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Application of the Public Policy Exception in the Context of International Contracts – the Rome I Regulation Approach[*1]

1. Introduction

Though constituting one of the cornerstones of the system of private international law rules on matters of contractual obligations, the parties' freedom to choose the law applicable to their contracts is not entirely unlimited. In addition to targeted protection in favour of those parties regarded as being weaker,[*2] along with specific limitations for purely internal contracts,[*3] the Rome I Regulation (Rome I)[*4] includes an overall clause allowing the courts of EU member states the possibility to refuse to apply a provision of the foreign law either chosen by the parties or otherwise applicable to the contract on grounds of manifest incompatibility with its public policy (*ordre public*).[*5]

Other than this general public policy exception, Rome I provides for a similar instrument – overall mandatory provisions of the law of the forum state.[*6] Both serve the purpose of safeguarding the fundamental principles of the forum country whilst, however, operating differently. Overall mandatory provisions embody and protect the state's public interests in a 'positive' manner, inasmuch as they are to be applied regardless of the content of the law otherwise applicable to the contract. Therefore, they do not necessarily

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2 Contracts in favour of passengers, consumers, insurance contracts' policy-holders, and employees – see Articles 5, 6, 7, and 8 of Rome I, respectively.

3 Contracts pertaining to situations wherein all elements relevant to the situation are located in one country – see Article 3 (3) and (4) of Rome I.

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 *ff*. It replaces the Rome Convention on the law applicable to contractual obligations of June 1980. The consolidated text of that convention is found in OJ C 334, 30.12.2005, p. 1 *ff*.

5 Article 21 of Rome I. In this paper, the notions of public policy and *ordre public* are used in parallel in denotation of the public policy clause of Article 21.

6 Provisions of the forum state that are to be applied to the contract irrespective of the law otherwise applicable to the contract – see Article 9 (1) and (2) of Rome I.

constitute a barrier to the application of foreign law.[*7] By contrast, the general public policy exception performs a negative function as it counteracts certain provisions of foreign law by excluding their application.[*8]

Recent developments in the EU's second-generation regulations on the enforcement of judgements from other Member States seem to point to a certain decline in the importance of the public policy clause in private international law, by abolishing in part the public policy exception and the *exequatur* in general.[*9] In addition, continuous harmonisation of substantive law related to the EU internal market indicates that the need for a public policy exception may be ostensibly diminishing.[*10] These trends constitute incentive to investigate whether the role of an overall public policy clause in matters of contractual obligations should be reconsidered as well, particularly as these are not as value-sensitive as other areas of civil law and in account also of the existence of special rules on overriding mandatory provisions in Rome I. What is more, the wording of the public policy exception in itself is vague, thereby complicating its application while simultaneously entailing broad judicial discretion.

This article explores the employment of the public policy exception from the perspective of Rome I, which determines the law applicable to contractual obligations for 27 European Union member states.[*11] Only the substantive-law aspects and not the enforcement-stage protection of public policy shall therefore be the focus of this paper. The article starts by examining the preconditions for applying the public policy clause. It then analyses the relativity of *ordre public*, developing three dimensions to be considered in the courts' use of the public policy exception in a particular case. In its conclusions, the article answers the question of why, notwithstanding its infrequent application, dispensing with the public policy exception would be unthinkable. Given that the essence of public policy differs from state to state, it should be stated here that the subsequent analysis and the examples provided are applicable in the context of Estonia's legal order and based on its fundamental values.

2. Prerequisites for recourse to the public policy clause

Rome I, in its Article 21, uses the 'standard' wording of the public policy clause. Ever since the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations toward children,[*12] similar – if not quasi-identical – wording has been employed in numerous private international law cross-border instruments for the public policy clause, including other EU regulations, along with most Hague Conven-

7 For in-depth analysis of the concept of overriding mandatory provisions, see, for example, R. Piir. Eingreiffen oder nicht eingreiffen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, p. 199 *ff*.

8 More on the distinction between positive and negative functions can be found in such works as R. Hausmann. Art. 21 Rome I. – U. Magnus (ed.). *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum BGB/IPR. Art 11-29 Rom I-VO; Art 46b, c EGBGB (Internationales Vertragsrecht 2)*. Berlin: Sellier 2011 (in later notes, 'Staudinger/Hausmann'), paragraph 2; D. Martiny. Art. 21 Rom I. – J. von Hein (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*. Munich: C. H. Beck 2015 (in later notes, 'Münchener Kommentar / Martiny'), paragraph 7.

9 See J. Kramberger Škerl. European public policy (with an emphasis on exequatur proceedings). – *Journal of Private International Law* 2011/7, p. 482. For a more in-depth analysis of the abolition of *exequatur* in the second-generation regulations in general, see, for example, S. Pabst. A.I.3 EG-Vollstreckungstitelverordnung. Einleitung. – T. Rauscher (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Cologne: Verlag Otto Schmidt 2015, paragraph 12; M. Torga. Brüsseli I (uuesti sõnastatud) määrus: kas põhjalik muutus Eesti rahvusvahelises tsiviilkohtumenetluses? ('The Brussels I Regulation (recast): A thorough change in the Estonian Civil Procedure?'). – *Juridica* 2014/4, p. 311 (in Estonian). The term 'second-generation regulations' is used here to indicate Regulation (EC) No. 805/2004 creating a European enforcement order for uncontested claims. – OJ L 143, 21.4.2004, p. 15 *ff*.; Regulation (EC) No. 861/2007 establishing a European small claims procedure. – OJ L 199, 31.7.2007, p. 1 *ff*.; Regulation (EC) No. 1896/2006 creating a European order for payment procedure. – OJ L 399, 30.12.2006, p. 1 *ff*.; Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 7, 10.1.2009, p. 1 *ff*.; and Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). – OJ L 351, 20.12.2012, p. 1 *ff*. These are not considered in this article.

10 M. Stürner. Europäisierung des (Kollisions-)Rechts und nationaler ordre public. – *Grenzen überwinden – Prinzipien bewahren. Festschrift für Berndt von Hoffmann*. Bielefeld, Germany: Verlag Ernst und Werner Gieseking 2011, p. 482.

11 Denmark, having an opt-out from implementing regulations under the area of freedom, security, and justice, still adheres to the Rome Convention, which was replaced by Rome I in 2009 and which provided almost the same rules on party autonomy as does Rome I.

12 Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, Article 4. Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=37 (most recently accessed on 25 March 2015).

tions in this field. Because of the continuing need to formulate the preconditions for its application in a rather broad manner in order to preserve its universal character, the wording used by Rome I has remained unaltered in comparison to the predecessor of this provision – Article 16 of the former Rome Convention. According to the explicit stipulation of Article 21, the preconditions for recourse to the public policy clause are the application of a foreign law to the case and the manifest incompatibility of the result with the public policy of the forum.

2.1. Application of foreign law

The 'safety net' concept of the public policy exception in private international law (i.e., its aim of refraining from obliging the court to give effect to foreign-law provisions that are counter to the fundamental principles of the forum state) makes it clear that public policy constitutes reason for intervention only in cases wherein the law applicable to the contract (*lex contractus*) is not that of the forum (*lex fori*) but a foreign law.[*13] Accordingly, whether the applicable law has been determined through a choice of law or by virtue of the general conflict rules makes no difference. Thus, in cases wherein a court has to apply its domestic law, EU law, or international treaties, it is not the public policy clause of Article 21 but the domestic law provisions that have to avoid possibly unfair results.[*14] The public policy exception therefore applies only in cases in which the applicable law has been designated in accordance with the conflict rules in Rome I and it is not the *lex fori* that governs the case.

The applicable law itself is not criticised. Even though it is imaginable that a foreign law provision as such may seem contrary to the forum's public policy, its inapplicability *per se* without further consideration is very problematic.[*15] As a general rule, determination of the contents of the foreign law must always be carried out even before consideration of making use of the public policy clause.[*16] Hence, it must be noted that intervention via the public policy exception can never be applied 'upon suspicion' or on grounds of simple assumption of a conflict between the public policy of the forum and a foreign law provision substantially deviating from the *lex fori*.[*17]

Determination of the content and objective of the *lex contractus*, also called the preliminary examination phase,[*18] serves as no more than an initial basis on which to decide whether or not to apply the public policy exception. The decisive factor here is the outcome as a whole of the application of the foreign law provision in specific circumstances, also called the thorough examination phase.[*19] It could, for instance, be conceivable that the application of a provision that is seemingly contrary to the public policy of the forum leads to an acceptable result and that said provision could, therefore, nevertheless be applied.[*20] By

13 P. Kaye. *The New Private International Law of Contract of the European Community*. Aldershot 1993, p. 345; A. Chong. The public policy and mandatory rules of third countries in international contracts. – *Journal of Private International Law* 2006/2, p. 30.

14 J. von Hein. Art. 6 EGBGB. – J. von Hein (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*. Munich: C. H. Beck 2015 (in later notes, 'Münchener Kommentar / von Hein'), paragraph 123.

15 Doctrinal literature points out that only foreign laws violating the core content of public policy – e.g., universally recognised human rights and the international *ius cogens* – should be held inapplicable regardless of the circumstances and results of their application. See C. Renner. Art. 21 Rome I. – G.-P. Calliess (ed.). *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Kluwer Law International BV 2011 (in later notes, 'Calliess/Renner'), p. 320, paragraph 10; D. Bureau, H. Muir Watt. *Droit international privé/I*, 3rd edition. Paris: Presses Universitaires de France 2014, p. 535.

16 K. Thorn. Art. 6 EGBGB. – P. Bassenge, U. Diederichsen (eds.). *Palandt Bürgerliches Gesetzbuch*. Munich 2009 (in later notes, 'Palandt/Thorn'), paragraph 5. See also R. Jankelevitš. Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses (Public policy and imperative norms in private international law). – *Juridica* 2002/7, p. 481 (in Estonian).

17 Münchener Kommentar / von Hein (see Note 14), paragraph 118.

18 D. Bureau, H. Muir Watt (see Note 15), p. 533. D. Bureau and H. Muir Watt divide the application of the public policy into three phases – namely, examination, confrontation, and decision phases (*phases d'examen, de confrontation et de décision*), and the examination phase into preliminary and thorough examination phases.

19 See also Münchener Kommentar / von Hein (see Note 14), paragraph 118 *ff*.; G. Kegel, K. Schurig. *Internationales Privatrecht. Ein Studienbuch*. Munich: C. H. Beck 2004, section 16 II; P. Kaye (see Note 13), p. 347; Calliess/Renner (see Note 15), p. 320, paragraph 11.

20 M. Voltz. Art. 6. – D. Heinrich (ed.). *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum BGB/IPR. Art 3-6 EGBGB (IPR – Allgemeiner Teil)*. Berlin: Sellier 2013 (in later notes, 'Staudinger/Voltz'), paragraph 125.

way of example, the fact that a foreign law does not prescribe limits on interest rates would not justify its non-application on the grounds of public policy as long as the interest rate agreed upon in the case at hand would not be usurious according to the domestic public policy standard.[*21] An inverse situation, wherein a foreign law in the abstract does not seem to contradict public policy yet its application produces an unfair result, could also be imaginable, although presumably only in highly exceptional cases.[*22] What is more, in order to assess the outcome as a whole, one may have to take into consideration a wider legal context. Thus, even the absence of a legal provision in foreign law could lead to a result contradictory to the public policy of the forum.[*23]

2.2. Manifest incompatibility with the public policy of the forum

2.2.1. Interpretative uncertainty as to the criterion 'manifest'

The thorough examination phase brings us to the next expressly stated prerequisite to resorting to public policy – the manifest incompatibility of the result with the public policy of the forum. This second precondition, considered in what is called the confrontation phase, requires the court to find special grounds for upholding an objection to application of foreign law to the contract.[*24]

The formulation used in Rome I does not itself give much assistance as to its application in a given case, although the appending of 'manifest' is supposed to impose a restrictive interpretation of the provision.[*25] Indeed, when compared to an imaginable 'simple' incompatibility, its scope of application could theoretically be seen as somewhat more limited.[*26] In practice, however, the provision does not provide any specific guidelines as to its application. In consequence, the interpretation of the criterion of manifest incompatibility remains subject to case-by-case analysis.

It is important to establish in this context that this precondition must be interpreted very restrictively if one is to ensure its high substantive threshold and to impose the condition that only serious breaches would justify intervention by way of this exceptional clause.[*27] Illustrating this, the German Federal Court of Justice recently had reason to underscore the importance of this condition (referred to as *Offensichtlichkeitskriterium*) anew, explaining that the mere infringement of substantive law without a violation of the core principles of the state is not enough to justify recourse to public policy.[*28] The European Court of Justice too has been strict on the matter, when interpreting the limits of a Member State's right of recourse to public policy, judging that it can be 'envisaged only where [the result of applying foreign law] would be at variance to an unacceptable degree with the legal order of the State […] inasmuch as it infringes a fundamental principle' and that 'the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State […] or of a right recognised as being fundamental within that legal order'.[*29]

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21 See B. Audit. *Droit International Privé*, 4th edition. Paris 2006, paragraph 838; Calliess/Renner (see Note 15), p. 321, paragraph 11. See also M. Giuliano, P. Lagarde. Report on the Convention on the law applicable to contractual obligations. – OJ C 282, 31.10.1980, p. 1 *ff*., Article 16.

22 D. Bureau, H. Muir Watt (see Note 15), p. 535.

23 Palandt/Thorn (see Note 16), paragraph 47 *ff*.; Münchener Kommentar / von Hein (see Note 14), paragraph 120.

24 M. Giuliano, P. Lagarde (see Note 21), Article 16.

25 See, in this sense, the reasoning in the legislative proposal of the German Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche). – BT-Drucks, 10/504, p. 42. See also Staudinger/Voltz (see Note 20), paragraph 128 *ff*.

26 Nevertheless, in spite of it referring to **manifest** incompatibility, it has been called a largely declaratory statement. See R. Plender, M. Wilderspin. *The European Private International Law of Obligations*. Sweet & Maxwell 2009, paragraph 12-057; Calliess/Renner (see Note 15), p. 328, paragraph 36.

27 *Ibid*.; P. Kaye (see Note 13), p. 348.

28 Bundesgerichtshof, 28.01.2014. – III ZB 40/13, Rn. 3 und 4.

29 Judgment of the Court of Justice of the European Communities of 28 March 2000, Case C-7/98, *D. Krombach v. A. Bamberski*, paragraph 37. – ECR 2000, I-1935, although given in the context of international civil procedure.

2.2.2. Problematics of determining the nature of the breach

The question of how to judge whether applying the *lex contractus* produces results manifestly incompatible with the forum's public policy is not an easy one to answer. It can be predicted, however, that, because the law of obligations is mainly of a dispositive nature, breaches of public policy should remain rather scarce in practice.[*30] In this light, it can be argued that applying foreign law could not be considered contrary to public policy for instance in cases wherein domestic law would allow clauses in standard terms that produce similar results.[*31] Or, by way of another example, a mere difference between statutes of limitations in two legal systems could not be considered intolerable and therefore manifestly in breach of public policy. In contrast, complete absence of a statute of limitations for certain claims or a limitation period so short that it would not allow a creditor to protect his interests in practice, or – inversely – so long that the debtor remains exposed to possible claims for an unreasonably long period could prompt recourse to the public policy exception.[*32]

In determination of the manifest nature of the breach, 'test' questions such as whether the legislator of the forum country would ever consider regulating the case at hand in a similar way or whether such a regulation would be legal and compliant with constitutional rights in the *lex fori* might also prove helpful.[*33] For instance, the execution of contracts involving corruption or deception of third parties, as well as contracts promoting sexual immorality, might be rejected by the forum for reason of breach of its core principles.[*34] The same would apply for cases wherein the applicable law would lead to the expropriation of intellectual property rights when a licence contract for a trade mark is not renewed upon expiry of its term.[*35]

As far as the point in time for evaluating the incompatibility requirement is concerned, the view is commonly held that the critical point when one is judging whether the result of applying a provision of the *lex contractus* is compatible with the public policy of the forum is, in principle, the date of the court decision[*36]: 'Public policy is the policy of the day' (C.K. Allen).[*37] An issue-by-issue approach, inherent to public policy, does, however, enable the particular circumstances to be taken into account, thereby allowing a deviation from this principle in, for example, the case of contracts with continuous obligations.[*38]

3. Relativity of public policy

Interpreting the 'enshrined' prerequisites for employing recourse to public policy is challenging in its own right; however, the main difficulty in application of Article 21 of Rome I lies in its relativity. Because of the exceptional character of public policy and its reliance on the substantive outcome of applying foreign law to the case at hand, several interdependent factors are to be considered when one is deciding whether this provision should come into play (i.e., in the decision phase[*39]). The public policy clause is indeed a provision that will never be complete. Therefore, in order to abrogate a conflict-of-law rule that designates a foreign law as the *lex contractus*, a certain connection between the specific case and the forum state is needed. This interdependency is best evidenced through analysis of the relative nature of public policy, which is most usefully discussed under three sub-categories, covering the temporal; material; and, most importantly, territorial relativity (proximity) of public policy.[*40]

30 See also Münchener Kommentar / Martiny (see Note 8), paragraph 2.

31 See, with this sense, also Münchener Kommentar / von Hein (see Note 14), paragraph 135.

32 Staudinger/Hausmann (see Note 8), paragraph 25.

33 *Ibid*., paragraph 26.

34 Calliess/Renner (see Note 15), p. 323, paragraph 20, with further references.

35 European Max Planck Group (editor: P. Torremans). *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary*. Oxford University Press 2013, paragraph 3:902.C03.

36 See, for example, G. Kegel, K. Schurig (see Note 19), section 16 V; Palandt/Thorn (see Note 16), paragraph 4; D. Bureau, H. Muir Watt (see Note 15), p. 543; Staudinger/Voltz (see Note 20), paragraph 144.

37 C.K. Allen. *Law in the Making*, 7th edition. Oxford University Press 1964, p. 155.

38 Staudinger/Voltz (see Note 20), paragraph 146.

39 For the division of phases, see Note 15.

40 Staudinger/Voltz (see Note 20), paragraph 155. In some doctrines, the concept of relativity has been divided into relativity in a narrower sense, proximity, and seriousness of the breach – see, for instance, A. Mills. The dimensions of public policy in private international law. – *Journal of Private International Law* 2008/4, p. 210 *ff*.

3.1. Territorial relativity or proximity

The forum proximity (*räumlice Relativität* or *Inlandsbeziehung*, as it is referred to in German legal writing) requirement follows already from the wording of Article 21, as the provision itself makes reference to the forum state. Therefore, only in cases wherein there is a sufficiently strong connection between the case and the forum's legal order can it be justified that the private international law rules and private autonomy shall be set aside in favour of domestic fundamental principles.

Article 21 does not, other than in mentioning the forum state, contain any reference as would aid in determining the degree of connection that is necessary for invoking the public policy exception.[*41] In contrast, it is conceivable that the overriding mandatory provisions, as regulated in Article 9 of Rome I, include a reference to the necessary degree of the required connection in their proper wording, which would simplify their application.[*42]

The various factors of help in determining the proximity of the forum state to the specific case include personal and factual circumstances, alongside the legal considerations. It seems justified to rely first and foremost on criteria that are, taken individually, used in private international law to designate the law applicable to contracts, such as the domicile or nationality[*43] of the persons concerned. The existence of these factors should, in principle, suffice to establish *per se* the proximity requirement in a given case. Obviously, other important points of reference may either give weight to or, inversely, counterbalance those factors, with examples including the person's cultural and legal connections to the forum country or another country such as his language skills, registration of permanent address, place of birth, or company domicile.[*44] In contrast, the jurisdiction of the court seised of the case is, by itself, insufficient to establish the proximity requirement. The latter could be envisaged only in exceptional cases of serious violations of fundamental rights or where internationally recognised principles are at stake.[*45]

Consequently, in order to justify invoking public policy, an issue-by-issue approach is needed. Whether the existence of a particular criterion or several combined criteria is sufficient to establish the proximity requirement depends on the circumstances of the case and is to be determined *ad hoc*.[*46] In addition, the material substance of the foreign legal norm involved and the seriousness of the breach are important factors in determination of the necessary degree of the connection – a blatant violation of domestic conceptions of justice requires a less intense link between the facts of the case and the forum state, and vice versa.[*47] The question of establishing the sufficient-proximity requirement is even more multifaceted in the context of Europeanisation of the concept of public policy. Given that *ordre public* may also comprise principles derived from international sources, determination of the required substantive connection with the forum state may have to be treated differently when fundamental principles of cross-border origin are at stake. The latter apply, for example, in cases wherein the *lex contractus* is the law of a state other than an EU member state and a sufficiently strong connection with the EU forum state is not established. If European fundamental values constitute the public policy concern in the case, a substantive connection to the internal market should be considered sufficient for fulfilment of the proximity requirement.[*48]

41 A specific proximity requirement can, for instance, be found *expressis verbis* in the Belgian Code of Private International Law, according to which, in determination of any incompatibility with public policy, special consideration is given to the degree to which the situation is connected with the domestic legal order and to the significance of the consequences produced by the application of the foreign law. – Code de droit international privé du 16 juillet 2004 (Belgian Code of Private International Law of 16 July 2004), Article 21, II. English text available at http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf (most recently accessed on 25 March 2015).

42 For in-depth analysis of the proximity requirement for overriding mandatory provisions, see R. Piir (see Note 7), paragraphs 3.1 and 3.2.2.

43 Even though nationality as a determinant of the applicable law is losing its importance in the course of harmonisation of private international law in the EU, it could certainly be considered an important factor in establishment of the proximity requirement, given that the national has preserved connections to the state of his nationality.

44 For more details, see Münchener Kommentar / von Hein (see Note 14), paragraph 186 *ff*.; Staudinger/Voltz (see Note 20), paragraph 158 *ff*.

45 Calliess/Renner (see Note 15), p. 329, paragraph 38; Staudinger/Voltz (see Note 20), paragraph 155.

46 Münchener Kommentar / von Hein (see Note 14), paragraph 190; G. Kegel, K. Schurig (see Note 19), section 16 II.

47 A. Mills (see Note 40), p. 211; Palandt/Thorn (see Note 16), paragraph 6. For similar reasoning in German jurisprudence, see, for instance, this ruling of the German Federal Court of Justice, or *Bundesgerichtshof*: 4.06.1992. – BGHZ 118, 312/349.

48 M. Stürner (see Note 10), p. 481; see also Münchener Kommentar / von Hein (see Note 14), paragraph 193; Staudinger/Voltz (see Note 20), paragraph 160.

3.2. Temporal and material relativity

The proximity requirement is supplemented by temporal and material considerations that are also intrinsic to public policy.

Temporal relativity (in German legal culture, *zeitliche Relativität*) means that in order for one to invoke public policy, the circumstances of the case must comprise a connection of a certain degree with the present time. In other words, it is necessary to evaluate the impact on the current legal and value system of applying foreign law to the case at hand.*[49] Given that the concept of public policy is determined at the time of the court decision, it is also at this point that the evaluation of whether and to what extent the circumstances are connected to the present must be carried out. Under the interdependency discussed above, the stronger the impact of the result of applying foreign law on the present or future, the more likely public policy is to be invoked. In contrast, in cases wherein mainly past issues that have already been drawn to a conclusion are concerned, the public policy exception is to be applied only with due caution.*[50]

In keeping with the material relativity (in German, *sachliche Relativität*) of public policy, the consideration of whether the undue result of applying foreign law is associated with the main issue of the dispute or, instead, only a preliminary matter is also to be taken into account.*[51] In principle, as long as only preliminary matters are at issue, the application of the public policy exception should remain rather rare, as preliminary questions determine the existence or the single effects of legal relationships as opposed to establishing legal relationships in the forum state. Their material connection to the forum state is, therefore, considerably weaker, although, that having been said, it depends also on the type of preliminary question at hand and its significance for the whole case. It is quite imaginable, therefore, that even though the application of foreign law with regard to a preliminary question leads to an unacceptable result, the overall result of the dispute can be considered acceptable.*[52]

4. Conclusions

It follows from the above analyses that, in consequence of imposing a high substantive threshold, Article 21 of Rome I is likely to come into play rather infrequently, as should be the case. Accordingly, it is submitted that the public policy clause continues to function more as a safety net for general conflict rules, also referred to as a relief valve*[53] or even as an emergency brake before an *excursus* into the depths of a foreign law,*[54] rather than a frequently invoked necessity. Nevertheless, on account of the continuous changes in society, this exceptional clause is expected to maintain its importance even within the domain of international contracts. It can therefore be predicted that the public policy exception will, no matter its very restrictive application criteria, retain its scope of application for matters of contractual obligations.

The public policy exception will remain essential particularly for reason of its relativity, allowing equitable results to be achieved even in cases unforeseen by legislators. The regulation of public policy in Rome I constitutes an abstract and flexible instrument, exactly as it should, in order to retain its applicability in exceptional cases, allowing for prevention of possible violations of domestic fundamental values and to respond adequately to a changing society. It is important to bear in mind, however, the exceptional nature of this clause, in order to guarantee that, in practice, it is 'only a fundamental clash of concepts [...that] can ignite the spark of public policy'.*[55]

49 Staudinger/Voltz (see Note 20), paragraph 165; Münchener Kommentar / von Hein (see Note 14), paragraph 202 *ff*.

50 G. Kegel, K. Schurig (see Note 19), section 16 V.

51 Münchener Kommentar / von Hein (see Note 14), paragraph 191.

52 Staudinger/Voltz (see Note 20), paragraph 166.

53 C. von Bar, P. Mankowski. *Internationales Privatrecht*, *1*, 2nd edition. Munich: C. H. Beck 2003, p. 714.

54 K. Siehr. *Internationales Privatrecht*. Heidelberg, Germany: C. F. Müller Verlag 2001, p. 490.

55 M.S. Abdel Wahab. The law applicable to technology transfer contracts - Egypt. – *Yearbook of Private International Law* 2010/12, p. 467 DOI: http://dx.doi.org/10.1515/9783866539488.457.