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The Constitutionalization of Public Policy in Private International Law

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Abstract: *The impact of constitutionally protected values shape the reach of the public policy reservation in German and European private international law. Historically, this process began in Germany with the 1971 "Spaniard case", which led to many changes in German private international law to implement the principle of gender equality. Over time, courts used constitutional values increasingly to discard the application of foreign law. Consequently, public policy violations are particularly numerous in the areas of family and succession law. Around the world, these areas of law are shaped by very different cultural and religious influences. Analysing the European regulations on private international law reveals that the concept of public policy is still, to a large extent, defined by national values. However, recent actions of the European legislator threaten to abandon established principles of private international law as Art. 10 Rome III Regulation can be interpreted as an abstract control of foreign divorce rules to protect gender equality. We argue that an abstract control may have unwarranted consequences for the parties involved. Looking at the future of the public policy reservation, we argue that its importance will surely diminish given that the connecting factors of European private international law ensure in many cases that the law of the forum (and not a foreign law) applies. As far as courts still have to apply foreign laws, we believe that these laws should not be controlled too tightly on constitutional grounds.*

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I. Introduction

The public policy reservation (*ordre public*) is a cornerstone of modern Private International Law. It is not only German conflict-of-law rules which contain a provision on public policy (Art. 6 of the German Introductory Act

to the Civil Code, hereafter: EGBGB).[1] All European Regulations on private international law, such as the Rome I Regulation,[2] the Rome II Regulation,[3] the Rome III Regulation[4] or the Succession Regulation,[5] and other country's choice-of-law rules[6] also do so. These provisions allow courts to disregard foreign laws that would otherwise apply. The reason why every legal order contains such a safety net is that traditional private international law rules are designed to find the law with the closest connection to a case.[7] However, applying this law might violate fundamental values of the forum and create tensions within a jurisdiction, a situation that should be avoided.[8]

Yet, from the perspective of private international law, public policy remains an "*enfant terrible*".[9] Disregarding the applicable foreign law, the public policy reservation undermines the principle of closest connection and endangers the international consistency of decision-making. Excessively

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1 Einführungsgesetz zum Bürgerlichen Gesetzbuch, English translation available at: http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html.

2 Art. 21 Rome I Regulation (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, 6).

3 Art 26 Rome II Regulation (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, 40).

4 Art. 12 Rome III Regulation (Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, 10).

5 Art. 35 Succession Regulation (Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107).

6 See, e.g., Art. 21 Belgian Private International Law Act of 2004 (English translation in 70 (2006) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 358–397; Art. 16 Italian Private International Law Act of 1995.

7 Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th Edition, 2004), § 2 I; Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.03 [C], 319 et seq.

8 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 258.

9 Pierre Mayer and Vincent Heuzé, *Droit international privé* (11th Edition, 2014), para. 206.

applied, the doctrine would destroy the system of private international law. As *Christian von Bar* and *Peter Mankowski* put it:

> "Very much like distinguishing between medicine and poison, the question of the effect of public policy depends foremost on the quantity. Only the application in the right amount will have the desired positive effect."[10]

Against this background, German doctrine and courts have developed the following prerequisites for invoking the *ordre public* reservation:

- Courts may only set aside the application of foreign law if it produces a result that is incompatible with fundamental German values. It is not the abstract rule or provision at issue which is subject to control, but rather the result of its application ("result control").[11] Consequently, a foreign rule abstractly incompatible with values of German law nonetheless must be applied to a case whenever that concrete application produces an acceptable result. Hence, a foreign law awarding custody of a child that has reached a certain age to the father without considering the child's best interest would apply nevertheless, if the father's custody was in the best interest of the child (for example because the mother cannot take care of the child because of severe drug problems).
- To reject the application of foreign law, the result must further be manifestly incompatible with fundamental values.[12] The term "manifestly" refers to the severity of the breach of principles and values. Rejecting the foreign law solution requires not only a breach of domestic values but rather a severer incompatibility with these.[13]

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10 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 258: „Wie die Abgrenzung von Arznei vom Gift, so ist deshalb auch die Frage der Wirkungsweise des ordre public-Vorbehalts ein Problem der Menge. Positiv wirkt er sich nur aus, wenn er in richtig dosierter Menge zur Anwendung gelangt".

11 Bernd von Hoffmann and Karsten Thorn, *Internationales Privatrecht* (9th Edition, 2007), § 6 para. 150; Jan Kropholler, *Internationales Privatrecht* (6th Edition, 2006), § 36 II.

12 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 259; Jan Kropholler, *Internationales Privatrecht* (6th Edition, 2006), § 36 II.

13 Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 263.

- Furthermore, there is a form of relativity to the *ordre public*: Weak ties to the forum demand more serious breaches of public policy to disregard the foreign law.[14] The degree of the domestic relations (*Inlandsbeziehung)* matters for an *ordre public* analysis.[15] This prerequisite is necessary to prevent the public policy doctrine from becoming an abstract control mechanism of foreign law.[16]

The rejection of a foreign rule leaves a gap in need of filling. Instead of the foreign rule, one could simply be tempted to apply the law of the forum.[17] However, public policy does not allow courts to disregard the foreign law entirely.[18] Bearing the principle of closest connection in mind, one should primarily turn to the foreign law which would otherwise be applicable. Courts should thus try to fill the gap which has emerged either by applying different rules of the foreign law or modifying the offending rule.[19] Recourse to the law of the forum is only permissible as a last resort, in circumstances where applying a different or modified rule of the foreign law is impossible.[20]

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14 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 263; Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.03 [D], 323.

15 BGH 20.12.1972 – IV ZB 20/72 – BGHZ 60 (68 and 79) = NJW 1973, 417 (419); Jan Kropholler*, Internationales Privatrecht* (6th Edition, 2006), § 36 II; on the difficulties to apply this criterion to violations of the *Grundgesetz* see Dirk Looschelders, 65 (2001) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 461 (475 et seq.).

16 Jan Kropholler*, Internationales Privatrecht* (6th Edition, 2006), § 36 II.

17 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 285 et seq.

18 Michael Stürner*, Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (324); Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.04, 327.

19 Jan Kropholler*, Internationales Privatrecht* (6th Edition, 2006), § 36 V; Michael Stürner*, Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (324); Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.04, 327 et seq.

20 Michael Stürner*, Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (324); Jan Kropholler, *Internationales Privatrecht* (6th Edition, 2006), § 36 V.

In German law, fundamental values are enshrined in the German constitution (*Grundgesetz,* GG).[21] Over the last few decades, German courts have relied more and more on provisions of the *Grundgesetz* to disregard the application of foreign law. This article discusses the implications of this development. It will first recall the landmark "Spaniard" judgment of the Federal Constitutional Court of Germany, which introduced constitutional aspects to the field of private international law (II.) and explain the consequences of this judgment leading to the reform of the German rules of private international law in 1986 (III.). It then examines case law in various areas of law to demonstrate the impact of the Constitution on the application of the *ordre public* (IV.) and assesses the influence of European legislation on public policy (V.). Finally, future developments of the *ordre public* will be assessed and evaluated (VI.).

II. How it all started: the Spaniard case of the Federal Constitutional Court

The 1971 ruling in the Spaniard case[22] of the Federal Constitutional Court (*Bundesverfassungsgericht*) marks the beginning of the constitutionalization process. German authorities had refused to marry a German-Spanish couple because Spanish marriage law determining the conditions of marriage for the catholic Spanish fiancé, applicable under the German rules of private international law, did not recognise the (German) fiancée's divorce from her former husband under German law. From the perspective of the applicable Spanish marriage law, the German fiancée was still married to her former spouse and thus unable to enter into a second marriage with the Spanish fiancé. When the case came before the *Bundesverfassungsgericht*, the Court upheld their complaint and ruled that the German authorities were to marry the couple. This was the first case in which the Court had the opportunity to rule on the relationship of the GG and the rules of private international law. The Court made clear that not only the rules of German private international law but also the application of foreign law on the basis of these rules must be measured against the basic rights enshrined in the

21 Basic Law for the Federal Republic of Germany, English translation available at: https://www.gesetze-im-internet.de/englisch_gg/.

22 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 = NJW 1971, 1509.

German constitution.[23] The Court held that refusing to marry the claimants on the ground that the home law of the Spanish fiancée did not recognise the German fiancée's divorce violated the couple's right to enter into a marriage, protected by Art. 6 GG of the German Constitution.[24]

The Court's ruling presented a significant volte-face in how the Constitution's effect on the field of private international law was perceived. The prevailing opinion prior to this decision among German courts[25] and scholars[26] saw this field of law largely excluded from the scope of constitutional provisions. Private international law was seen as a "neutral" and rather "technical" area which called for the application of the law with the closest connection to a case.[27] The operation of these rules was not to be hindered by a thorough constitutional review. It was accepted that a review was possible when rules led to the application of German law. And it was also widely agreed upon that the German conflict-of-law rules had to be in conformity with constitutional requirements,[28] although different views existed as to how to achieve this result. If, however, a foreign law was to be applied, the *ordre public* (then Art. 30 EGBGB) only required a foreign rule to be disregarded if "fundamental principles of the German constitution, which are an unmovable basis of the public or social life in Germany, are violated. Only in such severe cases could foreign rules incompatible with the

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23 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 = NJW 1971, 1509 Leitsatz 2: „Die Vorschriften des deutschen Internationalen Privatrechts und die Anwendung des durch sie berufenen ausländischen Rechts im Einzelfall sind an den Grundrechten zu messen."

24 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 (80 et seq.) = NJW 1971, 1509 (1512).

25 BGH 12.2.1964 – IV AR (VZ) 39/63 – BGHZ 41, 136 (150 et seq.) = NJW 1964, 976 (979); BGH 29.4.1964 – IV ZR 93/63 – BGHZ 42, 7 (12 et seq.) = NJW 1964, 2013 (2014). For further references see Jan Kropholler, *Gleichberechtigung durch Richterrecht. Erfahrungen im Familienrecht – Perspektiven im internationalen Privatrecht* (1975), 81 et seq.

26 Murad Ferid, 'Wechselbeziehungen zwischen Verfassungsrecht und Kollisionsnormen', in: Ernst von Caemmerer, Arthur Nikisch and Konrad Zweigert (eds), *Vom deutschen zum europäischen Recht – Festschrift für Hans Dölle* (1963) Vol. 2, 119 (143 et seq.).

27 On this debate see Dieter Henrich, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1974, 105; Jan Kropholler, *Gleichberechtigung durch Richterrecht. Erfahrungen im Familienrecht – Perspektiven im internationalen Privatrecht* (1975), 82 et seq.

28 Hans Dölle, *Internationales Privatrecht* (2nd Edition, 1972), 20.

Grundgesetz not be applied".[29] In other words, a violation of constitutional rights was only considered incompatible with public policy if the essential content of a given right was affected.[30] This confined the reach of the *ordre public* to severe violations of constitutional rights.

In overruling this case law, the Federal Constitutional Court reminded the ordinary courts that according to Art. 1(3) GG all German authorities are bound by the basic rights set out in the Constitution.[31] The basic rights enshrined in the Constitution are the foundation of a "free and democratic order in Germany."[32] The reach of these rights must therefore not depend on the rules of the EGBGB; it must be determined directly and solely on the basis of these rights.[33] A limited control to protect parties against foreign rules is not justifiable. Thus, violations of rights enshrined in the Constitution must lead to courts disregarding the foreign law.[34]

III. The aftermath of the Spaniard case I: reforming the EGBGB at last

Even though it is undisputed that the Spaniard case of 1971 marked a turning point in the conception of the constitution's effect on the field of private international law, it was a while before the full force of this decision was felt. This is well illustrated by the existence of conflict-of-law rules in the

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29 BGH 29.4.1964 – IV ZR 93/63 – NJW 1964, 2013 (2014): „Auf Grund des Art. 30 EGBGB ist auch die Anwendung eines ausländischen Gesetzes ausgeschlossen, wenn dadurch wesentliche Verfassungsgrundsätze, die eine unverrückbare Grundlage des deutschen staatlichen oder sozialen Lebens bilden, verletzt werden. Nur in derartig schwerwiegenden Fällen scheidet die Anwendung ausländischer Vorschriften, die sich mit dem GG nicht vereinbaren lassen, aus."

30 BGH 29.4.1964 – IV ZR 93/63 – NJW 1964, 2013 (2014) with reference to Karl Heinz Neumayer, 'Zur positiven Funktion der kollisionsrechtlichen Vorbehaltsklausel', in: Ernst von Caemmerer, Arthur Nikisch and Konrad Zweigert (eds), *Vom deutschen zum europäischen Recht. Festschrift für Hans Dölle* (1963) Vol. 2, 179 (202).

31 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 (72 et seq.) = NJW 1971, 1509 (1510 et seq.).

32 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 (73) = NJW 1971, 1509 (1511): „freiheitlich-demokratischen Ordnung des staatlichen Lebens".

33 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 (73) = NJW 1971, 1509 (1511).

34 BVerfG 4.5.1971 – 1 BvR 636/68 – BVerfGE 31, 58 (73 et seq.) = NJW 1971, 1509 (1511).

EGBGB which did not comply with the constitutionally protected principle of equality of men and women (Art. 3(2) GG). The conflict rules in family law used the nationality of the husband as the connecting factor to determine the applicable law in many family matters such as the law of divorce or of the property regime. This discrimination against wives was defended by scholars arguing that the application of conflict-of-law rules "is merely a technical process […] by which neither the husband nor the wife receives preferential treatment." [35] And given the possibility that the law of the husband would be more favourable to the wife than the law of her nationality, she might have an interest in the application of the law of the husband.[36] Even though this view was not undisputed,[37] courts were reluctant to deviate from the traditional approach for a significant period, hoping that the legislature would step in to alter the law.[38] It was only in the 1980s when the *Bundesgerichtshof* (BGH),[39] i.e. the highest court in civil and commercial matters, and again the *Bundesverfassungsgericht* made clear that such a connecting factor violated the principle of equal treatment of men and women. Such a connecting factor generally subordinated a wife – unlike her

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35 Hans Dölle, *Internationales Privatrecht* (2nd Edition, 1972), 21: „[Eine Verfassungswidrigkeit ist [n]ach herrschender Ansicht [zu verneinen], da die Anknüpfung primär ein technischer Vorgang ist, durch den in materieller Hinsicht weder der Mann noch die Frau bevorzugt wird …". This view was also shared by the *Bundesgerichtshof*, see BGH 18.1.1954 – IV ZR 144/53 – NJW 1954, 837.

36 Hans Dölle, *Internationales Privatrecht* (2nd Edition, 1972), 57: „Man mag fragen, ob diese Bevorzugung des Mannesrechts angesichts der heute in Deutschland anerkannten Gleichberechtigung von Mann und Frau noch Verfassungsmäßig ist …. Das IPR hat zwar mit materiellrechtlichen Wertungen wenig zu tun. Allein, die Frau kann u.U. ein Interesse haben, nicht dem Recht des Mannes unterworfen zu sein, sondern ihrem eigenen. Die Gleichberechtigung ist hier jedoch zumindest einer unter mehreren Gesichtspunkten der besonderen ‚Anknüpfungsgerechtigkeit' des IPR …".

37 Alexander N. Makarov, 17 (1952) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 382 (385); see also Dieter Henrich, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1974, 105 (106 et seq.) (with regard to certain albeit not all conflict rules that used the husband's nationality as connecting factor); Jan Kropholler, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1976, 316.

38 See OLG Stuttgart 22.5.1978 – 17 UF 20/78 G – IP-Rechtsprechung 1978, No. 54, 117 (118). For further references see Paul Heinrich Neuhaus, *Grundbegriffe des Internationalen Privatrechts* (2nd Edition, 1976), 46 et seq.

39 BGH 8.12.1982 – IVb ZR 334/81 – BGHZ 86, 57 (61 et seq.) = NJW 1983, 1259 (1260).

husband – to a law different from her home law and did so in such a way that she could also not change the applicable law, even by acquiring another nationality.[40] The *Bundesverfassungsgericht* thus declared the rules determining the law applicable to the matrimonial property regime (Art. 15 EGBGB old version) [41] and to divorces (Art. 17 EGBGB old version) [42] void.

These decisions placed the legislature under strong pressure to act. As consequence, in 1986 a new EGBGB was promulgated.[43] In so doing, conflict-of-law rules were provided with a new basis, aligning them with constitutional requirements. Three changes deserve attention.

First, the newly formed Art. 6 EGBGB expressly refers to basic rights (*Grundrechte*) of the German constitution as values protected by public policy. Applications of foreign law resulting in the violation any of these protected human rights must not be implemented by a German court.[44] By introducing this reference, the German legislature sent a clear signal that the public policy doctrine must be open to constitutional values.

Second, the legislature created special clauses to ensure that constitutional rights are not violated,[45] such as Art. 13(2) EGBGB.[46] Art. 13(2) EGBGB mandates the application of the law of the forum when applying foreign marriage law violates the individual freedom to marry, protected by

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40 Alexander N. Makarov, 17 (1952) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 382 (385); Michael Sachs, *Grenzen des Diskriminierungsverbots* (1987), 279.

41 BVerfG 22.2.1983 – 1 BvL 17/81 – BVerfGE 63, 181 (194) = NJW 1983, 1968 (1970).

42 BVerfG 8.1.1985 – 1 BvR 830/83 – BVerfGE 68, 384 (390) = NJW 1985, 1282.

43 Art. 1 Gesetz zur Neuregelung des Internationalen Privatrechts of 25 July 1986, BGBl. I, 1142, 1143. For an overview see Jürgen Basedow, *Neue Juristische Wochenschrift (NJW)* 1986, 2971 et seq.

44 Regierungsbegründung zum Gesetz zur Neuregelung des IPR, BT-Drucksache 10/504 of 20 October 1983, 44; see also Dirk Looschelders, 65 (2001) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 461 (478).

45 Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 121 et seq.; specifically regarding the creation of Art. 13(2) no. 3 EGBGB: Regierungsbegründung zum Gesetz zur Neuregelung des IPR, BT-Drucksache 10/504 of 20 October 1983, 53.

46 Regierungsbegründung zum Gesetz zur Neuregelung des IPR, BT-Drucksache 10/504 of 20 October 1983, 53.

Art. 6 GG, provided that the following provisions are met: one of the persons engaged to be married is a German national or has his habitual residence in Germany (no. 1), both persons have taken necessary and reasonable steps to set aside the obstacle (no. 2) and refusing to marry the engaged would violate their freedom of marriage, for example because the home state law of one the fiancés does not recognise a German divorce decree or a foreign divorce decree recognised in Germany (no. 3).[47] Thus, in cases having sufficient connections with Germany, a foreign law preventing one of the fiancés from marrying may be replaced by German law if the constitutionally protected freedom of marriage demands so and the parties have taken all reasonable steps to overcome the obstacle of the home state law – for example by trying to have a divorce decree in their home jurisdiction recognised. Recently, Art. 13 EGBGB was amended even further to tighten the control over marriages officiated abroad if one of the parties had not reached the age of 16 at the time of marriage (see below section IV. 3. a)).

Finally, since the 1986 reform of the EGBGB, the provisions regarding the general effects of marriage, the matrimonial property regime as well as divorces (Art. 14-17 EGBGB) no longer refer to the home state law of the husband. Instead, they followed a cascade approach, according to which different factors apply starting from the common home state law of both spouses leading to the principle of closest connection (so called "*Kegel'sche Leiter*"). Meanwhile some of these provisions have been replaced by EU law (Art. 17 EGBGB) or will be replaced soon (Art. 15 EGBGB).

IV. The aftermath of the Spaniard case II: controlling the application of foreign law by recourse to the Grundrechte

Since the 1986 reform, it has fallen to the judiciary to decide quite a number of cases in which violations of the Constitution called for the invocation of the public policy reservation. The following overview analyses important cases in different areas of the law. The survey will show that the frequency

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47 Article 13(2) no. 3 EGBGB states: If under this [foreign] law, a requirement is not fulfilled, German law shall apply to that extent, if it is incompatible with the freedom of marriage to refuse the conclusion of the marriage; in particular, the previous marriage of a person engaged to be married shall not be held against him or her if it is nullified by a decision issued or recognised here or the spouse of the person engaged to be married has been declared dead. (translation by Juliana Moersdorf-Schulte, available at: http://www.gesetze-im-internet.de/englisch_bgbeg/ englisch_bgbeg.html).

with which the public policy exception has been successfully applied differs depending on the area of law. It further reveals that in some areas courts have recently tightened the grip by resorting to constitutional values.

1. Contract law

In the field of contract law, the *ordre public* reservation does not play a major role. The judiciary has found violations of public policy mainly in very special circumstances.

The BGH, for instance, ruled that claiming payment out of a directly enforceable suretyship violates public policy if the creditor (a bank) is controlled by a foreign state that has previously disowned the surety of all the shares it held in the chief debtor.[48] The BGH considered such a claim a dispossession without compensation of the surety, violating the constitutionally protected right of ownership of Art. 14 GG.[49]

Excessively high contractual penalties may also violate the *ordre public* reservation, allowing courts to reduce the penalties.[50] Foreign legal orders not containing provisions for objecting contractual obligations on the grounds of abuse of law may also contradict public policy.[51] Nowadays, the

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48 BGH 28.4.1988 – IX ZR 127/87 – NJW 1988, 2173 (2174).

49 BGH 28.4.1988 – IX ZR 127/87 – NJW 1988, 2173 (2175). For details on the question of whether foreign surety law is compatible with public policy if the foreign law imposes an excessively heavy financial burden on the surety see Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 21 Rom I VO para. 60 et seq.

50 This finding is commonly traced back to OLG Hamburg 23.12.1902 – II. ZS – summarised in OLGE 6 (1903), 231; see Rupert Doehner, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 21 Rom I VO para. 12; Gerhard Hohloch, in: Harm-Peter Westermann and Georg Maier-Reimer (eds), *Erman BGB* (15th Edition, 2017), Art. 21 Rom I VO para. 5; Dieter Martiny, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 21 Rom I VO para. 4; Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 21 Rom I VO para. 56.

51 LG Frankfurt 11.12.1979 – 3/10 O 123/79 – NJW 1981, 56 (58); Rupert Doehner, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 21 Rom II VO para. 12; Gerhard Hohloch, in: Harm Peter Westermann and Georg Maier-Reimer (eds), *Erman BGB* (15th Edition, 2017), Art. 21 Rom I VO para. 5; Dieter Martiny, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 21 Rom I VO para. 4;

public policy reservation for most contractual obligations is found in Art. 21 Rome I Regulation, which has superseded Art. 6 EGBGB in the scope of application of the Rome I Regulation.[52]

2. Tort law

In tort law, the impact of the public policy reservation has been a little larger but not of great importance. There is a wide consensus that punitive damages (U.S. style) might violate German public policy.[53]

Accordingly, the BGH has, in 1992, declined the possibility of recognising punitive damages awarded in an American judgment to a claimant who had suffered sexual abuse and battery by the tortfeasor.[54] According to the BGH, the general yardstick of German law is the principle of adequate compensation, and the aim of punishment of the tortfeasor is a matter to be dealt with by criminal law. The recognition and enforcement of punitive damages

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Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 21 Rom I VO para. 47; Karsten Thorn, in: Peter Bassenge, Jürgen Ellenberger, Christian Grüneberg et al. (eds), *Palandt BGB* (77th Edition, 2018), Art. 21 Rom I VO para. 5.

52 Rupert Doehner, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 21 Rom I VO para. 12; Gerhard Hohloch, in: Harm-Peter Westermann and Georg Maier-Reimer (eds), *Erman BGB* (15th Edition, 2017), Art. 21 Rom I VO para. 5.

53 Matteo Fornasier, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 40 EGBGB para. 144; Gerhard Hohloch, in: Harm-Peter Westermann and Georg Maier-Reimer (eds), *Erman BGB* (15th Edition, 2017), Art. 26 Rom II VO para 7; Dominique Jakob and Peter Picht, in: Thomas Rauscher (ed), *Europäisches Zivilprozessrecht und Kollisionsrecht Kommentar* (4th Edition, 2016), Art. 26 Rom II VO para. 24; Abbo Junker, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 26 Rom II VO para. 25; Michael Stürner, in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 26 Rom II VO para. 44 and 46; Karsten Thorn, in: Peter Bassenge, Jürgen Ellenberger, Christian Grüneberg et al. (eds), *Palandt BGB* (77th Edition, 2018), Art. 26 Rom II VO para. 2 et seq., all referring to the judiciary practice under Art. 6 EGBGB before the enactment of the Rome II Regulation.

54 BGH 4.6.1992 – IX ZR 149/91 – NJW 1992, 3096 (3103). On the prerequisites of recognition and enforcement of money judgments from States outside the European judicial area in Germany see Wolfgang Wurmnest, 23 (2005) *Berkeley Journal of International Law (Berk. J. Int'l Law)*, 175 et seq.

awards bare the danger of circumventing the procedural protection of defendants under criminal law and are thus incompatible with public policy.[55] Nevertheless, such damages are compatible with public policy according to the BGH as far as they do serve a purpose different from punishment, for example by awarding the claimant a general compensation for legal fees or losses that are hard to prove or quantify.[56] Regarding the application of a foreign law calling for non-compensatory damages, it is important to note that, in 1999, the German legislature introduced Art. 40(3) nos. 1 and 2 EGBGB with the intention of preventing German courts from awarding punitive and multiple damages.[57] This provision bars damage claims under foreign tort law as far as they serve a purpose other than compensating the plaintiff for losses suffered.[58] Today, Art. 40(3) EGBGB (and also Art. 6 EGBGB) are mostly superseded by the Rome II Regulation as far as delictual obligations in civil and commercial matters are concerned.[59] Although the Rome II Regulation takes a softer stance towards non-compensatory damages[60] as some EU Member States as well as EU law permit non-compensatory damages, many authors argue that U.S. style punitive damages remain incompatible with German public policy.[61] Other European jurisdiction, however, take a much softer stance towards such damages and a dis-

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55 BGH 4.6.1992 – IX ZR 149/91 – NJW 1992, 3096 (3103).

56 BGH 4.6.1992 – IX ZR 149/91– NJW 1992, 3096 (3103).

57 Regierungsbegründung zum Gesetz zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen, BT-Drucksache 14/343 of 1 February 1999, 12.

58 Matteo Fornasier, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 40 EGBGB para. 136.

59 Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 322.

60 See Angelika Fuchs, in: Peter Huber (ed), *Rome II Regulation - Pocket commentary* (2011), Art. 26 Rome II para. 28.

61 Gerhard Hohloch, in: Harm Peter Westermann and Georg Maier-Reimer (eds), *Erman BGB* (15th Edition, 2017), Art. 26 Rom II VO para. 7; Dominique Jakob and Peter Picht, in: Thomas Rauscher (ed)*, Europäisches Zivilprozessrecht und Kollisionsrecht Kommentar* (4th Edition, 2016), Art. 26 Rom II VO para. 24; Abbo Junker, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 26 Rom II VO para. 25; Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 26 Rom II VO para. 44 and 46; Art. 26 Rom II VO para. 2 et seq; Jan von Hein, in: Gralf–Peter Calliess (ed), *Rome Regulations Commentary* (2nd Edition, 2015), Art. 26 Rome II Regulation para. 20.

cussion has emerged as to what extent the Rome II Regulation may influence national concepts of public policy.[62] Without touching upon this debate, it is apparent that especially European private law (but also German law) has in some areas of law strongly embraced the idea that claims for damages can also serve preventive purposes.[63] It is therefore not possible to reject *per se* the application of foreign rules awarding damages that (from a traditional perspective) go beyond mere compensation for public policy reasons. Against this background it is very doubtful that the 1992 judgment of the BGH on recognition and enforcement of punitive damages would be handed down as straightforwardly today as it was done nearly 30 years ago.[64]

3. Family law

In this area of law, *ordre public* violations have been much more frequent. German courts have found public policy violations in numerous cases where foreign laws were considered incompatible with constitutional values. The following will provide a short overview of the most important cases.

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62 On this discussion see Thomas Ackermann, 'Antitrust Damages Actions under the Rome II Regulation', in: Mielle Bulterman, Leigh Hancher, Alison McDonnell et al. (eds), *Liber Amicorum Piet Jan Slot* (2009), 109 (118); Jan von Hein, 'Punitive Damages in European and Domestic Private International Law', in: Alexander Bruns and Masabumi Suzuki (eds), *Preventive Instruments of Social Governance* (2017), 143 (151 et seq.); Cedric Vanleenhove, *Punitive Damages in Private International Law* (2016), 80 et seq. (241).

63 For a detailed analysis of the European rules see Christian Heinze, *Schadensersatz im Unionsprivatrecht* (2017).

64 Astrid Stadler, in: Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (15th Edition, 2018), § 328 ZPO Rn. 25.

a) Validity of foreign marriages

Various courts have found a number of different minimum marriageable ages imposed by foreign marriage laws incompatible with national values.[65] Most of the German judiciary seems to have conceded that a marriageable age of 14 years or younger violates public policy, as sexual intercourse of any sort with minors below the age of 14 years is a criminal offence pursuant to § 176 of the German Criminal Code.[66] The intended protection of these minors has to apply to international cases, as it safeguards their right to physical integrity protected by Art. 2(2) GG.[67] Very recently, the German legislature has, however, introduced a new form of reservation clause in Art. 13(3) EGBGB for minimum marriageable ages,[68] which will alter the existing findings of the judiciary. Art. 13(3) no. 1 EGBGB now declares all marriages concluded after a certain point of time null and void under German law if one of the parties has not reached the age of 16 at the time of marriage – irrespective of the law applicable and the facts of the case. Further, any marriage shall be annulled under German law, if one of the parties has reached the age of 16 but not 18 at the time of marriage, Art. 13(3) no. 2 EGBGB. This new piece of legislation has already led to controversies and many questions regarding the application of these new reservation clauses and their constitutionality remain unanswered for now.[69]

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65 AG Hannover 7.1.2002 – 616 F 7355/00 – BeckRS 2002, 1869 (15 years); AG Offenbach 30.10.2009 – 314 F 1132/09 – BeckRS 2010, 23013 (16 years); declining a violation at the age 15: KG 7.6.1989 – 18 U 2625/88 – BeckRS 1989, 2838.

66 OLG Köln 4.9.1996 – 16 Wx 181/96 – NJWE-FER 1997, 55 (Iranian law: 10 years); KG 21. 11. 2011 – 1 W 79/11 – FamRZ 2012, 1495 (Lebanese law: 14 years); leaving the question of a public policy violation unanswered OLG Bamberg 12.5.2016 – 2 UF 58/16 – BeckRS 2016, 09621: appeal to the BGH pending: XII ZB 292/16.

67 Jennifer Antomo, *Neue Juristische Wochenschrift (NJW)* 2016, 3558 (3561 et seq.); Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 344; Jan von Hein, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 6 EGBGB para. 259.

68 Gesetz zur Bekämpfung von Kinderehen of 17 July 2017, BGBl. I, 2429 et seq.

69 See for more details: Jennifer Antomo, 50 (2017) *Zeitschrift für Rechtspolitik (ZRP)*, 79 (81 et seq.); Christian Friedrich Majer, *Neue Zeitschrift für Familienrecht (NZFam)* 2017, 537 (540 et seq.); Lena-Maria Möller and Nadjma Yassari, *Kritische Justiz (KJ)* 2017, 269 et seq. The authors criticise especially the fact that marriages are declared null and void without regarding the circumstances of each case.

Apart from the minimum marriageable age, different impediments to marriage imposed by foreign laws have been considered to violate public policy. The BGH found a foreign law obstructing a marriage due to different religious affiliations of the engaged incompatible with constitutionally guaranteed legal principles.[70] The constitution guarantees equal access to civil duties, rights, and privileges of a general nature regardless of religious affiliation. This includes equal access to marriage. Foreign laws implementing such obstacles cannot be applied.[71]

Public policy has not only made courts disregard certain foreign impediments to marriage; it has also forced courts to restrict certain forms of marriages permissible under foreign law. Foreign marriage laws permitting polygamy, for example, have been disregarded where German authorities were to marry the parties and one partner was already married.[72] The special protection Art. 6 GG granted to the institution of marriage prohibits such unions in Germany. The recognition of polygamous marriages officiated abroad, on the other hand, does not violate national public policy.[73]

b) Divorce

The legal institute of divorce itself has experienced an increase in protection by the German judiciary over the last few decades. Initially, the BGH found that foreign laws not providing any means of divorce accorded with German values and principles.[74] A more recent decision of the BGH shows that the court has changed its view on that matter and that it is willing to protect access to divorce before German courts.[75] The court held foreign laws treating marriage as inseparable for life incompatible with the freedom of marriage, Art. 6 GG, and thus a public policy violation.[76]

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70 BGH 12. 5. 1971 – IV AR (Vz) 38/70 – NJW 1971, 1519.
71 BGH 12. 5. 1971 – IV AR (Vz) 38/70 – NJW 1971, 1519 (1521).
72 BVerwG 30.4.1985 – 1 C 33/81 – NJW 1985, 2097.
73 Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 357.
74 BGH 12.2.1964 – IV AR (Vz) 39/63 – NJW 1964, 976; BGH 29.4.1964 – IV ZR 93/63 – NJW 1964, 2013.
75 BGH 11.10.2006 – XII ZR 79/04 – NJW-RR 2007, 145 (148 et seq.).
76 BGH 11.10.2006 – XII ZR 79/04 – NJW-RR 2007, 145 (149).

Foreign laws providing the possibility of "unilateral" divorce for one spouse only (usually the husband, whereas the wife can demand a divorce only on certain grounds) have also been problematic on public policy grounds. Such divorces are allowed, for example, in countries whose divorce laws are based on the tradition of Islamic law (so-called "ṭalaq divorces"). Courts have found such divorces adverse to the *ordre public* in cases in which their application led to results discriminating against women and thus violating Art 3 GG.[77] However, it is not the divorce as such that is held incompatible with national values and principles. Rather, the BGH has found divorce rules in line with public policy whenever applying these rules did not discriminate against the wife – for example because the wife agreed to the divorce[78] – or because the divorce was permissible under the law of the forum as well.[79]

c) Custody

In this area, for example, the laws of countries with strict distribution of custody according to gender and religion have been prone to violate public policy. For example, Courts have disregarded foreign rules that made transferring any kind of custody dependant on religious affiliation with Islam.[80]

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77 OLG Frankfurt a. M. 18.1.2001 – 1 UF 251/00 – BeckRS 2001, 30156129; OLG Hamm 11.10.2010 – 6 UF 59/10 – BeckRS 2011, 18163 (public policy violation because wife had no possibility of divorcing her husband). BayObLG 29.11.1982 – BReg. 1 Z 54/82 – BayObLGZ 1982, 389; OLG Stuttgart 3.12.1998 – 17 VA 6/98 – BeckRS 1998, 13578 (public policy violation because the wife had no knowledge of her husband's unilateral divorce intent and did not accept the divorce afterwards). See for further details: Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 373.

78 BGH 6.10.2004 – XII ZR 225/01 – NJW-RR 2005, 81 (84).

79 BGH 6.10.2004 – XII ZR 225/01 – NJW-RR 2005, 81 (84); similarly: OLG Frankfurt a. M. 11.5.2009 – 5 WF 66/09 – BeckRS 2009, 2441; Tobias Helms, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2011, 1765 (1772) with further references.

80 OLG Düsseldorf 23.3.1993 – 6 UF 4/92, NJW-RR 1994, 7; OLG Hamm 8.2.1990 – 2 UF 216/89, BeckRS 2010, 26684; Recently most Islamic countries have introduced the principle of the best interests of the child in their custody rules, see for a comparative analysis the contributions in Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (2017).

This dependency on religious belief has been considered incompatible with the discrimination prohibition in Art. 3 GG. Furthermore, foreign legal orders transferring custody of minors to one parent, e.g. the father, without considering the minor's well-being violate public policy.[81] The BGH concluded that neglecting the child's well-being breaches its constitutionally guaranteed rights of physical integrity as well as free development of the personality protected by Art. 1 and 2 GG.[82]

4. Succession law

In the area of succession law, the issue of public policy has only recently become of importance,[83] as the reported judgments confirming violations of public policy were essentially handed down in the last 10 years.[84] Problems have arisen particularly regarding foreign laws that, based on religious provisions, contained discriminatory provisions on the allocation of the inheritance.[85]

In 2010, the OLG Frankfurt a.M. disregarded Egyptian succession law because its application resulted in an unequal treatment of men and women.[86] It contained a provision in terms of which wives inherited less

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81 BGH 14.10.1992 – XII ZB 18/92 – NJW 1993, 848.

82 BGH 14.10.1992 – XII ZB 18/92 – NJW 1993, 848 (850).

83 See Gerhard Hohloch, 'Internationales Erbrecht und Ordre public – Stand, Bedeutung und Perspektiven', in: Rolf Stürner, Hiroyuki Matsumoto, Wolfgang Lüke and Masahisa Deguchi (eds), *Festschrift für Dieter Leipold zum 70. Geburtstag* (2009), 997 et seq.

84 OLG Hamm 28.2.2005 – 15 W 117/04 – ZEV 2005, 436 (439); OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 – NJW-RR 2009, 732; OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 – ZEV 2011, 135; OLG München 16.4.2012 − 31 Wx 45/12 – NJW-RR 2012, 1096.

85 Anatol Dutta, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 35 EuErbVO para. 9; Dirk Looschelders, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 35 EuErbVO para. 19; Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 404.

86 OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 – ZEV 2011, 135. Criticising this decision: Thomas Rauscher and Steffen Pabst, *Neue Juristische Wochenschrift (NJW)* 2011, 3547 (3350).

than husbands on the death of their spouse. In 2012, the OLG München ruled similarly regarding Iranian succession law, which equally discriminated against women.[87] Both court decisions show that the breach of gender equality subject to the protection of Art. 3 GG may violate the *ordre public*. Other decisions show that courts have also rejected foreign succession laws excluding family members from the inheritance because they had different religious beliefs from the deceased.[88] Such a discrimination is adverse to Art. 3(3) GG and was considered incompatible with public policy.

5. Analysis

The overview reveals significant differences with regard to the frequency of public policy violations in the areas of the law that we have adumbrated. While violations in the areas of family and succession law have been relatively numerous, only very few cases concern the application of foreign contract and tort law. In the following we try to explain this imbalance.

a) Special connecting factors

One reason for the imbalanced application can be found in the varying usage of special connecting factors in the different areas of private international law.

The rules on international contract and tort law provide special connecting factors for overriding mandatory provisions that lead to the application of the law of the forum (Art. 9 Rome I Regulation and Art. 16 Rome II Regulation). These rules ensure that important provisions of German law are enforced regardless of the law that otherwise applies. Thus, the choice of law rules already respect a forum's sensitivity to certain areas of law, making recourse to public policy largely unnecessary.[89] The protection granted by these rules goes further than the protection by public policy as

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87 OLG München 16.4.2012 − 31 Wx 45/12 − NJW-RR 2012, 1096.

88 OLG Hamm 28.2.2005 – 15 W 117/04 − ZEV 2005, 436 (439); OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 − NJW-RR 2009, 732; OLG Frankfurt a. M. 10.5.2010 – 20 W 4/10 − ZEV 2011, 135.

89 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 278.

the application of mandatory overriding provisions does not depend on a result control. In addition, the multitude of special connecting factors ensures that certain standards and values are maintained and not circumvented by the application of a foreign, less protective rule, thereby making recourse to public policy largely obsolete.[90]

By contrast, the situation in family and succession law is somewhat different. There are no rules on overriding mandatory provisions. Therefore, recourse to public policy is more important for protecting fundamental German values.

b) Cultural differences and religious influences

Moreover, it seems that in contract and tort law there is – despite significant differences – more agreement on certain basic principles around the globe than in the fields of family and succession law that are shaped by very different cultural and religious influences. Therefore, public policy violations are more likely especially when courts protect the principle of access to marriage, as partly protected by Art. 6 GG, or the principle of non-discrimination, as enshrined in Art. 3 GG, with heightened scrutiny. An early example of this development was the extension of the *ordre public* in the area of marriage law leading to the increased possibility of fiancés being able to get married as a consequence of the Federal Constitutional Court's Spaniard ruling (see supra section II.). Later foreign divorce laws came under closer scrutiny and the possibility of the spouses to obtain a divorce was strengthened (see supra section III.). Another example of this trend may be found in the area of succession law where most judgements finding public policy violations are of recent origin.[91] While courts have been reluctant to interfere with foreign succession law in the past, the decisions show that courts have lately become more willing to do so. For example, the OLG Hamm found provisions of Iranian succession law that discriminated against

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90 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 278; Moritz Renner, in: Gralf–Peter Calliess (ed), *Rome Regulations Commentary* (2nd Edition, 2015), Art. 9 Rome I Regulation para. 1.

91 The oldest one stems from 2005: OLG Hamm 28.2.2005 – 15 W 117/04 − ZEV 2005, 436 (439).

women to be compatible with public policy back in 1992.[92] Only a few years later, courts have found many discriminatory provisions of religiously inspired foreign succession rules incompatible with the public policy of the forum.[93] In sum, enforcing constitutional values has led the German judiciary to find public policy violations more readily, making rules differing from German law less likely to be tolerated. Naturally, this increases the frequency of public policy violations in the areas of family and succession law.

V. The Europeanisation of the public policy doctrine

1. Defining the content of the public policy: National or European concept

The *ordre public* is also a key element of the European conflict-of-law rules. All European regulations on private international law allow courts to disregard foreign law if an application is contrary to the forum's public policy. The question arises whether the European reservation clauses are to be interpreted according to autonomous European standards. A closer look at the wording of the provisions reveals that this cannot be the case. All of the European choice-of-law Regulations state that the application of foreign law is to be denied "if such application is manifestly incompatible with the public policy (*ordre public*) […] *of the forum*".[94] The wording emphasising the values of the forum shows that, in general, public policy is still defined

92 OLG Hamm 29.4.1992 – 15 W 114/91 − IPRax 1994, 49 (53).

93 OLG Hamm 28.2.2005 – 15 W 117/04 − ZEV 2005, 436 (439); OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 − ZEV 2011, 135; OLG München 16.4.2012 − 31 Wx 45/12 − NJW-RR 2012, 1096; similarly: OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 − NJW-RR 2009, 732. These cases concerned the application of foreign laws inspired by "Islamic law" (which is of course a very heterogenic source of law). On the succession law in Egypt, Tunisia and Morocco, see Andreas Pattar, *Islamisch inspiriertes Erbrecht und deutscher Ordre public* (2007), 281 et seq.

94 Art. 21 Rome I Regulation, Art. 26 Rome II Regulation, Art. 12 Rome III Regulation, Art. 35 Succession Regulation (emphasis added).

by national, not European values. As a national concept, it preserves and protects the values of the forum, which may differ across Europe.[95]

The observation that the *ordre public* is still governed by national values does not mean, however, that its content may not be shaped by recourse to European values. European law is an integral part of each Member State's legal system and penetrates the legal orders of its Member States.[96] This influence of European law has also extended to the field of public policy, enriching formerly purely national doctrines.[97] By supplementing the existing national values, public policy now also serves in the protection of European values and standards incorporated into German law.[98] The following four sources are the primary sources of the European values protected by national courts throughout Europe:[99] The Charter of Fundamental Rights of the European Union,[100] the European Convention on Human Rights

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95 Dieter Martiny, 'Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht', in: Michael Coester, Dieter Martiny, Karl August von Sachsen Gessaphe (eds), *Privatrecht in Europa: Vielfalt, Kollision, Kooperation. Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag* (2004), 523 (531 et seq.); Götz Schulze, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 26 Rom II VO para. 2; Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 21 Rom I VO para. 19; Susanne Gössl, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest, *BeckOGK* (December 2017), Art.12 Rom III VO para. 3.

96 Pietro Franzina, in: Ulrich Magnus and Peter Mankowski (eds), *European Commentaries of Private International Law* (2015), Art. 21 Rome I Regulation para. 28.

97 Michael Stürner, 'Europäisierung des (Kollisions-)Rechts und nationaler ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 463 (464).

98 Pietro Franzina, in: Ulrich Magnus and Peter Mankowski (eds), *European Commentaries of Private International Law* (2015), Art. 21 Rome I Regulation para. 28; Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 271.

99 See Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.03 [B], 316.

100 Cf. Recital 58 of the Succession Regulation; Recital 54 Matrimonial Property Regulation.

(ECHR),[101] the four fundamental freedoms of the EU[102] and the general legal principles developed by the Court of Justice of the European Union (ECJ).[103] In addition, the contours of European private law shape the reach of the public policy reservation.

Simultaneously, European values also set boundaries to the application of the *ordre public*. Disregarding foreign law may not contravene European law. The content of national public policy is not excluded from the scrutiny of European law; invoking the public policy exception must always be in line with European provisions.[104] The steadily increasing number of European private law and choice of law rules are likely to advance the influence of European values on the concept of public policy.[105] Limiting the application of different national *ordre public* reservations, this corrective function of the European influence will steadily increase the consistency of public policy applications by national courts. In the long term, there will be an

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101 Dieter Martiny, 'Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht', in: Michael Coester, Dieter Martiny, Karl August von Sachsen Gessaphe (eds), *Privatrecht in Europa: Vielfalt, Kollision, Kooperation. Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag* (2004), 523 (533 et seq.); Karsten Thorn, in: Peter Bassenge, Jürgen Ellenberger, Christian Grüneberg et al. (eds), *Palandt BGB* (77th Edition 2018), Art. 21 Rom I VO para. 4. Pursuant to Art. 6(3) of the EU Treaty, the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are regarded as general principles of EU law.

102 Stefan Leible and Matthias Lehmann, *Recht der Internationalen Wirtschaft (RIW)* 2007, 721 (734) (regarding the Rome II Regulation); Götz Schulze, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 26 Rom II VO para 2; Karsten Thorn, in: Peter Bassenge, Jürgen Ellenberger, Christian Grüneberg et al. (eds), *Palandt BGB* (77th Edition, 2018), Art. 21 Rom I VO para. 4.

103 Erik Jayme, *Ein internationales Privatrecht für Europa* (1991), 37. For further European influences, see Michael Stürner, 'Europäisierung des (Kollisions-) Rechts und nationaler ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 463 (464 et seq.).

104 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 272.

105 For details see Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (2016), § 14.03 [B], 317 et seq.

ever-increasing overlap between European values and national public policy doctrines.[106] So for example, where Member State introduces punitive damages when transposing a European directive calling for dissuasive sanctions to safeguard Community rights, German courts cannot reject the application of these rules even though – from a traditional national perspective – they are not in line with principles of German law (see supra section IV. 2.), as setting aside the foreign rules would impair the effective enforcement of Community law.[107]

In short, national courts must disregard foreign laws violating European values, even if the result of the foreign law accords with the traditional concept of national public policy. Correspondingly, courts wishing to decline the application of foreign law on the grounds of national public policy must verify if doing so accords with European law. Hence, the primacy of European law may force a national court to apply the law of another EU state contrary to its national values.[108]

2. Art. 10 Rome III Regulation: European paternalism

European law has not only given the *ordre public* a "European dress".[109] It is also capable of overriding fundamental concepts of private international law, as a closer look at Art. 10 Rome III Regulation reveals. This special reservation clause for divorce cases sits beside the "general" (and traditional) public policy reservation in Art. 12 Rome III Regulation. Art. 10

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106 Michael Stürner, 'Europäisierung des (Kollisions-)Rechts und nationaler ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden - Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 463 (472).

107 Jan von Hein, 'Punitive Damages in European and Domestic Private International Law', in: Alexander Bruns and Masabumi Suzuki (eds), *Preventive Instruments of Social Governance* (2017), 143 (156).

108 For example Recital 58 of the Succession Regulation states that recourse to public policy to disregard or alter a foreign law of a Member State is impermissible "when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination."

109 Stefan Leible, *Rom I und Rom II: Neue Perspektiven im europäischen Kollisionsrecht* (2009), 72 (public policy is "europäisch aufgeladen"); Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 271 (public policy is "europäisch angereichert").

Rome III states: "Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply." This special reservation clause demands the application of the law of the forum in two circumstances: First, the law of the forum applies if the foreign law applicable does not contain any provisions for divorce. Second, the law of the forum must also be applied if the possibility of becoming divorced under the foreign law depends on the sex of the spouse.

The first alternative of Art. 10 Rome III Regulation was enacted with Maltese law in mind,[110] which did not provide any divorce provisions up until 1st October 2011.[111] Courts should not have been compelled to refuse to divorce the spouses just because Maltese law was applicable.[112] The second example seeks to prevent any gender based discrimination against a spouse willing to file for divorce.[113] Such a discrimination is particularly common not only in some jurisdictions which have a divorce law based on

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110 Maarit Jänterä-Jareborg, 'Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe', in: Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (2008), 317 (338).

111 After a referendum that took place after the Rom III Regulation was adopted, Malta has enacted rules on divorce. For details on the new divorce law see Peter Pietsch, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2012, 426 et seq.

112 Christine Budzikiewicz, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 10 Rom III VO para. 2; Maarit Jänterä-Jareborg, 'Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe', in: Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (2008), 317 (338); Tobias Helms, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2011, 1765 (1771).

113 Christine Budzikiewicz, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 10 Rom III VO para. 3; Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation of 24 March 2010, COM (2010) 105 final, 8 (Comment on Art. 5).

Islamic tradition[114] but under Jewish "get" divorce law as well,[115] as both systems differentiate the grounds for divorce according to the sex of the spouses.

As much as the intent of Art. 10 Rome III Regulation is clear, the modalities of its application are not. Whereas Art. 12 Rome III Regulation follows the traditional approach of public policy only examining the result of the application of a foreign rule (see supra section I.), and not the foreign rule itself, the wording of Art. 10 Rome III Regulation stipulates just that.[116] According to its wording, disregarding a foreign law does not depend on the result being unacceptable to the forum. The recitals also contain no limitation of the reservation clause to unacceptable results of foreign law.[117] Hence, Art. 10 Rome III Regulation seems to allow courts to refuse the application of foreign law as soon as a foreign rule is incompatible with the protected values – i.e. gender-neutral divorce provisions.[118] The legislative history of the rule also favours this understanding: The introduction of Art. 10 Rome III Regulation can be traced back to some Member States exercising pressure on the legislative process. Those states wanted to "fend off"

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114 Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (124); Christine Budzikiewicz, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 10 Rom III VO para. 4. See section IV. 3. b) for details on talaq divorces.

115 Eva Lein, in: Gralf–Peter Calliess (ed), *Rome Regulations Commentary* (2nd Edition, 2015), Art. 10 Rome III Regulation para. 26 et seq. with further references; for details on the Jewish "get" law see Christoph Herfarth, *Die Scheidung nach jüdischem Recht im internationalen Zivilverfahrensrecht* (2000), 22 et seq.; Walter Homalka, *Das jüdische Eherecht* (2009), 113 et seq.; Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (124 et seq.).

116 Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (127); Peter Winkler von Mohrenfels, 'Art. 10 Rom III-VO: Kollisionsrechtliche Eingriffsnorm oder Spezialfall des ordre public?', in: Normann Witzleb, Reinhard Ellger, Peter Mankowski, Hanno Merkt and Oliver Remien (eds), *Festschrift für Dieter Martiny zum 70. Geburtstag* (2014), 595 (599).

117 See recital 24 Rome III Regulation. See also the opinion of the advocate general Saugmandsgaard Øe, C-372/16, 14.9.2017, *Soha Sahyouni v. Raja Mamisch*, ECLI:EU:C:2017:686, para. 74.

118 Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (129 et seq.).

sexually discriminatory rules of religious origin. Consequently, the application of the special reservation would be a lot broader than that of public policy.[119] Many scholars therefore argue that an abstract discrimination is sufficient to trigger the application of Art. 10 Rome III.[120] This conclusion was shared by the advocate general at the ECJ Saugmandsgaard Øe in his opinion he delivered on 9 September 2016 on the case *Soha Sahyouni v. Raja Mamisch*.[121]

However convincing the wording, systematic position[122] and legislative history may seem, these arguments cannot conceal the unwanted consequences of such an interpretation of Art. 10 Rome III Regulation. This is true especially for the more relevant case of unequal access to divorce on grounds of sex, protected by Art. 10 2nd alt. Rome III Regulation. Before the enactment of the Rome III regulation, German courts held that an Islamic "talaq divorce" does not violate German public policy if the wife agrees to the divorce.[123] An abstract control of foreign law would change this significantly. Art. 10 Rome III Regulation would bar courts from applying discriminatory foreign divorce laws regardless of whether the result is acceptable to the forum or not.

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119 Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (127).

120 Marc Philippe Weller, Irene Hauber and Alix Schulz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123 (129); Peter Winkler von Mohrenfels, 'Art. 10 Rom III-VO: Kollisionsrechtliche Eingriffsnorm oder Spezialfall des ordre public?', in: Normann Witzleb, Reinhard Ellger, Peter Mankowski, Hanno Merkt and Oliver Remien (eds), *Festschrift für Dieter Martiny zum 70. Geburtstag* (2014), 595 (599, 615).

121 Opinion of the advocate general Saugmandsgaard Øe, Case C-372/16, 14.9.2017, *Soha Sahyouni v. Raja Mamisch*, ECLI:EU:C:2017:686, para. 89. In its final judgement, the ECJ did not elaborate on this question. Instead, this question turned out to be irrelevant in the specific case as the ECJ found the Rome III Regulation inapplicable to private divorces in general, which was the main question asked, see ECJ, Case C-372/16, 20.12.2017, *Soha Sahyouni v. Raja Mamisch*, ECLI:EU:C:2017:988, para. 50.

122 If Art. 10 were to be understood as a special public policy provision, the general public policy clause of Art. 12 Rome III Regulation would completely absorb its scope of application, rendering it redundant, see Peter Winkler von Mohrenfels, *Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss)* 2016, 650 (658).

123 See IV) 3) b).

This approach is contrary to the established principles of private international law and violates the principle of international consistency of decision-making, the principle of closest connection and the assumption of general equality of all legal orders.[124] It also makes matters more difficult for the divorced spouses. A divorce effected under the law of an EU state might face more trouble being recognised and enforced in the spouses' home country.

Imposing an abstract result control does not make sense. Hence, the only sensible approach to Art. 10 Rome III Regulation is to interpret the rule in line with other public policy reservations and limit the application to a result control only.[125]

VI. The future of public policy

After focussing on various aspects that shaped the current public policy doctrine, it is now appropriate to try to evaluate the future of this *Vorbehaltsklausel*. Two aspects are important in this regard.

1. Diminishing importance

First of all, it seems clear that the importance of the public policy reservation will diminish. As shown above, the rules regarding mandatory overriding provisions of the forum and other special connecting factors have already limited the application of public policy in contract and tort law.[126] Special connecting factors have also been included in new European choice

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124 Christine Budzikiewicz, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 10 Rom III VO para. 27; Tobias Helms, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2011, 1765 (1772); Lena-Maria Möller, *Journal of Private International Law (JPrivIntL)* 2014, 461 et seq.

125 Christine Budzikiewicz, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 10 Rom III VO para. 27; Tobias Helms, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2011, 1765 (1772); Eva Lein, in: Gralf–Peter Calliess (ed), *Rome Regulations Commentary* (2nd Edition, 2015), Art. 10 Rome III Regulation para. 27.

126 See the analysis in section IV. 5. a).

of law rules, like Art. 30 of the Matrimonial Property Regime Regulation[127] and Art. 30 of the Property Consequences of Registered Partnerships Regulation.[128] More special connecting factors will limit the necessity of public policy control.

Moreover, in the fields of succession and family law, EU Regulations replacing nationality as the principal connecting factor with habitual residence will further limit the application of the *ordre public* since the rules of jurisdiction support the alignment of forum and *ius* to a large extent. A glimpse at some of the recently adopted European Regulations may serve to demonstrate this point.

Art. 21(2) Succession Regulation determines that the law of the State in which the deceased had his or her habitual residence governs all aspects of the succession.[129] Prior to that, many EU Member States regarded nationality[130] as the relevant connecting factor. In addition, the Succession Regulation contains provisions for establishing the international jurisdiction of courts. The general rule of Art. 4 Succession Regulation states that "the courts of the Member State in which the deceased had his habitual residence at the time of his death shall have jurisdiction […]." Using the same connecting factor for determining the jurisdiction and the applicable law synchronises forum and law. This means that an authority dealing with succession will regularly be applying its own law.[131] Thus, the issue of public policy usually does not arise.[132] Violations of the *ordre public* remain possible only in the rare case that the forum will not be applying its own law, for

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127 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, 1.

128 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, 30.

129 Whether or not the law specified by the Succession Regulation is the law of a Member State is irrelevant for the application, Art. 20 Succession Regulation.

130 The nationality of the deceased was the connecting factor set out in Art. 25 EGBGB (old version).

131 Recital 27 Succession Regulation

132 Michael Stürner, *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (321).

example if the prorogation of the forum according to Art. 5 Succession Regulation is invalid or jurisdiction is based on Art. 10 (subsidiary jurisdiction) or Art. 11 Succession Regulation (*forum necessitatis*), if the deceased had no habitual residence within the EU.[133]

In divorce matters, in the absence of a choice of law, Art. 8 Rome III Regulation primarily refers to the spouses' common habitual residence at the time the court is seized with the application of the divorce (subsection (a)) to determine the applicable law. Even if the spouses no longer have a common habitual residence, the law of that state applies provided that one spouse still resides therein and "the period of residence did not end more than one year before the court was seized" (subsection (b)).[134] The common nationality of the spouses is no longer the primary connecting factor as it used to be under Art. 17(1), 14(1) no. 1 EGBGB (Art. 17(1) EGBGB has been abrogated after the coming into force of the Rome III Regulation). Jurisdiction for these divorce cases is - inter alia - also established by reference to the spouses' habitual residence (Art. 3(1) Brussels IIa Regulation).[135] The rules of private international law thus often lead to the application of the *lex fori* as intended by the Commission,[136] thereby diminishing the importance of the *ordre public*.

The situation is somewhat similar in the area of maintenance law, although the Europeanisation of private international law did not bring significant changes to the prior rules in force in Germany. Art. 3(1) of the Proto-

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133 Michael Stürner, *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (320).

134 If these requirements are not met one has to apply the law of the common nationality of the spouses or, failing that, the lex fori of the court seized (Art. 8 subsection (c), (d) Rome III Regulation).

135 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 12.12.2003, 1.

136 Katharina Hilbig-Lugani, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 8 Rom III para. 4; Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation of 24 March 2010, COM (2010) 105 final, 7 (Comment on Art. 4).

col of 23 November 2007 on the Law Applicable to Maintenance Obligations[137] now determines the law of the habitual residence of the maintenance creditor applicable. Art 3 of the Maintenance Regulation[138] provides four alternative connecting factors for establishing the international jurisdiction of courts, one of which being the habitual residence of the maintenance creditor (Art. 3 (b) Maintenance Regulation), which will often be chosen by the creditor. Hence, it is possible, to a certain extent, to perceive an alignment of the connecting factors in this area as well.

These synchronised connecting factors for determining jurisdiction and the law applicable ensure that courts will be applying the law of the forum more often, or even in most cases. As public policy violations are out of the question in such cases, the importance of public policy in these areas of law will diminish significantly.

2. Overtight control of foreign law?

Second, there is the danger that the constitutionalization of the *ordre public* might lead to an overtight control of foreign law. The most recent developments indicate an expansion of public policy: In the area of succession law, asserting gender equality has prompted German courts to disregard more foreign laws in recent years.[139] With regard to Art. 10 Rome III Regulation there are voices advocating that this rule stipulates an abstract control to enforce the principle of gender equality and recital 58 of the Succession Regulation emphasises the importance of the European ban on discrimination[140] when applying public policy.

This development must be viewed critically. The public policy reservation should not "fend off" rules simply because they differ from local rules. It is a means of last resort to protect fundamental values of the forum and

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137 Council decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ L 331, 16.12.2009, 17.

138 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to Maintenance obligations, OJ L 7, 10.1.2009, 1.

139 See supra section IV. 5. b).

140 Art. 21 of the Charter of Fundamental Rights of the European Union.

must, therefore, be confined to exceptional cases.[141] Denying the application of foreign law too often undermines the principle of closest connection and endangers the international consistency of decision-making.[142] Finding the most suitable law to resolve a legal dispute is not only necessary to find the most appropriate solution to the conflict, but also to ensure that the judgement will be recognised abroad. Rejecting foreign laws too readily makes the whole process of searching for the best suited law obsolete. One could simply apply national law to all disputes instead. The outcome of a dispute depending solely on the forum chosen and the resulting judgment not being recognised abroad would, however, not serve any party to a conflict.

It is therefore imperative that the principle of result control is not watered down. Moreover, courts should always look for solutions which confine the application of the *ordre public* as far as possible. A good example of such a cautious approach is the case law of German courts regarding the application of foreign succession rules designating only those relatives as heirs that possess the same religion as the testator. German courts have found that such rules may possibly violate the German *ordre public* as they discriminate against potential heirs on religious grounds (Art. 3(3) GG).[143] But, under German law a testator is free to allocate his property as he wishes (and

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141 Paul Torremans and James J. Fawcett, *Cheshire/North/Fawcett Private International Law* (15th Edition, 2017), 133 and 140 et seq.; Jan Kropholler, *Internationales Privatrecht* (6th Edition, 2006), § 36 II („zurückhaltende Handhabung"); Paul Vlas, 'Public Policy in Private International Law and its Continuing Importance', in: The Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private International Law: Essays in Honour of Hans van Loon* (2013), 621 (624) ("ultimum remedium").

142 Christian von Bar and Peter Mankowski, *Internationales Privatrecht* (2nd Edition, 2003) Vol. 1, § 7 para. 258; Patrick Kinsch, 'La 'sauvegarde de certaines politiques législatives', cas d'intervention de l'ordre public international?', in: Tristan Azzi et al. (eds), *Liber amicorum Hélène Gaudemet-Tallon. Vers de nouveaux équilibres entre ordres juridiques* (2008), 447.

143 OLG Hamm 28.2.2005 – 15 W 117/04 – ZEV 2005, 436 (437 et seq.); OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 – NJW-RR 2009, 732 (733); OLG Frankfurt a. M. 10.5. 010 – 20 W 4/10 – ZEV 2011, 135 (136).

can therefore discriminate against one of his children, for example, by allocating more of the inheritance to one of them than to another).[144] This freedom is also protected by the German constitution (Art. 14(1) GG).[145] So, if it can be proven that the testator wanted the "discriminatory" foreign rule to apply, courts must apply it and not invoke the *ordre public*.[146]

Such a cautious approach also needs to be applied with regard to forced heirship rights (*Pflichtteilsrecht*). Under German law, forced heirship rights guarantee, under certain conditions, direct descendants of a testator and his surviving spouse a minimum part of the inheritance, enforceable against the actual heir in the form of a money claim. German law does not make these claims dependent on the needs of these family members. In 2005, the German Federal Constitutional Court granted some constitutional protection to those rights stressing that the participation of children in the inheritance is protected irrespective of their needs.[147] This decision must be mirrored when deciding under which conditions foreign rules not containing such a right or similar rights may constitute a public policy violation.[148] Views differ on this issue, given that the reach of the judgment of the Federal Constitutional Court is disputed and the older case law of the ordinary courts accepted that the testator could partly circumvent these rights without violating the *ordre public*.[149] For some, the judgement states that forced heirship rights promote a right of the descendants of the deceased to partake in a

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144 OLG Hamm 28.2.2005 – 15 W 117/04 – ZEV 2005, 436 (439); OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 – NJW-RR 2009, 732 (734); OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 – ZEV 2011, 135 (137).

145 Wolfgang Wurmnest, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 447 (451).

146 OLG Hamm 28.2.2005 – 15 W 117/04 – ZEV 2005, 436 (437 et seq.); OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 – NJW-RR 2009, 732 (733); OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 – ZEV 2011, 135 (136); Anatol Dutta, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 35 EuErbVO para. 9; Dirk Looschelders, in: Rainer Hüßtege and Heinz-Peter Mansel (eds), *NomosKommentar BGB* (2nd Edition, 2015), Art. 35 EuErbVO para. 8.

147 BVerfG 19.4.2005 – 1 BvR 1644/00 – BVerfGE 112, 332 = NJW 2005, 1561.

148 See KG 26. 2. 2008 – 1 W 59/07 – ZEV 2008, 440 (441) (considered invoking the *ordre public* because of the Constitutional Court's judgment, but leaving the question undecided in the end).

149 BGH 21.4.1993 – XII ZR 248/91 – NJW 1993, 1920 (1921); OLG Köln 26. 6. 75 – 10 U 215/74 – FamRZ 1976, 170 (172).

minimum part of the inheritance regardless of their actual needs.[150] Foreign laws falling short of that absolute minimum are incompatible with German public policy regardless of other compensating schemes they may provide – such as maintenance claims, which depend on the descendants being in need of support. Others read the judgment of the Federal Constitutional Court more narrowly when assessing its impact on the *ordre public*.[151]

In our opinion the latter view is correct. It is incorrect to derive from the Constitutional Court's judgement that children must always be guaranteed a minimum inheritance. Even under German law, the minimum participation in the inheritance is not guaranteed[152] and awarding a minimum share is therefore not completely independent of any prerequisites.[153] Thus, the judgment of the Constitutional Court must not be interpreted as guaranteeing the descendants an absolute right to participate in the inheritance regardless of any need. Instead, the participation in the inheritance is granted only "generally" and "structurally"[154] regardless of any need.[155] This interpretation of the *ordre public* remains feasible because the Constitutional

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150 KG 26. 2. 2008 – 1 W 59/07 – ZEV 2008, 440 (441); Dirk Looschelders, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2006, 462 (465): „Das Pflichtteilsrecht soll … nicht nur den Bedarf minderjähriger Kinder absichern, sondern die Kinder des Erblassers generell vor unverhältnismäßiger Zurücksetzung schützen. Billigt das Erbstatut den Abkömmlingen überhaupt kein Pflichtteilsrecht zu, so dürfte dies daher mit dem deutschen ordre public unvereinbar sein."; Tobias Pfundstein, *Pflichtteil und ordre public* (2010), 247 et seq, who postulates a "constitutional right to inherit" (*Grundrecht zu erben*) and develops a detailed analysis to safeguard this right.

151 Anatol Dutta, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 35 EuErbVO para. 9; Anne Röthel, 'Englische family provision und ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 348 (361).

152 § 2333 of the German Civil Code provide certain grounds to bar direct descendants from forced heirship rights.

153 Anne Röthel, 'Englische family provision und ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 348 (361).

154 BVerfG 19.4.2005 – 1 BvR 1644/00 – BVerfGE 112, 332 (349 and 355) = NJW 2005, 1561 (1563 et seq.): „Bedarfsunabhängige wirtschaftliche Mindestbeteiligung der Kinder am Nachlass ist tragendes Strukturprinzip des Pflichtteilsrechts".

155 Anne Röthel, 'Englische family provision und ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 348 (360).

Court only dealt with the question under which conditions children or the surviving spouse are excluded from claiming a minimum share of the estate because they are unworthy to inherit (§ 2333 of the German Civil Code). It did not draw a strict line delineating the requirements foreign succession laws have to meet in enabling a minimum participation of the direct descendants in the inheritance. In fact, it did not even do so concerning German forced heirship rights.

While the Federal Constitutional Court stated that descendants had to be granted an adequate proportion of the inheritance regardless of any need, it did not state how this goal was to be achieved or how high such a proportion might be.[156] The current design of forced heirship rights in form of money claims is not compulsory; other participation possibilities would also be in line with the Constitutional provisions.[157] Against this background, any foreign law providing some means to compensate the testator's children, for example through maintenance claims, remains applicable – even after the judgment of the German Constitutional Court.[158] Thus, if – as it is the case under the English concept of family provision – a judge decides on the allocation and opines that the children (because they are adult and have own sources of income) do not need to be compensated, the *ordre public* is not violated.[159]

These examples demonstrate that courts should not hastily discard the application of foreign law but rather only do so if national values protected by the constitution are violated. As the safety net of last resort, the *ordre*

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156 Reinhard Gaier, 'Pflichtteil und grundrechtliche Freiheit', in: Anne Röthel (ed), *Reformfragen des Pflichtteilsrechts* (2007), 161 (163).

157 Reinhard Gaier, 'Pflichtteil und grundrechtliche Freiheit', in: Anne Röthel (ed), *Reformfragen des Pflichtteilsrechts* (2007), 161 (163).

158 Heinrich Dörner, in: Jan Kropholler (ed), *Staudinger BGB* (2007), Art. 25 EGBGB para. 726; Gerhard Hohloch, 'Internationales Erbrecht und Ordre public – Stand, Bedeutung und Perspektiven', in: Rolf Stürner, Hiroyuki Matsumoto, Wolfgang Lüke and Masahisa Deguchi (eds), *Festschrift für Dieter Leipold zum 70. Geburtstag* (2009), 997 (1005); Michael Stürner, *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317 (323).

159 Heinrich Dörner, in: Jan Kropholler (ed), *Staudinger BGB* (2007), Art. 25 EGBGB para. 726; Anatol Dutta, in: Jan von Hein (ed), *Münchener Kommentar BGB* (7th Edition, 2018), Art. 35 EuErbVO para. 8; Anne Röthel, 'Englische family provision und ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011), 348 (361 et seq.); Michael Stürner, in: Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *BeckOGK* (March 2018), Art. 6 EGBGB para. 408.

public must only apply when other measures fail to deliver an acceptable result to the forum.

VII. Conclusion

(1) Public policy is a reservation clause of private international law allowing courts to disregard foreign laws that violate fundamental values of the forum.

(2) The application of the public policy reservation depends on the result of foreign law being unacceptable to the protected values of the forum.

(3) In Germany, the public policy reservation rightly protects constitutional provisions as fundamental values of the forum; the basic rights of the *Grundgesetz* define the content of the *ordre public* to a large extent.

(4) The Spaniard decision of the Federal Constitutional Court of Germany started the process of constitutionalizing the content of public policy. This process has forced the German legislator to change many conflict-of-law rules to implement the principle of equal treatment of men and women. Moreover, courts imposed a tighter control over foreign law which has been further and further extended over the last decades.

(5) While courts have, since the reforms of the EGBGB, regularly found the public policy reservation to apply in the area of family and succession law, the application of the *ordre public* is of less importance in the fields of contract and tort law. One explanation for this divergence is the existence of special connecting factors that make recourse to public policy largely redundant in the areas of contract and tort law. Another explanation is that family and succession laws across the globe are shaped by very different cultural and religious influences whereas there is more agreement on basic principles in the area of contract and tort law.

(6) European law has also influenced the content of public policy. While the concept of public policy still remains a national concept, European values have supplemented the existing content and introduced boundaries to the application of public policy by national courts. Thus, national courts must disregard foreign rules contradicting European values on public policy grounds. On the other hand, courts may not disregard a foreign law if doing so violates European values.

(7) Art. 10 Rome III Regulation should be interpreted as a special public policy reservation even though its wording, systematic position, and legislative history suggest an abstract control of foreign divorce law.

(8) The importance of public policy will diminish significantly in the future: More special connecting factors enforcing the application of the law of the forum in sensitive legal areas will reduce public policy violations. Most importantly, changing the connecting factors for the determination of the applicable law from nationality to habitual residence, thereby aligning it with the factor establishing international jurisdiction, will reduce public policy violations significantly in family and succession law. Thus, public policy violations will be reduced as courts will be applying the law of the forum more regularly.

(9) Courts and also the legislature should be careful to implement an overtight control of foreign law. Disregarding foreign rules by recourse to public policy has to remain an extraordinary remedy to safeguard the most important values of the forum.

Bibliography

Thomas Ackermann, 'Antitrust Damages Actions Under the Rome II Regulation', in: Mielle Bulterman, Leigh Hancher and Alison McDonnell et al. (eds), *Liber Amicorum Piet Jan Slot* (Kluwer Law International, Alphen aan den Rijn, 2009), 109.

Jennifer Antomo, 'Kinderehen, ordre public und Gesetzesreform' *Neue Juristische Wochenschrift (NJW)* 2016, 3558.

Jennifer Antomo, 'Verbot von Kinderehen?' *Zeitschrift für Rechtspolitik (ZRP)* 2017, 79.

Christian von Bar and Peter Mankowski, *Internationales Privatrecht Vol. 1: Allgemeine Lehren* (2nd Edition, C. H. Beck, München 2003).

Jürgen Basedow, 'Die Neuregelung des Internationalen Privat- und Prozeßrechts' *Neue Juristische Wochenschrift (NJW)* 1986, 2971.

beck-online.GROSSKOMMENTAR, Rom I-VO/EGBGB, Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds) (C. H. Beck, München 2018).

Hans Dölle*, Internationales Privatrecht* (2nd Edition, C. F. Müller, Karlsruhe 1972).

Erman Bürgerliches Gesetzbuch. Handkommentar, Vol. 2, Harm-Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (eds) (15th Edition, Otto Schmidt Verlag, Köln 2017).

Europäisches Zivilprozess- und kollisonsrecht EuZPR/EulPR – Kommentar, Vol. 3, Thomas Rauscher (ed) (4th Edition, Otto Schmidt Verlag, Köln 2016).

European Commentaries on Private International Law ECPIL, Vol. 2, Ulrich Magnus and Peter Mankowski (eds) (Otto Schmidt Verlag, Köln 2017).

Murad Ferid, 'Wechselbeziehungen zwischen Verfassungsrecht und Kollisionsnormen', in: Ernst von Caemmerer, Arthur Nikisch and Konrad Zweigert (eds), *Vom deutschen zum europäischen Recht - Festschrift für Hans Dölle Vol. 2,* Internationales Recht, Kollisionsrecht und internationales Zivilprozessrecht – Europäisches Recht (Mohr Siebeck, Tübingen 1963), 119.

Reinhard Gaier, 'Pflichtteil und grundrechtliche Freiheit', in: Anne Röthel (ed), *Reformfragen des Pflichtteilsrechts: Symposium vom 30.11.–2.12.2006 in Salzau* (Nomos, Baden-Baden 2007), 161.

Jan von Hein, 'Punitive Damages in European and Domestic Private International Law', in: Alexander Bruns and Masabumi Suzuki (eds), *Preventive Instruments of Social Governance* (Mohr Siebeck, Tübingen 2017), 143.

Christian Heinze, *Schadensersatz im Unionsprivatrecht* (Mohr Siebeck, Tübingen 2017).

Tobias Helms, 'Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung' Zeitschrift für das gesamte Familienrecht (FamRZ) 2011, 1765.

Dieter Henrich, 'Gleichberechtigung im internationalen Privat- und Staatsangehörigkeitsrecht' *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1974, 105.

Christoph Herfarth, *Die Scheidung nach jüdischem Recht im internationalen Zivilverfahrensrecht* (Winter, Heidelberg 2000).

Bernd von Hoffmann, Karsten Thorn and Karl Firsching*, Internationales Privatrecht* (9th Edition, C. H. Beck, München 2007).

Gerhard Hohloch,'Internationales Erbrecht und Ordre public – Stand, Bedeutung und Perspektiven', in: Rolf Stürner, Hiroyuki Matsumoto, Wolfgang Lüke and Masahisa Deguchi (eds), *Festschrift für Dieter Leipold zum 70. Geburtstag* (Mohr Siebeck, Tübingen 2009), 997.

Walter Homalka, *Das jüdische Eherecht* (De Gruyter, Berlin 2009).

Maarit Jänterä-Jareborg, 'Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe', in: Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, Tübingen 2008), 317.

Erik Jayme, *Ein internationales Privatrecht für Europa* (Decker & Müller, Heidelberg 1991).

Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th Edition, C. H. Beck, München 2004).

Patrick Kinsch, 'La 'sauvegarde de certaines politiques législatives', cas d'intervention de l'ordre public international?', in: Tristan Azzi et al. (eds), *Liber amicorum Hélène Gaudemet-Tallon. Vers de nouveaux équilibres entre ordres juridiques* (Dalloz-Sirey, Paris 2008), 447.

Jan Kropholler, *Gleichberechtigung durch Richterrecht. Erfahrungen im Familienrecht – Perspektiven im internationalen Privatrecht* (Gieseking, Bielefeld 1975).

Jan Kropholler, *Internationales Privatrecht* (6th Edition, Mohr Siebeck, Tübingen 2006).

Jan Kropholler, 'Gleichberechtigung und Aufenthaltsprinzip' *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1976, 316.

Stefan Leible, *Rom I und Rom II: Neue Perspektiven im europäischen Kollisionsrecht*, Vorträge und Berichte des Zentrums für Europäisches Wirtschaftsrecht No. 173 (Zentrum für Europäisches Wirtschaftsrecht, Bonn 2009).

Stefan Leible and Matthias Lehmann, 'Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")' *Recht der Internationalen Wirtschaft (RIW)* 2007, 721.

Dirk Looschelders, 'Die Ausstrahlung der Grund- und Menschenrechte auf das Internationale Privatrecht' 65 (2001) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 461.

Dirk Looschelders, 'Grundrechtliche Diskriminierungsverbote, Pflichtteilsrechte und Testierfreiheit im internationalen Erbrecht' *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2006, 462.

Christian Friedrich Majer, 'Das Gesetz zur Bekämpfung von Kinderehen' *Neue Zeitschrift für Familienrecht (NZFam)* 2017, 537.

Alexander N. Makarov, 'Die Gleichberechtigung der Frau und das Internationale Privatrecht' 17 (1952) *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 382.

Dieter Martiny, 'Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht', in: Michael Coester, Dieter Martiny, Karl August von Sachsen Gessaphe (eds), *Privatrecht in Europa: Vielfalt, Kollision, Kooperation. Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag* (C. H. Beck, München 2004), 523.

Pierre Mayer and Vincent Heuzé, *Droit international privé* (11th Edition, LGDJ, Issy-les-Moulineaux 2014).

Lena-Maria Möller, 'No Fear of Ṭalāq: A Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation' *Journal of Private International Law (JPrivIntL)* 2014, 461.

Lena-Maria Möller and Nadjma Yassari, 'Wenn Jugendliche heiraten. Die Minderjährigenehe aus rechtsvergleichender und international-privatrechtlicher Sicht' *Kritische Justiz (KJ)* 2017, 269.

Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung. Kommentar* (15th Edition, Franz Vahlen, München 2018).

Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 11, Jan von Hein (ed) (7th Edition, C. H. Beck, München 2018).

Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 12, Jan von Hein (ed) (7th Edition, C. H. Beck, München 2018).

Karl Heinz Neumayer, 'Zur positiven Funktion der kollisionsrechtlichen Vorbehaltsklausel', in: Ernst von Caemmerer, Arthur Nikisch and Konrad Zweigert (eds), *Vom deutschen zum europäischen Recht - Festschrift für Hans Dölle Vol. 2,* Internationales Recht, Kollisionsrecht und internationales Zivilprozessrecht - Europäisches Recht (Mohr Siebeck, Tübingen 1963), 179.

NomosKommentar BGB. Rom-Verordnungen, Vol. 6, Rainer Hüßtege, Heinz-Peter Mansel (eds) (2nd Edition, Nomos, Baden-Baden 2015).

Palandt Bürgerliches Gesetzbuch. mit Nebengesetzen, Gerd Brudermüller, Jürgen Ellenberger Isabell Götz, Christian Grüneberg, Sebastian Herrler, Hartwig Sprau, Karsten Thorn, Walter Weidenkaff, Dietmar Weidlich and Hartmut Wicke (eds) (77th Edition, C. H. Beck, München 2018).

Andreas Kurt Pattar, *Islamisch inspiriertes Erbrecht und deutscher Ordre public: Die Erbrechtsordnungen von Ägypten, Tunesien und Marokko und ihre Anwendbarkeit im Inland* (Duncker & Humblot, Berlin 2007).

Tobias Pfundstein, *Pflichtteil und ordre public* (C. H. Beck, München 2010).

Peter Pietsch, 'Scheidungsrecht in Malta' *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2012, 426.

Thomas Rauscher and Steffen Pabst, 'Die Rechtsprechung zum Internationalen Privatrecht 2010-2011' *Neue Juristische Wochenschrift (NJW)* 2011, 3547.

Rome Regulations Commentary, Gralf-Peter Calliess (ed) (2nd Edition, Kluwer Law International, Alphen aan den Rijn 2015).

Rome II Regulation: Pocket Commentary – Pocket Commentaries on European Regulations and International, Vol. 1, Peter Huber (ed) (Sellier, München 2011).

Anne Röthel, 'English family provision und ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden - Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (Gieseking, Bielefeld 2011), 348.

Michael Sachs, *Grenzen des Diskriminierungsverbots: Eine Untersuchung zur Reichweite d. Unterscheidungsverbots nach Art. 3 Abs. 2 u. 3 Grundgesetz* (Vahlen, München 1987).

Staudinger BGB – EGBGB, Jan Kropholler (ed) (De Gruyter, Berlin 2007).

Michael Stürner, 'Europäisierung des (Kollisions-)Rechts und nationaler ordre public', in: Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden - Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (Gieseking, Bielefeld 2011), 463.

Michael Stürner, 'Die Bedeutung des ordre public in der EuErbVO' *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2014, 317.

Paul Torremans and James J. Fawcett, *Cheshire/North/Fawcett Private International Law* (15th Edition, Oxford University Press, Oxford 2017).

Cedric Vanleenhove, *Punitive Damages in Private International Law* (Intersentia, Cambridge 2016).

Paul Vlas, 'Public Policy in Private International Law and its Continuing Importance', in: The Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private International Law: Essays in Honour of Hans van Loon* (Intersentia, Cambridge 2013), 621.

Marc Philippe Weller, Irene Hauber and Alix Schulz, 'Gleichstellung im Internationalen Scheidungsrecht – talaq und get im Licht des Art. 10 Rom III-VO' *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 123.

Peter Winkler von Mohrenfels, 'Art. 10 Rom III-VO: Kollisionsrechtliche Eingriffsnorm oder Spezialfall des ordre public?', in: Normann Witzleb, Reinhard Ellger, Peter Mankowski, Hanno Merkt and Oliver Remien (eds), *Festschrift für Dieter Martiny zum 70. Geburtstag* (Mohr Siebeck, Tübingen 2014), 595.

Peter Winkler von Mohrenfels, 'Die Rom III- und Brüssel IIa-Verordnungen in der deutschen Rechtspraxis' *Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss)* 2016, 650.

Wolfgang Wurmnest, 'Ordre Public (Public Policy)', in: Stefan Leible (ed), *General Principles of European Private International Law* (Kluwer Law International, Alphen aan den Rijn 2016), 305.

Wolfgang Wurmnest, 'Der Anwendungsbereich des deutsch-iranischen Niederlassungsabkommens bei erbrechtlichen Streitigkeiten und deutscher ordre public' *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 447.

Wolfgang Wurmnest, 'Recognition and Enforcement of U.S. Money Judgments in Germany' 23 (2005) *Berkeley Journal of International Law (Berk. J. Int'l Law)*, 175.

Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (Asser Press, The Hague 2017).

Register of Cases

KG 7.6.1989 – 18 U 2625/88 – BeckRS 1989, 2838.
KG 26. 2. 2008 – 1 W 59/07 – ZEV 2008, 440–442.
KG 21. 11. 2011 – 1 W 79/11 – FamRZ 2012, 1495–1497.
OLG Bamberg 12.5.2016 – 2 UF 58/16 – BeckRS 2016, 09621.
OLG Düsseldorf 23.3.1993 – 6 UF 4/92 – NJW-RR 1994, 7–8.
OLG Düsseldorf 19.12.2008 – 3 Wx 51/08 – NJW-RR 2009, 732–735.
OLG Frankfurt a. M. 18.1.2001 – 1 U 209/99 UF 251/00 – BeckRS 2001, 30156129.
OLG Frankfurt a. M. 11.5.2009 – 5 WF 66/09 – BeckRS 2009, 24414.
OLG Frankfurt a. M. 10.5. 2010 – 20 W 4/10 – ZEV 2011, 135–137.
OLG Hamburg 23.12.1902 – II. ZS – OLGE 6 (1903), 231.
OLG Hamm 8.2.1990 – 2 UF 216/89 – BeckRS 2010, 26684.
OLG Hamm 29.4.1992 – 15 W 114/91 – IPRax 1994, 49–55.
OLG Hamm 28.2.2005 – 15 W 117/04 – ZEV 2005, 436–440.
OLG Hamm 11.10.2010 – 6 UF 59/10 – BeckRS 2011, 18163.
OLG Köln 26.6.1975 – 10 U 215/74 – FamRZ 1976, 170.
OLG Köln 4.9.1996 – 16 Wx 181/96 – NJWE-FER 1997, 55.
OLG München 16.4.2012 − 31 Wx 45/12 – NJW-RR 2012, 1096–1097.
OLG Stuttgart 22.5.1978 – 17 UF 20/78 G – FamRZ 1978, 507–508.
OLG Stuttgart 3.12.1998 – 17 VA 6/98 – BeckRS 1998, 13578.
LG Frankfurt 11.12.1979 – 3/10 O 123/79 – NJW 1981, 56–58.
AG Hannover 7.1.2002 – 616 F 7355/00 – BeckRS 2002, 01869.
AG Offenbach 30.10.2009 – 314 F 1132/09 – BeckRS 2010, 23013.

European Court of Justice, Case C-372/16, 20.12.2017, *Soha Sahyouni v. Raja Mamisch*, ECLI:EU:C:2017:988.