

The Application of Overriding Mandatory Rules in Hungarian Private International Law

Introduction

One of the novelties of the new Hungarian Private International Law Act (PIL Act) is that, for the first time in autonomous Hungarian private international law, it provides explicitly for the possibility of applying overriding mandatory provisions.¹ However, prior to this change, legal literature and court practice had already acknowledged that certain rules apply irrespective of the otherwise governing law. Moreover, with Hungary's accession to the EU, Hungarian private international law had to adapt itself to the EU private international law regime, which includes several legal sources addressing the application of overriding mandatory rules.²

At EU level, the notion of overriding mandatory provision was defined for the first time by Article 9 (1) of the Rome I Regulation.³ According to this Article, overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation. In addition, the Rome II Regulation on the law applicable to non-contractual obligations also contains a rule on overriding mandatory norms.⁴ However, not all fields of private law are covered by the EU private international law regulations and these remain in the regulatory competence of the Member States. The areas concerned may include personal status, family law, property law and company law.

This paper intends to give an overview primarily on the application of overriding provisions outside the scope of application of the EU private international law regulations in light of Hungarian legislation, the judicial practice of domestic courts and Hungarian legal science.

* Csenge Merkel is a doctoral student at ELTE Eötvös Loránd University, Faculty of Law, Budapest.

** Tamás Szabados is associate professor at ELTE Eötvös Loránd University, Faculty of Law, Budapest.

¹ 2017. évi XXVIII. törvény a nemzetközi magánjogról (Act XXVIII of 2017 on private international law).

² See Tamás Szabados, 'EU Private International Law in Hungary: An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EU' (2018) 2 ELTE Law Journal 41–64.

³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 16.

The authors' view is that the PIL Act undoubtedly clarifies several questions concerning the application of overriding mandatory norms in autonomous Hungarian private international law. Legislation gives little help to practice in identifying overriding mandatory rules, though. The questions related to the application of overriding mandatory provisions in Hungary were answered on the basis of the PIL Act, the relevant case law and legal literature. The PIL Act entered into force on 1 January 2018, and we are not aware of any court practice related to overriding mandatory provisions under the PIL Act since then. Therefore, regarding cases falling under the scope of autonomous private international law, the article relies on the case law based on the preceding private international law legislation, Decree-Law 13 of 1979 on Private International Law (PIL Decree-Law).⁵

I Overriding Mandatory Rules in the New PIL Act

The PIL Act contains an explicit rule on overriding mandatory norms in Section 13 (1). Section 13 (1) does not give a precise definition, but specifies certain characteristics of overriding mandatory rules. The appearance of an explicit provision on overriding mandatory norms is a novelty introduced by the PIL Act. The PIL Decree-Law did not contain any provision on overriding mandatory provisions; nevertheless, private international law scholarship found it possible to apply overriding mandatory rules even in the absence of a statutory provision. Court practice also accepted the applicability of overriding mandatory provisions and mostly cited the definitions given by the legal literature.⁶

In the new PIL Act, Section 13 of the PIL Act addresses overriding mandatory provisions in the following way:

- (1) Those provisions of Hungarian law whose content and purpose unequivocally establish their mandatory application in the legal relationships falling under the scope of application of this Act shall apply irrespective of the law governing under this Act (overriding mandatory provisions).
- (2) The overriding mandatory provisions of another state may be taken into consideration if they are closely connected to the facts and they have decisive significance as to the determination of the case.⁷

The PIL Act describes overriding mandatory provisions as norms that gain application irrespective of the law governing under the PIL Act. The need for their application can be deduced from their content and scope. In the explanatory memorandum prepared for the PIL Act, further information may be found on overriding mandatory provisions.⁸ The memorandum

⁵ 1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról (Decree-Law 13 of 1979 on private international law).

⁶ BH 1997. 489., Tatabánya Regional Court 9.G.40.074/2013/4.

⁷ Translation by Tamás Szabados, 'Hungary: Act XXVIII of 2017 on Private International Law' (2018) 82 *Rabels Zeitschrift* 1004–1045.

⁸ Explanatory memorandum to the PIL Act. *T/14237. számú törvényjavaslat a nemzetközi magánjogról*: <<https://www.parlament.hu/irom40/14237/14237.pdf>> accessed 24 February 2020.

is an explanation and justification of the provisions of the PIL Act drafted by the Hungarian Ministry of Justice. As it states, the direct objective of overriding mandatory provisions is the protection of public interests, such as political, social or economic organisation. Overriding mandatory provisions hence include rules that have a sufficiently close relationship with the political, social or economic system of Hungary. The explanatory memorandum adds that the purpose of overriding mandatory provisions is the protection of the fundamental values of Hungary. Whenever a Hungarian judge faces a situation that is regulated by an overriding mandatory provision of Hungarian law, the judge is obliged to apply it.

Section 13 (1) of the PIL Act does not determine exactly what kinds of norms are included in the category of overriding mandatory rules. For this reason, in Hungarian law it may raise a problem to decide whether a provision may qualify as an overriding mandatory provision. Section 13 (1) of the PIL Act refers to the content and purpose of the legislation as factors to be taken into account as to whether a norm requires application irrespective of the otherwise governing law.

Overriding mandatory norms, as their name suggests, have to claim mandatory application. From this perspective, it must be stated that national legislation, court practice and literature clearly delimit mandatory norms and overriding mandatory provisions.⁹ Overriding mandatory provisions are far 'more' than mandatory rules. Internationally mandatory provisions are a narrower category than mandatory norms.¹⁰ Mandatory norms may be usually avoided if foreign law is applied, due to the operation of conflict of laws, while overriding mandatory norms apply irrespective of the otherwise applicable law.¹¹

It happens that the PIL Act gives some guidance on the nature of the norm. Despite the difficulties of having an exact list of overriding mandatory provisions, as a specific expression of overriding mandatory norms, Section 26 (4) of the PIL Act states that the marriage may not be celebrated in Hungary if there is an unavoidable impediment to the celebration of the marriage under Hungarian law. Unavoidable impediments to the celebration of marriage in Hungarian law are an already existing marriage or certain close family relationships between the parties.¹² In such a way, the PIL Act rules out double marriage or a marriage between close relatives, even if it was permissible under the personal law of the persons to be married. The fact that the parties are of the same sex is also considered as unavoidable obstacle, because under the Hungarian Fundamental Law, only a man and a woman may enter into a marriage.¹³ Thus, Article L of the Fundamental Law, according to which the marriage is a life community between a man and a woman based on a voluntary decision, is deemed to be an overriding mandatory norm.¹⁴

⁹ Raffai Katalin, 'A nemzetközi magánjogi közrend rétegei – különös tekintettel a közösségi és a magyar jogra' (doctoral thesis) 37 <https://www.ajk.elte.hu/file/DI_Raffai_Katalin_dis.pdf> accessed 24 February 2020.

¹⁰ Nagy Csongor István, *Nemzetközi magánjog* (HVG-ORAC 2017, Budapest) 48.

¹¹ See Explanatory memorandum to Section 13.

¹² Mádl Ferenc and Vékás Lajos, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (Eötvös 2018, Budapest) 300.

¹³ Nagy (n 10) 50.

¹⁴ Nagy (n 10) 50.

Another example may be Section 25 of the PIL Act, by virtue of which Hungarian law shall apply to family law relationships concerning a child, provided that it is more favourable to the child. A rule similar to the current Section 25 of the PIL Act was considered an overriding mandatory provision in the legal literature.¹⁵

Apart from these rules, the PIL Act does not provide much help in identifying overriding mandatory norms. Examples for overriding mandatory provisions given by the explanatory memorandum of the PIL Act include the prohibition of expropriation without compensation, the nullity of contracts or a unilateral declaration limiting legal capacity, and the nullity of contracts limiting consumers' possibility to enforce their rights before courts or otherwise.¹⁶

Judicial practice has rarely had to address overriding mandatory norms; it mainly occurred in contract law disputes. The Kúria, the supreme court of Hungary, stated that the resolutions of the UN Security Council and the measures of the European Union imposing economic sanctions are overriding mandatory provisions that are applicable irrespective of the law governing the contract under the Rome I Regulation.¹⁷ Regarding a contract falling under the scope of application of the Rome Convention, it was held that Hungarian legislative provisions determining the coming into existence, form, validity, content, the scope and extent of the rights and obligations, the performance and the termination of a loan agreement do not qualify as overriding mandatory provisions.¹⁸

Legal literature tries to give some support to identifying overriding mandatory rules and the explanatory memorandum also relied on these scholarly opinions when having formulated the abovementioned examples. It can be assumed that the constitutional provisions and respect for human rights form part of overriding mandatory provisions.¹⁹ The constitutional provisions stating that all persons have legal capacity and the corresponding rules in the Civil Code that state that a legal declaration restricting legal capacity is null and void are often-cited examples of overriding mandatory provisions in textbooks.²⁰ It may also be noted that, among the norms which have a sufficiently specific content, those standing at a higher level of the hierarchy of legal sources (e.g., the Fundamental Law) have a bigger chance of qualifying as overriding mandatory norms than those at an inferior level. Legal literature mentions export and import restrictions,²¹ foreign exchange provisions,²² competition law, the protection

¹⁵ Réczei László, *Nemzetközi magánjog* (Tankönyvkiadó 1959, Budapest) 81 with regard to 1952. évi 23. törvényerejű rendelet a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény hatálybalépése és végrehajtása, valamint a személyi jog egyes kérdéseinek szabályozása tárgyában (Decree-Law 23 of 1952 concerning the entry into force and the execution of Act IV of 1952 on the marriage, family and guardianship, and concerning the regulation of certain issues of personal law), art 17 (3).

¹⁶ See Explanatory memorandum to Section 13.

¹⁷ A Kúria tájékoztatója a Gfv.V.30.045/2019/9. számú egyedi ügyben. See also Budapest-Capital Regional Court of Appeal Gf. 40.608/2017/12.

¹⁸ Győr Regional Court of Appeal Gf. 20.062/2015/8.

¹⁹ Raffai (n 9) 55.

²⁰ Mádl and Vékás (n 12) 175; Burián László, Kecskés László and Vörös Imre, *Magyar nemzetközi kollíziós magánjog* (Krim 2006, Budapest) 133; Nagy (n 10) 50.

²¹ Réczei (n 15) 81; Mádl and Vékás (n 12) 174.

²² Mádl and Vékás (n 12) 174.

of cultural property and environmental protection legislation,²³ as well as the rules protecting workers²⁴ and consumers. Further examples may be brought from the area of labour law; the rules on industrial relationships and works councils are considered as overriding mandatory norms and cannot be avoided by agreement if the seat or the independent establishment of the employer is in the territory of Hungary.²⁵

Since there is no limitation in the PIL Act as to the nature of overriding mandatory provisions, the concept of overriding mandatory norms might embrace both public and private law provisions. In the Hungarian legal tradition, public and private law have been differentiated. The most common demarcation principle is functionality, which considers whether the legal relationship concerned involves exercising public power. Public law provisions regulate the structure of the state, the exercise of public authority and the relationship between the state and the citizens.²⁶ Private law comprises norms governing the legal relationships between parties in a non-hierarchical relationship.

Furthermore, the PIL Act does not differentiate between public or private interests regarding overriding mandatory provisions. Some of the examples provided by the explanatory memorandum include rules protecting public interests, such as those serving the protection of the environment or cultural goods. However, other rules provided as examples of overriding mandatory norms do not only protect public interests, but also private interests (e.g., the nullity of contracts limiting legal capacity, interests of consumers and workers).²⁷

It is worth noting that a proposal was put forward by Palásti, according to which a special act should be adopted with a non-exhaustive list of those rules of the Hungarian Civil Code that are considered overriding mandatory provisions.²⁸ Such a solution would facilitate the identification of overriding mandatory norms contained in the Civil Code for both domestic and foreign courts. The proposal was, however, not endorsed by the legislature.

It must be noted that the approach of the legislative provision and the explanatory memorandum, as well as the scholarly definitions, largely correspond to the definition of the Rome I Regulation. The explanatory memorandum of the PIL Act lists the same interests to be taken into account as the Rome I Regulation: public interests, including political, social or economic interests.²⁹ There is no explicit rule in the PIL Act or case law according to which

²³ Nagy (n 10) 49.

²⁴ Réczei (n 15) 81.

²⁵ *2012. évi I. törvény a munka törvénykönyvéről* (Act I of 2012 on the Labour Code), s 3 (3); see Kártás Gábor, Petrovics Zoltán, Takács Gábor, *Kommentár a munka törvénykönyvéről szóló 2012. évi I. törvényhez* (Wolters Kluwer 2019, Budapest).

²⁶ Trócsányi László and Schanda Balázs, *Bevezetés az alkormányjogba; Az Alaptörvény és Magyarország alkotmányos intézményei* (HVG-ORAC 2014, Budapest).

²⁷ Explanatory memorandum to Section 13.

²⁸ Palásti Gábor, *Javaslat az új Ptk. imperatív szabályainak alkalmazásáról szóló jogszabály alkotására*. <<https://ptk2013.hu/szakcikkek/palasti-gabor-javaslat-az-uj-ptk-imperativ-szabalyainak-alkalmazasarol-szolo-jogszabaly-alkotasara/2165>> accessed 24 February 2020; *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code).

²⁹ Explanatory memorandum to Section 13.

EU law or the case-law of the Court of Justice of the European Union should be followed when interpreting overriding mandatory provisions in autonomous private international law. However, in light of the similarity of their approaches, it can be inferred that they may be interpreted in the same way. In their book, Mádl and Vékás note that the definition accepted in EU private international law, in particular in Article 9 (1) of the Rome I Regulation, can be helpful in interpreting domestic overriding mandatory provisions.³⁰

For the first time, in autonomous Hungarian private international law, the PIL Act contains an explicit provision on overriding mandatory rules. It lays down that overriding mandatory rules are norms that must be mandatorily applied, irrespective of the governing law, on the basis of their content and purpose. The general reference to the content and the purpose of the norms and their mandatory claim for application provides quite flexible pivots and it remains largely uncertain which norms have an overriding mandatory nature. Although legal literature and the explanatory memorandum give some examples of overriding mandatory rules, in practice it may be difficult to ascertain whether a norm qualifies as an overriding mandatory rule.

II The Application of Overriding Mandatory Rules of the *Lex Fori*, *Lex Causae* and the Law of Another Foreign Country

Overriding mandatory provisions may appear in the *lex fori*, the *lex causae* and in the law of a third state. In the absence of a legislative provision on the application of overriding mandatory provisions prior to the adoption of the PIL Act, but based on the legal literature and some court decisions, it was quite clear that the overriding mandatory norms of Hungarian law could be applied; however, it remained questionable whether the overriding mandatory norms of the *lex causae* or another foreign country may be applied or given effect. The application of foreign overriding mandatory norms could find some support in a decision of the Hungarian Constitutional Court. Hungarian private international law does not follow the principle of the non-application of foreign public law.³¹ On the contrary, the Hungarian Constitutional Court pointed out that courts have the possibility to take the public law provisions of the governing foreign law into consideration in private law disputes.³² This could suggest that overriding mandatory norms having a public law origin could be applied as part of the governing law. No guidance could be found, however, on the potential impact of overriding mandatory norms of third countries.

The PIL Act has clarified the situation. As far as the overriding mandatory rules of the forum are concerned, section 13 (1) of the PIL Act requires domestic courts to apply the

³⁰ Mádl and Vékás (n 12) 175.

³¹ Palásti Gábor, 'A magyar nemzetközi kollíziós közjog alapvonalai' (2005) 23 *Sectio Juridica et Politica*, Miskolc 439–487.

³² Decision 30/1998. (VI. 25.) AB of the Constitutional Court of Hungary, ABH 1998, 220, IV. 4.

overriding mandatory provisions of Hungarian law. Regarding overriding mandatory norms other than those of the forum, the PIL Act follows the approach of Article 7 (1) of the Rome Convention. Section 13 (2) of the PIL Act provides that the overriding mandatory provisions of another state may be taken into consideration if they are closely connected to the facts and they have decisive significance as to the determination of the case. From this paragraph, it follows that both the overriding mandatory norms of the *lex causae* and of another foreign country may be taken into account, and the PIL Act does not make any difference between the overriding mandatory provisions of the *lex causae* and those of third countries. In order to give them effect, the same conditions have to be fulfilled: the provisions of the foreign law have to be closely connected to the factual situation and they have to have decisive significance as to the assessment of the case. The close connection may, in particular, be based on the nationality, domicile or habitual residence of the party or parties concerned. It is more difficult to see what the requirement on decisive significance involves. If a rule qualifies as overriding mandatory by definition, it claims application to any case falling in its scope of application, regardless of the governing law. In this sense, all overriding mandatory norms closely related to the case seem to be decisive. Section 13 (2) of the PIL Act gives the possibility of taking the overriding mandatory provisions into consideration, but does not impose an obligation on Hungarian courts to give effect to the overriding mandatory norms of a foreign country. Legislation does not make a distinction between overriding mandatory provisions of EU Member States and third countries in areas outside the scope of application of the EU private international law regulations. We are not aware of any difference in treatment in the case law.

In conclusion, the PIL Act makes it clear which states' overriding mandatory norms can be applied or given effect. The overriding mandatory provisions of the *lex fori* shall be applied by the judges. The overriding mandatory provisions of the *lex causae* and the law of another country may be taken into account provided that they are closely connected with the factual situation and are of decisive importance regarding the assessment of the case.

III Delimitation of the Ordre Public Clause and Overriding Mandatory Provisions

Legal literature distinguishes the *ordre public* clause and overriding mandatory provisions, although it is often considered that they constitute two methods for the same purpose, namely the protection of public policy.³³ Several textbooks deem the *ordre public* clause as the negative way of protecting public policy, since it rules out the application of foreign law breaching public policy, while overriding mandatory provisions constitute the positive method of protecting public policy.³⁴

³³ Mádl and Vékás (n 12) 174–180; Burián, Kecskés and Vörös (n 20) 133–134.

³⁴ Mádl and Vékás (n 12) 174.

Accordingly, the PIL Act contains two different sections for the two different techniques. As we have seen, Section 13 addresses overriding mandatory provisions, while Section 12 contains the *ordre public* exception. According to Section 12:

- (1) The application of the foreign law governing under this Act breaches Hungarian public policy and therefore shall be disregarded if the result thereof in the given case obviously and seriously violated the fundamental values and constitutional principles of the Hungarian legal system.
- (2) If the violation of public policy cannot be prevented in any other way, the provisions of Hungarian law shall apply instead of the disregarded provision of foreign law.

As mentioned above, in literature it is common to begin with the concept of public policy, and then explain that, in private international law, there are two legal techniques in the hands of the national legislature to protect it: overriding mandatory provisions and the *ordre public* clause. Certain representatives of the legal literature insist on the function of overriding mandatory provisions to protect public policy positively. Public policy consists of the main principles that reflect the core ethical values of a society. Világhy considered the concept of overriding mandatory norms as part of the broader *ordre public* clause.³⁵ In his formulation, overriding mandatory provisions are those rules that directly protect the bases of the Hungarian social and economic order expressed in the Constitution. Mádl and Vékás similarly define overriding mandatory norms as those rules that directly serve and protect the foundations of the economic and social order mostly expressed in the Fundamental Law of Hungary as well.³⁶ Case law usually cites the definition given in the leading private international law textbook written by Professor Mádl and Professor Vékás.³⁷

Other authors reject the above distinction, because overriding mandatory norms should be applied irrespective of the need to protect of public policy, and they have to be applied even if the *lex causae* does not endanger the public policy of the *lex fori*. In 1938, István Szászy wrote about the '*absolute ordre public clause*' that enabled the application of certain provisions of domestic law, irrespective of any potentially applicable foreign law. Szászy stated that in the case of the '*absolute ordre public clause*', the dismissal of the application of the designated foreign law does not depend on its content.³⁸ Réczei also underlines the difference between the *ordre public* clause and overriding mandatory provisions.³⁹ Overriding mandatory provisions prevent the application of conflict of laws rules and courts decide a dispute based on the overriding mandatory provisions. What is excluded is not the application of foreign law, but the collision itself. In his view, in such a case there is no collision. The *ordre public* clause intervenes and prevents the application of foreign law once the collision between legal systems has already been decided in favour of the foreign law. There are scholars today who share the

³⁵ Világhy Miklós, *Bevezetés a nemzetközi magánjogba* (Tankönyvkiadó 1974, Budapest) 65.

³⁶ Mádl and Vékás (n 12) 175.

³⁷ Mádl and Vékás (n 12) 173–175.

³⁸ Szászy István, *Nemzetközi Magánjog* (Sylvester Irodalmi és Nyomda Intézet Rt. 1938, Budapest) 108.

³⁹ Réczei (n 15) 81–82.

above opinion that the examination of public policy protection is unnecessary with regard to overriding mandatory provisions.⁴⁰

IV Conflicts between Overriding Mandatory Provisions

A situation might occur whereby two overriding mandatory provisions are in conflict. In the PIL Act, there is no concrete provision on how to resolve a conflict between two mandatory provisions. There is no guidance in court practice either. However, the interpretation of Section 13 of the PIL Act may help to resolve conflicts between Hungarian and foreign overriding mandatory norms.

The PIL Act explicitly states that Hungarian overriding mandatory provisions have to be applied by Hungarian courts, whilst there is no obligation imposed on the courts to apply foreign ones. Hungarian courts only have the possibility to take foreign overriding mandatory provisions into consideration provided that they are closely connected to the factual situation and are of decisive importance regarding its assessment. Consequently, if there was a contradiction between a Hungarian overriding mandatory provision and a foreign overriding mandatory rule, the Hungarian overriding mandatory provision would prevail, because courts are bound to apply the overriding mandatory norms of Hungarian law, but not those of a foreign law. In the legal literature, the same view is accepted for conflicts between the overriding mandatory provisions of the forum and those of a third state.⁴¹

The legislative provision does not provide guidance in a case where a Hungarian court should decide on the conflict between two foreign overriding mandatory norms. In our view, in resolving such a conflict, several factors can be taken into account. The court has to ascertain which overriding mandatory norm is more closely connected to the case and it is also to be examined which overriding mandatory norm is more in accordance with the interests and values represented by Hungarian legal order.

Conclusions

Due to the gradual expansion of EU law within the field of private international law, the role of autonomous private international law is becoming increasingly limited. In certain areas not covered by EU law, however, the PIL Act keep its relevance. This also holds for the application of overriding mandatory norms. The PIL Act has introduced an express rule on overriding mandatory provisions in autonomous Hungarian private international law for the first time. Thereby, the PIL Act makes the difference between the application of overriding

⁴⁰ Burián László, *Nemzetközi magánjog – Általános rész.* (Pázmány Press 2014, Budapest) 193; Burián László, Raffai Katalin and Szabó Sarolta, *Nemzetközi Magánjog.* (Pázmány Press 2018, Budapest) 236.

⁴¹ Vékás Lajos, 'Európai és tagállami nemzetközi magánjog' (2017) 10 Magyar Jog 589–601, 597.

mandatory norms and the *ordre public* exception unequivocal. Section 13 of the PIL Act provides for the application of overriding mandatory rules and at the same time describes some elements of such norms. However, the rule seems to be fairly flexible. Which norms can be applied under the new PIL Act as overriding mandatory rules is essentially left to court practice.

Prior to the adoption of the new PIL Act, it was not clear whether courts could only apply the overriding mandatory rules of Hungarian law, or those of other states could be applied or taken into consideration as well. The PIL Act distinguishes the overriding mandatory provisions of the *lex fori* and those of a foreign country. Hungarian courts are to apply the overriding mandatory provisions of the *lex fori*. In addition, the PIL Act unequivocally states that Hungarian courts have the option (but not an obligation) to give effect to the overriding mandatory provisions of a foreign country, provided that the overriding mandatory provision is closely connected to the underlying case and is decisive in terms of the assessment of the case. This formulation largely corresponds to the solution of the Rome Convention.