MÁTYÁS CSÁSZÁR*

On the Mandatory Nature of the EU Private International Conflict of Laws Regulations

I. INTRODUCTION

Answering the relatively simple question – whether the EU Private International Conflict of Laws Regulations have mandatory character – is, at first glance, straightforward. If however we were to analyse the question and the practice of Member States in more depth, the issue will seem more complex. A Hungarian lawyer will answer the question with a "yes", a British lawyer will say "no", whereas a French, Scandinavian or Baltic lawyer will say: "It depends." This paper endeavours to present the extent of the mandatory nature of the application of the European Union's Private International Conflict of Laws regulations in the practice of the Member States; as well as to discover what sort of answers may be given to the question raised and what kind of arguments there are to support those answers. The present paper aims to point out the fact that EU Member States' national civil procedure rules greatly impact the application of International Conflict of Laws regulations, thereby we are witnessing a conflict between EU Private International Conflict of Laws and national civil procedure. The present essay analyses the Member States' application of regulations containing express conflict rules and regulations of a mixed nature, assuming the binding nature of EU regulations and norms regarding jurisdiction, recognition and enforcement. The present paper argues for the mandatory character of EU Private International Conflict of Laws connect rules and for the necessity of an EU regulation regarding the application of foreign law.

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II. THE PRIVATE INTERNATIONAL LAW REGULATIONS OF THE EU

As to their content, the Private International Law regulations of the European Union can be categorised into three groups.

1. Pure Conflict of Laws Regulations

1.1. *Rome I.* [Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations]

1.2. *Rome II.* [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]

1.3. *Rome III.* [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]

2. Mixed Regulations (containing rules regarding jurisdiction, conflicts, recognition and enforcement as well)

2.1. *Insolvency regulation* [Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings]

2.2. *Maintenance regulation* [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]

2.3. *Succession regulation* [Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, applicable from 17 August 2015]

2.4. There are *draft regulations* regarding *matrimonial property* and regarding *the effects of registered partnerships on property law.*[1]

3. Regulations Regarding Jurisdiction, Recognition and Enforcement

3.1. *Brussels I* [Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters]

3.2. *Brussels IIbis* [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]

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[1] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM(2011) 125 final – CNS 2011/0059, Brussels March 16 2011; Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and recognition and enforcement of decisions regarding property consequences of registered partnerships COM(2011) 127 final – CNS 2011/0060, Brussels March 16 2011.

3.3. *Brussels Ibis* [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, applicable from 10 January 2015]

III. THE FUNDAMENTAL RIGHTS APPROACH

The legal basis for the enactment of the EU's PIL regulations are Art 67. (4)[2] and Art. 81 (2) c)[3] of the Treaty on the Functioning of the European Union (TFEU)[4] which are placed within the Treaty's section entitled "Area of Freedom, Security And Justice". Art. 67 (4) contains the principles of mutual recognition of Member States' decisions and the right to access to justice. Art. 81. (2) c) prescribes the task of harmonising the Member States' rules for conflict of laws and jurisdiction.

Art. 47[5] of the Charter of Fundamental Rights of the European Union[6] declares the right to fair trial, building blocks of which are the right to an effective judicial protection of rights and the principle of proceeding by trial.

Point 6 of the preambles of Rome I and II declares the specific goals of the EU Private International Conflict of Laws regulations:

1. the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation,
2. certainty as to the law applicable and the free movement of judgements,
3. for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

Which answer to the question raised does guarantee the application of the aforementioned fundamental rights?

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[2] TFEU Art. 67. (4) : "The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."

[3] TFEU Art. 81 (2) : "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction..."

[4] "Consolidated Version of the Treaty on the Functioning of the European Union" (TFEU) OJ 9.5.2008, C 115/47.

[5] Charter of Fundamental Rights of the European Union Article 47: "Right to an effective remedy and to a fair trial
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.
Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

[6] 30.3.2010 OJ C 83/389.

IV. DIFFERENT SYSTEMS REGARDING THE MANDATORY CHARACTER OF NATIONAL CONFLICT OF LAWS RULES

The jurisprudence of Member States is quite diverse with regards to the binding nature of their internal Conflict of Laws rules, i.e. whether the Member State's courts have to take into account the significant international element of the legal relation at hand ex officio or just per petition of the parties. Also whether the Member State's courts must, in the framework of a PIL dispute, apply its own internal Conflict of Laws rules and determine the applicable material law ex officio or only per plea of the parties. If for the Member State's court the lex fori's Conflict of Laws rules designate a foreign material law as applicable, the court has to apply it either ex officio or per petition.

The solutions of Member States may be categorised in three groups:[7]

1. ex officio,
2. voluntary/optional system,
3. mixed/dual/hybrid system.

The place of specific Member States in these groups is not self-evident.

The Member State's Internal Conflict of Laws Rules are mandatory, therefore the ex officio principle is prevalent in 12 Member States.

(Austria, Belgium, Bulgaria, Estonia, Germany, Greece, Hungary, Italy, Poland, Portugal, Spain and the Netherlands)[8]

In these Member States the lex fori's conflict rules are mandatory, the courts have to take into account the presence of the legal relation's significant international element ex officio and determine which law applies with the aid of the Member State's conflict rules, also ex officio. If the Member State's conflict connecting rules designate the foreign law as applicable, the Member State's courts have to apply it ex officio.

The Application of the Member States' Conflict of Laws Rules is not mandatory in 5 States.

(United Kingdom, Ireland, Malta, Cyprus and Luxembourg)[9]

In these Member States the courts are not mandated to look for significant international elements in the legal relation of the procedure ex officio, only if one of the

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[7] ESPLUGUES CARLOS – IGLESIAS, JOSÉ LUIS – PALAO, GUILLERMO (ed): *Application of Foreign Law*, Sellier, Munich, 2011. p. 18–29. Groupe Européen de Droit International Privé (GEDIP), Vingt-deuxième réunion, La Haye 14–16 September, 2012., p. 22., http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm, accessed on 20/03/2013; Swiss Institute of Comparative Law: *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future, Synthesis Report with Recommendations*, JLS/2009/JCIV/PR/0005/E4, Lausanne, 11 July 2011, revised 30. September 2011, pp. 15–18., http://ec.europa.eu/justice/civil/files/foreign_law_en.pdf, accessed on 10/06/2013.

[8] ESPLUGUES-IGLESIAS-PALAO 2011, p. 18–29.; The Synthesis Report by the Swiss Institute of Comparative Law places the Czech Republic, Slovakia, Slovenia, Finland, Latvia, Lithuania, Estonia and Belgium in the ex officio and dual groups at the same time, while placing Romania in the ex officio group. Synthesis Report pp. 15–18.

[9] ESPLUGUES-IGLESIAS-PALAO 2011, pp. 18–29., The Swiss Institute of Comparative Law's Synthesis Report places Luxembourg in the dual group as well. See Synthesis Report pp. 16–18.

parties pleas for it. The courts are not bound to apply national conflict rules ex officio, only if there is a petition for it. If the national conflict connecting rule determines foreign law as applicable, the Member State's court may apply it only if the parties plea for it. If the parties do not recourse for the application of foreign law, the court will assume that the legal relation does not contain any significant international elements, the legal relation at the heart of the dispute is purely internal, therefore the court will apply the national substantive law.

Mixed/Dual/Hybrid Systems are present in 7 Member States

(France, Finland, Sweden, Latvia, Lithuania, Denmark and Romania)[10]

In the jurisprudence of these Member States, one part of the internal Conflict of Laws rules are mandatory, another part is not. Although the Member States within this group follow different solutions, generally it may be ascertained that this group of states' courts regard the EU conflict rules as optionally applicable and applicable only per petition in legal relations in which the parties may decide to settle the dispute on their own accord, and legal relations in which the parties may choose which law applies. In legal relations however, in which the parties have no option of ending the dispute with a settlement or the parties may not choose which law applies (family law legal relations, issues about civil status, as well as legal relations in which the public policy is paramount), Member States' conflict rules have mandatory nature and the courts of the Member State have to apply them ex officio.

V. DO THE CONNECTING RULES OF EU PRIVATE INTERNATIONAL LAW REGULATIONS HAVE MANDATORY CHARACTER?

There are three approaches to answering this question:

1. mandatory (ex officio); 2. the mandatory nature is contingent on the Member State's Conflict of Laws or civil procedure rules; 3. partly mandatory, partly contingent on the Member State's Conflict of Laws or civil procedure rules

1. Mandatory - Ex officio Application:

According to the interpretation preferred also by the author, the PIL regulations of the Union are mandatory and should be applied ex officio by every Member States' courts if the issue at hand is a legal relation that falls within the scope of EU PIL Conflict of Laws regulations.[11] Therefore the courts must ascertain ex officio whether the issue at hand should fall within the scope of an EU PIL conflict regulation. If so, they should be obliged even without the parties' petition to apply to the issue the relevant EU PIL

[10] ESPLUGUES-IGLESIAS-PALAO 2011, pp. 18–29.; pp. 15–18.

[11] For a similar opinion see ESPLUGUES-IGLESIAS-PALAO 2011, p. 19.

conflict regulation's connecting rules and the substantive law designated by the EU Conflict of Laws connecting rule.

1.1. According to this theory the ex officio application of EU Conflict of Laws connecting rules is prevalent in those Member States as well, where

a. the application of internal conflict rules is not mandatory (the United Kingdom, Ireland, Malta, Cyprus and Luxembourg),

b. the application of only a certain part of national Conflict of Laws rules is mandatory (France, Denmark, Sweden, Finland, Romania, Latvia and Lithuania).

1.2. This interpretation may be supported by the following arguments.

a. According to the textual interpretation of the EU's pure Conflict of Laws regulations' wording, their definitions of material scope imply a mandatory nature in the following languages: Hungarian („...*e rendeletet kell alkalmazni*..."), English („....*this regulation shall apply*...") and German („...*Diese Verordnung gilt für*...").

b. According to the principles of the supremacy and direct effects of Union law[12], should the EU's PIL regulations' rules requiring mandatory application and a Member State's civil procedure rules prescribing their application per petition be in conflict, the EU regulations' mandatory rules are of higher priority.

c. Art. 288 of the TFEU states that regulations have a general scope of application in their entirety, i.e. all of their rules are binding and directly applicable in all Member States.[13]

d. The functioning of the internal market, the foreseeable ending to legal disputes and the certainty regarding the applicable law, the free movement of judgements may only become a reality if EU conflict rules are mandatory and are applied ex officio without any petition.

e. It does not make sense to provide uniform European Conflict of Laws rules if their application is contingent on national conflict or procedural rules.

f. The phenomenon of "forum shopping" is repressed by the mandatory nature of EU Conflict of Laws connecting rules. For if the EU regulations' conflict connecting rules are not binding and in a specific case the substantive law of a Member State based on the optional system is more advantageous for the parties compared to the applicable law determined by the EU conflict rule, the parties may decide to take their dispute into such a Member State, thereby evading the applicable law designated by the EU conflict regulation.

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[12] If a directly applicable EU legal norm or a directive conforming to the requirements of direct effects in a horizontal relationship and a Member State's national legal norm should be in conflict, the Member State's norm may not be applied during a trial. The Member State's norm which is in conflict with the EU norm doesn't become invalid, it merely cannot be applied and should be disregarded. With the exception of directives coming into play within a horizontal relationship, if a directly applicable EU legal norm and a Member State's norm should be in conflict, the EU legal norm is applicable during the trial of a case at hand.

[13] TFEU Art. 288 subsection 2: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

g. The non-mandatory character of EU Conflict of Laws regulations leads to the fragmentation of EU PIL regulations. This is because the mandatory nature of jurisdictional, recognition and enforcement regulations and that of conflict regulations would differ. The application of jurisdictional, recognition and enforcement regulations (Brussels I, Brussels IIbis, Brussels Ibis) would be mandatory, while the pure Conflict of Laws regulations (Rome I, Rome II, Rome III) would not be. Secondly an undesirable phenomenon would present itself in the case of mixed PIL regulations (Insolvency regulation, Maintenance regulation, Succession regulation), whereby, within a single EU legal source, there would be mandatory rules (rules of jurisdiction, recognition, enforcement) and non-mandatory rules (conflict rules).

h. Rome III, the Succession regulation, the draft regulations on matrimonial property and the effects of registered partnerships on property law – contrary to Rome I and Rome II regulations – do not explicitly exclude procedural questions and evidence from their scope of application.

2. The Mandatory Nature is Contingent on Member States' Conflict of Laws or Civil Procedure Rules

According to the second approach, the mandatory character of the EU PIL regulations' Conflict of Laws connecting rules is determined by the Member States' Conflict of Laws or civil procedure rules. In Member States which have binding national conflict rules, EU PIL conflict regulations are also mandatory. In those Member States where national conflict rules are not mandatory, the connecting rules of EU PIL conflict regulations are also not mandatory. Finally, in Member States where a part of national conflict rules are obligatory and another part of them is not, one part of EU regulations' connecting rules are obligatory and another part is not.

This interpretation may be supported by the following arguments:

2.1. *Par excellence* EU Conflict of Laws regulations (Rome I and II) contain rules within their respective definitions of material scope for the exclusion of their application in procedural questions.[14] Therefore in these procedural matters not regulated by EU conflict regulations, the national conflict or civil procedure rules are to be applied.

2.2. If we apply a comparative textual analysis on the material scope rules of the EU's pure conflict regulations, we find that the French language version uses a reflexive verb[15]; the Italian, Spanish and Romanian language versions use the so-called general subject[16]; the Portuguese version uses the nominal predicate[17] – these grammatical

[14] Rome I Article 1 (3): "This Regulation shall not apply to evidence and procedure, without prejudice to Article 18." Rome II Article 1 (3): "This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22."

[15] „Le présent règlement s'applique..."

[16] „Il presente regolamento si applica...";„El presente Reglamento se aplicará...";„Prezentul regulament se aplică..."

[17] „O presente regulamento é aplicável..."

instruments imply a non-mandatory nature. This is especially apparent in the Spanish language text, where the tense of the third person singular verb is the future, which grammatically signifies uncertainty.

2.3. A frequently emphasised argument for the second interpretation is the principle of procedural autonomy developed in the case law[18] of the CJEU.[19] The idea behind this is that in the absence of any relevant EU rules it is for the national legal order of each Member State to lay down procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of EU law, provided that

a. these rules are not less favourable compared to those governing the same right of action on an internal matter (principle of equivalence),

b. they do not prohibit or make it disproportionately difficult to exercise the rights given by EU law (principle of effectiveness).

As there is no relevant EU rule regarding the mandatory nature of EU PIL Conflict of Laws regulations, their mandatory character depends on the Member States' civil procedure rules.

It is worth noting at this point in the argument that the CJEU dealt with the principle of procedural autonomy only in cases on pure internal matters, i.e. those without a significant international element, and has not yet taken a stance regarding the mandatory nature of Conflict of Laws regulations.

2.4. If we analyse the practical import of the matter, generally speaking it makes no difference whether the EU regulations' conflict rules are to be applied or not. Both the EU conflict regulations and Member States' conflict rules generally allow for choice of law and especially the choice of the lex fori. If we remain on the level of generalities and the application of the rules of jurisdiction are adequately guaranteed – especially those to do with exclusive and special jurisdiction –, the lex fori is in general the applicable law. Thus, in most practical issues, both the conflict rules of EU regulations as well as the Member States' Conflict of Laws rules lead to the same law to be applied, that is the lex fori's substantive law, therefore it's basically irrelevant whether the Member State's courts arrive at the destination of their own material law by way of its national conflict rules or the EU conflict regulations.

3. The EU Conflict of Laws Connecting Rules are Regarded as Partly Mandatory, Partly Contingent on the Member State's Conflict of Laws or Civil Procedure Rules.

According to the third approach, the EU conflict regulations' connecting rules are only mandatory in cases of certain legal relations, while for another group of legal relations

[18] C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 01989; C-45/76 Comet BV v Produktschap voor Siergewassen [1976] ECR 02043; Joined cases C-430/93 and C-431/93 Van Schijndel, van Veen v Stichting Pensioenfonds [1995] ECR I-04705; C-40/08 Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira [2009] ECR I-09579.

[19] GEDIP, Vingt-deuxième réunion, La Haye 14-16 September, 2012., pp. 19–20., http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm, accessed on 20/03/2013.

the binding nature of EU conflict connecting rules is contingent on the Member State's Conflict of Laws or civil procedure rules. The application of EU Conflict of Laws connecting rules are only mandatory in the following legal matters:

3.1. *legal relations in which a weaker party is protected, so-called privileged legal relations* (consumer contracts, employment),

3.2. *legal relations in which the choice of law is restricted* (insurance contracts, personal carriage contracts, maintenance, divorce and separation, succession)

3.3. *legal relations in which the choice of law is prohibited* (restriction of competition, intellectual property infringement).

In other legal relations, mandatory character is contingent on Conflict of Laws or civil procedure rules.

This interpretation may be founded on the case law of the CJEU regarding consumer and competition issues.[20] According to this, the principle of confinement to petition generally prevails in civil and commercial matters, however there is an exception if the public policy demands an ex officio intervention.[21]

This means that in matters relating to legal relations protecting a weaker party or relations in which the choice of law is restricted or prohibited, public policy demands the court's ex officio intervention, and therefore the EU Conflict of Laws regulations are mandatory.

VI. CONCLUSION

Since the Member States follow different practices regarding the mandatory application of their own national and EU Conflict of Laws rules, it seems to be necessary, in order to further the goal of harmonisation of Member States' conflict rules, to develop a new legal source on the application of foreign law by the institutions of the European Union. The most appropriate type and form for this EU legal source would be a regulation enacted following ordinary legislative procedure. Regarding the application of foreign laws, the regulation could establish for itself a material scope by determining the mandatory or optional nature of EU conflict connecting rules, the issue of determining the content of foreign laws and the matter of legal remedies against the application of foreign laws. This author would deem it favourable if this regulation should declare the mandatory nature of EU Conflict of Laws connecting rules and establish the ex officio application of foreign law.[22]

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[20] Some of the recent and Hungarian-related cases: C-8/08 T-Mobile Netherlands ECR [2009] I-04529; C-40/08 Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira [2009] ECR I-09579; C-137/08 VB Pénzügyi Lízing Zrt. v Schneider Ferenc ECR [2010] I-10847; C-243/08 Pannon GSM Zrt. v Sustikné Győrfi Erzsébet ECR [2009] I-04713; C- 472/11 Banif Plus Bank v Csipai Csaba és Viktória judgement of 21/02/2013; C-26/13 Kasler Árpád, Kaslerné Rábai Hajnalka v OTP Jelzálogbank Zrt. Judgement of 30/04/2014 62013CJ0026.,

[21] GEDIP, Vingt-deuxième réunion, La Haye 14-16 September, 2012., pp. 19–20., http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm, accessed on 20/03/2013

[22] For a contrary opinion see: GEDIP, Vingt-deuxième réunion, La Haye 14-16 September, 2012, p. 20., p. 24, http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm, accessed on 20/03/2013; Swiss Institute of Comparative Law: *The Application of Foreign Law in Civil Matters in the EU Member States*

CSÁSZÁR MÁTYÁS

AZ EU NEMZETKÖZI KOLLÍZIÓS MAGÁNJOGI RENDELETEINEK KÖTELEZŐ JELLEGÉRŐL

(Összefoglalás)

Kötelezőek-e az EU nemzetközi kollíziós magánjogi rendeletei? A viszonylag egyszerű kérdésre, első ránézésre, egyszerű a válasz. Ha azonban mélyebben megvizsgáljuk a témát és a tagállamok gyakorlatát, a kép meglehetősen összetett. Egy magyar jogász a kérdésre „igen"-nel válaszol, egy angol jogász „nem"-mel, míg egy francia, skandináv vagy balti jogász válasza: „Attól függ." A jelen írás azt kívánja bemutatni, hogy az Európai Unió nemzetközi kollíziós magánjogi rendeletei a tagállamok gyakorlatában a külföldi jog alkalmazása során mennyiben kötelező jellegűek; a feltett kérdésre milyen válaszok adhatók és azok milyen érvekkel támaszthatóak alá. Az írás rá kíván mutatni arra, hogy az uniós nemzetközi kollíziós magánjogi rendeletek tagállami alkalmazását nagyban meghatározza a tagállamok nemzeti polgári eljárásjogi szabályozása, ezáltal az uniós nemzetközi kollíziós magánjog és a nemzeti polgári eljárásjogok közötti kollíziónak lehetünk szemtanúi.

Három megközelítés emelhető ki EU nemzetközi magánjogi rendeleteinek kollíziós kapcsoló szabályai kötelező jellegére nézve:

1. kötelezőek (ex officio),
2. a kötelező jelleg a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ,
3. részben kötelezőek, másik részben a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ

1. Kötelezőek – ex officio alkalmazás

Az általam is preferált megközelítés szerint az Unió nemzetközi magánjogi rendeleteinek kollíziós kapcsoló szabályai kötelezőek, azokat valamennyi tagállam valamennyi bírósága hivatalból köteles alkalmazni, amennyiben az előtte folyamatban lévő eljárás tárgya olyan jogviszony, amely az uniós nemzetközi kollíziós magánjogi rendeletek hatálya alá tartozik. Tehát a tagállami bíróságok hivatalból kötelesek vizsgálni azt, hogy az adott bírósági eljárásban a jogvita tárgyát képező jogviszony valamely uniós nemzetközi kollíziós magánjogi rendelet hatálya alá tartozik-e. Amennyiben igen, hivatalból – nem a felek kérelmére – kötelesek alkalmazni az adott jogviszonyra vonatkozó uniós nemzetközi kollíziós magánjogi rendeletnek a vonatkozó kapcsoló szabályát és az uniós kollíziós kapcsoló szabály által alkalmazandó jogként kijelölt anyagi jogot.

E felfogás alapján az uniós kollíziós kapcsoló szabályok ex officio alkalmazása érvényesül azon tagállamokban is

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and its Perspectives for the Future, Synthesis Report with Recommendations, JLS/2009/JCIV/PR/0005/E4, Lausanne, 11 July 2011, revised 30. September 2011, 66-81 p., http://ec.europa.eu/justice/ civil/files/ foreign_law_en.pdf accessed on 10/06/2013.

- ahol a nemzetközi kollíziós szabályok nem kötelezőek (Egyesült Királyság, Írország, Málta, Ciprus, Luxemburg),
- ahol a nemzeti kollíziós szabályok csak egy része kötelező (Franciaország, Dánia, Svédország, Finnország, Románia, Lettország, Litvánia).

2. A kötelező jelleg a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ

A második megközelítés szerint az uniós nemzetközi magánjogi rendeletek kollíziós kapcsoló szabályainak kötelező jellege a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ. Azon tagállamokban, amelyekben a tagállami kollíziós szabályok kötelezőek, az uniós nemzetközi kollíziós magánjogi rendeletek is kötelezőek. Azon tagállamokban, amelyekben a tagállami kollíziós szabályok nem kötelezőek, az Unió nemzetközi kollíziós magánjogi rendeleteinek kollíziós kapcsoló szabályai sem kötelezőek. Végül azon tagállamokban, amelyekben a belső kollíziós szabályok egy része kötelező, másik része pedig nem, az uniós rendeletek kapcsoló szabályainak egy része kötelező, másik része pedig nem kötelező.

3. Részben kötelezőek, más részben a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ az uniós kollíziós kapcsoló szabályok kötelező jellege

A harmadik megközelítés szerint az uniós kollíziós rendeletek kapcsoló szabályai csak meghatározott jogviszonyok esetében kötelezőek, míg a jogviszonyok másik részében az uniós kollíziós kapcsoló szabályok kötelező jellege a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ. Az uniós kollíziós kapcsoló szabályok csak a következő jogviszonyokban kötelezőek:

- gyengébb felet védő, ún. privilegizált jogviszonyokban (fogyasztói szerződés, munkaviszony),
- azon jogviszonyokban, ahol a jogválasztás korlátozott (biztosítási szerződés, személyszállítási szerződés, tartás, házasság felbontása és különválás, öröklés)
- azon jogviszonyokban, ahol a jogválasztás kizárt (versenykorlátozás, szellemi tulajdonjogok megsértése).

Egyéb jogviszonyokban a kötelező jelleg a tagállami kollíziós vagy polgári eljárásjogi szabályoktól függ.

Mivel a tagállamok eltérő gyakorlatot követnek a saját nemzeti és az uniós kollíziós szabályok kötelező alkalmazását illetően, a tagállamok kollíziós szabályainak összeegyeztetésével elérni kívánt cél megvalósítása érdekében szükségesnek mutatkozik az Európai Unió intézményei részéről jogforrás megalkotása a külföldi jog alkalmazása tárgyában. Az uniós jogforrás típusára és formájára a rendes jogalkotási eljárásban elfogadott rendelet a legmegfelelőbb. A külföldi jog alkalmazása kapcsán a rendelet szabályozási körébe vonhatná az uniós kollíziós kapcsoló szabályok kötelező vagy fakultatív jellegének a kérdését, a külföldi jog tartalma megállapításának, a külföldi jog alkalmazása miatti jogorvoslat lehetőségének kérdését. A magam részéről üdvözlendőnek tartanám, ha a rendelet az uniós kollíziós kapcsoló szabályok kötelező jellegét deklarálná és a külföldi jog ex officio alkalmazása mellett tenné le a voksát.