

# **EU Private International Law in Hungary**

## **An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EU**

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### **I Introduction**

The accession of new Member States to the European Union (EU) in 2004 brought crucial legal, economic and social changes in the acceding countries, including Hungary. Legal changes did not leave private international law immune either. EU accession triggered remarkable interactions between EU law and the domestic law of the acceding countries. The more straightforward impact of EU integration has been that it required states joining the EU to conform to the EU private international law regime. However, the accession not only affected the legal systems of the acceding countries, but also brought about certain changes for EU private international law.

This article focuses on the principal changes resulting from EU accession from the standpoint of autonomous private international law, in particular the reception of the EU legal instruments on private international law, in one of the acceding countries, namely Hungary. The reception of EU private international law will be examined first of all in light of those interpretation problems leading to preliminary references to the Court of Justice of the European Union (CJEU) by Hungarian courts, and, second, in the broader context of Hungarian court practice related to the application of EU private international law instruments. However, before analysing the effects of EU private international law rules on Hungarian private international law, the impact of the accession of new Member States on EU private international law will briefly be discussed.

### **II The Impact of the EU Accession of New Member States on EU Private International Law**

We usually think only of how EU accession has affected the laws of the acceding countries. However, the gradual nature of the EU integration process has left an imprint on the development of EU private international law, too. The variables of the integration process

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– its geographical extension, its depth in substance, the presence and articulation of interests strengthening particularism – can be noticed also in the development of EU private international law.

First, EU private international law has a dynamic geography. Some geographical differences in the application of the EU private international law rules already existed before the 2004 accession wave. Although the old Member States joined the Rome Convention on the law applicable to contractual obligations,<sup>1</sup> they could avail themselves of the possibility to make reservations to it, giving rise to differences in the application of the rules of the convention. Denmark opted out of the application of the EU rules on judicial cooperation in civil matters,<sup>2</sup> while the UK and Ireland have the right to opt-in regarding the application of the otherwise common rules.<sup>3</sup> After the accession in 2004, the geography of EU private international law rules has become even more heterogeneous. The Rome Convention entered into force in the acceding Member States on different dates, resulting in differences in the temporal scope of application of the convention and rendering it more difficult to find the applicable legal source. Furthermore, several Member States joining the EU in 2004 refrained from participating in certain EU private international law instruments adopted in the framework of enhanced cooperation.

Second, the depth of integration is not uniform across the EU. The possibility of enhanced cooperation contributes to the fragmentation of EU private international law. The Rome III Regulation has been adopted in the framework of enhanced cooperation and some of the Member States acceding the EU in 2004 do not participate in its application.<sup>4</sup> Similarly, the regulations on the matrimonial property regimes and the property consequences of registered partnerships have been adopted in the framework of enhanced cooperation.<sup>5</sup> In addition to other Central and Eastern European countries, Hungary refrained from taking part in the application of the property regulations.

Third, the diverse policy interests and values of the Member States unavoidably influence the course of private international legislation. The private international law regulations related to family law demonstrate the sensitivity of the acceding countries regarding the regulation

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<sup>1</sup> 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 OJ [1980] L266/1.

<sup>2</sup> Protocol (No 22) on the position of Denmark OJ [2012] C326/299.

<sup>3</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice OJ [2016] C202/295.

<sup>4</sup> 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 [2010] OJ L343/10. The Czech Republic, Cyprus, Poland and Slovakia do not apply the Rome III Regulation.

<sup>5</sup> 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 [2016] L183/1 and 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 [2016] L183/30. In addition to Hungary, Poland and Slovakia do not apply these regulations.

of certain questions. In particular, Hungary and Poland opposed the property regulations because of their worries about determining the concept of marriage and, in general, to safeguard national interests. The appearance of the new Member States in the EU lawmaking process also involves them pursuing particular policy considerations – which may be based either on changing political interests or on the deeply-rooted traditions and values of their social and legal order.

### III The Impact of EU Accession on Private International Law in Hungary

It is intended to give a brief examination here of how EU accession impacted autonomous private international law. First of all, following the change of the political system in Hungary in 1989, the international mobility of persons and the number of international commercial transactions started to grow significantly.<sup>6</sup> This tendency was further strengthened when, thanks to the EU accession, many of the barriers to the mobility of persons and commercial transactions were eliminated. These changes underlined the role of both EU and autonomous private international law in the acceding states.

Second, the accession required the reception of EU private international law instruments by both the legislature and the judicature. The countries joining the EU in 2004, including Hungary, had to adapt themselves to an already existing EU private international law regime. At the time of accession, Article 65 of the *Treaty establishing the European Community*,<sup>7</sup> the predecessor of the current Article 81 of the *Treaty on the Functioning of the European Union* (TFEU) had already been introduced.<sup>8</sup> Article 81 TFEU enables the EU to adopt measures in the field of private international law, including with regard to conflict of laws, jurisdiction and the recognition and enforcement of foreign judgments. In 2004, the Brussels Ia Regulation,<sup>9</sup> the Brussels IIa,<sup>10</sup> the Rome Convention and the former Insolvency Regulation<sup>11</sup> were already applied in the Member States. Hungary became a party to the Rome Convention

<sup>6</sup> See, for example, Vékás Lajos, 'Egy új nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 70 *Jogtudományi Közlemény* 292–299, 292; Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions' (2018) 82 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 972–1003, 974–975.

<sup>7</sup> *Treaty establishing the European Community* OJ [1997] C340/203.

<sup>8</sup> Consolidated version of the *Treaty on the Functioning of the European Union* [2012] OJ C 326/47.

<sup>9</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2001] L12/1.

<sup>10</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ [2000] L160/19, later repealed and revised by 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 [2003] L338/1 (Brussels II bis Regulation).

<sup>11</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ [2000] L160/1.

following accession.<sup>12</sup> Hungary did not have an influence on the drawing up of these legal instruments; however, the development of EU private international law did not stop there. Not long after the accession of the Central and Eastern European countries, the Rome Convention was converted into a regulation, the Rome I Regulation on the law applicable to contractual obligations,<sup>13</sup> and the EU legislature adopted the Rome II Regulation on the law applicable to non-contractual obligations,<sup>14</sup> the Rome III Regulation on the law applicable to divorce and legal separation,<sup>15</sup> the Maintenance Regulation,<sup>16</sup> the Succession Regulation,<sup>17</sup> the Regulation on matrimonial property regimes and the Regulation on the property consequences of registered partnerships. Hungary takes part in the enhanced cooperation for the application of the Rome III Regulation, but it does not in the application of the regulations on matrimonial property regimes and the property consequences of registered partnerships. The Brussels I Regulation<sup>18</sup> and the Insolvency Regulation<sup>19</sup> were revised after the accession. A number of further legal instruments were prepared in the field of international civil procedure; these are applied in Hungary.<sup>20</sup> The coexistence of EU private international law rules and autonomous

<sup>12</sup> 2006. évi XXVIII. törvény a szerződéses kötelezettségekre alkalmazandó jogról szóló, Rómában, 1980. június 19-én aláírásra megnyitott egyezmény és jegyzőkönyvei, valamint az azokat módosító egyezmények, továbbá a Ciprusi Köztársaságnak, a Cseh Köztársaságnak, az Észt Köztársaságnak, a Lengyel Köztársaságnak, a Lett Köztársaságnak, a Litván Köztársaságnak, a Magyar Köztársaságnak, a Máltai Köztársaságnak, a Szlovák Köztársaságnak és a Szlovén Köztársaságnak az említett egyezményhez és jegyzőkönyveihez történő csatlakozásáról szóló, Brüsszelben, 2005. április 14-én aláírt egyezmény kihirdetéséről (Act XXVIII of 2006 on the promulgation of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and its protocols, and of the conventions amending those, and of the convention on the accession of the Republic of Cyprus, the Czech Republic, the Republic of Estonia, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Slovak Republic and the Republic of Slovenia to the mentioned convention and its protocols signed in Brussels on 14 April 2005).

<sup>13</sup> 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 [2008] L177/6.

<sup>14</sup> 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 [2007] L199/40.

<sup>15</sup> 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 [2010] L343/10.

<sup>16</sup> 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 [2009] L7/1.

<sup>17</sup> 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 [2012] L201/107.

<sup>18</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2012] L351/1.

<sup>19</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings OJ [2015] L141/19.

<sup>20</sup> See in particular, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure OJ [2007] L199/1; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure OJ [2006] L399/1.

rules gives rise to a plurality of legal sources in the Member States and private international law has become multi-layered. This undoubtedly renders the selection of the applicable legal source more difficult in practice.

Third, Hungarian legislation had to conform to EU law from the date of accession. From a regulatory point of view, the legislative reception of EU law posed a challenge for legislature already under the previous Hungarian private international law regime (Old PIL Code)<sup>21</sup> and this was one of the major questions during the codification process leading to the adoption of the new Hungarian Private International Law Act (New PIL Code).<sup>22</sup> From the multitude of questions concerning the relation between EU law and domestic law, we refer here only briefly to the treatment of the primacy of EU law in formal and substantive terms.

Before EU accession, autonomous private international law was in principle restrained by international conventions and constitutional limits. EU accession required further adaptation to EU law. The legislature may choose to acknowledge the existence of this limit in formal terms, expressly referring to the primacy of EU law or the private international law instruments of the EU. We can notice here a change in the regulatory approach in Hungary. The Old PIL Code referred only to the primacy of international treaties without mentioning the primacy of EU law.<sup>23</sup> From the date of accession, even in the absence of an explicit provision, the principle of the primacy of EU law applied automatically. Following the adoption of the Rome I and Rome II Regulations, the Hungarian legislature repealed the previous autonomous conflict-of-laws rules and referred explicitly to the primacy of the Rome I Regulation<sup>24</sup> and the Rome II Regulation.<sup>25</sup> The Old PIL Code established that its provisions apply only to contractual and non-contractual obligations that fell outside the scope of application of these regulations. The references to the EU regulations were inconsistent, because no reference was made to the other EU regulations determining the governing law, jurisdiction or the recognition and enforcement of foreign decisions. The New PIL Code reflects a more conscious approach towards EU law than its predecessor. First, the New PIL Code refers explicitly to the primacy of EU law in addition to international conventions. Section 2 of the New PIL Code establishes that the provisions of the New PIL Code apply only to questions that do not fall under the scope of application of a legal act of the European Union that has general application and is directly applicable or an international treaty. Second, the drafters of the New PIL Code abandoned references to specific EU regulations, because the primacy of EU legislative acts after the accession is evident and this is also made clear by Section 2 of the New PIL Code.

More importantly, EU accession requires the substantive alignment of domestic law with EU law. It means that, in the fields where the EU legislature intervened and regulations were

<sup>21</sup> 1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról (Decree-Law 13 of 1979 on private international law).

<sup>22</sup> 2017. évi XXVIII. törvény a nemzetközi magánjogról (Act XXVIII of 2017 on private international law). On the adaptation of autonomous private international law rules to EU law, see: Réka Somssich, 'Cohabitation of EU Regulations and National Laws in the Field of Conflict of Laws' [2015] ELTE Law Journal 67–79.

<sup>23</sup> Old PIL Code, s 2.

<sup>24</sup> Old PIL Code, s 24.

<sup>25</sup> Old PIL Code, s 32.

adopted, the national legislature lost its power to regulate. Autonomous lawmaking only has a role in areas that are not covered by EU law, or where EU legislation expressly enables national legislatures to regulate. It must also be noted that compliance with EU law may prove necessary, even in areas that are not covered by EU regulations, to the extent this is required by primary law and the related case law of the CJEU. This may be well illustrated by the issue of use of the name in Hungarian private international law. In the *Garcia Avello* judgment, the CJEU ruled essentially that Union citizens who have dual nationality can choose between the laws of their states of citizenship concerning the registration of their family name.<sup>26</sup> This was deduced from the principle of the prohibition of discrimination and the provisions on Union citizenship. The original wording of the Old PIL Code required the application of the personal law of the person concerned regarding the use of a name. As a main rule, the personal law of a person having multiple citizenships, including Hungarian citizenship, was Hungarian law. Therefore, the law applicable to names of dual nationals who were also Hungarian citizens was Hungarian law. Following the *Garcia Avello* judgment of the CJEU, the Hungarian legislature decided to amend the Old PIL Code so as to grant a choice of law concerning the registration of the birth name for persons having multiple citizenships to ensure conformity with the judgment.<sup>27</sup> The Old PIL Code was so amended after the *Garcia Avello* judgment that in the course of the registration of a birth name the court, at the request of the person concerned, had to apply the law of that other state of citizenship and not Hungarian law. Regarding names, choice of law for multiple nationals has been enshrined in the New PIL Code, too.<sup>28</sup>

Fourth, the need for compliance with EU law, along with social and economic changes following the change of the political system in the Central and Eastern European countries, was a factor justifying the enactment of new private international law codes in these Member States. They found it necessary to revise their pre-existing codes in order to ensure conformity with EU law and recodify their autonomous private international law rules. The fact that more and more states in the region adopted a new private international law code triggered a self-generating process, because the legislature in other countries could consider the new enactments as a possible model and they also decided in favour of devising a new private international law code. The result was a wave of codification in the Central and Eastern European countries. New private international law codes were adopted in particular in Slovenia (1999), Estonia (2002), Bulgaria (2005), Poland (2011) and the Czech Republic (2012). Hungary was not out of this recent legislative wave. Accordingly, the recodification of Hungarian private international law took place in 2017.

Finally, in relation to the recodification of autonomous private international law, it must be noted that EU law even impacts autonomous private international law in areas not covered by EU legislation. The solutions of EU private international law are often considered as models

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<sup>26</sup> C-148/02, *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

<sup>27</sup> Old PIL Code, s 10(2).

<sup>28</sup> New PIL Code, s 16(2)-(3).

for the autonomous legislation of the Member States. In several Central and Eastern European countries, autonomous private international law increasingly applies habitual residence instead of the previously used connecting factor, citizenship, to determine questions related to personal status following the widespread use of this connecting factor in EU conflict of laws.<sup>29</sup> The new Hungarian private international law code retained citizenship as the main connecting factor in matters related to personal status, but habitual residence is used, for example, regarding conservatorship,<sup>30</sup> a declaration made by an adult having disposing capacity for the event of a future limitation of his disposing capacity or the absence of his capacity to protect his interests<sup>31</sup> and the violation of personality rights.<sup>32</sup> Another illustration is the possibility of a person whose personality rights were breached to choose the law of the state where the centre of his interests is situated.<sup>33</sup> This connecting factor was used in some judgments of the CJEU for determining jurisdiction in relation to the violation of personality rights.<sup>34</sup> The appearance of this connecting factor, never used before in Hungarian private international law, was definitely due to the consideration of EU law as a model. Furthermore, it can also be noted that although Hungary does not take part in the enhanced cooperation regarding matrimonial property regimes and the property relationships of partners, the possibility of a choice of law is ensured by the New PIL Code following the rules of the EU regulations,<sup>35</sup> with the single difference that the law of the forum, i.e. Hungarian law, may additionally be selected by the parties.<sup>36</sup>

#### IV Preliminary Ruling Requests by Hungarian Courts

So far, the legislative reception of EU private international law has been discussed. Another layer, the judicial reception of the EU private international law instruments, must also be examined to get a full picture. Judicial reception embraces the interpretation and application of the EU legal sources by courts and an involvement in a judicial dialogue with the CJEU through the preliminary ruling procedure where it is necessary to solve problems of interpretation.

At an EU level, the number of preliminary references related to private international law is growing, which is probably due to the boost in the international mobility of persons, the

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<sup>29</sup> Tamás Szabados, 'Bestimmung des Personalstatuts in den postsozialistischen Staaten' [2016] *Zeitschrift für Europäisches Privatrecht* 278–299, 288–292.

<sup>30</sup> New PIL Code, s 18.

<sup>31</sup> New PIL Code, s 19.

<sup>32</sup> New PIL Code, s 23.

<sup>33</sup> New PIL Code, s 23(2) *a*).

<sup>34</sup> Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN Limited* [2011] ECR I-10269, paras 48–52.

<sup>35</sup> Matrimonial Property Regulation, art 22.

<sup>36</sup> New PIL Code, ss 28 and 36.



increasing number of international commercial transactions and to the fact that the EU legislature occupies a continually broadening domain in the field of private international law, by adopting more and more legislative acts.<sup>37</sup>

The preliminary ruling requests referred by Hungarian courts fit into the broader picture of preliminary ruling requests submitted by the courts of the Member States of the EU, as far as the legal sources applied are concerned. This means that there were many more preliminary ruling requests referred in relation to jurisdictional questions under the Brussels Ia and I bis Regulations, while only a few requests were submitted by Hungarian courts to the CJEU regarding conflict-of-laws issues. This is in line with the general tendency that there were many more preliminary references concerning the Brussels Convention,<sup>38</sup> the Brussels Ia and I bis and the Brussels IIa and the Brussels II bis Regulations than regarding the Rome Convention and the regulations providing for conflict-of-laws rules. It is difficult to see the reasons behind this. One might be that the adjudication of all international private law disputes starts with the question of jurisdiction and, once the court establishes that for some reason it cannot assert jurisdiction, there is no need for going ahead with the question of the governing law. Chronologically, because of the earlier adoption of the Brussels Convention, national courts had more time to refer cases on jurisdiction, the recognition and enforcement of foreign judgments to the CJEU than in the case of conflict-of-laws instruments.

According to the statistics contained in the 2018 report on the judicial activity of the CJEU, Hungarian courts referred 187 cases in total to the CJEU since the EU accession of the country.<sup>39</sup> From this number, 10 preliminary ruling requests concerned EU legal instruments related to judicial cooperation in civil matters. The preliminary rulings given by the CJEU in the cases referred by Hungarian courts most often required the refinement of certain points in the previous case law and did not necessitate essentially new pronouncements. However, it must be noted that, in terms of private international law, not only the preliminary references submitted regarding questions related to the area of freedom, security and justice are relevant, but other preliminary ruling requests may be equally significant. For instance, the preliminary rulings on the cross-border mobility of companies, which indirectly touched upon the law applicable to companies as well, cannot be ignored, although they were not rendered on the basis of a legal instrument related to the area of freedom, security and justice, but in the context of the freedom of establishment provisions of the TFEU. However, this does not alter the fact that these preliminary rulings made a significant contribution to private international law.

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<sup>37</sup> In the context of the freedom, security and justice, see: Réka Somssich, 'Uniform or Diverging Application of EU Instruments in the Field of Private International Law by National Jurisdictions – Preliminary References in the Area of Judicial Cooperation in Civil Matters' in Miklós Király, Tamás Szabados (eds), *Perspectives of Unification of Private International Law in the European Union* (Eötvös Kiadó 2018, Budapest) 53–84.

<sup>38</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version) OJ [1972] L299/32.

<sup>39</sup> Court of Justice of the European Union, *Annual Report 2018 – Judicial Activity* (European Union 2019, Luxembourg) 143.



All of the preliminary ruling requests were found admissible but one. In *Herrenknecht*, the CJEU considered the request for a preliminary ruling as manifestly inadmissible, because the referring court failed to present the facts in relation to the preliminary questions concerning the choice-of-forum and choice-of-law clauses of a contract entered into between a German and a Hungarian company; it did not provide information on whether the parties challenged the jurisdiction of the court seised indicating the parties' will and did not state the reasons for the request for a preliminary ruling.<sup>40</sup> In the *IBIS* case, the reference made concerning the interpretation of the Brussels Ia Regulation by the Hajdú–Bihar County Court was withdrawn by the referring court.<sup>41</sup>

## 1 Jurisdiction and the Recognition and Enforcement of Foreign Judgments

Most of the cases referred to the CJEU by Hungarian courts concerned a jurisdictional question. The relevant cases required the interpretation of the Brussels Ia and Brussels I bis Regulations. No preliminary reference was made by the Hungarian courts regarding other EU private international law instruments concerning jurisdiction. In one case, the Brussels Ia Regulation was construed with regard to the European Order for Payment Regulation.

Regarding the interpretation of the EU jurisdictional rules, it must be noted that although Hungary was not a party to the Brussels Convention, the CJEU judgments interpreting the Brussels Convention could not be ignored by Hungarian courts. This is due to the fact that most provisions of the Brussels Convention correspond to the provisions of the Brussels Ia and Brussels I bis Regulations and the CJEU often held that the rulings rendered under the Brussels Convention also govern issues under the Brussels Ia and I bis Regulations.

The preliminary references made by Hungarian courts concern topics that are popular subjects of preliminary ruling requests in other Member States as well. Somssich summarised the most common topics of preliminary rulings in the context of the application of the Brussels Convention as well as the Brussels Ia and I bis Regulations as follows: the concept of 'civil and commercial matters' and the subject-matter scope of application of the Brussels Convention and the Regulations; the definition of 'matters relating to a contract'; jurisdiction clauses; *lis pendens* cases; multi-defendant cases; and the interpretation of certain factors establishing jurisdiction, such as the place where the harmful event occurred.<sup>42</sup> If we look through the Hungarian preliminary references, Hungarian courts had to deal mostly with questions from this list: the temporal and subject-matter scope of application of the Regulations and in particular the concept of 'civil and commercial matters'; the interpretation of certain grounds of jurisdiction (the category of claims in matters relating to a contract can

<sup>40</sup> C-366/14, *Herrenknecht AG v Hévíz-Sugár Kft.*, ECLI:EU:C:2014:2353.

<sup>41</sup> C-490/11, *IBIS S.r.l. v PARTILUM '70 Műanyagipari Zrt.*, ECLI:EU:C:2012:229.

<sup>42</sup> Somssich (n 37) 76–83.

be also mentioned here as establishing special jurisdiction on the basis of the place of performance); and the prorogation of jurisdiction.

A number of the preliminary references concerned the scope of application of the Brussels Ia and Brussels I bis Regulations, in particular the concept of ‘civil and commercial matters.’ In the *Siemens* case, the Hungarian Competition Authority imposed a fine on Siemens, a company domiciled in Austria, for breaching competition law rules.<sup>43</sup> The fine was reduced later by administrative court decisions following a challenge by Siemens. The Competition Authority therefore repaid to Siemens a part of the fine together with interest. However, the Curia of Hungary confirmed the original amount of the fine. Siemens again paid the balance due, but without interest. The Hungarian Competition Authority claimed the restitution of the interest on the ground of unjust enrichment before a Hungarian court. After Siemens contested the jurisdiction of the Hungarian courts, the question whether a claim for the reimbursement of interest in such a case falls under the scope of the Brussels Ia Regulation and whether jurisdiction may be established on the basis of Article 5(3) of the Brussels Ia Regulation, which provides for special jurisdiction in matters relating to tort, delict or quasi-delict, was referred to the CJEU. In essence, the CJEU confirmed that the actions by public authorities made in exercising public power fall outside the ambit of the Brussels Ia Regulation. The imposition of a fine by a competition authority for a breach of competition rules is based on the exercise of public power and a claim for the restitution of interest due under competition law rules qualifies as an administrative matter excluded from the scope of the Brussels Ia Regulation and not a civil or commercial matter that comes within the scope of the Brussels Ia Regulation.

The *Weil* judgment of the CJEU concerned an issue related to the enforcement of foreign judgments and the scope of application of the Brussels Ia Regulation.<sup>44</sup> Ms Weil and Mr Gulácsi were unregistered partners. After the termination of their partnership, Ms Weil, who was domiciled in Hungary, brought proceedings against Mr Gulácsi, who was domiciled in the UK, and the Municipal Court of Szekszárd ordered Mr Gulácsi to pay Ms Weil an amount of ca. EUR 2 060 in order to settle the property relationships arising out of their *de facto* non-marital partnership. The judgment could not be enforced in Hungary as the defendant had no assets in Hungary. Ms Weil therefore requested a certificate be issued under Article 53 of the Brussels I bis Regulation in order to enforce the judgment in the UK. In this case, the referring court essentially asked first whether the court of a Member State must issue the certificate on the enforceability of a decision automatically or if it can examine whether the case falls within the scope of the Brussels I bis Regulation and, second, whether a compensation claim arising from the dissolution of the property relationships between *de facto* non-registered partners falls within the concept of ‘civil and commercial matters’, and thereby within the material scope of application of the Brussels I bis Regulation. First of all, the CJEU established that *ratione temporis* the case falls under the scope of application of the Brussels Ia Regulation, as

<sup>43</sup> C-102/15, *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich*, ECLI:EU:C:2016:607.

<sup>44</sup> C-361/18, *Ágnes Weil v Géza Gulácsi*, ECLI:EU:C:2019:473.

the judgment for which the certificate of enforcement was sought was given on 23 April 2009, i.e. before the starting date of application of the Brussels I bis Regulation, which was 10 January 2015. The CJEU recognised not only the possibility but also the obligation of the courts of the Member States to examine whether the dispute falls under the scope of application of the Brussels Ia Regulation before issuing the certificate. This follows from the requirement of legal certainty on which the mutual trust in the administration of justice in the EU is based. The CJEU answered the second question so that claims related to the dissolution of property relationships arising out of a *de facto* unregistered partnership, come within the concept of ‘civil and commercial matters’ and thus fall under the scope of application of the Brussels Ia Regulation. Although the Brussels Ia Regulation excludes rights in property arising out of a matrimonial relationship from its scope of application, exceptions must be construed narrowly. The parties to the dispute were not married and the property relationships resulting from their *de facto* unregistered partnership could not be characterised as ‘rights in property arising out of a matrimonial relationship’.

In some cases, Hungarian courts asked guidance from the CJEU regarding the interpretation of certain grounds of jurisdiction. In *OTP v Hochtief*, a Hungarian company did not repay a loan to OTP, a Hungarian bank. In the meantime, the German Hochtief acquired 75% ownership of the debtor company.<sup>45</sup> Under Hungarian company law rules, in the event of such an acquisition, the acquiring company had to declare the acquisition of ownership to the court of company registration and have the fact and extent of the acquisition published in the company gazette. If the acquiring company failed to declare the acquisition, it was fully and unlimitedly liable for the debts of the controlled company, provided that the assets of the controlled company were insufficient to meet the creditors’ claims. This happened in *OTP v Hochtief*. The controlled company became insolvent and could not pay back the loan to OTP. OTP made a claim against Hochtief as the controlling company, which failed to comply with its obligation to declare the acquisition of ownership in the debtor company.

The question was whether Hungarian courts had jurisdiction in this case under Article 5(1) a) of the Brussels Ia Regulation, pursuant to which a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. The CJEU established that the underlying legal relationship could not be excluded from the scope of application of the Brussels Ia Regulation under the insolvency exception [Article 1(2) b) of the Brussels Ia Regulation] and the exclusive jurisdictional ground for company law matters [Article 22(2) Brussels Ia Regulation] could not be applied either, because that jurisdictional ground concerned only disputes over the validity of the constitution, the nullity or the dissolution of companies or of the validity of the decisions of company organs. The CJEU added that the claim did not even qualify as a contractual claim under Article 5(1) a) of the Brussels Ia Regulation. This is because a contractual claim presupposes a freely assumed obligation by one party to another. Hochtief

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<sup>45</sup> C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG*, ECLI:EU:C:2013:674.

did not act as a party to the underlying contracts entered into between OTP and the debtor company. Nevertheless, the CJEU noted that it is not ruled out that the jurisdiction of Hungarian courts may be established on the basis of another jurisdictional ground of the Brussels I Regulation, such as Article 5(3), which allows bringing a claim against a person domiciled in an EU Member State in matters relating to tort, delict or quasi-delict in the courts for the place where the harmful event occurred or may occur. The CJEU laid down that the term ‘matters relating to tort, delict or quasi-delict’ within the meaning of Article 5(3) of the Brussels Ia Regulation covers all actions that seek to establish the liability of a defendant and are not related to a ‘contract’ within the meaning of Article 5(1) a).

Following the preliminary ruling, the referring court, the Curia of Hungary, stated that the obligation of the dominant member to declare and have the acquisition published gives rise to a statutory, *sui generis* liability based on company law.<sup>46</sup> It pointed out that, for establishing liability relating to tort, delict or quasi-delict, the CJEU required the existence of causality between the damage and the harmful acts. At the same time, the failure to comply with the statutory obligation on declaration and publication does not necessarily cause damage to creditors. The failure to meet the claims of creditors usually cannot be traced back to the fact that the person acquiring influence failed to comply with its obligation to declare the acquisition. Therefore, in the view of the Curia of Hungary, the statutory liability at issue could not fall under Article 5(3) of the Brussels Ia Regulation and there was no available ground of jurisdiction that could establish the jurisdiction of Hungarian courts in the case.

The *Nothartová* case concerned counterclaims related to a personality right claim and, more generally, the establishment of jurisdiction for counterclaims.<sup>47</sup> Ms Nothartová, a Slovak national, brought an action against Mr Boldizsár, a Hungarian national domiciled in Hungary for establishing the violation of her image and phonogram rights by publishing photographs and videos of her on the internet without her permission. The defendant brought a counterclaim for damages on the grounds that, first, the claim restricts the distribution of his intellectual creations; second, he was referred to incorrectly by the claimant using his father’s name, infringing his right to a name and the deceased person’s right to respect; and, third, mentioning the registration number of his vehicle by the claimant breached the ‘vehicle’s personality right’. The referring court asked the CJEU to interpret Article 8(3) of the Brussels I bis Regulation, which lays down that a person domiciled in a Member State may also be sued before the court in which the original claim is pending in respect to a counterclaim arising from the same contract or facts on which the original claim was based. The CJEU established that the special jurisdictional ground specified in Article 8(3) concerns only claims having a common origin. In the given case, it could be applied provided that a decision on the counterclaim required the court to assess the lawfulness of the actions on which the applicant based her own claims. Article 8(3) is an alternative to other jurisdictional grounds. Hence, it is an alternative to the

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<sup>46</sup> BH 2014. 115.

<sup>47</sup> C-306/17, *Éva Nothartová v Sámson József Boldizsár*, ECLI:EU:C:2018:360.

general rule of jurisdiction laid down in Article 4(1) of the Brussels I bis Regulation, as well as to the other rules of special jurisdiction set out in the Brussels I bis Regulation.

Furthermore, the pending *Tibor-Trans* case poses the question of the applicability of Article 7(2) of the Brussels I bis Regulation and requires the interpretation of the concept of the ‘place where the harmful event occurred’ in establishing the jurisdiction of the Hungarian forum with regard to the effects of an anticompetitive agreement entered into abroad.<sup>48</sup>

The validity of a choice-of-forum clause was in issue in *Hószig*.<sup>49</sup> The question referred to the CJEU was whether a jurisdiction clause that was found in the general terms and conditions of one of the parties to which the parties’ contract referred, and which stipulated the jurisdiction of the courts of a city in a Member State, namely the courts of Paris, is to be considered as valid under Article 23(1) of the Brussels Ia Regulation. In relation to a contractual dispute between a Hungarian and a French company, the Hungarian company brought an action against the French company before a Hungarian court, notwithstanding a jurisdiction clause included in the general terms and conditions of the French company in favour of the courts of Paris. The jurisdiction of the Hungarian court was challenged by the French party. The CJEU concluded that the jurisdiction clause complied with the conditions set out in Article 23. First, the parties’ contract explicitly referred to the general terms and conditions of one of the parties. Second, it was also noted that the designation of the courts of the capital of a Member State undoubtedly intended to confer exclusive jurisdiction to the courts belonging to the judicial system of that Member State.

The *Flight Refund* case required not only the interpretation of the Brussels Ia Regulation, but also that of the European Order for Payment Regulation.<sup>50</sup> A flight passenger assigned her right to compensation against the flight company for a delayed flight to Flight Refund, a company specialised in the recovery of such compensation claims. Flight Refund requested a Hungarian notary to issue a European order for payment against Lufthansa. The European order for payment was issued by the notary, but Lufthansa opposed it. Therefore, the procedure should have been continued in accordance with the rules of ordinary civil procedure before the competent court of the Member State where the order for payment had been issued. However, the notary could not identify the competent court, therefore asked the Curia of Hungary to do so. In essence, the CJEU was asked by the Curia of Hungary to give it guidance on how to proceed in the case. The CJEU first stated that jurisdiction for flight passengers’ compensation claims must be established based on the Brussels Ia Regulation. The European Order for Payment Regulation provides for the application of national rules of civil procedure to any question not settled by that regulation once the proceedings continue following an opposition. However, the rules of civil procedure must allow the examination of international

<sup>48</sup> C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS NV*. – Request for a preliminary ruling from the Győr Regional Court of Appeal (Hungary) lodged on 10 July 2018.

<sup>49</sup> C-222/15, *Hószig Kft. v Alstom Power Thermal Services*, ECLI:EU:C:2016:525.

<sup>50</sup> C-94/14, *Flight Refund Ltd v Deutsche Lufthansa AG*, ECLI:EU:C:2016:148.

jurisdiction under the Brussels Ia Regulation. If, based on the Brussels Ia Regulation, the courts of the Member States of the referring court have jurisdiction to hear the case, the court cannot terminate the proceedings because it could not identify the competent court. Instead, it has to identify or designate the competent court. However, if the jurisdiction of the courts of the Member State of origin cannot be established based on the Brussels Ia Regulation, the referring court is not required to review the order for payment.

## 2 Conflict of Laws

A single preliminary reference made by Hungarian courts concerned the EU conflict-of-laws instruments. The former Insolvency Regulation had to be interpreted by the CJEU at the request of the Supreme Court. Under the Insolvency Regulation and its former version, the law applicable is the law of the Member State where the insolvency proceedings are opened. However, the Insolvency Regulation allows a deviation in favour of the application of the *lex rei sitae* regarding rights *in rem* of creditors or third parties in respect of assets belonging to the debtor that are situated within the territory of another Member State at the time of the opening of proceedings. In the *Erste Bank* case, the question was whether the Insolvency Regulation and in particular the possibility of deviation in favour of the *lex rei sitae* contained therein may be applied to a case where the main insolvency proceedings were opened in an EU Member State, in Austria, but a security deposit was located in Hungary, which was not yet a member of the EU when the insolvency proceedings were opened, but was already a member when an action was brought in Hungary concerning the right over the security deposit.<sup>51</sup> The CJEU pointed out that the former Insolvency Regulation had entered into force on 31 May 2002 and the insolvency proceedings against the Austrian company was initiated after this date. In Hungary, the former Insolvency Regulation had to be applied from the date of Hungary's accession to the EU, that is from 1 May 2004. From this date, Hungarian courts are required to recognise judgments on the opening of insolvency proceedings rendered by courts in other Member States. This requirement may be traced back to the principle of mutual trust. Hence, Hungarian courts had to apply the former Insolvency Regulation together with the rule permitting deviation in favour of the *lex rei sitae* to insolvency proceedings opened in a Member State before Hungary's accession regarding rights *in rem* of creditors over a debtor's assets located in Hungary, which had been an EU Member State at the time when an action was brought there concerning the right *in rem*.

Hungarian judges contributed significantly to the development of EU law with two preliminary ruling requests related to the cross-border mobility of companies. This is a field not yet covered by EU legislation, but the relevant case law has private international law implications. The *Cartesio*<sup>52</sup> and *VALE*<sup>53</sup> cases helped the clarification of the relationship

<sup>51</sup> C-527/10, *ERSTE Bank Hungary Nyrt v Magyar Állam and Others*, ECLI:EU:C:2012:417.

<sup>52</sup> C-210/06, *Cartesio Oktató és Szolgáltató Bt.*, [2008] ECR I-9641.

<sup>53</sup> C-378/10, *VALE Építési Kft.*, ECLI:EU:C:2012:440.



between EU law and national law concerning the law applicable to companies. Following the *Centros*,<sup>54</sup> *Überseering*<sup>55</sup> and *Inspire Art*<sup>56</sup> judgments of the CJEU, it was called into question whether the real seat doctrine is compatible with the freedom of establishment provisions of the TFEU. In *Cartesio*, the Hungarian court of registration established that the transfer of seat of a Hungarian company to Italy with the retention of Hungarian law as governing law was not possible under domestic law. Although the obstacle here stemmed from the absence of substantive and procedural rules on the cross-border movement of companies, the CJEU held that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.'<sup>57</sup> This statement may result in the conclusion that a Member State of origin can opt either for the incorporation or the real seat theory. The cited statement of the CJEU was also confirmed in the *VALE* case, where an Italian company wanted to convert itself into a corresponding Hungarian company form; this time, with a change in the governing law, but this was rejected, again due to the absence of rules in Hungary for cross-border conversions.<sup>58</sup> Neither primary, nor secondary EU legislation determines the connecting factor for the law applicable to companies. The CJEU case law does not even exclude *a priori* the application of any of the connecting factors. Hence, Member States are free to determine the connecting factor. However, the application of the connecting factor selected by national law must be in compliance with EU law. Due to the case law of the CJEU, in particular the *Centros*, *Überseering* and *Inspire Art* judgments, in the relationship between the company and the host Member State, the real seat doctrine has been to a large extent supplanted by the incorporation doctrine.

## V Reception of the EU Private International Law Instruments in Hungarian Court Practice

The cases where Hungarian courts faced an interpretation problem and submitted a preliminary ruling request to the CJEU represent only the tip of the iceberg. In fact, EU private international law regulations had to be applied in many more cases; preliminary ruling has been asked only in a few of them. Therefore, this chapter intends to give a brief overview of

<sup>54</sup> C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

<sup>55</sup> C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

<sup>56</sup> C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

<sup>57</sup> *Cartesio*, para 110.

<sup>58</sup> *VALE*, para 29.



the Hungarian court practice related to the application of the EU private international law instruments.

The analysis of the case law is not intended to be exhaustive. It is instead limited to some illustrations on the application of the EU private international law regulations. Cases raising jurisdictional issues under the Brussels Ia and I bis Regulations and the Succession Regulation will be discussed along with the domestic court practice related to the Rome I and II Regulations. It must be noted that, among the EU private international law sources, the former Insolvency Regulation had to be construed by Hungarian courts both in the context of the governing law and jurisdiction.<sup>59</sup>

Typical questions include the temporal and subject-matter scope of application of the regulations, the relationship between international conventions and the EU private international law regulations, the interpretation of certain grounds of jurisdiction or connecting factors determining the governing law, prorogation of jurisdiction and choice of law, as well as questions related to enforcement. Often, the jurisdiction or the governing law was not contested and courts limited themselves simply to state that the jurisdiction and applicable law was established based on a given regulation.

## 1 Jurisdiction and the Recognition and Enforcement of Foreign Judgments

Domestic court practice related to the Brussels Ia and I bis Regulations is abundant. Often courts simply stated that jurisdiction must be established in accordance with the Brussels Ia or the Brussels I bis Regulation.<sup>60</sup> It happened that the jurisdiction of the court could be established due to the appearance of the defendant in accordance with Article 24 Brussels Ia Regulation.<sup>61</sup>

A first group of cases concerns the temporal and subject-matter scope of application of the jurisdictional regulations. Courts sometimes had to delimit *ratione temporis* the application of the Brussels Ia and I bis Regulations, when, for instance, at the time of the emergence of the case, the Brussels Ia Regulation had been applicable, while at the time of filing the statement of claim the Brussels I bis Regulation was already in force.<sup>62</sup> The court correctly chose in favour of the application of the Brussels Ia Regulation. The temporal scope of application of the two Regulations also arose regarding enforcement and it was confirmed that the Brussels Ia Regulation had to be applied to a judgment given in legal proceedings instituted before the starting date of application of the Brussels I bis Regulation, i.e. 10 January 2015.<sup>63</sup> In relation

<sup>59</sup> See in particular BH 2017. 97; EBH 2013. G.4.

<sup>60</sup> Szeged Regional Court of Appeal Gf. 30.147/2013/5; Budapest-Capital Regional Court Pf. 638.807/2016/4; Budapest-Capital Regional Court Pf. 640.701/2013/4. Budapest-Capital Regional Court Pf. 640.701/2013/4; Pécs Regional Court G. 20.694/2017/5.

<sup>61</sup> Budapest-Capital Regional Court P. 22.877/2012/10.

<sup>62</sup> Budapest-Capital Regional Court of Appeal BDT 2019. 3983.

<sup>63</sup> BH 2016. 144.

to the enforcement of a maintenance claim, the Curia of Hungary applied the Brussels Ia Regulation to a judgment given in legal proceedings instituted before the starting date of the application of the Brussels I bis Regulation, and even before the starting date of application of the Maintenance Regulation, which, referring to the rules of the Hague Maintenance Protocol, replaced the maintenance rules of the Brussels Ia Regulation.<sup>64</sup> The subject-matter scope of application of the Brussels I Regulation was examined in several cases. The priority of the CMR Convention was established in relation to the Brussels Ia Regulation based on Article 71(1) of the Regulation, which provides that the Regulation does not affect any convention to which the Member States are parties and which in a certain special field, governs jurisdiction or the recognition or enforcement of judgments.<sup>65</sup> In another case, the court stated that, for the question of establishing the existence and accepting a claim by a creditor in insolvency proceedings, the jurisdiction had to be ascertained on the basis of the Insolvency Regulation, because Article 1(2) b) of the Brussels Ia Regulation excluded from its scope of application ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.’<sup>66</sup>

Prorogation of jurisdiction was examined in a more detailed manner in a few cases. A jurisdiction agreement in a consumer contract in favour of an Austrian court was found to be invalid, because it did not comply with Article 17 of the Brussels Ia Regulation as it was not entered into after the dispute had arisen and did not allow the consumer to bring proceedings in courts other than those referred to in the general provisions on jurisdiction over consumer contracts.<sup>67</sup> The consumer could not be deprived of the alternative ground of jurisdiction that enables him to bring proceedings against the other party either in the courts of the Member State in which that party is domiciled or in the courts of the state in which the consumer is domiciled. The provisions of the Brussels I bis Regulation on prorogation of jurisdiction had to be taken into consideration in the course of a European order for payment procedure started before a Hungarian public notary between an Italian and a Slovakian party.<sup>68</sup> After a statement of opposition was filed by the defendant, the notary referred the case to the Curia of Hungary for the purpose of designating the competent court, because, in his view, no Hungarian court was competent in the case. The claimant argued that the place of performance was Hungary, as indicated in certain confirmations of orders that could establish the jurisdiction of Hungarian courts under Article 7(1) of the Brussels I bis Regulation. At the same time, the parties’ agreements referred to the exclusive competence of the court of Milan in Italy. The Curia of Hungary stated that the choice-of-court of the parties must be examined

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<sup>64</sup> Curia of Hungary Pfv. 21.258/2018/3.

<sup>65</sup> EBD 2015. G.3. *Convention on the Contract for the International Carriage of Goods by Road (CMR)*, date of signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961).

<sup>66</sup> BH 2017. 97.

<sup>67</sup> Budapest-Capital Regional Court of Appeal BDT 2019. 3983.

<sup>68</sup> BH 2019. 80.

by the designated court *ex officio* in light of Article 25 of the Brussels I bis Regulation and it cannot be ignored. An alternative ground of jurisdiction, such as the place of performance, can establish the jurisdiction of a Hungarian court insofar as the rules on prorogation of jurisdiction are not applicable.

The application of the special jurisdiction ground set out in Article 5(3) of the Brussels Ia Regulation was at issue in relation to an alleged violation of personality rights caused by two foundations protecting animals, one of which was Hungarian while the other Austrian, and by the legal representative of the Austrian foundation, due to certain statements published on the websites of the foundations regarding the plaintiff, a poultry processing company seated in Hungary.<sup>69</sup> The Budapest-Capital Regional Court of Appeal extensively referred to the case law of the CJEU and held that the claimant could bring an action in respect to the full damage suffered in the courts of the Member State where it has the centre of its interests.<sup>70</sup> The centre of interests can coincide with the place where a company has its registered office. However, the court argued that, in the given case, the place of the registered office of the plaintiff company did not coincide with the centre of its interests, because the harmful act occurred in a different Member State; the harmful statement was made in the language of this country and this country was equally the destination of the goods intended to be exported by the plaintiff. Consequently, the direct damage was sustained in Austria and Germany, and not in Hungary; therefore, concerning the Austrian foundation, the jurisdiction of the Hungarian courts could not have been established based on this special ground of jurisdiction. Nevertheless, one of the defendants was domiciled in Hungary and Hungarian courts could assert jurisdiction regarding it. Jurisdiction regarding the Austrian defendants could be established under Article 6 of the Brussels Ia Regulation, since the court found that the claims brought against the defendants factually and legally covered each other; it could therefore be concluded that the claims were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

Issues related to the enforcement of foreign decisions also arose.<sup>71</sup> In one case, it was held that the request for issuing an enforcement certificate and the issue of the enforcement certificate may not be considered as acts interrupting the prescription of the claim to be enforced if the request for issuing the enforcement certificate is not accompanied by a request to order enforcement.<sup>72</sup>

The Succession Regulation was also subject to court interpretation in Hungary. A court had to decide whether to assert jurisdiction under the Succession Regulation upon the plaintiff's request in relation to a claim by the plaintiff for the declaration and registration of ownership of some real estate located in Croatia and shareholding due to the community of property stemming from his/her partnership and subsequently matrimonial relationship with the

<sup>69</sup> Budapest-Capital Regional Court of Appeal BDT 2019. 4038.

<sup>70</sup> In particular, it referred to C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766 and *eDate*.

<sup>71</sup> See in particular BH 2012. 98; Curia of Hungary Pfv. 21.258/2018/3.

<sup>72</sup> BH 2016. 144.

deceased person.<sup>73</sup> The court stated that it could not assert jurisdiction because the Succession Regulation does not govern matrimonial property relations. Article 1(2) *d*) and *l*) exclude from the scope of application of the Succession Regulation ‘questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage’ and ‘any recording in a register of rights in immovable or movable property’. The plaintiff’s claim did not concern legal succession regarding the property of the deceased; even the claimant argued that the assets concerned did not belong to the property of the deceased person.

The Hungarian application of the Brussels II bis Regulation also reflects the proportions of the preliminary ruling requests. Although in Hungary, courts did not request a preliminary ruling from the CJEU regarding the interpretation of the Brussels II bis Regulation, some courts in other Member States did so. These preliminary ruling requests mostly concerned parental responsibility and not marital questions.<sup>74</sup> The same holds for the Hungarian court practice related to the Brussels II bis Regulation. Domestic court decisions mainly addressed parental responsibility and child abduction<sup>75</sup> rather than marital issues, mostly examining whether Hungarian courts have jurisdiction<sup>76</sup>. We find only a few illustrations for referring to the Brussels II bis Regulation, for instance in divorce cases to establish jurisdiction.<sup>77</sup> The scope of the Brussels II bis Regulation was examined in a case where the court stated that it does not apply to matrimonial property.<sup>78</sup>

In a child custody case, prorogation of jurisdiction was established by the Supreme Court under Article 12(3) of the Brussels II bis Regulation.<sup>79</sup> It found that the defendant accepted in an unequivocal manner the jurisdiction of Hungarian courts, as she appeared before the court, submitted a counterclaim on the merits and argued that another Hungarian court was competent in the matter, which assumed the jurisdiction of Hungarian courts and declared at a hearing that she was ready to make a settlement with the plaintiff. Recognition and enforcement of a foreign decision was also at issue in relation to parental responsibility.<sup>80</sup> In relation to the recognition and enforcement of a decision of a Belgian court, it was held that the enforcement of a foreign decision may not be denied, even if the child concerned was not heard, provided that the court ensured the possibility of a hearing.<sup>81</sup> Moreover, the recognition of a court decision may not be refused on the grounds of public policy if the court decision concerned ignored mandatory rules of the state where recognition is sought without breaching the fundamental principles or rules of that state. The recognition and enforcement

<sup>73</sup> Debrecen Regional Court of Appeal BDT 2019. 4057.

<sup>74</sup> See Somssich (n 37) 82.

<sup>75</sup> BH 2015. 100; BH 2013. 271.

<sup>76</sup> BH 2013. 344; BH 2013. 19; BH 2012. 224; EBH 2011. 2318; BH 2009. 298; BH 2013. 68.

<sup>77</sup> Pest Central District Court P. 102.782/2012/55.

<sup>78</sup> Debrecen Regional Court of Appeal BDT 2014. 3091.

<sup>79</sup> EBH 2010. 2141.

<sup>80</sup> BH 2011. 167.

<sup>81</sup> BH 2014. 248.

of a foreign decision may not be denied on the grounds of public policy if a study of the circumstances of the child was not prepared or psychological examination of the persons concerned was not conducted, because even Hungarian courts are not obliged to take these measures.

The Maintenance Regulation was simply referred to in several instances in order to establish jurisdiction and the applicable law.<sup>82</sup> The maintenance issue often arises in relation to a divorce. Additionally, it also happened that the court examined the temporal scope of application of the Maintenance Regulation and held that it could not be applied to the recognition and enforcement of a foreign decision, because the decision was rendered before the starting date of application of the Maintenance Regulation.<sup>83</sup> In relation to the enforcement of a French court decision in Hungary, the court confirmed that, in accordance with Article 41(1) of the Maintenance Regulation, the law governing the enforcement procedure is the law where the enforcement takes place.<sup>84</sup>

## 2 Conflict of Laws

As far as conflict-of-laws questions are concerned, Hungarian courts interpreted in several instances the Rome Convention, the Rome I Regulation and the Rome II Regulation. We equally find an example for the application of the Insolvency Regulation.<sup>85</sup> We are, however, not aware of domestic court practice related to the Rome III Regulation and conflict-of-laws issues related to the Succession Regulation.

It is a general trend that although there have been only a few cases referred to the CJEU in relation to the interpretation of the Rome I Regulation or the Rome Convention, cases where national courts apply the Rome I Regulation are abundant. Hungarian court practice confirms this, too. Nonetheless, in the relevant cases, courts often simply stated that the law governing the contract must be determined under the Rome I Regulation.<sup>86</sup>

Courts often examined whether the case must be decided on the basis of the Rome I Regulation, the Rome Convention or autonomous private international law *ratione temporis*.<sup>87</sup> In a judgment, the court stated that the Rome Convention did not have to be applied to a contract that was entered into before the promulgation of the Rome Convention in Hungary, but which was modified thereafter in 2007.<sup>88</sup>

<sup>82</sup> Curia of Hungary Pfv. 22.223/2017/4; Pest Central District Court P. 102.782/2012/55; Budapest-Capital Regional Court Pf. 630.704/2017/12.

<sup>83</sup> Curia of Hungary Pfv. 21.258/2018/3.

<sup>84</sup> BH 2018. 120.

<sup>85</sup> BH 2017. 97.

<sup>86</sup> Budapest-Capital Regional Court of Appeal Gf. 40.608/2017/12; Budapest-Capital Regional Court G. 42.072/2014/17.

<sup>87</sup> Curia of Hungary Pfv. 22.111/2015/12; Debrecen Regional Court of Appeal Gf. 30.372/2012/7; Győr Regional Court of Appeal Pf. 20.267/2013/3; Győr Regional Court of Appeal Pf. 20.074/2011/5; Somogy County Court G. 40.024/2010/21.

<sup>88</sup> Budapest-Capital Regional Court G. 41.731/2009/92.

Choice of law had to be assessed by courts in several cases under the Rome I Regulation and the Rome Convention.<sup>89</sup> Interestingly, the distinction between the Rome Convention and the Rome I Regulation caused a problem for the Curia of Hungary, where, in relation to a credit agreement between a foreign financial institution and the Hungarian borrower entered into on 11 October 2007, it stated that a choice in favour of the Austrian law did not violate the Rome I Convention (*sic!*) and it complied with the Old PIL Code, in particular because it did not constitute a fraudulent connection (*fraus legis*), since there were foreign elements in the case.<sup>90</sup> Although the judgment of the Curia of Hungary was given in 2016, when the Rome I Regulation already had to be applied, the Rome Convention needed to be applied in the matter, since the validity of the underlying contract had to be decided and, at the relevant time (11 October 2007), the Rome Convention had already entered into force between Hungary and Austria.<sup>91</sup> In addition to the terminological inaccuracy as far as the reference to the Rome I Convention is concerned, the Curia of Hungary ignored that the cited legal sources cannot be applied simultaneously because, like the New PIL Code, the Old PIL Code gave priority to the application of international conventions to autonomous private international law. Moreover, fraudulent connection was known by the Old PIL Code, but not by the Rome Convention or the Rome I Regulation. The problem of simultaneous application of the EU and autonomous private international law sources to buttress choice of law was not unique. A reference to jurisdiction of two Hungarian courts and to the Hungarian Civil Code was considered by the Budapest-Capital Regional Court as a choice in favour of Hungarian law, not only under the Rome I Regulation, but in parallel under the Old PIL Code.<sup>92</sup> The underlying guarantee contract was concluded on 27 January 2006, while the

<sup>89</sup> BH 2017. 97; Curia of Hungary Pfv. 20.489/2014/7; Győr Regional Court of Appeal Gf. 20.062/2015/8; Pécs Regional Court of Appeal Pf. 20.024/2016/3; Pécs Regional Court of Appeal Gf. 40.051/2014/8; Budapest-Capital Regional Court G. 40.306/2015/23; Budapest-Capital Regional Court Pf. 639.898/2014/5; Békéscsaba District Court P. 20.930/2013/37; Győr Regional Court P. 20.197/2012/33; Győr Regional Court P. 20.052/2012/79; Budapest Environs Regional Court G. 40.464/2015/16.

<sup>90</sup> Curia of Hungary Pfv. 20.919/2015/6.

<sup>91</sup> 27/2006. (XI. 29.) KúM határozat a szerződéses kötelezettségekre alkalmazandó jogról szóló, Rómában, 1980. június 19-én aláírásra megnyitott egyezmény és jegyzőkönyvei, valamint az azokat módosító egyezmények, továbbá a Ciprusi Köztársaságnak, a Cseh Köztársaságnak, az Észt Köztársaságnak, a Lengyel Köztársaságnak, a Lett Köztársaságnak, a Litván Köztársaságnak, a Magyar Köztársaságnak, a Máltai Köztársaságnak, a Szlovák Köztársaságnak és a Szlovén Köztársaságnak az említett egyezményhez és jegyzőkönyveikhez történő csatlakozásáról szóló, Brüsszelben, 2005. április 14-én aláírt egyezmény kihirdetéséről szóló 2006. évi XXVIII. törvény 2–5. §-ainak hatálybalépéséről (Decision of the Minister of Foreign Affairs No. 27/2006. (XI. 29.) on the entry into force of ss 2-5 of Act XXVIII of 2006 on the promulgation of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and its protocols, and of the conventions amending those, and of the convention on the accession of the Republic of Cyprus, the Czech Republic, the Republic of Estonia, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Slovak Republic and the Republic of Slovenia to the mentioned convention and its protocols signed in Brussels on 14 April 2005).

<sup>92</sup> Budapest-Capital Regional Court G. 42.206/2012/102.

Rome I Regulation is applicable only to contracts concluded after 17 December 2009. At the time of the conclusion of the guarantee contract, the Rome Convention had not yet been promulgated, therefore the case should have been decided on the basis of the Old PIL Code alone. The Pécs Regional Court of Appeal pointed out that, under the Rome I Regulation, the parties domiciled in Hungary could have opted for the applicable law, but choice of law must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.<sup>93</sup> A reference to the German BGB did not suffice to establish a choice of law, because the parties also referred simultaneously to some Hungarian laws.

In the absence of choice of law, courts decided on the applicable law under Article 4(1) of the Rome I Regulation, for instance concerning a sales contract,<sup>94</sup> a construction contract,<sup>95</sup> a mandate<sup>96</sup> and other types of services contracts.<sup>97</sup> The Győr Regional Court of Appeal referred to Article 4(2) of the Rome I Regulation regarding a works contract and applied the law of the habitual residence of the person carrying out the repair works, though the contract could certainly qualify as a service contract within Article 4(1) b).<sup>98</sup> The determination of the applicable law was more challenging in a case where the Curia of Hungary had to find the law governing a cooperation agreement.<sup>99</sup> The Curia of Hungary held that the cooperation agreement constituted in fact a mandate and thereby qualified it as a service contract under Article 4(1) b) of the Rome I Regulation. Due to the peculiar circumstances of the case, the habitual residence of the German claimant, who provided services in Russia under the agreement concluded with a Hungarian company, could not be established unequivocally. It could be either Russia or Germany. The Curia of Hungary called attention to the fact that Article 4 constitutes a cascade system of conflict rules and explained that Article 4(4) of the Rome I Regulation can be applied, i.e. the governing law can be determined on the basis of the closest connection only if the applicable law cannot be determined pursuant to paragraphs (1) or (2). Without having been able to determine with certainty the habitual residence of the plaintiff, the court concluded that the contract is manifestly more closely connected with Hungary based on Article 4(3), because the defendant's personal law was Hungarian. The judgment might be seen as an illustration of the homeward trend due to some flaws in the argumentation. Article 4(3) of the Rome I Regulation may be applied provided that it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country. The contract demonstrated some connections to Russia, Germany and Hungary. It is questionable why the personal law of the company weighed more than other connecting factors. The Rome I Regulation refers directly to the habitual residence. The concept of personal law is not even used in the Rome I Regulation; it is a concept taken from the Old

<sup>93</sup> Pécs Regional Court of Appeal Gf. 40.051/2014/8.

<sup>94</sup> Szeged Regional Court of Appeal Gf. 30.147/2013/5; Kaposvár Regional Court P. 20.365/2015/82.

<sup>95</sup> Zalaegerszeg Regional Court G. 40.161/2013/47.

<sup>96</sup> Buda Central District Court P. 22.689/2012/57.

<sup>97</sup> Szekszárd Regional Court Pf. 20.006/2016/4; Veszprém Regional Court G. 40.031/2014/8.

<sup>98</sup> Győr Regional Court of Appeal Gf. 20.100/2017/5.

<sup>99</sup> BH 2018. 250.



PIL Code, which has been retained by the New PIL Code. If the personal law of the defendant could have mattered, the personal law of the agent could have also been taken into account, pointing to the application of German law. If the habitual residence of the service provider could not be established by the Curia of Hungary, it should have determined the governing law under Article 4(4), because the law applicable could not be determined pursuant to paragraphs 1 or 2. Article 4(3) may be applied only if the governing law can be determined in accordance with paragraphs 1 or 2, but the case is manifestly more closely connected to the law of another country. It must be noted, however, that the court could have drawn the same conclusion – the application of Hungarian law – even on the grounds of Article 4(4) of the Rome I Regulation.

The law applicable to certain contracts was determined in accordance with the special rules of the Rome I Regulation, such as Article 5 on carriage contract.<sup>100</sup> The rules of the Rome Convention were applied in the absence of choice of law to a carriage contract.<sup>101</sup> The law governing a consumer contract was ascertained under the Rome Convention and the court applied Hungarian law, taking the habitual residence of the consumer into account.<sup>102</sup>

In one instance, the court had to decide whether a domestic provision qualified as an overriding mandatory provision. The Győr Regional Court of Appeal did not consider the provisions of Hungarian law on the creation, form, validity and content of a legal relationship concerning a loan and the scope, extent and performance of obligations and rights, as well as the termination of the legal relationship, as (overriding) mandatory provisions under Article 7 of the Rome Convention.<sup>103</sup>

The Rome II Regulation also gained application in Hungarian court practice. Courts correctly did not apply the Rome II Regulation to claims related to the violation of personality rights and found the Old PIL Code applicable.<sup>104</sup> Due to its temporal scope of application, courts could not apply the Rome II Regulation in several cases.<sup>105</sup> Concerning a damages claim related to a traffic accident, the court applied the law of the place where the damage occurred, in accordance with Article 4(1) of the Rome II Regulation.<sup>106</sup> The general *lex loci damni* rule of the Rome II Regulation was similarly applied to other damages claims, for example when a Hungarian poultry breeding company brought a damages action against an Austrian foundation and other entities for its loss suffered because the latter pursued a policy against feather harvesting from live animals due to which the claimant allegedly could not sell its

<sup>100</sup> Budapest-Capital Regional Court G. 41.170/2015/22; Budapest-Capital Regional Court G. 44.567/2014/26; Budapest-Capital Regional Court G. 41.332/2010/41.

<sup>101</sup> Budapest Environs Regional Court G. 40.138/2010/64.

<sup>102</sup> Budapest-Capital Regional Court of Appeal Pf. 20.095/2015/5.

<sup>103</sup> Győr Regional Court of Appeal Gf. 20.062/2015/8.

<sup>104</sup> Budapest-Capital Regional Court of Appeal BDT 2019. 4038.

<sup>105</sup> Pécs Regional Court of Appeal BDT 2016. 3562.

<sup>106</sup> Győr Regional Court of Appeal Pf. 20.174/2011/10; Budapest-Capital Regional Court P. 24.487/2012/47; Budapest-Capital Regional Court Pf. 641.647/2013/4; Budapest-Capital Regional Court Pf. 640.701/2013/4.

products on the market.<sup>107</sup> In Hungarian court practice, we even find an example of a choice of law regarding the non-contractual relationship of the parties, in a case where a claim was brought by the plaintiff bank against an appraiser for stating a higher market price for a real estate than the real price, in breach of professional rules. Here, the court noted that the parties requested the application of Hungarian law according to Article 14(1) a) of the Rome II Regulation and so it had to be applied by the court.

## VI Summary

EU accession required legislatures to adapt autonomous private international law to EU law. The New PIL Code in Hungary explicitly recognises the primacy of EU law. Moreover, in the course of drawing up the New PIL Code, the legislature took the solutions of EU law into account, even in fields not covered by EU regulations. Courts are also obliged to apply the EU private international law regulations. The reception of EU private international law regulations by the Hungarian judiciary took place smoothly. Judges often cited the judgments of the CJEU given in private international law matters. More serious interpretation problems concerning the EU private international law regulations seldom arose before Hungarian courts. In these rare cases, Hungarian courts were ready to refer the case to the CJEU in the framework of the preliminary ruling procedure. As far as the number of preliminary ruling requests, Hungarian courts seem to be relatively active in the judicial dialogue with the CJEU in the field of judicial cooperation in civil matters. The preliminary rulings given by the CJEU in these cases tended to require the refinement of certain points in the previous case law and did not necessitate essentially new pronouncements. Where courts decided cases requiring the application of the EU private international law regulations independently, without requesting the guidance of the CJEU, they did not hesitate to apply EU law and most often this took place correctly. Only minor uncertainties could be identified in the case law, such as the parallel reliance on the autonomous law and EU regulations by courts ignoring the primacy of the latter, and in a few instances finding the appropriate connecting factor caused some difficulty, though these usually did not affect the outcome of the case.

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<sup>107</sup> Debrecen Regional Court G. 40.057/2012/118.