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Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow

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Abstract: This article deals with the notion of public policy in the framework of Brussels system the past, present and future. Author concludes that Brussels I Recast Regulation did not change much regarding the public policy issue. Even though initially there were thoughts that it should be removed from the system altogether, at the end only the exequatur has been abolished, but the public policy exception remained. As there was no significant change related to the public policy exception in the last Regulation, all the case law made under Brussels Convention and Brussels I Regulation is still applicable. This means that the public policy exception can be based on either procedural or substantive public policy arising out of national legal order and suitable for international relations (international public policy). There are also emerging contours of pure EU public policy. However, this one is still not supplementing the public policy based on national legal rules as this is a hallmark of European diversity.

KEYWORDS: • public policy • Brussels Regulation I • Brussels Convention • Court of Justice of the EU • contradictory principle • judgement

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1 Introduction

This article discusses the relevance of public policy or "ordre public" within the so called Brussels system. The term "ordre public" possesses two distinct meanings. In the first place, it has a meaning similar to that associated with "public policy" in the common law: courts will not enforce acts the performance of which would contravene fundamental moral principles, or which would offend against some other overriding public interest. But in civil law countries "ordre public" also connotes legislative provisions which are mandatory or "jus cogens", i.e. provisions which cannot be contracted out of or otherwise excluded (Forde, 1980: 259). Even though the term "public policy" is of common law origin and "ordre public" is the civilian tradition term, and that there exist certain differences between the two, we will use them bellow as synonyms.

In literature the public policy is sometimes referred as an evil since it represents an obstacle to apply foreign law or it is a ground for refusal of foreign judgements. However, it is also referred as necessary evil by explaining that it is unlikely for the states to consent with mutual recognition and enforcement of foreign judgements in absence of such guardian of their fundamental principles of law (Varadi, Bordaš, Knežević, Pavić, 2010: 161). In the broad meaning[1] of private international law the public policy come into play twice. At first, it comes in the context of conflicts of laws rules, where a judge has the ability not to use foreign law if it contradicts public policy of the forum state. Secondly, it comes in the context of rules on recognition and enforcement of foreign judgements, where a judge in the state where recognition or enforcement is sought has the ability to refuse foreign judgement if it contradicts public policy of the state of recognition. This article refers to the public policy in relation to recognition and enforcement only.

Public policy clause can be found practically in every national legal act containing provisions on recognition and enforcement, as well as in international treaties and legal acts of the European Union. Public policy is the utmost symbol of culture and this constitutes richness, not impairment (Kessedjian, 2007–2008: 35–36). In the Republic of Slovenia the public policy clause is to be found in the Private International Law and Procedure Act,[2] while at European Union level several legal acts exists containing provisions on public policy in the context of recognition and enforcement, such as Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters[3] (Brussels I), 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 judgements in civil and commercial matters[4] (Brussels I Recast), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility, repealing Regulation (EC) No 1347/2000[5] (Brussels II), Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[6] (Insolvency Regulation) as well as the new Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings[7] (applicable on 26 June 2017), 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.[8] The purpose of this Article is to review public policy in EU legal acts relating to civil and commercial matters as defined in today's Brussels I Recast only, according to which some proceedings are excluded (e.g. bankruptcy, arbitration, maintenance obligations arising out of family relationships, wills and succession, the status or legal capacity of natural persons, rights in property arising out of matrimonial relationship etc.).[9] Thus, public policy in Brussels I Recast and its predecessors Brussels Convention and Regulation 44/2001 will be reviewed.

Article deals with the question of defining the scope of public policy and its relation to other grounds for refusal of judgements rendered in another Member State of the European Union, with special attention to the contradictory principle. To this purpose the most important judgements of the CJEU will be analysed. At the end some thoughts concerning public policy in the future will be given.

2 Public policy – its content and purpose

Before addressing the subject matter as such, the content of public policy should be clarified. First, it should be stressed that public policy considered in the Brussels I Recast is a special type of public policy or "ordre public". It is an international public policy (odre public international) that does not cover all "jus cogens". However, neither in case law nor in literature we can find a full definition of public policy (substantive or procedural). As of procedural public policy we can ascertain that in includes those fundamental principles and institutes of civil procedure without which there can be no democratic court procedure or rule of law (Kramberger, 2005: 255). Even more dim is the notion of substantive public policy. It is clear that (international) public policy does not include all "jus cogens" as not all internally mandatory rules are appropriate to be applied in international environment. Only the most fundamental rules of "jus cogens" that form the essence of certain legal order can be applied in international environment. Such rules are the constitutional provisions, basis principles of national and EU law, European Human Rights principles (European Convention on Human Rights and Fundamental Freedoms – ECHR). Some authors also include customary international law, vital interests of a state etc. (see Kramberger, 2005: 255–257). Special problem related to substantive public policy is relation to the morality. Usually it is claimed that the basic moral principles can be included in the substantive public policy. However, definition of morality is so evasive that one should be very careful. Even though, justice and equity can be considered to reside in the centre of every legal system and thus also form part of public policy.

One of the more elaborative attempts to describe public policy is at Mills (2008). Mills describes public policy as a "safety net" to choice-of-law rules and rules governing the recognition and enforcement of foreign judgments (2008: 202). As such the public policy defines the outer limits of the "tolerance of difference" implicit in national legal rules. This is a traditional function of special importance in multicultural societies and a globalising world. However, a recent case law suggests an expansion in the use of

public policy derived from sources external to the state (e.g. EU). This development suggests a revolutionary change in its character and effects (Mills, 2008: 202).

In an attempt to describe the landscape of public policy and on a basis of English case law analysis Mills (2008) differentiate among five types of typical situations where the public policy exception can be applied. The first category of cases are cases in which the dispute is proximate to the forum (the forum has a strong interest in the dispute) and the policies that are at stake are shared with the other affected states or are absolute (and thus ought to be shared). The case law is consistent with the expectation that public policy should be readily applied in these circumstances (Mills, 2008: 220). In the second category of cases, the dispute is not closely connected to the forum state, but the policies that are at stake are (or, it is believed ought to be) shared between the affected states. The case law is consistent with the conclusion that a strongly shared or absolute policy may be applied, regardless of the low proximity of the dispute (Mills, 2008: 222). The next category of cases is those in which the claim involves a breach of a relative norm, but the dispute is strongly connected to the forum state. The application of public policy may be justifiable on the grounds of the strong proximity of the dispute to the forum (Mills, 2008: 225). A further category concerns cases which involve both disputes with a low proximity and breaches of only relative norms. As these cases lack either criteria which justifies the application of public policy it is to be expected that in these cases courts should be most prepared to accept that a foreign law or judgment should be given effect, even if the result is one which is different from that which would be reached under national law (refusing to apply public policy) (Mills, 2008: 228). The most difficult cases are those where there is some degree of proximity between the dispute and the forum state, but not so much that local public policy is very readily applicable, and the public policy at stake is not entirely shared or absolute, but neither is it entirely relative (Mills, 2008: 230).

On the basis of such analysis there are three leading principles that can be extrapolated. First, as a subsidiary form of choice-of-law rule, the application of public policy should reflect the degree of proximity of the dispute with the forum state. Second, the willingness to apply public policy should reflect the relativity of the norm which is breached - the extent to which it is shared with other interested states or absolute (ought to be shared). Where shared or absolute norms are involved, such as when public policy is sourced from EU or international law, it is transformed from a negative exclusionary doctrine to a positive mechanism for enforcing those norms. Third, public policy should be more easily invoked depending on the seriousness of the breach (Mills, 2008: 236).

The Brussels Convention has not relinquished the public policy ground for refusing recognition and enforcement. As a general (substantive and procedural) exemption clause, this ground is still important. It is commonly believed that this reservation must be construed narrowly in the sense of an "ordre public international" (Gottwald, 1997: 161).The need for a substantive public policy defence has been reduced by the harmonisation of applicable law rules in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[10] (Rome I) and 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[11] (Rome II) because in theory all courts in the Member States of the EU will be applying the same law to the dispute. However, both these instruments have a public policy exception. The problem is that the use of the public policy exception in Rome I and Rome II will vary according to the forum. Therefore, although the applicable law should be the same irrespective of the forum, its compatibility with the law of the forum depends on which forum is hearing the case (Beaumont & Johnston, 2010: 263). Harder it may be for the judgment debtor to seek redress in the country which issued the judgment if the decision is based on procedural irregularities (Beaumont & Johnston, 2010: 264).

3 Public policy in the Brussels I system

3.1 General

In the field of civil and commercial matters nowadays covered by the Brussels I Recast Regulation, three legal acts of the EU containing provision on public policy should be mentioned: Brussels Convention and Brussels I Regulation which are predecessors of the Brussels I Recast.

Article 27(1) of the Brussels Convention, which was applicable until Regulation 44/2001 came into force, states:
"A judgement shall not be recognised if such recognition is contrary to public policy in the State in which recognition is sought."

In the Brussels I Regulation public policy clause is contained in Article 34(1), according to which:
"A judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."

Article 45(1)(a) of the Brussels I Recast states:
"On the application of any interested party, the recognition of a judgment shall be refused if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed.

The new Brussels I Recast Regulation retains and cumulates the earlier exceptional grounds of challenge from the Brussels I Regulation. The Member States agreed to sacrifice the exequatur stage on condition that the existing grounds for the refusal of recognition and enforcement of foreign judgments were retained (Fitchen, 2015: 150). The comparison of the above mentioned acts shows the difference between Brussels Convention on the one hand and Brussels I Regulation and Brussels I Recast on the other hand. The difference lies in the word "manifestly", which clearly shows the intention of the EU legislator to limit the use of public policy clause as much as possible. As for the comparison of Brussels I Regulation and Brussels I Recast, apart from addition of the phrase "ordre public" and stylistic adjustments, regulation of public policy clause is conceptually identical to Brussels I Regulation (Franzina, Kramer, Fitchen, 2015: 440). However, there is a big difference in the system of the enforcement of judgements. According to the Brussels I Regulation a special procedure

was required in order to enforce the judgement rendered in another Member State of the EU. The Brussels I Recast now abolishes any procedure regarding declaration of enforceability which means that judgement given in one Member State of the EU can be automatically enforced in another Member State of the EU (Article 39 of the Brussels I Recast). An interested party (debtor) has the ability to file an application for refusal of enforcement (Art. 46 et seq. of the Brussels I Recast). Considering the similarities between regulations of public policy clause in different EU legal acts, case law regarding the interpretation of Brussels Convention still applies in order to interpret the content and scope in the Brussels I Regulation and Brussels I Recast. The CJEU has on the basis of the Brussels Convention and Regulations put limitations on public policy by granting the Member States the right to decide for themselves on the requirements to be satisfied under their public policy, but denying the State in which recognition is sought the right to decide for itself whether its public policy reservations made carry enough weight to impede the recognition or declaration of enforceability of the judgment given in another Member State. The CJEU argues that the scope of public policy reservations is to be determined by interpretation of the Convention or the Regulation, respectively, which interpretation, again, is incumbent on the CJEU (Geimer, 2002: 29).

Already at the preparation of Brussels I Regulation the European Commission proposed to give up the possibility of declining recognition of a judgment on the grounds that it is contrary to public policy. Public policy was held not to be compatible with the European integration process. The European Commission did not succeed at that time (Geimer, 2002: 28). At the preparation of Brussels I Recast the European Commission sought again, and again unsuccessfully, to narrow the public policy clause in order to prevent substantive aspects of public policy from being available as a ground for non-recognition and enforcement. Consequently, public policy clause would be limited to the procedural aspects of public policy only. During the recast process this attempts to restrict public policy haven been rejected by the Member States of the EU (Franzina, Kramer, Fitchen, 2015: 440–442; Stanivuković, 2011: 102). The final text of the Brussels I Recast brought a half-way solution. Exequatur has been abolished, but the refusal grounds have been kept, including the public policy exception (Francq, 2016: 877). The abolition of exequatur has necessitated the extension of this suspensory discretion to include the enforcement authority as well as the court: questions remain concerning how these authorities will exercise a discretion previously reserved for the judiciary. The answer will depend upon the domestic provisions by which the Brussels I Recast is supported, and thus will vary across the EU. It seems reasonable, however, to assume that a discretion that is antagonistic to the fundamental policy of facilitating the enforceability of judgments across EU borders will be applied cautiously (Fitchen, 2015: 149–150).

Article 45(1) of the Brussels I Recast exhaustively sets out the exceptional grounds that, when present, prevent the recognition, and hence the enforcement, of a foreign judgment in the Member State addressed. The new Brussels I Recast Regulation retains and cumulates the earlier exceptional grounds of challenge from the Brussels I Regulation. Article 45(1) requires that the court must refuse recognition if, on an application by any interested party, the recognition of the foreign judgment violates any

of its exceptions. These exceptions are interpreted strictly and are construed narrowly. The new Brussels I Recast Regulation introduces the novel requirement that the applicant must be an "interested party" but offers no definition of this term. It is suggested that "interested party" probably refers to a person possessed of such legal interest in (at least) the Member State of origin as to be entitled to either benefit from the judgment or to face liabilities in connection thereunto (Fitchen, 2015: 150).

Besides the public policy clause, judgement rendered in one Member State of the EU can be according to the Brussels I Recast refused (Art. 46 referring to Art. 45 of the Brussels I Recast): (i) where the judgment was given in default of appearance and the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so (ii) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed, (iii) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed, (iv) if the judgement conflicts with some provisions regarding rules on international jurisdiction as provided by the Brussels I Recast (e.g. exclusive jurisdiction, jurisdiction regarding weaker parties). These grounds for refusal are obligatory. Therefore, recognition and enforcement must be refused if any of these grounds exist (Francq, 2012: 648).

It is important to stress that national judge is prohibited to use any other ground not expressly enumerated in Article 45 of the Brussels I Recast.[12] Besides, under no circumstances a judgment may be reviewed as to its substance (Art. 52 of the Brussels I Recast) and when examining the grounds of jurisdiction national judge is bound by the findings of fact on which the court of origin based its jurisdiction (Art. 45(2) of the Brussels I Recast). Thus it is not opened to the court where recognition or enforcement is sought to consider whether the court of origin made some error in determining the underlying dispute as to the facts of the case, applicable law etc. (Stone, 2010: 231).

3.2 Relationship between public policy clause and other grounds for refusal

Interested party is not prohibited to invoke more than one ground for refusal enumerated in Article 45 of the Brussels I Recast. However, the use of public policy ground cannot be invoked in the event that other specific ground for refusal can be invoked (Franzina, Kramer, Fitchen, 2015: 443; Bogdan, 2012: 74). E.g. if the judgement is irreconcilable with a judgement in the State of recognition, interested party cannot invoke public policy ground. In *Hoffmann v Krieg*[13] CJEU expressly stated that public policy exception was in any event precluded if a different ground for non-recognition or enforcement listed in Art. 27 of the Brussels Convention (now Art. 45 of the Brussels I Recast) is applicable.[14] Therefore, the CJEU elaborated strictly subsidiary character of the public policy (see also Study, 2007: 31). In other words, public policy exception has a residual character and applies only where other grounds for refusal are inapplicable (Lopez-Tarruella, 2000: 124).

4 The scope of public policy in the Brussels Regulation

4.1.1 General

Public policy clause is the only ground for refusal of recognition and enforcement of an open nature. All other grounds mentioned in Article 45 of the Brussels I Recast are specific (e.g. default judgements or rules on jurisdiction). Therefore its content and scope are of great importance. Open nature of public policy clause allows for the possibility of being abused by the Member States of the EU (Lopez-Tarruella, 2000: 125). Consequently, the control of the CJEU is needed in the sense of setting the limits of its interpretation.

By the term public policy it is not meant any supranational (EU) public policy but national public policy of the Member States of the EU. Therefore, the content of public policy depends on the national conception of the Member State of the EU where recognition or enforcement is sought. However, the limits in its application are set by the Brussels I Recast and CJEU. As far as the limits contained in the Recast are concerned, Art. 45(3) should be mentioned according to which the test of public policy may not be applied to the rules relating to jurisdiction.

Nor Brussels Convention nor Brussels I Regulation and Brussels I Recast give any positive definition of public policy as an autonomous EU concept. Likewise, CJEU so far has not provided such definition. On the contrary, CJEU referred to national conceptions of public policy but sought to temper the liberty of definition it allows to the Member States of the EU regarding its limits. The reason for the lack of definition lies in the fact that CJEU cannot define the content of public policy of the Member State.[15]

CJEU has repeatedly stated in several judgements, beginning with *Hoffmann v Krieg*, that public policy exception must be interpreted strictly and ought to operate only in exceptional cases. This means that its application is confined to the last resort (Bogdan, 2012: 73). Recourse to the public policy exception could be envisaged only where recognition or enforcement of the foreign judgement would be at variance to an unacceptable degree with the legal order of the Member State of the EU in which enforcement is sought inasmuch it infringes a fundamental principle. Considering the prohibition of substantial review of the judgement, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State of recognition or enforcement or of a right recognised as being fundamental within that legal order.[16] This interpretation is valid for substantive and procedural public policy. In *AS flyLAL Lithuanina Airlines*[17] has recently stated that public policy refers to the protection of legal interests which are expressed through the rule of law, rather than purely economic interests.

In the following chapters of this article limits in the interpretation of public policy clause set by the CJEU will be examined. As already mentioned, public policy consists of substantive and procedural aspects. Limits of the substantive public policy as

determined by the CJEU will be analysed first and then limits of procedural public policy.

4.1.2 Limits of interpretation of substantive public policy

In the EU substantive public policy is rarely used. Legal divergences between Member States in the field of civil and commercial matters covered by the Brussels I Recast are rarely strong enough to bring the contradiction with public policy. Besides, the use of substantive public policy is limited by the prohibition of a review of the substance of the decision (Francq, 2012: 662). The question of substantive public policy comes into play in case of divergences of legal provisions, legal errors in applying the law (national or EU) and in case of obtaining the decision by fraud.

As the CJEU held in case *Krombach v Bamberski* a mere difference of legislation is not considered as infringement of public policy in the Member States of the EU where the enforcement is sought.[18] Referring to such legislative differences would mean review of the judgement rendered in the Member State of origin as to its substance. The same is true for the legal errors in applying the law (Francq, 2012: 662–663). If Member State of origin apply Slovenian law instead of German law, such error does not justify the intervention of public policy. The question is, whether an interested party can refer to public policy exception when correct application of EU law is at stake, such as fundamental freedoms of the EU or freedom of competition are infringed.

CJEU held in *Renault v Maxicar*[19] that a violation of the fundamental freedom of free movement and freedom of competition are not covered by public policy exception.[20] But it added that infringement of public policy in such situation could only be considered if the remedies in the Member State of origin did not ensure sufficient protection of the parties.[21] On the basis of judgement in *Renault v Maxicar* three conclusions could be made. First, CJEU as regards public policy clause establishes the equality between national and EU law provisions. Second, misapplication of EU rule does not constitute the breach of fundamental principles and third, procedure for recognition and enforcement provided by the Brussels I Recast is not appropriate instrument to review the application of EU law (Lopez-Tarruella, 2000: 128).

Does public policy exception cover decisions obtained by fraud in the Member State of origin? The Schlosser report confirmed that public policy clause could be invoked on the fraud. However, where the fraud has already been alleged in the Member State of the origin, it is only in very exceptional situations where it could be accepted as ground for refusal of recognition and enforcement (Francq, 2012: 666–667).

4.1.3 Limits of interpretation of procedural public policy

Nowadays it is not arguable whether procedural issues are covered by public policy clause. In the past the wording of provisions referring to public policy exception and traditional interpretation led to a different outcome. According to the traditional view, Art. 45(1)(b) Brussels I Recast referring to the principle of fair trial before the court of origin is the only provision devoted to procedural issues of judgement. The problem

with traditional view is that Art. 45(1)(b) of the Brussels I Recast cover only situations where the judgment was given in default of appearance and the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so. If these conditions are not met, interested party cannot invoke Art. 45(1)(b) of the Brussels I Recast. Consequently, the defendant who is a victim of the gross violation of the right to a fair trial not covered by Art. 45(1)(b) of the Brussels I Recast would be deprived of any protection (Francq, 2012: 667).

This delicate issue was settled by the CJEU in case *Krombach v Bamberski*. Before analysing this case we should mention case *Hendrikman*,[22] where CJEU gave broad interpretation of now Art. 45(1)(b) of the Brussels I Recast. In case *Hendrikman* the judgement was not given in default of appearance since Mr. And Mrs. Hendrikman were represented by the two lawyers chosen by the judge but without any authority of the defendants. As a result, Art. 45(1)(b) of the Brussels I Recast could not apply and defendants invoked public policy clause in order to oppose the recognition of judgement in Netherlands. CJEU considered that Art. 45(1)(b) of the Brussels I Recast should be given broad interpretation to include situations where the defendant had not had an opportunity to defend himself.[23] Public policy exception is thus precluded when the issue must be resolved on the basis of more specific provision.[24]

Returning to *Krombach v Bamberski*, Mr. Krombach was condemned by the French Courts for violence resulting in the death of a younger girl Kalinka Bamberski in Germany. The judgement arose out of criminal proceeding in France. A civil claim was introduced by victim's father André Bamberski before the French criminal courts whose jurisdiction was based of the French nationality of the victim (according to French national law). The French court ordered Mr. Krombach to appear in person, but Mr. Krombach refused to appear since he feared to be arrested. As a result, French court applied contempt procedure pursuant to Art. 627 et seq. of the French Code of Criminal Procedure according to which the court can render the decision without hearing of the person in contempt. The French lawyers of Krombach were not permitted to defend the case. Among other, French court order Mr. Krombach to pay compensation to Mr. Bamberski who sought recognition of the payment order in Germany. Mr. Krombach appealed and contended that he had not been able effectively to defend his case in the French proceeding. German court referred the question whether the recognition of French judgement was excluded under Art. 27(1) of the Brussels Convention (Art. 45(1)(a) of the Recast) since he was denied the right to be defended by the lawyer and since international jurisdiction of the court of origin was based on the nationality of the plaintiff. As for the later, CJEU held that public policy clause cannot be used to control jurisdiction of the court of origin even if based on exorbitant jurisdiction rules. As regards the principle of fair hearing, CJEU referred to general description of the public policy clause which requires manifest infringement of the rule or principle considered as fundamental in the Member State of the EU where recognition or enforcement is sought.[25] CJEU believed that right to be effectively defended constitutes such right.[26] Accordingly, German court refused recognition of the French judgement. It is also

important to stress that recourse to public policy is possible only in exceptional circumstances where the guarantees laid down in national legislation of the state of origin are insufficient to protect the defendant from manifest breach of his right to defend himself.[27] It is only on the assumption that procedural requirements have been satisfied that there can be liberal recognition of foreign judgments differing on issues of substance from those of the forum. This is precisely the lesson to be learned from the *Krombach* case. Regardless how generous the requirements of recognition and enforcement is, in the superior interests of free movement of judicial decisions, there can be no concession on procedural fairness (Watt, 2001: 554).

As regards link between Art. 45(1)(a) and (b) of the Brussels I Recast it seems that in case *Krombach v Bamberski* CJEU abandoned broad interpretation of Art. 45(1)(b) of the Brussels I Recast. Some authors believe that CJEU could expand the application of Art. 45(1)(b) of the Brussels I Recast but instead it preferred the application of public policy (see Lopez-Tarruella, 2000: 126–127).

Procedural public policy was also subject matter of the decision in case *Gambazzi*.[28] Since Mr. Gambazzi did not comply with a disclosure orders issued by the English Court he was excluded from the proceeding. The judgement was rendered the decision as if Mr. Gambazzi was in default. Italian Court recognised English judgement but Gambazzi appealed. Question was referred to the CJEU regarding the applicability of public policy clause. It has to be stressed that in this case defendant entered an appearance before English Court but was excluded from the proceeding on the ground that he did not comply with the obligations imposed by the Court. CJEU answered affirmatively but stressed the importance of a comprehensive assessment of the proceeding. If in a light of all circumstances appears that exclusion measure constitutes a manifest and disproportionate infringement of the defendant's rights to be heard, and then public policy clause could be invoked. In making such assessment CJEU gave some guidelines. National court where recognition is sought should examine whether defendant had the opportunity to be heard, what legal remedies were available to him, if he had the opportunity to raise all the factual and legal issues which could support his application etc.[29] After this assessment the balancing test should be exercised in order to assess whether the exclusion of defendant from the proceedings appears to be a manifest and disproportionate infringement of his right to be heard.[30]

The public policy exception was also considered in case *Apostolides v Orams*[31] and *Trade Agency*.[32] In the first case CJEU held that public policy exception cannot be invoked if the judgement is unenforceable in the state of origin. Such unenforceability in the state of origin is not considered as violation of public order in the state where recognition is sought. In case *Trade Agency* concerning a judgement rendered in default of appearance by English court ordering Trade Agency to pay compensation. Creditor required recognition and enforcement of judgement in Latvia. The problem was that judgement given by the English court did not contain an assessment of subject-matter on the basis of the action and lacked any arguments of its merits. Therefore the question was whether public policy was violated. CJEU held that the right to the fair trial requires that all judgements be reasoned to enable the defendant to see why judgement has been pronounced against him and to bring appropriate and effective appeal against

it.[33] It also stressed that in principle such judgement given in default of appearance which does not contain any assessment of the subject-matter, basis and merits of the action, is a restriction on a fundamental right within the legal order of Member State.[34] However, fundamental rights may be subject of the restrictions if such restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objective pursued, a manifest and disproportionate breach of the rights thus guaranteed.[35]

In case of *Volker Sonntag*[36] the CJEU discussed both a procedural and a substantive issue. The German defendant appealed recognition of an Italian judgment on the basis that the decision did not fall within the ambit of the Convention (now Regulation) as under German law. The defendant, a teacher, was a civil servant and thus the dispute concerned public, not civil law. This argument was swiftly rejected by the CJEU – if the activity of supervising pupils is characterized in the Contracting State of origin of the teacher concerned as an exercise of public powers, that fact does not affect the characterization of the dispute in the main proceedings (Beaumont & Johnston, 2010: 260).

The CJEU was right to fear that states may abuse the use of the public policy exception. But as a result of that fear it has emptied the provision of its basic meaning, with only a few remaining instances where the states are allowed to apply the exception. But who can argue that human rights protection is not a European public policy nowadays? Hence, the reason Germany was allowed to use its public policy to forbid the commercialisation of a violent game (*Omega* case)[37] may simply be that Germany's public policy is clearly the same as European public policy, but we still have to wait for a case where the state public policy will be different from that of the EU, and where the state wins (Kessedjian, 2007–2008: 35–36).

Decisions of the CJEU in cases *Gambazzi* and *Trade Agency* shows that the recognition of judgement should not be lightly refused by reference to public policy exception. In both cases national courts where recognition was sought uphold the recognition of the judgement (Franzina, Kramer, Fitchen, 2015: 445).

5 Conclusion

As seen in the case law, the CJEU has relied on the Brussels regime public policy exception to deny the enforcement of foreign judgments in a few limited situations. The public policy exception has mostly served as a defence only in conjunction with another valid provision of the Brussels Convention or Regulation (Minehan, 1995–1996: 815). As can be seen in the case-law it is clear that procedural issues are the crux of Article 45 of Brussels I Recast (*ex* Article 34 of Brussels I Regulation)(Beaumont & Johnston, 2010: 261). Considered from the perspective of the judgment creditor and his legal representatives, the provisions and procedures introduced by the new Brussels Recast Regulation represent an improvement comparing to the Brussels Regulation 44/2001. For the judgment creditor the exequatur-free circulation of civil and commercial judgments within the EU allows a more immediate engagement with the authorities who may effect the actual enforcement sought. It is also clearly preferable for the

creditor that the debtor must independently act to commence proceedings to suspend or challenge the recognition or enforcement of a judgment that is presumed to automatically possess both of these attributes. However, the new Brussels I Recast does not leave the judgment debtor without the means to suspend or challenge the judgment by an ordinary appeal in the Member State of origin or the recognition/enforcement of the judgment in the Member State addressed if one of its exceptions in Art. 45(1) should apply. The recognition and enforcement provisions of the new Brussels I Recast Regulation thus seem well balanced between judgment creditor and debtor (Fitchen, 2015: 152).

The new Brussels I Recast contributes nothing to the problem of defining public policy. The old case law on the basis of Brussels Convention and Brussels I Regulation is still applicable. This public policy is still primarily a national public policy. It shall be very difficult to speak about the substitution of the national public policies by an EU one in the foreseeable future. During the time the actual EU dimension of the private international public policy exception may acquire, particularly in relation to the deepening of the European integration. Such EU public policy does and will exist as a logical consequence of the EU law autonomy (Meidanis, 2005: 110).

In this context it is recognised that some states have fundamental values that should be respected as limits on free movement of goods, services, capital and people even though those fundamental values are not shared throughout Europe. One example of this is the German respect for human dignity which allows it to ban laser games (*Omega* case) that simulate the violent death of individuals (Beaumont & Johnston, 2010: 277). The most important outcome of what we learned from the public policy case law is the fact that despite all Member States being a party to the ECHR and being bound by general principles of EU law, which includes fundamental rights protection, Dr. Krombach, Mr. Larmer and others were not given a fair trial (Beaumont & Johnston, 2010: 270). This clearly teaches us that there is still place for international public policy based on national legal regulation. Even the introduction of new EU law instruments for enforcement (e.g. the European Enforcement Order) with abolition of the public policy did not change the game. As it is pointed out in the literature, the European Enforcement Order allows for the enforcement of judgments which are contrary to the ECHR. In *Omega* case we saw that this is not just a theoretical possibility. However, under the Brussels Regulation 44/2001 or Brussels I Recast there is a possibility of public policy defence. Under the European Enforcement Order there is none. Germany was sufficiently concerned by this possibility that although it has abolished a "public policy" defence at the exequatur stage, it has retained defences at the "actual enforcement" stage if the debtor was unable to raise those defences during the trial in the other EU country (Beaumont & Johnston, 2010: 270).

The final aim for free movement of judgements in the EU is for the judgements to achieve "full faith and credit" in all Member States as it is in the United States. However, even today in the United States the public policy exceptions to the full faith and credit clause are an important issue, especially where fundamental values and beliefs are concerned as it seems to be the case for example with same-sex marriages (Callies, 2004: 1493). Whether we can expect the public policy exception to be

abolished within the Brussels system remains to be seen. Perhaps European society will be so integrated at certain point that public policy exceptions will have to be outlawed (Kessedjian, 2007–2008: 35–36). However, it is not that time yet. Cultural diversity is still an important mark of EU and difference constitutes advantage and benefit, not weakness. As long as the national cultures of EU will prosper, there will be place for public policy exception.

Notes

[1] In a broad sense private international law includes not only conflicts of laws rules but rules on international civil procedure as well (international jurisdiction and recognition and enforcement).
[2] OJ RS, No. 56/99 and 45/08 – ZArbit.
[3] OJ L 12, 16. 1. 2001, p. 1–23, Art. 34(1).
[4] OJ L 351, 20. 12. 2012, p. 1–32, Art. 45(1)(a).
[5] OJ L 338, 23. 12. 2003, p. 1–29, Arts 22(a) and 23(a) .
[6] OJ L 160, p. 1–18, Art. 26.
[7] OJ L 141, 5. 6. 2015, p. 19–72, Art 33.
[8] OJ L 7, 10. 1. 2009, p. 1–79, Art. 24 (a).
[9] See Article 1(2) of the Brussels I Recast.
[10] OJ L 177, 4.7.2008, p. 6–16.
[11] OJ L 199, 31.7.2007, p. 40–49.
[12] However, according to some authors, limitative enumeration in Article 45 of the Brussels I Recast does not exclude the control of conditions imposed by public international law, mainly limitations imposed on jurisdiction regarding the immunity of the defendant (Francq, 2012: 652).
[13] Case C-145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61.
[14] Hoffmann, par. 21.
[15] Case C-302/13, flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, ECLI:EU:C:2014:2319, par. 47.
[16] Case C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164.
[17] Case C-302/13, flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, ECLI:EU:C:2014:2319, paras. 56–58.
[18] Krombach, par. 37.
[19] Case C-38/98, Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225.
[20] Different was the outcome in case C-126/97, Eco Swiss China Time Ltd. V Benetton International NV, ECLI:EU:C:1999:269 referring to the infringement of Art. 81 of the EC Treaty (today Art. 101 TFEU) in the connection with grounds for annulment of arbitration rewards in domestic law. According to Magnus and Mankowski this contradiction should be attributed to mutual trust accorded to judgements rendered in Member States of the EU and the system of legal remedies offered to the parties in order to raise their claims (Magnus, Mankowski, 2012: note 24).
[21] Maxicar, par. 33.
[22] Case C-78/95, Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH, ECLI:EU:C:1996:380.
[23] Hendrikman, par. 15.
[24] Hendrikman, par. 23.
[25] Krombach, par. 37.
[26] Krombach, par. 40.
[27] Krombach, par. 44.
[28] Case 394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, ECLI:EU:C:2009:219.
[29] See Gambazzi, paras. 41–46.

[30] Gambazzi, par. 47.
[31] Case C-420/07, Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams, ECLI:EU:C:2009:271.
[32] Case C-619/10, Trade Agency Ltd v Seramico Investments Ltd., ECLI:EU:C:2012:531.
[33] Trade Agency, par. 53.
[34] Trade Agency, par. 54.
[35] Trade Agency, par. 55.
[36] Case C-172/91, Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann, ECLI:EU:C:1993:144.
[37] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614.

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