that this approach must also apply for the special *ordre public* reservation laid down in Article 10 Rome III Regulation. This provision states: ‘Where the law applicable pursuant to [choice of law rules of this Regulation] makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply.’<sup>83</sup>

This special reservation clause, which was incorporated in the Regulation in addition to the general public policy provision (Article 12 Rome III Regulation), declares the *lex fori* applicable in two constellations. First, the law of the forum shall apply where the foreign law does not permit divorce. This exception was established with an eye to Malta, whose law at that time did not permit divorce.<sup>84</sup> Second, the law of the forum should be applied if the foreign law sets conditions for a divorce that depend on the sex of the spouse, as is the case not only in numerous jurisdictions governed by Islamic law,<sup>85</sup> but also under Jewish law.<sup>86</sup>

According to its wording, Article 10 Rome III Regulation stipulates an abstract control, in contrast to the general reservation clause set out in Article 12 Rome III Regulation. Yet Article 10 Rome III Regulation does not refer to the result of the application of law. Also, the recitals do not limit the power of the judges to a result control.<sup>87</sup> This special public policy reservation was not contained in the Commission’s Proposal for the Rome III Regulation. However, recital 20 of the Proposal stated that ‘in certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on the grounds of their sex, the law of the court seized should nevertheless apply.’<sup>88</sup>

During negotiations in the Council, the (soft) recital was retained (recital 24 Rome III Regulation) and in addition a special reservation clause was added to the Rome III Regulation. These changes may be traced back to the pressure of those states that wanted to ‘fend off’ the sexually discriminatory rules of Islamic law,<sup>89</sup> a position

82. See Hausmann, *supra* n. 48, Art. 21 Rom I-VO at 9; Martiny, *supra* n. 46, Art. 21 Rom I-VO at 5; Thorn, *supra* n. 35, Art. 21 Rom I-VO at 11 (on the Rome I Regulation); von Hein, *supra* n. 46, Art. 26 Rome II at 16 (on the Rome II Regulation). The same holds true for Art. 12 Rome III Regulation and Art. 35 Succession Regulation.

83. Emphasis omitted.

84. Helms, *Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung*, FamRZ 2011, 1765, 1771; Jänterä-Jareborg, *supra* n. 33, 317, 338. After a referendum, Malta has now enacted rules on divorce. The new divorce act has been in force since 1 Oct. 2011, see Pietsch, *Scheidungsrecht in Malta*, FamRZ 2012, 426 et seq.

85. For an overview of the legal rules of divorce in various Islamic countries, see Ebert, *Das Personalstatut arabischer Länder*, 108 et seq. (Lang 1996).

86. For an overview of Jewish divorce law, see Homolka, *Das jüdische Eherecht*, 113 et seq. (Sellier de Gruyter 2009).

87. See recital 24 Rome III Regulation.

88. Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation of 24 Mar. 2010, COM(2010) 105 final.

89. Helms, *supra* n. 84, 1765, 1772.

that had already received substantial support in the failed negotiations to pass the Rome III Regulation in the ordinary legislative procedure.<sup>90</sup>

If interpreted in the wrong way, the reservation contained in Article 10 Rome III Regulation may lead to unwarranted results. This point will be elaborated in greater detail by looking at a case of unequal access to divorce on grounds of sex. If Article 10 2nd alt. Rome III Regulation was to be understood as an abstract public policy control, a judge would have to apply the *lex fori* even if the application of the foreign law would lead to an acceptable outcome. The consequences may be illustrated by reference to the divorce by repudiation (divorce without the necessity of grounds being stated). In many states in the Muslim world, this type of divorce is only available to men. A woman can also apply for a divorce, but only if certain grounds for divorce are met or if she gives up certain pecuniary claims that she has against her husband.<sup>91</sup> According to the traditional view a German court, for example, would be able to order the divorce of the spouses even on the basis of the discriminatory foreign law, provided that the result is acceptable in the case at hand. Such an acceptable outcome might occur if the wife agrees to the divorce or if the husband could also demand a divorce on the basis of the *lex fori*.<sup>92</sup> A judge could no longer follow this sensible approach if Article 10 2nd alt. Rome III Regulation were to be interpreted as an abstract control which calls for the application of the *lex fori* in those cases. This is not only contrary to established principles of private international law, but might even complicate the live of the spouses, who often wish to divorce under their home law in order to ensure recognition of the divorce decree in their home state.<sup>93</sup> Therefore, an abstract control of foreign rules does not make sense.

The key question, therefore, is whether Article 10 2nd alt. Rome III Regulation can be interpreted in line with the generally accepted principle of private international law according to which the public policy reservation allows for a result control only. It is a matter of debate whether such a restrictive interpretation of Article 10 2nd alt. Rome III Regulation is possible.<sup>94</sup> In my opinion, such an interpretation should be followed in line with the protective purpose of this special reservation clause. It shall prevent a spouse suffering disadvantages due to discrimination that is not in accordance with values that dominate in Europe. If in exceptional cases the application of the discriminatory foreign law does not lead to such discrimination, there is no reason to apply the *lex fori*.<sup>95</sup> This narrow interpretation also retains the ‘dignity of private

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90. Jänterä-Jareborg, *supra* n. 33, 317, 338 with n. 10.

91. See the overview given by Rohe, *Das islamische Recht*, 215 et seq. (Beck 2009).

92. Helms, *supra* n. 84, 1765, 1772 (with further references).

93. Helms, *supra* n. 84, 1765, 1772.

94. See Helms, *supra* n. 84, 1765, 1772; Schurig, *supra* n. 33, 405, 410; Budzikiewicz, in: *NomosKommentar*, Art. 10 Rom III at 27 (Hüßtege/Mansel [eds.], 2nd ed., Nomos 2015); Lein in: *Rome Regulations, Commentary*, Art. 10 Rome III at 27 (Calliess [ed.], 2nd ed., Kluwer Law International 2015) (arguing in favour of a result control); but see Siehr, *supra* n. 55, 424, 427; Winkler-von Mohrenfels, *Die Rom III-VO*, ZEuP 2013, 699, 715 (stating that Art. 10 Rome III Regulation sets forth an abstract control).

95. Helms, *supra* n. 84, 1765, 1772.

international law’, which is based on the ‘recognition of foreignness as such’.<sup>96</sup> Therefore Article 10 Rome III Regulation should not stand in the way of a divorce by repudiation to which the wife expressly agrees, or if the husband could also demand a divorce on the basis of *lex fori*.<sup>97</sup>

However, it is doubtful whether this sensible interpretation – which would comport with general principles of private international law – will be accepted by the ECJ. The wording of the reservation, its systematic positioning<sup>98</sup> and the legislative history will probably point the judges into a different direction.

## [2] ‘Rome 0 Regulation’

The consequences for a ‘Rome 0 Regulation’ are obvious. First, the principle that a judge may only disregard foreign law if the result of its application would lead to unjust results must be retained in the public policy provision to be incorporated in this Regulation. Second, special reservation clauses should also mirror this principle. For reasons of legal clarity, Article 10 Rome III Regulation should therefore be adapted when reforming European private international law.

## [D] Connection with the Forum

### [1] Lex Lata

According to the traditional view prevailing in European<sup>99</sup> and national private international law,<sup>100</sup> recourse to the *ordre public* depends on the connection of the case with the forum, as well as the gravity of the violation of fundamental values.<sup>101</sup> A

96. Goldschmidt, *Die philosophischen Grundlagen des internationalen Privatrechts*, in: FS f. Wolff, 203, 213 (von Caemmerer et al. [eds.], Mohr 1952) (the quote in the original language is: ‘Die Würde des IPR beruht gerade auf der Anerkennung des Fremden als solchem’).

97. Helms, *supra* n. 84, 1765, 1772.

98. If Art. 10 Rome III Regulation was understood as permitting a control of the outcome of a case (‘result control’) only, there would be no need for a special reservation clause in addition to the ‘general’ public policy clause (Art. 12 Rome III Regulation) which also prescribes such a control, see Schurig, *supra* n. 33, 405, 410 (who notwithstanding argues in favour that Art. 12 applies only if the outcome of a case is manifestly contrary to the domestic *ordre public*).

99. See Hausmann, *supra* n. 48, Art. 21 Rom I-VO at 19; Martiny, *supra* n. 46, Art. 21 Rom I-VO at 5; Thorn, *supra* n. 35, Art. 21 Rom I-VO at 14 (regarding the Rome I Regulation); von Hein, *supra* n. 46, Art. 26 Rome II at 19; Schaub, in: Prütting/Wegen/Weinreich, *BGB-Kommentar*, Art. 26 Rom II-VO at 5 (Prütting/Wegen/Weinreich [eds.], 9th ed., Luchterhand 2014) (regarding the Rome II Regulation).

100. von Hoffmann/Thorn, *Internationales Privatrecht*, § 6 at 152 (9th ed., Beck 2007) (regarding German law); Siehr, *supra* n. 55, 424, 425 (regarding *inter alia* Dutch, Italian, Portuguese and Spanish law).

101. One of the first scholars who voiced this requirement was Franz Kahn, see Kahn, *Abhandlungen zum internationalen Privatrecht*, 181 et seq. (reprint Lenel/Lewald [eds.], vol. I, Duncker & Humblot 1928): ‘Es kommt ... in allen ... Fällen ... auf eine besondere Voraussetzung an, ... auf das Vorhandensein oder Nichtvorhandensein einer besonders gearteten Anknüpfung zu der für Entstehen oder Bestehen des Rechtsverhältnisses kritischen Zeit’.

refusal to apply foreign law is only permissible if there is a direct link between the case and the forum<sup>102</sup> (*proximité de la situation avec le for*).<sup>103</sup> This requirement is seen as an aspect of the ‘relativity of the *ordre public*’:<sup>104</sup> The stronger the connection to the forum, the easier it is to refuse undesirable results connected to the application of foreign law. In the reverse situation, where there is a marginal connection to the forum, a higher degree of tolerance may be exercised.<sup>105</sup> However, establishing the link between the case and the forum is a question of extent and degree, which is difficult to formalise into a general rule.<sup>106</sup>

Traditionally, the link concerns the proximity of the case and forum state.<sup>107</sup> This understanding is correct insofar as it concerns the refusal of foreign law due to violations of fundamental national values. However, other limits must be set for cases concerning violations of European principles. As European rules apply across national borders, the contacts between the case and the forum cannot be solely relevant. Instead, recourse to the public policy reservation is also possible if there is a sufficient relationship with the law of another EU Member State<sup>108</sup> or – with regard to violations of the ECHR – even with another ECHR signatory state.<sup>109</sup> Thus, a European connection suffices, which may even extend beyond the single market, given that the ECHR also applies in Switzerland, for example. If a decision has to be made over the inheritance of land located in Germany and foreign law is applicable that gives a widow (who has not rejected her inheritance) only a fraction of what the widower would have received if he had been predeceased by his wife, the application of the *ordre public* to refuse this discriminatory rule does not depend on whether the widow maintained her habitual residence in Germany, France, or Switzerland.<sup>110</sup>

## [2] ‘Rome 0 Regulation’

A General Part of European private international law should retain the principle that recourse to the *ordre public* is possible only if there is a sufficiently strong connection of the case to the forum state. Even though it is difficult to circumscribe the content of this general principle in a codification, there should be a ‘hint’ for judges and lawyers applying the rules of European private international law. Currently, none of the European regulations mention the relativity of the public policy doctrine either in the

102. von Bar/Mankowski, *supra* n. 8, § 7 at 263; Junker, *supra* n. 52, at 279.

103. Batiffol/Lagarde, *Droit international privé*, at 359 (vol. I, 8th ed., LGDJ 1993).

104. Another aspect of relativity of the public policy doctrine is that the values defining its content may change over time; see Barel/Armellini, *supra* n. 21, 94. See generally on the relativity of the *ordre public* Mills, *The Dimensions of Public Policy in Private International Law*, J. Priv. Int’l L. 4 (2008), 201, 212 et seq.

105. Batiffol/Lagarde, *supra* n. 103, at 359; von Bar/Mankowski, *supra* n. 8, § 7 at 264; Kropholler, *supra* n. 21, § 36 II 2; Mills, *supra* n. 104, J. Priv. Int’l L. 4 (2008), 201, 236.

106. Kropholler, *supra* n. 21, § 36 II 2.

107. See Batiffol/Lagarde, *supra* n. 103, at 359 (regarding French law); Völker, *Zur Dogmatik des ordre public*, 231 (regarding German law) (Duncker & Humblot 1998).

108. von Hein, *supra* n. 46, Art. 26 Rome II at 19; Moersdorf-Schulte, *supra* n. 37, Art. 21 Rom I-VO at 4.

109. Siehr, *supra* n. 55, 424, 430 et seq.

110. Example by Siehr, *supra* n. 55, 424, 430 et seq.

wording of the reservation clauses or in the recitals. In my opinion, this should be changed.<sup>111</sup> In order to strengthen legal certainty, the provision in the ‘Rome 0 Regulation’ dealing with public policy should be amended or at least the recitals should state that the rejection of a foreign law has always to be judged in relation to an assessment of the gravity of the violation, and the connection of the case at hand to the law of one or more EU Member States, or to the law of an ECHR signatory state.<sup>112</sup>

#### §14.04 SELECTED ISSUES

After having examined the foundations of the *ordre public*, the following section will address a few selected issues that may be important for a reform of European private international law.

##### [A] Shaping the Content of Public Policy

###### [1] Reference to European Fundamental Rights

The European regulations enacted so far do not specify the content of the *ordre public*. This does not come as surprise. Throughout the history of private international law, attempts to develop comprehensive definitions of the public policy doctrine have failed due to the variety of sources from which the various fundamental values may flow.<sup>113</sup> Therefore, even many national legislatures have decided not to define the boundaries of the public policy reservation.<sup>114</sup> Occasional reference is made to the importance of national fundamental rights, such as in Article 6 German Introductory Act to the Civil Code (EGBGB). A similar reference could also be anchored in European public policy rules. A general reservation clause could, for example (and as elaborated above), refer to the Charter of Fundamental Rights of the European Union and the ECHR.<sup>115</sup> The further delineation of the content should, however, be left to courts and commentators.

111. Article 21(2) Belgian Private International Law Act may serve as model. It states: ‘Cette incompatibilité s’apprécie en tenant compte, notamment, de l’intensité du rattachement de la situation avec l’ordre juridique belge et de la gravité de l’effet que produirait l’application de ce droit étranger’.

112. The wording of Art. 135 Lagarde draft is too narrow as it only refers to the proximity to the forum. For a more comprehensive proposal, see Siehr, *supra* n. 55, 424, 432.

113. See Nußbaum, *Grundzüge des internationalen Privatrechts*, 111 et seq. (Beck 1952); Dicey, Morris & Collins, *supra* n. 47, at 5-008: ‘The reservation of public policy in conflict of laws cases is a necessary one but “no attempt to define the limits of that reservation has ever succeeded” (with reference to Westlake, *Private International Law*, 51 [7th ed., 1925]); Bucher, *supra* n. 20, 9, 172: ‘Le problème de définition de l’ordre public international n’a jamais été résolu et ne le sera jamais’.

114. See Art. 21(1) Belgian Private International Law Act; Art. 16(1) Italian Private International Law Act; § 6 Austrian Private International Law Act; Art. 7 Polish Private International Law Act.

115. See *supra* §14.03[B][2].

[2] *Special Reservation Clauses and Exception Rules*

Another possibility to make the public policy doctrine more tangible is the introduction of special reservations for certain legal areas. Though one needs to be very careful with such provisions, as they cast ‘shadows of national bias onto a private international law codification’,<sup>116</sup> such *Vorbehaltsklauseln* should not be refused in principle. A special reservation is reasonable in family law to ensure the freedom of marriage. An example can be found in Article 13(2) EGBGB<sup>117</sup> which, *inter alia*, prevents a foreigner from being barred from remarrying in Germany because his or her home law does not recognise a previous divorce decree.

Additionally, specific exceptions may delineate the boundaries of *ordre public* and strengthen the uniform application of European law. The European legislature could stipulate that recourse to the public policy reservation is not permissible to render a certain foreign rule inapplicable. For example, the Proposal of the European Commission for the Succession Regulation envisaged that a foreign rule ‘may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of the estate differ from those in force in the forum’.<sup>118</sup> This reasonable proposal was deleted during the legislative process, as states whose inheritance laws included wide-ranging forced heirship rights wanted to retain the right to enforce their provisions against foreign legal systems that do not recognise such mandatory rules.<sup>119</sup>

From a systematic point of view, however, special reservations do not fit into the General Part of a European Private International Law Code. For this reason such

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116. Kropholler, *supra* n. 21, § 36 VIII. The original language of the quote is: ‘Durch spezielle Vorbehaltsklauseln fällt der Schatten nationaler Einseitigkeit auf ein IPR-Gesetz’.

117. Article 13 EGBGB states: ‘(1) The conditions for the conclusion of marriage are, as regards each person engaged to be married, governed by the law of the country of which he or she is a national.

(2) If under this law, a requirement is not fulfilled, German law shall apply to that extent, if:

1. the habitual residence of one of the persons engaged to be married is within the country or one of them is German national;
2. the persons engaged to be married have taken reasonable steps to fulfill the requirement; and
3. it is incompatible with the freedom of marriage to refuse the conclusion of the marriage; in particular, the previous marriage of a person engaged to be married shall not be held against him or her if it is nullified by a decision issued or recognised here or the spouse of the person engaged to be married has been declared dead.’ (translation by *Moersdorf-Schulte*, available at [http://www.gesetze-im-internet.de/englisch\\_bgbeg/englisch\\_bgbeg.html](http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html)).

118. Article 27(2) Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession of 14 October 2009, COM(2009) 154 final.

119. It is, for example, argued that the exclusion of German ‘forced heirship rights’ (*Pflichtteilsansprüche*) violates German public policy, see Pfundstein, *supra* n. 75, 338 et seq.; it is, however, doubtful whether German courts will follow this view, see *Max Planck Institute for Comparative and International Private Law*, 74 *RabelsZ* 552, 664 (2010).

reservations should not be included in a ‘Rome 0 Regulation’, but in their respective context in the ‘Special Part’ of a European Private International Law Code yet to be enacted or (if no comprehensive codification is drawn up) in each of the Rome Regulations. The elaboration of uniform reservations for special areas of the law is, however, insofar problematic as the views on certain concepts of private law differ widely across the EU. One example is the treatment of punitive damages. While such damages are the exception on the continent, they are accepted on a much broader scale in Anglo-Saxon jurisdictions.<sup>120</sup> Therefore, the Rome II Regulation does not contain a strict reservation, but merely specifies a (soft) rule in the recitals that allows Member States to regard punitive damages of an excessive nature to be contrary to public policy.<sup>121</sup>

Such special reservations would simplify the application of private international law. But due to their treatment of specific issues, their place is not in the General Part of a future European Private International Law Code but (should a comprehensive codification be drawn up) in the Special Part, or (if there is no comprehensive codification at the EU level) in one or more of the Rome Regulations.

### [B] Specifying the Effects of the Public Policy Reservation

Finally, one could consider specifying the effects of the public policy reservation more precisely. So far, the reservations contained in the Rome Regulations only state that the application of a foreign legal rule ‘may be refused’ if its application is manifestly incompatible with the forum’s *ordre public*. The reservations do not prescribe which law shall fill the gap left by the application of the public policy reservation. *Hans Jürgen Sonnenberger* regards this approach as consistent when one regards the Regulations as comprehensive references to the public policy reservations of the Member States. Nevertheless, he sees the danger of divergent decisions within the single market and urges courts and commentators to not only focus on precedents from their own jurisdiction when interpreting the public policy reservation.<sup>122</sup> Whether this approach will ensure a substantial harmonisation effect seems questionable. Therefore, the European legislature should seek to stipulate the basic legal consequences of an application of the public policy doctrine.<sup>123</sup> This clarification seems necessary as the national codifications – except, obviously, for the principle that the foreign rule contradicting the *ordre public* shall not apply – envisage very different legal consequences to fill the gap caused by the application of the reservation clause. While some jurisdictions invariably apply the *lex fori*, others oblige the judge to develop a solution (or modification) from the foreign law to fill the gap before he or she is entitled to resort

120. See Moersdorf-Schulte, *Spezielle Vorbehaltsklausel im Europäischen Internationalen Deliktsrecht?*, ZVglRWiss 104 (2005), 192, 207 et seq.

121. Recital 32 Rome II Regulation.

122. Sonnenberger, *supra* n. 13, 227, 228.

123. Sonnenberger, *supra* n. 78, 325, 332 (arguing that the legislature should incorporate guiding principles in the recitals of regulations with regard to the legal consequences of the *ordre public*).

to the law of the forum.<sup>124</sup> Against this background, there is a real danger that the courts of the Member States will continue to apply their (divergent) traditional approaches even when ruling on public policy rules of European origin.<sup>125</sup>

Harmonising the legal consequences of the public policy reservation is a difficult task, as simple solutions often do not meet the particular requirements of the case at hand.<sup>126</sup> The starting point must be the maxim that an application of the public policy reservation may only affect the application of the foreign law as far as this is indispensable to safeguard the forum's fundamental values. Therefore, the law to be applied to fill the gap caused by the *ordre public* should be determined in accordance with the principle of a minimal interference with the foreign law.<sup>127</sup> Thus, the sole recourse to the *lex fori* is not an option, as this approach disregards the foreign law in its entirety. For this reason, and the fact that it creates incentives for forum shopping,<sup>128</sup> the *lex fori* approach should not be adopted at the European level.<sup>129</sup> Instead, the judge should try to fill the gap as far as possible by resorting to the foreign law designed by the choice of law rules.

The codification of this general principle is difficult, as the legal consequences of the application of the public policy reservation may vary greatly. In some instances, leaving the incompatible foreign rule unapplied and finding a solution to the case in accordance with the remaining rules of the *lex causae* is sufficient.<sup>130</sup> In some cases, recourse to the *lex fori* to fill the gap is necessary to ensure that domestic fundamental rights prevail. In other constellations, the gap can be filled by application of the modified foreign law.<sup>131</sup> If in exceptional cases the choice of law rules provide for an alternative law to be applied, it might be sensible to fill the gap by recourse to this law.<sup>132</sup> Only when the application of the (potentially modified) foreign law is not

124. See the overview given by Kreuzer, *supra* n. 4, 1, 45 (with references of the national provisions); Lagarde, *supra* n. 2, at 60 et seq. (partly outdated). On the law of Germany, see von Hoffmann/Thorn, *supra* n. 100, § 6 at 154; Kropholler, *supra* n. 21, § 36 V. On the law of England, see Mills, *supra* n. 104, J. Priv. Int'l L. 4 (2008), 201, 212.

125. von Hein, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, ZEuP 2009, 6, 24 (regarding the Rome II Regulation).

126. The German legislature has avoided codifying the effects of the application of the *ordre public* reservation in order to retain the option of differentiated solutions in legal practice, see Begründung zum Regierungsentwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts, BT-Drs. 10/504, 44.

127. This principle prevails, for example, in German private international law, see Begründung zum Regierungsentwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts, BT-Drs. 10/504, 44 ('Grundsatz möglichst weitgehender Schonung des fremden Rechts'). With regard to EU law, this approach is favoured by Hausmann, *supra* n. 48, Art. 21 Rom I-VO at 30; Ringe, in: *jurisPK-BGB*, Art. 21 Rom I-VO at 19 (Herberger et al. [eds.], 6th ed., juris 2013); Schulze, *supra* n. 59, Art. 26 Rom II-VO at 27.

128. von Hein, *supra* n. 46, Art. 26 Rome II at 125 (with regard to the Rome II Regulation).

129. Kreuzer, *supra* n. 4, 1, 46 et seq.

130. An example is the simple non-application of a non-compete clause that violates domestic public policy, see Kropholler, *supra* n. 21, § 36 V.

131. An example is the agreement of a lawyer's fee that contravenes domestic public policy. In such a case, the gap can be closed by recourse to the fee system of the foreign law that would prevail if the parties had not concluded a fee agreement, see BGH, IPRspr. 1968–1969, Nr. 245, 633, 638; Kropholler, *supra* n. 21, § 36 V.

132. Nordmeier, *supra* n. 75, at 138 (with regard to the Rome I Regulation).

possible, should recourse to the law of the forum be permitted. But, even here, the foreign law should be kept in mind as the judge should apply those provisions of the *lex fori* that most closely resembles the suppressed foreign legal rule. For this purpose, it may be necessary for the judge to adapt the domestic law slightly.<sup>133</sup>

Due to the complexity of the matter, the European legislature should refrain from an all-embracing codification of possible effects of the application of the public policy reservation. Instead it is submitted that the principle of minimal interference as guiding yardstick should be codified, either in the public policy provision itself or in the recitals. This would clarify that recourse to the law of the forum is only permissible insofar as the gap cannot be filled by the (adapted) foreign law or an alternative law.<sup>134</sup> Such an addition will remind the judge not to make premature recourse to domestic law. Any further definition of possible effects of the *ordre public* should be left to courts and commentators.

## §14.05 SUMMARY

- (1) The public policy reservation should be codified in the ‘Rome 0 Regulation’. A judge should apply this standard instrument of private international law *ex officio*. Moreover, the considerations leading to the rejection of a foreign rule should in principle not differ according to the origin (another EU Member State or a third state) of the rule in question (§14.02[A] & [B]).
- (2) The primary function of the *ordre public* is to refuse the application of foreign law that is incompatible with fundamental values of the forum state (negative function). A positive function in the classical sense can no longer be attributed to the public policy reservation (§14.03[A]).
- (3) The refusal of foreign law should only be permissible if the result of its application will lead to untenable results. The public policy doctrine does not legitimate an abstract control of foreign legal rules. This principle, which governs all general public policy reservations so far enacted in EU regulations, should also prevail in a ‘Rome 0 Regulation.’ The European legislature should further clarify in any future reform that this rule also applies for the special reservation clause laid down in Article 10 Rome III Regulation (§14.03[C]).
- (4) The rejection of foreign law cannot only result from a violation of domestic values, but also from a contravention of European standards, namely rights incorporated in the Charter of Fundamental Rights of the European Union or the ECHR. This additional facet of the European public policy doctrine should be expressed in the ‘Rome 0 Regulation’ (§14.03[B], §14.04[A]).

133. Kropholler, *supra* n. 21, § 36 V.

134. A similar approach is favoured by Kreuzer, *supra* n. 4, 1, 46 et seq. with reference to the Frankenstein draft (Frankenstein, *supra* n. 15). Article 13 Frankenstein draft states: ‘Lorsque ... la loi étrangère, normalement applicable, se trouve écartée, on appliquera les dispositions les mieux appropriées de la législation étrangère. Si, de cette façon, la lacune ne peut être comblée on appliquera la loi locale dans les limites de la stricte nécessité’.

- (5) The rejection of foreign law must always be judged in relation to an assessment of the gravity of the violation and the strength of the connection of the case to the forum. As far as a contravention of national values is concerned, the strength of the connection to the forum state is decisive. Where there is a violation of European values, one has to assess the connection of the case at hand to the EU or to a signatory state of the ECHR. These principles should be expressed in the *ordre public* provision of the 'Rome 0 Regulation' (§14.03[D]).
- (6) With respect to the effects of the public policy reservation, a 'Rome 0 Regulation' should incorporate the principle of a minimal interference with the foreign law. In addition, it should be clarified that recourse to the law of the forum is only permissible insofar as the gap caused by the public policy reservation cannot be filled by the (adapted) foreign law or an alternative law (§14.04[B]).

