

PUBLIC POLICY OF EUROPEAN PRIVATE INTERNATIONAL LAW: ROME II REGULATION PERSPECTIVE

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ABSTRACT: *Europeanization of private international law of the European Union member states is a Condition Sine Qua Non for the well functioning of the European common market. In this frame, creation of a unified group of rules for determination of the applicable law in potential cases that may arise is a necessity. Among this rules, one of the most debated topic is exclusion that relates with public order or public policies. The application of the foreign law sometimes constitutes a “dance with the unknown”, and this “dance” reflects some threats that become visible when the application of the foreign law is in conflict with some fundamental concepts of the lex fori. Even though, the exclusion of the foreign law should be an exceptional case that should happen once in a blue moon. Public order does not reflect a connection criteria, but it acts before a conflictual reasoning emerges, to block in extremis the application of the foreign law. In this frame, analyzing the Rome II Regulation regarding the public policy of the European Union (forum) represents a major problem in respect of its historical implementation background.*

KEYWORDS: Rome II Regulation, Public Policy, Lex Fori, Lex Causae.

INTRODUCTION

Since the Rome II Regulation is based on an essentially jurisdiction-selecting methodology that is indifferent to substantive policies,¹ there is a need for a ‘safety valve’ when the regular conflict of rule lead to the application of a foreign law that is repugnant to fundamental substantive values of the forum.² The traditional instrument to deal with this problem is public policy.³ Public policy is generally regarded as a ‘wild card’ in the conflicts game that is difficult to handle in a particularly way.⁴ Public policy clauses in supranational instruments are considered as particularly dangerous because, if they are framed too widely or used too liberally, they create the possibility for domestic judges of frustrating the unifying intentions underlying the international treaty or regulation.⁵ In several EU regulations on matters of international civil procedure, recourse to public policy is no longer allowed.⁶ For the communitarization of the conflict of laws, however, such a strategy is not viable option because

¹ Jan von Hein. (2008) Something Old and Something Borrowed, but Nothing New ? Rome II and the European Choice of Law Evolution. Tul. L. Rev. 82, 1663, 1686.

² Von Bar/Mankowski (2nd ed. 2003) Internationales Privatrechts, Vol.I, 714 para.258.

³ Article 26, Rome II Regulation.

⁴ Russell. J. Weintraub (2008) The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-contractual Obligations: Simple and Predictable, Consequences-Based, or Neither. Tex. Int'l L. J. 43, 401, 405.

⁵ Jan von Hein (2007) recent German Jurisprudence on Cooperation with the United States in Civil and Commercial Matters – A Defense of Sovereignty or Judicial Protectionism ?. 101.

⁶ Regulations on uncontested claims, payment procedure and small claims. Regulation 2004/805/EC creating a European Enforcement Order for uncontested claims; Regulation 2006/1896/EC creating a European order for payment procedure; Regulation 2007/861/EC establishing a European Small Claims Procedure.

both the Rome II and Rome I Regulation also apply in relations with third states.⁷ The tort law of the United States in particular has given rise to concerns among European business circles, courts and legislature.⁸ These fears are reflected in Recital 32, second sentence, which states that ‘*[i]n particular, the application of provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy of the forum*’.

Scope

Article 26 applies to all non-contractual obligations covered by the Regulation (‘the law of any country specified by this Regulation’), including cases in which the applicable law is determined by an agreement between parties.⁹ A few clarifications are, however, necessary with regard to other common rules of the Regulation. Article 26 in conjunction with Recital 32, second sentence put an end to the controversy as to whether claims for punitive damages may be characterized as ‘civil and commercial matters’ within the meaning of Article 1(1), first sentence.¹⁰ As Recital 32, 2nd sentence makes clear, such claims should be dealt with within the framework of the public policy clause, which means that they fall under the substantive scope of the regulation. In the U.K., excessive damages awarded under a foreign *lex causae* have traditionally been avoided by classification of the assessment of damages as a procedural matter, thus opening the way for an application of the *lex fori*.¹¹ Under Article 15(c), however, ‘the existence, the nature and the assessment of damage or the remedy claimed’ are now governed by the *lex causae*. Thus, the Rome II Regulation mandates a characterization of assessment issues as substantial rather than procedural, even if excessive punitive damages are concerned.¹² The close historic relationship between public policy¹³ and overriding mandatory rules¹⁴ is expressed by the fact that both provisions are explained by the same Recital.¹⁵ According to a venerable doctrine, the public policy exception should be divided into a ‘negative’ and a ‘positive’ function, with the first function barring foreign law from being applied – public policy as a ‘shield’ – and the second one leading to an application of the forum’s mandatory laws – public policy as a ‘sword’.¹⁶ Since the Regulation contains a specific rule on internationally mandatory provisions¹⁷, there is no need, however, for a ‘positive’ function within Article 26 itself. Finally, Article 26 only covers the public policy of the forum. The courts will not take into account the public policy of another state.¹⁸ Contrary to earlier drafts, the final regulation no longer contains any explicit reference to public policy of the European Union. A separate rule on Union public policy is unnecessary because the regulation is only to be applied by courts of Member States; for those courts, essential value judgments

⁷ Article 3 Rome III, Article 2 Rome II, Regulations.

⁸ Hess B., (2006) Aktuelle Brennpunkte des transatlantischen Justizkonflikts, Die AG, 857-905.

⁹ Article 14 Rome II Regulation

¹⁰ Against a characterization of punitive damages as civil and commercial matter, see: Mörsdorf Schulte, (2005) Spezielle Vorbehaltskalusel im Europäischen Internationalen Deliktsrecht ? ZVglRWiss. 104.

¹¹ Beaumont/Tang, (2008) Classification of delictual damages: Harding v. Weallands and the Rome II Regulation, Edin. L. Rev. 12, 131, 136.

¹² Idem.

¹³ Article 14, Rome II Regulation.

¹⁴ Article 16

¹⁵ Recital 32

¹⁶ Cf. Hay (12 nd ed. 1981) Comments on Public Policy in Current American Conflict Law, in FS Kropholler, 89.

¹⁷ Article 16

¹⁸ Brüning, (1997), Die Beachtlichkeit des fremden ordre public, 283 *et seq.*

of EU primary or secondary law constitutes a part of the forum's public policy anyway.¹⁹ The doctrinal question as to whether there is such a thing as a 'Union' public policy distinct from the forum's law at all may be intellectually intriguing,²⁰ but it is of limited use for practical purposes.²¹ Special public policy clauses found in secondary EU conflict law, however, are to be applied pursuant to Article 27.²²

Legislative History

Controversial Issues

The legislative history of codifying the public policy clause in the Rome II regulation was mainly characterized by the controversy as to whether a general public policy clause relating to the forum's law was sufficient or whether further specifications were needed.²³ The main bone of contention was the issue of codifying a special clause on public policy designed to fend off U.S. style punitive and treble damages. In the course of the 1999 reform of its private international law, Germany had passed such a provision,²⁴ which proved to be influential on several drafts for the Rome II Regulation. A related controversial issue was whether the Rome II Regulation could and should define a 'Union' public policy instead of leaving the content of public policy to the domestic laws of the Member States. Moreover, clarifications on various minor points were suggested during the legislative process, such as giving guidance on interpreting the public policy clause in the Regulation itself or on the procedural issue of whether parties had to invoke the clause or whether it should be applied *ex officio*.

The various Drafts and Proposals

a. The Commission's Draft of 2002 and 2003. The Commission's Draft Proposal of 2002 contained a general provision on public policy²⁵ that was almost literally identical to today's Article 26. The provision emulated Article 16 of the Rome Convention on the law applicable to contractual obligations. Like the Rome Convention, the proposed Article was framed in a language derived from the work of the Hague Conference, which has used since 1995 the formulation that a foreign law is 'manifestly incompatible' with the public policy of the forum.²⁶ Contrary to Article 16 of the Rome Convention, however, the Draft Proposal of 2002 added another special provision dealing specifically with the public policy of the Community in Article 23(1) 3rd. indent. The seemingly rather innocuous provision stated that '[t]his Regulation shall not prejudice the application of the provisions [...] contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which [...] prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation'.²⁷

¹⁹ Struycken (2008) L'ordre public de la communauté européenne, in *Liber Amicorum Gaudemet-tallon*, 617, 618-630.

²⁰ *Idem*

²¹ *Idem*

²² *Idem*

²³ Rouhette (2007) The Availability of Punitive Damages in Europe: Growing Trend or Non-Existent Concept? *J.* 74, 320, 339-342.

²⁴ Article 40(3) No. 1, 2 EGBGB.

²⁵ Article 20

²⁶ Article 4 of the Hague Convention of 1956.

²⁷ Hamburg Group for PIL (2003), *RabelsZ* 67.

The Commission's proposal of 2003 maintained both the general public policy clause with regard to the forum's law²⁸ as well as the specific provision on Community public policy.²⁹ Although the Commission pointed to Article 16 of the Rome Convention of 1980 as a model for the Rome II Regulation, the explanatory memorandum of 2003 emphasized that this bifurcated approach was chosen deliberately.³⁰ It did not explain, however, why a separate codification of Community public policy should be necessary in the field of tort conflicts whereas it was considered as superfluous in the Rome Convention.³¹ The Commission went even further by adding a new Article 24 on non-compensatory damages. This provision read as follows: "The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to the introduction of a specific public policy clause as follows:

Article 24 is the practical application of the Community public policy exception provided for by the third indent of Article 23(1) in the form of a special rule. In the written consultation, many contributors expressed concern at the idea of applying the law of a third country providing for damages not calculated to compensate for the damage sustained. It was suggested that it would be preferable to adopt a specific rule rather than to apply the public policy exception of the forum, as in the case of section 40(3) of the German EGBGB.³² The idea of defining a 'public policy' on this sensitive issue, which might be of a prejudicial character with regard to the communitarization of substantive tort law, met with strong opposition from U.K., however.³³ Moreover, the suggested specific public policy clause was criticized as simply superfluous in academic quarters.³⁴ Finally, the Commission's draft of 2003 contained a special public policy clause with regard to violations of rights relating to the personality.³⁵

b. The Parliament's Draft of 2005. The European Parliament's Position of 2005 in principle maintained the Commission approach. It kept both the general public policy clause with regard to the forum's law³⁶ as well as a specific clause on Community public policy in the text. It rewrote the specific clause on non-compensatory damages to make clear that this question should be left to the law of the forum and not be defined as a matter of Community public policy.³⁷ Article 24(3) of the Parliament's proposal of 2005 read as follows: '[T]he application of a provision of the law designated by this regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy of the forum'. Apart from that, Parliament proposed giving guidance to the Member States' courts by referring them to the European Convention on Human Rights, national constitutional provisions and international humanitarian law as authority. Finally, Parliament added a provision on a matter of procedure: It was regarded as inconsistent that the public policy clause of the Brussels I Regulation should apply automatically.³⁸ Consequently, a new Article 24(4) was added to provide that '[w]here, under this Regulation, the law specified as applicable is that of a Member State, the public

²⁸ Article 22

²⁹ Article 23 (1)

³⁰ Explanatory Memorandum accompanying the Original Proposal by the EC Commission (2003), of 22 July 2003, 427.

³¹ *Supra*.

³² Explanatory Memorandum of 2003, 29.

³³ Petch (2006) *The Rome II Regulation: An Update*, Part II, JIBLR, 515 *et seq.*

³⁴ *Idem*

³⁵ Article 6(1)

³⁶ Article 24 (1)

³⁷ Waills (2006) Report, in *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe*, 353, 382.

³⁸ *Idem*

policy exception may only be applied at the request of one of the parties'. On the other hand, the special public policy clause with regard to violations of rights relating to the personality proposed by the Commission in 2003 was abandoned.

c. Reaction of the Commission and the Council. In its revised draft of 2006, the Commission adhered to the basic tripartite framework consisting of a general public policy clause with regard to the forum's law³⁹, a specific clause on Community public policy⁴⁰, and a special provision on non-compensatory damages.⁴¹ Moreover, the Commission essentially accepted the rephrased provision on punitive damages proposed by the parliament in 2005: 'Subject to drafting changes to make clear that punitive damages are not *ipso facto* excessive, the Commission can accept this rule being incorporated in the Article concerning the public policy of the forum.'⁴² The rule proposed by the Commission⁴³ read as follows: 'In particular the application under this Regulation of law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum.'

The Commission rejected, however, spelling out the concept of public policy of the forum by listing reference instruments because '[e]ven though the public policy of the Member States will inevitably contain common elements, there are variations from one to another.'⁴⁴ Moreover, the Commission rejected the proposal that only the parties would be able to rely on the exception clause: '[I]t is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented. The Brussels I Regulation provides for the possibility for the court to withhold the *exequatur* from judgment given in another Member State if it would be contrary to the public policy of the forum. The Commission accordingly cannot accept the proposed paragraph.'⁴⁵

The Council, in the Common Position of 2006, slimmed down the proposed rules on public policy even further.⁴⁶ The superfluous provision on a Community public policy was finally deleted. Moreover, the specific clause on punitive damages was dropped in order to accommodate the concerns of the U.K. and other Member States whose substantive laws contain the possibility of awarding exemplary damages.⁴⁷

d. Parliament's Last Effort. In its Communication to the European Parliament, the Commission seemed ready to accept the idea that the general public policy clause offered sufficient safeguards against punitive damages, stating that 'there is no disagreement that the public policy clause does not offer sufficient guarantee and protection against potential

³⁹ Article 23

⁴⁰ Article 31 (c)

⁴¹ Article 23

⁴² Waills (2006) Report, in The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe, 353, 382.

⁴³ Article 23

⁴⁴ Waills (2006) Report, in The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe, 353, 382.

⁴⁵ Article 26 of the Common Position (EC) No.22/2006, adopted by the Council on 25 September 2006, with a view to adopting Rome II Regulation.

⁴⁶ Idem

⁴⁷ Schubert (2008) Punitive Damages – Das englische Recht als Vorbild für das deutsche Schadenrecht ? 138-143.

negative effects of awards of extreme non-compensatory damages'.⁴⁸ The European Parliament, however, at first insisted on a specific provision.⁴⁹

e. The final Regulation. At the end of the day, the final Rome II Regulation merely contains a general clause on the public policy 'of the forum'.⁵⁰ Recital 32, 2nd sentence clarifies that courts remain free to consider non-compensatory exemplary or punitive damages of an excessive nature as being contrary to their public policy. This compromise was achieved in the conciliation committee.⁵¹

CONCLUSIONS

Public policy clauses in supranational instruments are considered as particularly dangerous because, if they are framed too widely or used too liberally, they create the possibility for domestic judges of frustrating the unifying intentions underlying the international treaty or regulation. In several EU regulations on matters of international civil procedure, recourse to public policy is no longer allowed. For the communitarization of the conflict of laws, however, such a strategy is not a viable option because both the Rome II and Rome I Regulation also apply in relations with third states.

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⁴⁸ Idem

⁴⁹ idem

⁵⁰ Idem

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