The European Legal Forum

Forum iuris communis Europae

4-2016
pp. 85 - 112
16th Year July/August 2016

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

The public policy exception in the European civil justice system**

*Susanne Lilian Gössl**

I. Introduction

Private international law[1] is generally open in accepting or recognizing foreign law or foreign decisions. The public policy exception or *ordre public* constitutes a limit to that openness: It impedes the application of foreign law or the recognition of a foreign decision in cases in which the application or recognition would violate fundamental values or interests of the forum. As an ultimate limit to foreign law, thus, it is an essential part of private international law (PIL) and also part of (almost) every PIL instrument of the EU.[2]

The CJEU left the concrete content to be determined by each respective national law system. However, it started to control parts of the interpretation of the rules, thus producing a vast amount of literature discussing or determining the extent to which the *ordre public* has been "Europeanized". The same can be said about the extent to which the ECHR influences the interpretation of the content of each national *ordre public*. Consequently, several scholars of private international law have comprehensively dealt with challenging questions regarding requirements, determination and consequences of the use of the public policy exception and its understanding under EU law or the influence of the ECHR.[3]

My focus is different. I will also ponder the concrete determination of the public policy exception, but I will do so from the perspective of the national legal systems and national courts, not of EU law. Hence, I will neglect aspects of the "Europeanization" in favour of a comparative view. Thus, I will show that Member States courts use the exception in different ways and not only regarding the content of the public policy exception. The latter is probably most central part to the use of the exception, but the mode of operation of the exception is almost as important.

My analysis will start with an introduction into the topic followed by a brief overview of the public policy exception in the EU (II). Afterwards, I will show the extent to which the CJEU shapes the determination of the content, followed by different national approaches to the specification of these requirements (III). Then, I will shift my focus to

* *Dr Susanne L. Gössl, LL.M. (Tulane) is a senior research assistant at the University of Bonn, Germany.*

** *Revised lecture presented at the first unalex conference on 'European International Civil procedure – a system in the making' at the University of Zagreb on 30 September 2016, organised within the project 'unalex – multilingual information for the uniform interpretation of the instruments of judicial cooperation in civil matters', co-funded by the European Union.*

1 Understood as including conflict of laws and international procedural law.

2 For example: Article 45 Brussels Ia Regulation; Article 22 Brussels IIa Regulation; Article 21 Rome I Regulation; Article 26 Rome II Regulation, Article 12 Rome III Regulation; to the EU private international law, e.g. *Martiny*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger, Munich, 2004, 523, 528 *et seq*.; same concept even if slightly different wording *Fallon*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar, Milan, 2009, 331, 336; *Stürner*, in: *Arnold* (ed.), Grundfragen des Europäischen Kollisionsrechts, Tübingen, 2016, 87, 88-89; *Wurmnest*, in: *Leible* (ed.), General Principles of European Private International Law, 2016, 305, 314.

3 E.g., *inter alia*: *Lagarde*, Recherches sur l'ordre public en droit international privé, Paris, 1959; *Jayme*, Methoden der Konkretisierung des ordre public im internationalen Privatrecht, Heidelberg, 1989; *Meidanis*, European Law Review 2005, 95; *Álvarez*, in: *Bouza/Rodrigo/García* (eds.), La gobernanza del interés público global, Madrid, 2015, 146-181; *Helms*, IPRax 2017, forthcoming; *Hess/Pfeiffer*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, Brussels, 2011; *Basedow*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger, Munich, 2004, 291; *Siehr*, in: *Kronke/Thorn* (eds.), FS Kropholler, Bielefeld, 2011, 424; *Stürner*, in: *Arnold* (ed.), Grundfragen des Europäischen Kollisionsrechts (n. 2), 87; *Rodrígez Pineau*, European Review of Private Law 1995, 343; *Mills*, JPrivIntL 2008, 201; *de Boer*, in: *Malatesta/Bariatti/Pocar* (eds.), The external dimension of EC private international law in family and succession matters, Padua, 2008, 295.

the *modus operandi* of the public policy exception and show the different approaches of national laws to the use of the exception (IV). I will conclude with a quick observation on the state of cross-border dialogue regarding these aspects (V).

II. The Concept of Public Policy (*ordre public*)

1. Concept

The concept "public policy" is used in different ways. Some jurisdictions, and also some provisions in EU private international law[4] use the French term "ordre public" to distinguish it from the concept of public policy in other areas of law.[5] Here, I will use it only for the concept which is sometimes also referred to as "ordre public international", or "negative public policy" to describe the situation where foreign law has to be applied as a general rule or a foreign decision has to be recognized.[6] The judge is exceptionally allowed not to apply/recognize it because the application of the rule or the recognition of the decision would violate the public policy of the forum. This non-application/non-recognition constitutes the so-called "negative" function of the public policy exception.[7] There can be differences between procedural ordre public and conflict of laws ordre public. Nevertheless, for my purposes the distinction is not paramount and will be neglected.

2. Purpose

A corrective via the public policy exception is necessary for the traditional so-called "value neutral" approach to private international law that is used in most civil law systems and is also the private international law approach the EU legislator takes (even though it is not always value neutral).[8] The approach relies on an abstract determination of the law applicable by connecting a legal question and a case by an abstract connecting factor with the law that should apply. This method can lead, theoretically, to the application of every law of the world. The legislator therefore needs to install a corrective to ensure that the core values of the forum will never be given up to a foreign rule. With a conflict-of-laws approach that, instead, determines the law applicable directly by policies or interests of the forum, this corrective is less important. The policy consideration can already be made by the determination of the law applicable itself.[9] The same reasoning applies to the "value neutral" conflict-of-laws-system as applies to a system such as the one the EU has installed regarding judgments from other Member States: the system is generally open to the recognition of foreign judgments without looking at their content. An objection to recognition for reasons of substantive law, therefore, is the exception.

The purpose of EU private international law is to reduce the impediments to fundamental freedoms which can result from unforeseeable legal situations caused by cross-border activities. To avoid uncertainty about which laws apply in a cross-border context, or whether a court decision will be enforceable in another Member State, EU PIL provides formal and predictable rules.[10] Thus, the public policy exception, as one of the ultimate limits to that purpose, has to be read in that context as a possible impediment to a fundamental freedom. Hence, it has to be interpreted as being very narrow.[11] A Member State's decision or law is presumed to be legal in the other Member States and – influenced by the principle of mutual trust[12] – the proceedings in another Member State also enjoy the presumption of legality.[13]

III. The Content of Public Policy in EU Private International Law

1. Definition by the CJEU

The CJEU understands the public policy exception – similar to several national laws – as a manifest violation of a fundamental rule or right in the forum, including not

4 Art. 45 Brussels *Ibis* Regulation; Art. 21 Rome I Regulation.

5 To the concept "public policy" as a reason to impede the EU fundamental freedoms or in (international) public law; *Schmalenbach*, in: *Borić/Lurger et al.* (eds.), FS Posch II, Vienna, 2011, 691, 692-693.

6 Instead, sometimes, the concept "ordre public interne" is used for those rules within the national system that are mandatory at a national level, meaning that they cannot be derogated by party agreement, see e.g. for the distinction in Croatia, Germany, Greece, Italy: *Hoško*, CYELP 2014, 189, 198; *OLG Sachsen-Anhalt*, 31.3.1998 – 9 U 1489/97 (259), 9 U 1489/97, *unalex DE-2406*; *Ephetio Athen*, 27.8.2010 – 4467/2010, *unalex GR-138*; *Corte di Cassazione*, 9.5.2007 – n. 10549, *unalex IT-516*, 1; unclear *Pretore Milano*, 5.1.1995 – Peragallo Est. - *Giannantonio v. Sal.l.* - Società Imprese Industriali s.p.a., *unalex IT-541*; *Basedow*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger (n. 3), 291, 295-297.

7 Indirectly, the exception also has a positive function in conflict of laws: Instead of the original *lex causae* another rule (positively) has to be applied. See, e.g., *Álvarez*, in: *Bouza/Rodrigo/García* (eds.), La gobernanza del interés público global (n. 3), 146-181, 153. Sometimes also the term "positive" public policy is also used to refer a slightly different instrument of private international law, i.e. the positive application of rules independently of the fact which law applies according to the private international law, see *Meidanis*, European Law Review 2005, 95, 99.

8 E.g. *Lagarde*, in: *Lipstein/David* (eds.), International encyclopedia of comparative law, III, 1, Private International Law, Tübingen, 2011, ch. 11, 11-7 *et seq.*

9 *de Boer*, in: *Malatesta/Bariatti/Pocar* (eds.), The external dimension of EC private international law in family and succession matters (n. 3), 295, 300 *et seq*.

10 The European Economic and Social Committee's Opinion, (2004) OJ C 241/1, para 3.1, similar Recital 1 Rome I, *Salerno*, Quaderni di SIDIBlog 2014, 129, 131; *Mańko*, Europeanisation of civil procedure. Towards common minimum standards?, 2015 7; *Gray/Quinzá Redondo*, Familie & Recht 2013; more general *Koch*, ERPL 1995, 329, 336; *Fiorini*, Electronic Journal of Comparative Law 2008, 1, 115; *Calliess,* Rome Regulations, Alphen aan den Rijn, The Netherlands, 2nd edition, 2015, Introduction paras 9-11, 17-18; *Barnes*, Cambridge Student L. Rev. 2009, 124 135; *Kozyris*, Am. J. Comp. L. 2008, 471, 482.

11 *Fallon*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar (n. 2), 331, 336-337; E.g. *Franzina*, CDT 2014, 75, 90; *Mills*, JPrivIntL 2008, 201, 204-206; *Schmalenbach*, in: *Borić/Lurger et al.* (eds.), FS Posch II (n. 5), 691, 694; *Gössl,* beck-online.Großkommentar zum Zivilrecht, Art. 12 Rom III, para 21.

12 *Weller*, JPrivIntL 2015, 64.

13 *Beaumont/Johnston*, JPrivIntL 2010, 249, 254; *Vlas*, in: The Permanent Bureau of the Hague Conference on Private International Law (ed.), Essays in honour of Hans van Loon, Cambridge, 2013, 621, 623.

only national values but also fundamental principles of EU law, especially the fundamental freedoms and the human rights as embodied in the Charter of Fundamental Rights of the European Union (EU Charter) and the European Convention on Human Rights (ECHR).[14] In general, the court highlights that the concrete content of public policy remains a question of national law. It only controls the interpretation of the exception by "guarding its limits".[15] As part of that guardianship, the CJEU obliges the judge to give detailed arguments as to why a certain principle or right is fundamental to the national system.[16] Using those arguments the CJEU evaluates the reasons the courts gave for a rule or right being sufficient to constitute part of national public policy.[17] This leads to a "Europeanization" of the public policy exception, especially regarding the protection of human rights.[18]

2. Definitions by national courts

Thus, the concrete determination of the content of the public policy remains a question of national law. On this national level several differences remain. As a common core, all jurisdictions focus on fundamental norms of the legal system, many with a reference to those rules of constitutional hierarchy.[19] The EU Charter, the ECHR and the EU fundamental freedoms are included in this part.[20] The fundamental rights must exist at the time of the decision, as public policy always refers to values or rights at the moment the decision is rendered, meaning that public policy is open to change.[21]

Some jurisdictions place emphasis, apart from the constitution, on the fundamental norms constituting their private law systems,[22] or on the rights recognized as fundamental by the legal system[23] or those rules forming the legal culture of the forum.[24] Others have a broader, less national approach: Some jurisdictions do not recur to their national rules only but also derive fundamental values from public international law or from a legal comparison, such as the "norms of all civilized nations" as universally excepted absolute values (Italy, France).[25] This broader content of public policy is sometimes referred to as "ordre public transnational"[26] or "ordre public (veritablement) international"[27].[28] On the other hand, the Swiss Bundesgericht explicitly stated (regarding the Lugano Convention) that a violation of international law cannot itself constitute a breach of the national public policy.[29]

Furthermore, some jurisdictions include in their public policy norms of less normative but societal character, norms that are the expression and basis of the social, economic, political, cultural and religious life (Greece),[30] reflecting a certain morality or system of values resulting from the whole complex of rules (Italy, Poland, Luxembourg)[31] or rules which pursue social purposes subject to the specific social-economic system and political and moral thinking (Hungary).[32]

3. National agreement and disagreement

Using some concrete examples, I will show the extent to which the interplay between EU requirements and differ-

14 E.g. *CJEU*, 28.3.2000 – C-7/98 – *Krombach v. Bamberski*, *unalex EU-101* para 37; *Meidanis*, European Law Review 2005, 95, 104; *Schmalenbach*, in: *Borić/Lurger et al.* (eds.), FS Posch II (n. 5), 691, 697-698; *Beaumont/Johnston*, JPrivIntL 2010, 249, 253.

15 CJEU, 28.3.2000 – C-7/98 – Krombach v. Bamberski, unalex EU-101; CJEU, 25.5.2016 – C-559/14 – Meroni v. Recoletos, ECLI:EU:C:2016:349; CJEU, 23.10.2014 – C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation v. Starptautiskā lidosta Rīga VA, Air Baltic Corporation AS, unalex EU-611; Wurmnest, in: Leible (ed.), General Principles of European Private International Law (n. 2), 305, 316-317; Álvarez, in: Bouza/Rodrigo/García (eds.), La gobernanza del interés público global (n. 3), 146-181, 154 et seq.

16 E.g. *CJEU*, 11.5.2000 – C-38/98 – *Renault v. Maxicar*, *unalex EU-98*, paras 26-33; *CJEU*, Judgment, 28.04.2009 – C-420/07 – *Apostolides v. Orams*, ECR I-3571 *CJEU*, 2.4.2009 – C-394/07 – *Gambazzi v. Daimler Chrysler*, ECLI:EU:C:2009:219 2009, paras 34-48; *CJEU*, 2.6.2016 – C-438/14 – *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401 paras 59-60; *Corte di Cassazione*, 11.11.2002 – n. 15822, *unalex IT-527*, 2; *Beaumont/Johnston*, JPrivIntL 2010, 249, 256-258; *Hoško*, CYELP 2014, 189, 207 *et seq*.

17 *Martiny*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger (n. 2), 523, 532; *Schmalenbach*, in: *Borić/Lurger et al.* (eds.), FS Posch II (n. 5), 691, 698.

18 *Basedow*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger (n. 3), 291, 316; *Hess/Pfeiffer* (n. 3); see lately *Helms*, IPRax 2017, forthcoming.

19 Eg Spain, Audiencia Provincial Baleares, 15.2.2000 – n° 37/2000 – *Ricardo v. Jose Ángel*, *unalex ES-13 1*; Audiencia Provincial Pontevedra, 10.09.2009 – n. 143/2009, *unalex ES-379*; Audiencia Provincial Coruña (A), 25.9.2008 – n. 115/2008, *unalex ES-428*; Germany: Art. 6 phrase 2 EGBGB; Italy: Corte di Cassazione, 17.12.2005 – n. 26976, *unalex IT-518*; *Poland Sąd Najwyższy*, 7.11.2008 – IV CSK 256/08, *unalex PL-62*.

20 Corte d'Appello Torino, 19.11.1997 – R.G. 65/98 – *Régie Nationale des Usines Renault SA v. Maxicar S.p.A. e Orazio Formento*, *unalex IT-382*; *Rodrígez Pineau*, European Review of Private Law 1995, 343, 346; *Leandro*, NLCC 2011, 1512, 1514; *Mills*, JPrivIntL 2008, 201, 214; *Martiny*, in: Coester/Martiny/Prinz von Sachsen Gessaphe (eds.), FS Sonnenberger (n. 2), 523, 535-538.

21 *BGH*, 25.1.2005 – XI ZR 78/04, *unalex DE-2181*, 3; *Corte di Cassazione*, 11.11.2002 – n. 15822, *unalex IT-527*, 3-4; *Jayme* (n. 3), 33 f.; *Cour de Cassation*, Rapport Annuel 2013, p. 128 *et seq*.

22 Portugal: Tribunal da Relação Porto, 11.10.2004 – n. 0454490, *unalex PT-37*.

23 Ireland: *High Court* (*IE*), 28.2.2012 – [2012] IEHC 81, *unalex IE-100*, p. 13.

24 Spain Audiencia Provincial Baleares, 15.2.2000 – n° 37/2000 – *Ricardo v. Jose Ángel, unalex ES-13*, *1*.

25 *Cour de Cassation*, 25.5.1948 – n° 37.414, Bull. civ . 1948, I, n° 163, RCDIP 1949, 89, *Cour de Cassation*, 24.03.1998 – n° 96-10.171, *unalex FR-148*; *Cour de Cassation* (n. 22) p. 128; *Corte di Cassazione*, 17.12.2005 – n. 26976, *unalex IT-518*, 3; *Cour d'appel* (*LU)*, 30.11.2000 – n°24425 – *V. v. R*., *unalex LU-209*; *Franzina*, CDT 2014, 75, 84 (para 14); *Jayme* (n. 3), 31-63, without giving indications which countries are included in the comparison, *ibid* 51-53.

26 *Stürner*, in: *Arnold* (ed.), Grundfragen des Europäischen Kollisionsrechts (n. 2), 87, 102.

27 Cour de Cassation, 24.03.1998 – n° 96-10.171, *unalex FR-148*; Corte di Cassazione, 17.12.2005 – n. 26976, *unalex IT-518*, 3; Cour d'appel (LU), 30.11.2000 – n°24425 – V. v. R., *unalex LU-209*.

28 *Mills*, JPrivIntL 2008, 201, 213.

29 *Bundesgericht*, 29.12.2008 – 4A_440/2008 /len, *unalex CH-266*.

30 Efeteio Athen, 2.12.2004 – 8237/2004, *unalex GR-151*, *1*.

31 Corte di Cassazione, 17.12.2005 – n. 26976, unalex IT-518, 3; Corte di Cassazione, 11.11.2002 – n. 15822, *unalex IT-527*, *4*; Sąd Najwyższy, 7.11.2008 – IV CSK 256/08, *unalex PL-62*; Cour d'appel (LU), 30.11.2000 – n°24425 – *V. v. R*., *unalex LU-209*.

32 *Kecskés*, in: *Borić/Lurger et al.* (eds.), FS Posch II, Vienna, 2011, 301, 303.

ent national approaches leads to a common core but can also treat similar cases differently.

EU law, especially the principle of mutual trust in the legal systems of the other Member States, nudges national courts towards a very reluctant interpretation, at least if the recognition of a decision rendered by another Member State court is at play. Therefore, differences in national procedures or differences in the substantive law *per se* are not sufficient to breach the forum's public policy.[33] Furthermore (also because it has been codified in some EU acts, such as Article 45(3) Brussels Ia or 26 Brussels IIa), neither an evaluation of whether the first court was legally competent to hear the case (revision of the competence),[34] nor a wrong application of the law (*révision au fond*) is sufficient.[35]

On the other hand, the procedural rights guaranteed by Article 6 ECHR and Article 47 of the EU Charter, i.e. the right to a fair trial, especially the right to be heard, are essential to all legal systems in the EU and therefore always form part of public policy.[36]

The concrete application and interpretation of that right, nevertheless, differs from national system to national system. In a number of cases courts refused the recognition of a decision issued in another Member State for a violation of the right of a fair trial, showing that a trial can be regarded as "fair" in one state and not in another. For example, the courts found a violation of public policy in cases where other legal systems provided the possibility of excluding a party from participation at the trial,[37] or where service to the party was substituted by other forms of notification.[38] The public policy exception of some states includes the right to a second instance for every judicial decision, in some systems exceptions to that rule are possible.[39] Furthermore, there is a disagreement in the extent to which a decision has to contain the grounds for the decision.[40] Also, some courts regard it as part of public policy (access to a trial) that the costs of the proceedings or of legal representation should not by exaggeratedly high, therefore denying recognition of some decisions of other Member States.[41]

Another field of disagreement is the area of labour law, especially regarding the protection of employees for reasons such as unjustified dismissal, minimum salary, working conditions, gender quotas etc.[42] For instance, some Italian courts found that a certain stability of an employment contract is fundamentally necessary to protect the liberty and dignity of the employee and, therefore, a rule that allows an unjustified dismissal violates Italian public policy.[43] German courts found, *au contraire*, that dismissal protec-

---

33 *OLG Saarbrücken*, 3.8.1987 – 5 W 102/87, *unalex DE-215*; procedural differences: *Audiencia Provincial Zaragoza*, 2.5.2012 – n. 232/2012, *unalex ES-732*; *Sąd Najwyższy*, 7.11.2008 – IV CSK 256/08, *unalex PL-62*; substantive differences: *Cour d'appel* (*LU*), 15.3.1995 – n° 17052, *unalex LU-95*; *Cour d'appel* (*LU*), 30.11.2000 – n°24425 – *V. v. R.*, *unalex LU-209*; regarding substantive arguments of the case in Maintenance law: *OLG Stuttgart*, 1.12.2014 – 17 UF 150/14, *unalex DE-3223*; regarding statutes of limitations: *Tribunal da Relação Porto*, 30.6.2011 – n. 158/07.8TBMDB.P1, *unalex PT-152*; regarding different presumptions: *AG Geldern*, 27.10.2010 – 4 C 356/10, *unalex DE-2605*, 2; *OLG Stuttgart*, 13.2.2012 – 17 UF 331/11, *unalex DE-3118*; regarding procedural and substantive law issues: *OLG Hamm*, 28.6.2012 – II-11 UF 279/11, *unalex DE-2863*; regarding the similar provision of the Lugano Convention: *Bundesgericht*, 15.6.2004 – 4P.12/2004 /pai, *unalex CH-282*; regarding Greek decisions see *Anthimos*, Yearbook of Private International Law 2014/2015, 345, nn. 29-31.

34 CJEU, 28.3.2000 – C-7/98 – *Krombach v. Bamberski*, *unalex EU-101*; High Court - Family Division England and Wales, 5.8.2005 – [2005] EWCA 1811 – *W v. W*, UK-274; BGH, 4.12.1997 – IX ZB 23/97, *unalex DE-2086*; Tribunal Supremo, 5.11.2011 – n. 1023/2001, *unalex ES-5*; Tribunal Supremo, 31.12.1999 – n. 1180/1999 – *MOPEMAR, S.L. v. CULI D'OR, B.V.*, *unalex ES-8*; Cour d'appel (LU), 20.5.1999 – n° 21720, *unalex LU-81*.

35 *CJEU*, 11.5.2000 – C-38/98 – *Renault v. Maxicar*, *unalex EU-98*, paras 29, 31; *BGH*, 23.6.2005 – IX ZB 64/04, *unalex DE-317*; *Cour de Cassation*, 6.7.2016 – N° 15-14664, *unalex FR-2477*, 2-3; *Cour de Cassation*, 17.3.1992 – n° 90-15.422 – *Ravano v. Locabail*, *unalex FR-1053*; *High Court - Queen's Bench Division England*, 16.6.2005 – [2005] EWHC 1222 (Comm) – Viking *Line ABP v. The International Transport Workers' Federation, The Finnish Seamen's Union*, *unalex UK-118*; *OGH* (*AT*), 22.2.2007 – 3Ob233/06w, *unalex AT-359*; similar to an authentic instrument: *Rechtbank Roermond*, 27.8.1992 – 920033, *unalex NL-24*.

36 High Court England and Wales, 6.9.2006 – [2006] EWHC 2226 (QB) – *David Charles Orams v. Meletios Apostolides*, *unalex UK-271*; Ústavní soud, 25.4.2006 – 709/2005, *unalex CZ-8*.

37 Against a Belgian exclusion for contempt of court: *BGH*, 2.9.2009 – XII ZB 50/06, *unalex DE-1719*; similar under the Lugano Convention *Tribunale d'Appello Ticino*, 25.02.2004 – n. 12.2001.1, *unalex CH-302*; similar also: violation by a Dutch action that was heard in the absence of the respondent and without representation of the respondent *Court of Appeal (Civil Division) England and Wales*, 29.05.2002 – [2002] EWCA Civ 774 – *Maronier v. Larmer*, *unalex UK-10*.

38 Polish procedure of public notification violation the German public policy, *OLG Hamm*, 9.1.2007 – 29 W 33/06, *unalex DE-696*; but no violation of the Austrian public policy to a similar case under Polish law, *OGH* (*AT*), 23.6.2009 – 3Ob101/09p, *unalex AT-623*; a public policy violation where the claimant knew defendant's address and did not share it with the court: *Vrhovno sodišče Republike Slovenije*, 11.2.2010 – Cp 22/2009, *unalex SI-16*; similar Greek Drama 1st Instance Court 251/2000, Armenopoulos 2001, p. 535 cited after *Anthimos*, Yearbook of Private International Law 2014/2015, 345, n. 10; a breach of public policy in in a case of a fiction of notification under Belgium law ("*remise au parquet*") OLG Köln, 12.4.1989 – 13 W 73/88, *unalex DE-358*.

39 Efeteio Athens, 2.12.2004 – 8237/2004, *unalex GR-151*; Tribunal de première instance Bruxelles, 25.5.2005 – 2004/14192/A, *unalex BE-184*; but not Cour de Cassation, 17.1.2006 – n° 03-14.483, *unalex FR-320*; OLG Düsseldorf, 7.12.1994 – 3 W 277/94, *unalex DE-527*.

40 Enforcing court needs documents about grounds for the decision: *Cour de Cassation*, 22.10.2008 – n° 06-15.577, *unalex FR-1281*; *Cour de Cassation*, 28.11.2006 – n° 04-19.031, *unalex FR-420*; sufficient that court gave reasons in hearing: *BGH*, 26.8.2009 – XII ZB 169/07, *unalex DE-1694*; so party can communicate reasons for decision: *OLG Saarbrücken*, 3.3.2004 – 5 W 212/03-52, *unalex DE-326*; missing grounds not violating public policy: *Corte d'Appello Milano*, 11.2.2006 – n. 245/06 – *S.R.L. Maspero Elevatori v. Wegner Thorsten*, *unalex IT-285*; sufficient that there was a contradictory proceeding: *Corte di Cassazione*, 18.5.1995 – n. 5451, *unalex IT-81*; *BGH*, 18.9.1997 – IX ZB 79/96, *unalex DE-416*; Greek Supreme Court, case no. 877/2004, *Nomos*, cited according to *Anthimos*, Yearbook of Private International Law 2014/2015, 345, n. 11; similar regarding the Lugano Convention *Bundesgericht*, 23.07.2001 – 5P.81/2001/HER/bnm, *unalex CH-271*. The CJEU left this question open in 2012 and only specified that missing grounds can constitute a violation of the public policy if "after an overall assessment of the proceedings and in the light of all the relevant circumstances" it has to be impossible for the defendant to bring „an appropriate and effective appeal" against the decision. *CJEU*, 6.9.2012 – C-619/10 – *Trade Agency Ltd v. Seramico Investments Ltd*, *unalex EU-530*.

41 *Cour de Cassation*, 16.03.1999 – 97-17.598, *unalex FR-69*. Greek courts, Supreme Court 1829/2006, Private Law Chronicles 2007, p. 635 and Corfu CoA 193/2007, Legal Tribune 2009, p. 557, cited after *Anthimos*, Yearbook of Private International Law 2014/2015, 345, nn. 15 *et seq*.

42 *Fallon*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar (n. 2), 331, 332-333.

43 Corte di Cassazione, 11.11.2002 – n. 15822, *unalex IT-527*, 3; Corte di Cassazione, 17.12.2005 – n. 26976, *unalex IT-518*, *3*; similar Corte di Cassazione, 9.5.2007 – n. 10549, *unalex IT-516, 3*.

tion in general is not part of German public policy.[44] Similarly, an Austrian court had to consider a case the other way around, on the question of whether a stronger form of dismissal protection violates Austrian national public policy. It refused the use of public policy exception arguing that a different substantive law way of regulating the termination of an employment contract would not *per se* violate Austrian public policy exception.[45]

Other areas of law where the content of the public policy exception differs can especially be found in family law. The EU is progressing to harmonize private international law in this area. Substantive law, nevertheless, still shows a wide variety. Some national systems regard the right to marry of homosexual couples to be as essential as it is of heterosexual couples[46], others regard the protection of the institution of marriage as being only between a man and a woman as so essential that they codify this protection in their constitution.[47] Consequently, questions of filiation regarding same-sex couples and also regarding certain methods of reproductive medicine can be treated differently in different countries.[48] Furthermore, systems differ regarding the protection of (presumably) weaker parties in family law and the question as to how far parties are able or allowed to autonomously derogate from certain rules. A good example is a recent decision of the French Cour de Cassation which declared a complete waiver of maintenance rights as violating national public policy, even though this waiver had been concluded according to (applicable) German law and notary form.[49]

Likewise, especially relevant in the scope of application or tort law, national systems in the EU differ regarding the recognition of punitive damages. Mainly, there is an agreement that punitive damages do not *per se* violate public policy, but that they should not be "disproportional".[50] The determination of this concept, nevertheless, leads to differing options. German courts, therefore, decided that punitive damages exceeding the actual damage by 50% do not breach German public policy[51] and the Austrian OGH at least regarded the compensation for a dismissal as not breaching the public policy if it did not (even) exceed one year of the (potential) salary.[52] The French Cour de Cassation, on the other hand, decided that punitive damages which were exceeding the actual damage by 100% violated the public policy,[53] while the Swedish Supreme Court recognised a Romanian judgment which awarded damages which were nine times higher than under Swedish law.[54]

IV. Modus operandi in EU Private International Law

The content of public policy is only one aspect of the public policy exception in private international law.[55] Sometimes the term "relativity" of the *ordre public* is used, or "modus operandi" referring to the practise that even though the scope of application of the national public policy is open, the court will not *per se* make use of the public policy exception to block foreign law or a foreign decision. Further requirements are, e.g., that the dispute needs to have a certain connection to the forum, or that the rule application/recognition *in concreto* has to lead to an unbearable result. National private international law systems also differ regarding these aspects.[56]

1. Requirements of the CJEU

In EU private international law, the concrete mode of operation has been less disputed and has widely been ignored by the CJEU.[57] There are only few indications on how EU law requires the exception to be handled. The CJEU requires the national courts using the public policy exception to argue why some national values form part of the national public policy. It does not give any indication regarding the specific ways of restricting the public policy exception in some national systems. This lack of discourse results in the national courts treating the EU public policy exceptions as a referral *en bloc* to their national public policy exceptions. Subsequently, they use them as in national law. This means that, at least from a practical point of view, not only the content but also its mode of operation or method remain a question of the *lex fori*.[58]

---

44 Landesarbeitsgericht Köln, 6.11.1998 – 11 Sa 345/98, *unalex DE-2483*, 1-2; different emphasis Landesarbeitsgericht Hessen, 1.9.2009 – 16 Sa 1296/07, *unalex DE-2529*, 6.

45 OGH (AT), 22.3.2011 – 3Ob38/11a – *N***** O***** v. W***** GmbH*, *unalex AT-719*, p. 2.

46 *Cour d'appel de Chambery*, 22.10.2013 – N° 2013/02258.

47 Art 61(2) of the Croatian Constitution of 22.12.1990 (amendment 5/2014).

48 See, e.g. country reports on surrogacy in *brunet/Carruthers/Davaki/King/ Marzo/McCandless*, A Comparative Study on the Regime of Surrogacy in EU Member States, 2013 or *Trimmings/Beaumont* (eds.), International Surrogacy Arrangements, Oxford, 2013.

49 Cour de Cassation, 8.7.2015 – N° 14-17880, *unalex FR-2464*, 1.

50 *Hess/Pfeiffer* (n. 3), 65 *et seq*., referring to Greece, Lithuania, France, Germany. See, for example *BGH*, 8.5.2000 – II ZR 182/98, *unalex DE-2233*, 1-2; *Tribunale Milano*, 4.3.2011, *unalex IT-550*, 4-5; *Tribunale Milano*, 25.03.2011 – n. 69/2010, *unalex IT-548*; *Tribunale Rovigo*, 7.12.2010, *unalex IT-549*; more generous under English law, see *Commercial Court*, 16.7.2004 – [2004] APP.L.R. 07/16 – *Travelers Casualty & Surety Co Europe Ltd v Sun Life Assurance Co Canada (UK) Ltd*, para. 77.

51 OLG Düsseldorf, 4.4.2011 – 1-3W 292/10, *unalex DE-2047*.

52 OGH (AT), 22.3.2011 – 3Ob38/11a – N***** O***** v. W***** GmbH, unalex AT-719.

53 *Cour de Cassation*, 1.12.2010 – n° 09-13303, Bulletin I, n° 248 2010.

54 According to *Hess/Pfeiffer* (n. 3) p. 167 n. 748.

55 *Hoško*, CYELP 2014, 189, 207; *Álvarez*, in: *Domínguez Luelmo/García Rubio* (eds.), Liber Amicorum Torres García, Las Rozas, Madrid, 2014, 117, 125, 129.

56 *Meidanis*, European Law Review 2005, 95, 97; *Hoško*, CYELP 2014, 189, 207*Álvarez*, in: *Domínguez Luelmo/García Rubio* (eds.), Liber Amicorum Torres García (n. 56), 117, 125, 129; *Meidanis*, European Law Review 2005, 95, 97.

57 See *CJEU*, 25.5.2016 – C-559/14 – *Meroni v. Recoletos*, ECLI:EU:C:2016:349; *CJEU*, 28.3.2000 – C-7/98 – *Krombach v. Bamberski*, *unalex EU-101*; *CJEU*, Judgment, 28.04.2009 – C-420/07 – *Apostolides v. Orams*, ECR I-3571; *CJEU*, 2.4.2009 – C-394/07 – *Gambazzi v. Daimler Chrysler*, ECLI:EU:C:200 9:219 2009; *CJEU*, 2.6.2016 – C-438/14 – Bogendorff von Wolffersdorff, ECLI:EU:C:2016:401.

58 *Álvarez*, in: *Bouza/Rodrigo/García* (eds.), La gobernanza del interés público global (n. 3), 146-181, 147; *Sonnenberger*, IPRax 2011, 332.

2. Requirements of national courts

In all legal systems there are further requirements to restrict the use of the public policy exception, e.g. courts looking at the gravity of the breach and the value of the interests impeded. Then they typically balance them against legal certainty and the interests pursued by the private international law system. Furthermore, jurisdictions analyse how strong the connection between the case and the forum have to be, whether the violation of public policy has to be concrete or abstract, whether the foreign rule itself in the foreign forum is considered as outdated or in the process of abolition, how good the foreign relations to the other state are,[59] or the extent to which the person whose rights are breached autonomously decided to be exposed to the foreign law.[60]

3. National agreement and disagreement

For the comparison, I will use the two most prominent aspects to show how individual legal systems take different approaches to the *modus operandi*. Consequently, these approaches can lead to different outcomes regarding similar cases.

a) Connection to the forum

Most[61] jurisdictions require a connection or direct link between the public policy violation and the forum.[62] The stronger the connection to the case, the stronger the violation. On the other hand, if a right of considerable interest, such as a fundamental human right, is involved, the connection to the forum is less important.[63]

The quality of the concrete link differs and the intensity of the connection required can vary.[64] Some countries look for a formal connection between the case and the territory of the forum, especially focusing on factors such as citizenship or domicile of the parties involved.[65] This is sometimes called a "subsidiary" conflict of laws rule regarding certain rules of the forum.[66] Others look backwards, at the connection between the history of the case and the forum.[67] Again others have a more future-oriented focus to analyse the effects the application of the foreign law or the recognition of the foreign decision may unfold in the legal system in the forum. This can also lead to a broader investigation on the (indirect) effects of the decision (to be recognized or rendered) on the territory of the forum,[68] e.g. if the decision indirectly enforces another decision which itself violates national public policy.[69]

But jurisdictions also differ regarding the question of whether such a "direct link" is indispensable. Some jurisdictions, such as Germany and Austria, always require such a connection to the forum, as the scope of application of the fundamental national rights is only then open.[70] In the UK, the courts decided that public policy is already directly engaged if a national body or court had to enforce a rule that would be unenforceable under the *lex fori*.[71]

In some countries there is a tendency even to waive the necessity of such a link in the case of fundamental human rights violations.[72] Especially in cases of unequal treatment between men and women, the courts came to the conclusion that a link between the forum and the case is not necessary at all.[73] Even though the connection to the forum is the most discussed requirement for the public policy exception, there are hardly any cases where courts rejected a breach of the public policy because of a weak (or no) connection to the forum, probably mainly because the acceptance of jurisdiction usually already requires a connection to the forum. A difference in the outcome of similar cases

---

59 *Jayme* (n. 3), 43; *Benvenisti*, European Journal of International Law 1993, 159, 172.

60 *Sandrock*, in: *Coester/Martiny/Prinz von Sachsen Gessaphe* (eds.), FS Sonnenberger, Munich, 2004, 615, 632 *et seq*.

61 Not discussed in Poland by *Sąd Najwyższy*, 7.11.2008 – IV CSK 256/08, *unalex PL-62*, neither in some Polish literature, e.g *Grzegorczyk*, Monitor Prawniczy 2014; *Balos*, Monitor Prawniczy 2013; *Golaczynski*, Monitor Prawniczy 2011. I would like to express thanks to Dr. Rafael Harnos who helped me with his knowledge of the Polish language.

62 *Inlandsbeziehung* in Germany; sometimes called *effet atténue* in France or Belgium referring to the reduced effect on the public policy if the link to the forum is weak, see e.g. *Lagarde*, in: *Lipstein/David* (eds.), International encyclopedia of comparative law, III, 1, Private International Law (n. 8), ch. 11, 11-46 *et seq*.; *Wurmnest*, in: *Leible* (ed.), General Principles of European Private International Law (n. 2), 305, 322; *Siehr*, in: *Kronke/Thorn* (eds.), FS Kropholler (n. 3), 424, 425.

63 *Siehr*, in: *Kronke/Thorn* (eds.), FS Kropholler (n. 3), 424, 425; *Wurmnest*, in: *Leible* (ed.), General Principles of European Private International Law (n. 2), 305, 322; *Leandro*, NLCC 2011, 1512, 1517.

64 *Álvarez*, in: *Domínguez Luelmo/García Rubio* (eds.), Liber Amicorum Torres García (n. 56), 117, 130 *et seq*.

65 E.g. whether the parties are domiciled in the country of the forum or have the citizenship, see Article 21 and 57 Belgium Private International Law Act 2004, BS 10.11.2005, for France *Cour d'appel de Chambery*, 22.10.2013 – N° 2013/02258 p. 4; *Cour de Cassation*, 8.7.2015 – N° 14-17880, *unalex FR-2464*, 1; *Cour de Cassation* (n. 22), 129; *Lagarde*, in: *Lipstein/David* (eds.), International encyclopedia of comparative law, III, 1, Private International Law (n. 8), ch. 11, 11-42; *Benvenisti*, European Journal of International Law 1993, 159, 172; *http://conflictoflaws.net/2008/french-muslims-getting-divorce-back-home/*.

66 *Mills*, JPrivIntL 2008, 201, 211; similar *Lagarde*, in: *Lipstein/David* (eds.), International encyclopedia of comparative law, III, 1, Private International Law (n. 8), ch. 11, 11-26 *et seq*.; 11-45.

67 English law: Conclusion of contract and its performance, see *Mills*, JPrivIntL 2008, 201, 224 *et seq*.

68 *Leandro*, NLCC 2011, 1512, 1517; *Malatesta*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar, Milano, 2009, 643, 646-647; *Jayme* (n. 3), 47.

69 E.g. an (in the forum) illegal disappropriation *BGH*, 28.4.1988 – IX ZR 127/87, *unalex DE-2395*.

70 BVerfG 4.5.1971, BVerfGE 31, 86; *OGH* (*AT*), 22.3.2011 – 3Ob38/11a – N***** O***** v. W***** GmbH, unalex AT-719, p. 2; *Jayme* (n. 3), 47; *Henrich*, RabelsZ 1972, 2, 5; *Wengler*, JZ 1985, 100, 101 *et seq*.

71 High Court – Queen's Bench Division England and Wales, 23.11.2007 – [2007] EWHC 2720 (QB) – Alexandre Miguel Braz Duarte v. (1) The Black and Decker Corporation (2) Black and Decker Europe, unalex UK-486, 6.

72 For English law *Mills*, JPrivIntL 2008, 201, 223.

73 France: *Cour de Cassation*, 4.11.2009 – n° 08-20.574, Bulletin I, N° 280 2009; Spain: *Álvarez*, in: *Domínguez Luelmo/García Rubio* (eds.), Liber Amicorum Torres García (n. 56), 117, 129; *Pataut*, The Public-Policy Exception and the 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 (COM(2009)154), Brussels, 2011, 18, 21.

can be seen in the recognition of so-called "repudiation", referring to a divorce under Islamic law where the husband can divorce the wife unilaterally while the wife has not that possibility (for Member States participating in the Enhanced Cooperation called Rome III Regulation, this case will probably be harmonized by Article 10 Rome III in questions of conflict of laws). While French courts earlier recognized or accepted[74] such a repudiation-divorce if it took place abroad and the spouses were not French,[75] later French courts rejected the recognition of such a divorce for reasons of fundamental human rights violation: They composed a shift from the focus on the connection to the forum on the fundamentality of the right involved,[76] ultimately not analysing the connection at all.[77]

One footnote on the protection of EU fundamental or human rights: The CJEU would also probably derive from the *effet utile* that the domestic courts have to make use of the public policy exception without a connection to the forum. Thus, if EU law is involved, most probably the direct link between forum and case can be neglected and it is sufficient that there is a relationship to a EU or ECHR Member State, not necessarily to the forum.[78]

b) Concrete vs. abstract perspective

Another aspect regarding the mode of operation of the public policy exception is whether a concrete, result-oriented or a more abstract, rule-oriented perspective is necessary.

Some legal systems, e.g. Germany, Czech Republic, Luxembourg, Portugal and Poland focus strongly on the concrete result of the recognition or application of the foreign law, requiring that the result of the application/recognition *in concreto* constitutes a breach of public policy.[79] Nevertheless, even within that requirement, the focus can differ: Some courts explicitly limited their analysis to the rights of the parties involved,[80] some extended it to the effects that the application/recognition can have.[81] Thus, in some jurisdictions indirect effects can be untenable for the system, e.g. the indirect recognition of an (according to the forum) illegal expropriation,[82] or the circumvention of state immunity,[83] or the negative effect on an established national judicial practise.[84]

Some jurisdictions require an *in concreto* application only for certain kinds of public policy breaches. An abstract review is sufficient if the content of public policy stems from customary international law, international treaties, or is of considerable national interest.[85]

An abstract or objective evaluation of the foreign rules underlying the dispute is a tendency which is growing, especially in questions of human rights violations, and, especially, regarding the equal treatment of man and woman.[86] The case of repudiation which has been described above again can be used as a good example. Some courts found that a discriminating foreign rule is already sufficient to invoke the national public policy, [87] while other courts looked at the specific application of the rule, analysing whether in that concrete case the reasons for divorce under the *lex fori* would have been fulfilled as well. In the latter case, the foreign divorce was recognized/accepted, or even the foreign law applied.[88] In Austria, there seems to be a shift from the concrete consideration to the abstract, based on the importance of equal treatment.[89] In EU private international law, Article 10 Rome III also can be read as representing such an abstract approach on rejecting foreign discriminatory law.[90]

Another remarkable difference of the concrete vs. abstract evaluation of the case is the treatment of (*ordre pub-*

74 Depending on whether there was a court decision to recognize or not. To the confusion use of the termin "recognition" see *Gössl*, StAZ 2016, 232.

75 *Cour de Cassation*, 18.12.1979, RCDIP 1981, 88, 90; *Cour de Cassation*, 3.11.1983, RCDIP 1984, 325, 326 *et seq*; *Lagarde*, in: *Lipstein/David* (eds.), International encyclopedia of comparative law, III, 1, Private International Law (n. 8), ch. 11, paras 11-50.

76 *Cour de Cassation*, 19.9.2007 – n° 06-19577, Bulletin I, N° 280 2007; see to further decisions: http://conflictoflaws.net/2008/french-muslims-getting-divorce-back-home/.

77 *Cour de Cassation*, 4.11.2009 – n° 08-20.574, Bulletin I, N° 280 2009.

78 *de Boer*, in: *Malatesta/Bariatti/Pocar* (eds.), The external dimension of EC private international law in family and succession matters (n. 3), 295, 303; *Wurmnest*, in: *Leible* (ed.), General Principles of European Private International Law (n. 2), 305, 323; *Siehr*, in: *Kronke/Thorn* (eds.), FS Kropholler (n. 3), 424, 431.

79 OGH (AT), 22.3.2011 – 3Ob38/11a – *N***** O***** v. W***** GmbH, unalex AT-719*; Sąd Najwyższy, 7.11.2008 – IV CSK 256/08, *unalex PL-62*, 2; Nejvyšší soud, 24.3.2011 – 20 Cdo 5180/2006, *unalex CZ-25*; Tribunal da Relação Lisboa, 17.09.2009 – 2580/08-2, *unalex PT-148*, 1; Cour d'appel (LU), 14.5.1986 – n° 8739, *unalex LU-103*; BGH, 8.5.2000 – II ZR 182/98, *unalex DE-2233*, 1; BGH, 28.4.1988 – IX ZR 127/87, *unalex DE-2395*, 2; OLG Hamm, 19.9.1986, StAZ 1986, 352; Jayme (n. 3), 34.

80 High Court England and Wales, 6.9.2006 – [2006] EWHC 2226 (QB) – *David Charles Orams v. Meletios Apostolides, unalex UK-271*.

81 *Nejvyšší soud*, 24.3.2011 – 20 Cdo 5180/2006, *unalex CZ-25*; BGH, 28.4.1988 – IX ZR 127/87, *unalex DE-2395*, 2.

82 BGH, 28.4.1988 – IX ZR 127/87, *unalex DE-2395*, 2.

83 Tribunal de première instance Bruxelles, 26.10.2005 – R.R. 05/3092/B, *unalex BE-113*.

84 Hungarian decisions, according to *Kecskés*, in: *Borić/Lurger et al.* (eds.), FS Posch II (n. 33), 301, 304.

85 *Efeteio Athen*, 2.12.2004 – 8237/2004, *unalex GR-151*, 1; *Audiencia Provincial Logroño*, Sentencia, 7.4.2014 – Recurso N° 29/2014; resolución 108/2014, SAP LO 223/2014 – ECLI:ES:APLO: 2014:223; *Mills*, JPrivIntL 2008, 201, 213-215.

86 *Cadet*, L'ordre public en droit international de la famille, Paris, 2005, 85 *et seq*.; *Malatesta*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar (n. 69), 643, 649; *Büchler*, in: *Götz/Schwenzer et al.* (eds.), FS Brudermüller, Munich, 2014, 61, 63.

87 *Cour de Cassation*, 4.11.2009 – n° 08-20.574, Bulletin I, N° 280 2009; *Cour de Cassation*, 19.9.2007 – n° 06-19577, Bulletin I, N° 280 2007; *Audiencia Provincial Logroño*, Sentencia, 7.4.2014 – Recurso N° 29/2014; resolución 108/2014, SAP LO 223/2014 – ECLI:ES:APLO: 2014:223 already using Art. 10 and Art. 12 Rome III; earlier to Spanish law see *Cadet* (n. 87), p. 91 *et seq*.

88 BGH, Urteil, 6.10.2004 – XII ZR 225/01, NJW-RR 2005, 81, 84; OLG Hamm, 7.5.2013 – II-3 UF 267/12, NJOZ 2013, 1524.

89 Concrete breach *OGH (AT)*, 13.10.2011 – 6 Ob 69/11g, ZfRV-LS 2012/6; concrete breach but indicating that abstract breach is sufficient, *OGH (AT)*, 7.2.2008 – 7Ob10/08h, Zak 2008, 153; abstract breach OGH (AT), 31.8.200 6 – 6Ob189/06x, ECLI:AT:OGH0002:2006:0060 OB00189.06X. 0831.000; OGH (AT), 28.6.2007 – 3Ob130/07z, ECLI: AT:OGH0002:2007:0030OB001 30.07Z.0628.000; OGH (AT), 20.10.2011 – 2Ob81/11t, ECLI:AT:OGH0002: 2011:0020OB00081. 11T.1020.000.

90 Eg. *Gössl,* beck-online.Großkommentar zum Zivilrecht, Art. 10 Rom III; *Helms*, IPRax 2017, forthcoming.

lic violating) preliminary questions within (*ordre public* conforming) principal questions.[91] In two cases the French Cour de Cassation decided that the recognition of a maintenance obligation which had its basis in the preliminary (and public policy violating) determination of paternity would not violate the national public policy itself.[92] On the other hand, the German Bundesgerichtshof rejected the recognition of a decision based on an almost identical case. The court rejected the recognition of the maintenance obligation arguing that the public policy violation regarding the preliminary paternity determination should not become effective in the German system, not even indirectly by the recognition of the (itself *ordre public* conforming) maintenance obligation.[93]

V. Brief observations on a cross-border dialogue

As this short overview shows, the use of the public policy exception differs from EU Member State to EU Member State and not only with regard to content but also to *modus operandi*. There is a common core, nevertheless, and the CJEU as the guardian of the limits also nudges the national courts in certain directions.

From the point of view of EU private international law that respects the national values and legal cultures of the Member States, this approach is comprehensible. From the point of view of EU private international law that aims to create legal certainty to enhance the free movement of citizens and their trust in the EU legal order, this approach is not so satisfying. While the determination of the content clearly is a question of national values and therefore should be left to the national level to determine, the question of how to determine whether or how the exception should be applied to the specific case, on the other hand, could become more coherent within the union and therefore create more certainty for the citizens involved.

While researching that issue, I was struck by the fact that on the academic level there is indeed a strong dialogue which is not limited to national borders. The question as to how how the connection to the forum should be determined and how abstract or concrete the review of the court should be is discussed in many jurisdictions with strong cross-reference to foreign scholars and decisions.[94] On the other hand, at the court level, regardless of whether it is the CJEU or the national courts, such a discourse is missing, as well as – it seems – even the awareness that there could be a discourse. This leaves the impression that at least in some countries the dialogue between practise and academia could be strengthened. A European Union which aims to develop a coherent and predictable approach to the use of union-wide private international law instruments might be interested in furthering such a dialogue. Or, maybe even more feasible, start earlier and enhance the instruction in private international law at university – as the education of lawyers lays the foundation for the work they will later perform in practise.

VI. Conclusions

1. EU private international law leaves content as well as mode of operation of the public policy exception mainly to the Member States. Thus, national courts treat EU public policy exception mainly in the same way as their own national exceptions.

2. EU-wide national public policy exceptions have a common core but differ in a lot of details, not only regarding the content but also the concrete use of the exception, e.g. regarding the connection between case and forum or how concrete the breach of the public policy hast to be. This leads to different outcomes of almost equal cases in different national courts.

3. Legal academia is in a trans-border dialogue and agrees on most aspects while legal practice differs. An enhanced dialogue between academia / national courts but also a stronger focus on the education of private international law would help to develop a coherent and predictable use of the EU instruments in national courts.

---

91 To preliminary question in EU private international law, see *Gössl*, JPrivIntL 2012, 63 *et seq*.

92 Cour de Cassation, 20.2.2007 – n° 05-20.152, *unalex FR-281*; Cour de Cassation, 7.6.1995 – n° 93-18.360, *unalex FR-158*.

93 BGH, 26.8.2009 – XII ZB 169/07, *unalex DE-1694*.

94 Scholars see above note 3 and *Siehr*, in: *Kronke/Thorn* (eds.), FS Kropholler (n. 3), 424, 425; *Álvarez*, in: *Domínguez Luelmo/García Rubio* (eds.), Liber Amicorum Torres García (n. 56), 117, 126; *Carlier*, Tijdschrift voor Belgisch Burgerlijk Recht 2008, 525; *Malatesta*, in: *Venturini/Bariatti* (eds.), Liber Fausto Pocar (n. 69), 643, 649; *Mills*, JPrivIntL 2008, 201, 218-219; *Leandro*, NLCC 2011, 1512, 1513; *Vrellēs*, Private international law in Greece, Alphen aan den Rijn, The Netherlands, Frederick, MD, 2011, 49; *Wurmnest*, in: *Leible* (ed.), General Principles of European Private International Law (n. 2), 305, 319.