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The Non-application of Foreign Law under the General Part of the New Hungarian Private International Law Act

Abstract

Conflict of laws rules can lead to foreign law as the applicable law. However, it is not always the case that the designated foreign law will be applied at the end. Actually, one of the main questions of private international law concerns the non-application of the foreign law determined by the conflict of law rules. This contribution examines the general part of the new Hungarian Private International Law act in this regard, that is when and how the new Hungarian act can lead to the non-application of the foreign law.

Keywords: private international law, non-application of foreign law, national legislation, Hungarian Private International Law Act

Introduction

Almost forty years was the lifetime of the Law-Decree 1979/13 on private international law.[1] This law-decree, usually also referred to as the Code (of 1979), was the first complex codification of private international law in Hungary. Over its lifespan the Code was subject to several modifications, many of which were due to the developments that took place on an international and European scale. Especially the evolution and emergence of international conventions stimulated by the European integration process, and later the evolving EU private international law affected the provisions of the Code.[2] Just to name a few: the

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1 Law-Decree No. 13 of 1979 on Private International Law.

2 See in this regard e.g.: István Erdős, 'The impact of European private international law on the national conflict of laws rules in Hungary' (2013) LIV Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica, 161–188.

intended accession to the Lugano Convention,[3] or the adoption of Rome I regulation,[4] Rome II regulation,[5] etc. Due to these developments and several other factors (e.g. the legal form and a good number of the provisions of the Code became outdated over time, there were ambiguities regarding the application of certain provisions), especially after the accession to the European Union, there was an increasing intention to re-codify private international law in Hungary. In 2015 a Codification Committee was set up. The mandate of the Codification Committee was to produce a proposal for a new Act on Private International Law. The work of the Codification Committee took a bit more than two years. The proposal was finalised in early 2017, based on which the new and current act on private international law (Act XXVIII of 2017 on Private International Law[6] – 'PIL Act') was adopted.[7] The PIL Act entered into force on the 1st of January 2018.

The PIL Act determines the applicable law, the jurisdiction of courts and procedural rules to be followed by Hungarian authorities and the requirements concerning the recognition and enforcement of decisions of foreign courts in private law relationships involving foreign element(s), and applies unless an international treaty or a generally and directly applicable act of the European Union stipulates otherwise.[8] Apart from these issues, the PIL Act also provides for some procedural rules.[9] Approximately half of the PIL Act covers the narrow concept of private international law: conflict of laws.[10] Of course, certain provisions of this first part are applicable to other issues as well. For example, the rules on qualification are not only applicable to the determination of the applicable law, but also for the determination of jurisdiction and to the recognition and enforcement of foreign judgments as well.[11]

One of the essential questions of private international law concerns the non-application of the foreign law determined by the conflict of law rules. Is there any way the forum can or should not apply the foreign law? What discretionary power should the forum have in this regard? Can the parties have any kind of autonomy in this regard? This contribution invites the reader for a journey to explore how the relevant general provisions of the new PIL Act can lead to the non-application of the foreign law.

[3] *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* – Done at Lugano on 16 September 1988, OJ L 319, 25.11.1988, p. 9–48.

[4] 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), OJ L 177, 4.7.2008, p. 6–16.

[5] 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), OJ L 199, 31.7.2007, p. 40–49.

[6] The Act was published in the official gazette on April 11, 2017.

[7] The Act was adopted by the Parliament on April 4, 2017.

[8] PIL Act ss 1–2.

[9] E.g. on international legal assistance, service of documents, taking of evidence.

[10] PIL Act ss 1–65.

[11] PIL Act s 4 para 4.

I The Rules on Qualification, *Renvoi,* Evasion and Reciprocity

The expression 'non-application of the foreign law' might assume that it is an issue that arises after the application of the relevant conflict of laws rule, so when we know what law would be the applicable law. However, our point of departure is an earlier one. It is because, at least for the sake of a short excursion, it is worth looking at some of the factors that can have an effect on the application of the conflict of laws rules themselves, since these factors – indirectly – can also lead to the non-application of a foreign law.

The first issue in this regard is qualification (or classification, characterization). Qualification is an essential step in the conflict of laws analysis, since it is the tool to get to the right, applicable conflict of laws rules. If, through the qualification process, the issue cannot be determined so that it could be rendered under a certain conflict of laws rule, foreign law will not be applied. This is because it is only possible to apply foreign law if the lex fori conflict of laws rules order the forum to do so. If there is no conflict of laws rule regarding a certain issue, the lex fori substantive law will apply. Unless there is a tool in the lex fori conflict of laws law to ensure that, even in that case, a door is open to the application of foreign law subject to the circumstances of the case.

The PIL Act follows, as a general principle, the lex fori qualification rule. It provides that the legal assessment of a particular legal relation or question in order to identify the applicable conflict of law provision to determine the applicable law is to be conducted in accordance with the definitions and concepts of the Hungarian legal order. However, what happens if there is no such legal concept or instrument in the Hungarian law? For these situations, the PIL Act orders the forum to look at the foreign law as well. According to the new rules, if a legal concept or institution is not known in the Hungarian legal order, the forum will have to look at the foreign law regulating the particular legal institution. In the course of this assessment, the forum will have to pay particular attention to the functions and purposes of the respective legal concept or institution in the given foreign legal order. If the foreign legal institution is not unknown in Hungarian law, but its objective or function under the respective foreign legal order differs from the objective or function of the given legal concept under the relevant Hungarian law then, in the course of qualification, the forum will have to take into consideration the respective foreign law as well.[12] So, as it can be seen, although the main, general rule is the *lex fori* qualification rule, subject to the circumstances of the case, the forum will also have to resort to some comparative assessment.

What happens if it turns out that although a certain legal relationship or question falls under the scope of the PIL Act, but there is no corresponding conflict of laws rule in the special part? The existence of a corresponding conflict of laws rule is essential from the point of view of the applicability of foreign law, since it is the conflict of laws rule that relieves the forum of the obligation to apply the lex fori national law: this rule determines the applicable law and, finally,

[12] PIL Act s 4.

the conflict of laws rule obliges the forum to apply the identified lex causae. Under the PIL Act, the lack of a conflict of laws rule regarding a particular legal issue falling otherwise under the scope of the PIL Act[13] does not mean that the forum will have to resort to the application of the lex fori substantive law. There is a special provision in the general part of the PIL Act that provides for a solution: a subsidiary, general conflict of law rule. In such a case, the closest connection principle applies, meaning that the applicable law will be the law of the country with which the closest connection can be established.[14] This is a new rule, the Code did not have any similar provision.

Mention can be made of the rules on *renvoi* as well. More particularly, where the lex fori accepts the back-reference, it will result in the non-application of the foreign law designated by the applied special conflict of laws rules. Regarding renvoi and so acceptance of the back-reference, the PIL Act is more restrictive than the Code was. While the Code, except for one special exemption,[15] as a general rule provided for the acceptance of the back-reference,[16] the PIL Act left this route. The PIL Act, as a general rule, excludes renvoi.[17] It provides that if the conflict of laws provisions lead to foreign law, the rules of the applicable foreign law directly regulating the issue in question shall be applied. It means that the PIL Act follows the narrow reference approach; that is, the private international law rules of the foreign legal system cannot be taken into account. There is only one exception to this general rule.[18] If the applicable foreign law is determined based on a conflict of laws rule that applies the principle of nationality (citizenships) as its connecting principle and the conflict of laws rule of the given foreign law refers back to Hungarian law then Hungarian substantive law will be the applicable law.[19] Therefore, in this case, even if based on the applicable conflict of laws rule a foreign law should be the applicable law, the forum will return from this foreign legal system to the lex fori law, and will not apply this foreign law; it will apply Hungarian law as the applicable law.

Is it possible to intentionally modify or adjust the factual pattern of the case or the legal relationship in order to influence the result of the conflict of laws analysis, so basically changing the applicable law? *Evasion* occurs when the parties either actually modify or adjust the facts or the legal situation, or just pretend the existence of a foreign element in order to arrive at a law more favourable for them than the one that would be designated by the objective conflict of laws rule, should the patterns of the case remained intact in this regard. The Code accepted the result of such an adjustment or modification if that led to the application of the lex fori national law.[20] It was reasonable since, under the Code, the parties had the possibility

13 Private law relationships involving foreign element(s) and not being covered by an international treaty or a generally and directly applicable act of the European Union. See: PIL Act ss 1–2.

14 PIL Act s 11.

15 Code s 21/A.

16 Code s 4.

17 PIL Act s 5.

18 PIL Act s 5 para 2.

19 If the conflict of laws rule of the foreign law refers to a further foreign law, the substantive law of this foreign law will be the applicable law, PIL Act s 5 para 2 point *a)*.

20 Code s 8.

to request the non-application of a foreign law anyway.[21] Contrary to the Code, the PIL Act does not provide for a general, particular provision concerning the fraudulent evasion of the applicable law. The aim not to honour the result of such fraudulent action of the parties is ensured through other means now.[22] One of such means is the 'general escape clause' provision.[23] According to this general escape clause, where it is clear from the circumstances of the case that the case is manifestly more closely connected with a law of a country other than the one determined based on the special conflict of laws rules of the act, as an exception, this other law will be the applicable law. The general escape clause can not only be invoked by the parties, or by one of the parties, but the forum can apply it on its own motion as well.[24] Therefore, although this rule is not primarily about fraudulent evasion situations, in certain cases it can however serve as a sufficient means of correction.

The non-application of a foreign law can also be the consequence of the lack of *reciprocity*, if the requirement of reciprocity exists under the lex fori conflict of laws rules. There were provisions on reciprocity in the Code.[25] However, already under these provisions, the general rule was that the application of the foreign law does not depend on reciprocity, unless the law requires so. For the case where the law required reciprocity, the Code provided for a general presumption of reciprocity.[26] The PIL Act left these rules in the Code; it does not contain special provisions on reciprocity regarding the applicable law.[27] It means that reciprocity is not a condition for the application of the foreign law, so the lack of reciprocity cannot result in the non-application of a foreign law.

II Content-related Issues That Can Lead to the Non-application of the Foreign Law

So we arrive at the point when the connecting principle of the applicable conflict of law rule leads to a foreign law. What factors will influence whether, at the end, foreign law will be the applicable law, or the identified foreign law will be replaced by another law (the lex fori national law), and/or provisions of other legal orders will have to added and applied together with the applicable foreign law? In this regard, in the following, two main questions or problems will be discussed: the determination of the content of the foreign law and the effects of the lex fori public interests on the final conclusion of the conflict of laws analysis.

21 Code s 9.

22 See in this regard the Explanatory Report of the Proposal for the Private International Law Act, 2017, general justification.

23 PIL Act s 10.

24 Explanatory Report of the Proposal for the Private International Law Act, 2017, special justification for s 10.

25 Code s 6.

26 Code s 6 para 2.

27 It does so, however, regarding recognition and enforcement of foreign judgments and international legal assistance.

First, the determination of the content of the foreign law. Needless to say, without having proper information on the content of the foreign law, the forum is not able to apply it. But how is the content of the applicable foreign law determined? Whose obligation is it to determine the content of the foreign law? Is it the party's/parties' obligation to prove the content of the foreign law? The determination of the content of the foreign law is a core and crucial issue. This is because, if it is not possible to obtain proper information as to the content of the foreign law, the forum usually resorts to the lex fori national law. Since EU law does not regulate this issue,[28] it is a matter under the national law. In this case, the PIL Act regulates this issue, and provides that the forum has to determine the content of the foreign law *ex officio*.[29] So the principle *iura novit curia* applies not only to the lex fori national law but, based on the respective provisions of the lex fori private international law, it applies to the applicable foreign law as well. The PIL Act mirrors the corresponding provisions of the Code in this regard.

However, one can see a departure concerning other aspects. According to the Code,[30] in order to gain information on the content of a foreign law 'unknown' to the forum, when it was 'necessary', the forum could obtain expert opinion and could take into consideration the evidence provided by the parties. Also, according to the Code, the forum could turn to the ministry responsible for the administration of justice for information as to the content of the foreign law. The PIL Act introduced some changes in this regard. The PIL Act left out the requirement of necessity, changed the order of the means of establishing the content of the foreign law, and allows the forum take into consideration any evidence. So the current law provides that, in order to determine the content of the applicable foreign law, the forum can take into consideration any evidence, including particularly the submissions made by the parties, expert opinion, or the information provided by the minister responsible for the administration of justice.[31] The aim of the new rule is to make the determination of the content of the foreign law more efficient. What happens if the content of the foreign law cannot be determined? Under the Code, in such a case, the forum had to apply the lex fori national law.[32] Although the Code itself neither defined nor provided further provisions on when the forum could or had to conclude that the content of the foreign law could not be established, there was some guidance available on this issue. According to the explanatory report of the Code, the forum had to resort to all the available means and sources, and only if it was not possible to establish the content of the foreign law based on all these sources and means did the forum have the obligation to apply the lex fori national law instead of the identified foreign law.[33] Furthermore, as concluded by the ECtHR in 2004, it stems

[28] Regarding the 'Madrid Principles' see Carlos Esplugues, 'Harmonization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010 (July 25, 2011)' (2011) 13 Yearbook of Private International Law, 273–297. <https://doi.org/10.1515/9783866539648.273> accessed 19 October 2021.

[29] PIL Act s 8 para 1.

[30] Code s 5.

[31] PIL Act s 8 para 2.

[32] Code s 5 para 3.

[33] Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point *c)*.

from Article 6 of the European Convention on Human Rights that this analysis should be conducted and the conclusion on the issue of the content of the foreign law should be reached within a reasonable period of time.[34]

Compared to the provisions of the Code, the PIL Act introduced new features in the written national private international legislation in this regard as well. Now, under the current rules, if the content of the applicable foreign law cannot be determined within a reasonable period of time, the forum will have resort to the Hungarian law, as the Hungarian law will become the applicable law. The difference between the Code and the PIL Act is that now the PIL Act directly provides that the forum has a reasonable period of time to determine the content of the foreign law. So far there is no national case law on the interpretation of this particular provision; however, the previously referred ECtHR case law can be of some guidance. According to the ECtHR, the reasonableness of the length of a procedure should be assessed in the light of all the circumstances of the case, including the complexity of the legal issue.[35]

Finally, the PIL Act provides a solution for the situation when the case cannot be decided based on the application of the Hungarian law. According to the current law, if the case cannot be decided based on the Hungarian law, the law that is in the closest connection with the applicable foreign law will have to be applied.[36]

When the content of the applicable foreign law is established, a new question arises: to what extent is the content of the foreign law compatible with the public policy considerations of the lex fori national law? It is an essential question, since public policy considerations can result in the non-application of the foreign law. According to the Code,[37] the foreign law could not have been applied to the extent that the application of the given pieces of the foreign law in the particular case was contrary to the Hungarian public order.[38] The Hungarian law had to be applied instead of the disregarded foreign law.[39] As a guidance and clarification, in order to ensure that the public policy clause cannot be invoked for discriminatory purposes,[40] the Code made clear that the forum could not disregard the law of a given foreign state just because the socio-economic system of the foreign country was different.[41]

The PIL Act, through its modernised public policy clause, guarantees that the public policy of the forum cannot be disregarded or jeopardised by the application of a foreign law. According to the new public policy clause, the foreign law is deemed to be incompatible with the public policy of the forum and therefore has to be disregarded if the outcome of the application of the foreign law is obviously and manifestly incompatible with the constitutional values and basic principles of the Hungarian legal system. The forum can resort to the Hungarian law and apply

[34] Case of *Karalyos and Huber v. Hungary and Greece*, 75116/01, Judgment, 6 April 2004.

[35] See in this regard: Case of *Karalyos and Huber v. Hungary and Greece*, 75116/01, Judgment, 6 April 2004, para 32.

[36] PIL Act s 8 para 3.

[37] Code s 7 para 1.

[38] Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point *e).*

[39] Code s 7 para 3.

[40] Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point *e).*

[41] Code s 7 para 2.

the Hungarian law instead of the respective provisions of the foreign law only if the adverse outcome (the breach of public policy) cannot be eliminated in any other way.[42]

The PIL Act contains provisions on imperative rules as well.[43] The imperative rules can affect the composition of the set of norms applicable in the case. This is because where the forum notices that the issue is regulated through imperative rules in the lex fori substantive law, the forum will have to apply these imperative rules directly. The PIL Act makes sure that it does not prevent the application of provisions of the Hungarian legal order which, based on their subject matter and objective, are imperative, meaning, that they are always applicable regardless of the applicable law. However, it is not only about the Hungarian mandatory rules. Overriding mandatory provisions of other national laws can also be taken into account, but only if they are in close connection with the case and are of an essential nature concerning the decision on the substance of case.

III Application of the Foreign Law: Option or Obligation?

Is it an obligation for the forum to apply the foreign law? Or will the forum only apply the foreign law if the parties or one of the parties plead or pleads the application of the foreign law? Can the silence of the parties be interpreted as an implied request not to apply foreign law in the case?

The Code did not have an express provision on the obligation of the forum to apply the identified foreign law. However, such an obligation could have been deducted from the function of the conflict of laws rules, and also from the special provision of the Code which allowed the parties to request the non-application of the foreign law.[44] It meant that the parties could request the forum not to apply the foreign law designated by the conflict of law rule. However, it is important that the parties could only request the non-application of the foreign law, but could not designate what law should be applied instead (unless the parties could have chosen the law applicable to the given legal relationship anyway). The applicable law in that case was the lex fori substantive law. The PIL Act does not provide this possibility for the parties.

The PIL Act is more concrete and direct regarding the application of the foreign law. It makes clear that the forum has to apply the foreign law ex officio;[45] that is, it does not depend on whether the parties refer to it, or even plead the application. Furthermore, as the PIL Act further reads, the forum has to apply and interpret the rules of the foreign law in line with the respective rules and practice of the foreign law.[46]

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[42] PIL Act s 12.
[43] PIL Act s 13.
[44] Code s 9.
[45] PIL Act s 7 para 1.
[46] PIL Act s 7 para 2.

Closing Remarks

Is there any way the forum can or should not apply the foreign law? What discretionary power should the forum have in this regard? Can the parties have any kind of autonomy in this regard? The aim of this contribution was to look at those general provisions of the PIL Act that might result in the non-application of foreign law.

As we could see, the PIL Act contains modern rules in this regard. It makes clear that if, under the conflict of laws rules, the applicable law is a foreign law, it is the obligation of the forum to apply this foreign law. So it is not subject to the discretionary power of the forum. At the same time, the forum has a room for assessment in other cases: e.g. under the general escape clause or the public policy clause. Of course, in these cases, the forum cannot assess whether to apply the foreign law or not; its assessment extends to the issue of the determination of the applicable law, or to the compliance of the applicable foreign law with the public policy of the lex fori law. Also, regarding the determination of the content of the foreign law, it is the forum that will decide – within the limitations of the provisions of the PIL Act – when to move from the intended application of the foreign law to the actual application of the lex fori national law.

Regarding the autonomy of the parties, contrary to the approach followed by the Code, under the PIL Act the parties cannot request the non-application of the foreign law from the forum any longer. However, on the other hand, the PIL Act provides for a wider autonomy for the parties; that is, the parties can choose the applicable law in more situations than they could under the Code.

So, as the above analysis shows, the PIL Act follows a modern approach to ensure that when the conflict of laws rules would lead to the application of a foreign law, this foreign law will be applied by the forum, subject to some limited exemptions; ones that are generally accepted in private international law.