

Overriding Mandatory Provisions in Family Law and Names

Introduction

Overriding mandatory provisions have been within the interests of legal scholars for years. However, in many cases, authors focused on the overriding mandatory rules in commercial matters,¹ whereas overriding mandatory provisions within international family law, and particularly within international legal aspects of personal status, have not acquired sufficient attention within legal doctrine. This therefore analyses selected issues related to overriding mandatory provisions regarding the conclusion and dissolution of marriage, personal and property relations between spouses, parental responsibility, protection of adults, and finally, names of a natural person, in international private law.

This paper focuses on the relevant rules established within international conventions and European Union regulations. The second part also highlights key differences and anomalies between international and national laws, using Lithuania and Poland as examples, since both legal systems include rules on the application of overriding mandatory provisions.

I Theoretical Background

1 The Distinction between the ‘Overriding Mandatory Norms’ and a General ‘Ordre Public’ Clause

Although both international and national legal acts contain rules related to overriding mandatory norms, none provides their legal definition. Moreover, neither the legislature nor the doctrine is unequivocal regarding the definition of these norms. In the broadest understanding, overriding mandatory norms can be described as those norms that are

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¹ See Michael Hellner, ‘Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?’ (2009) 5 (3) *Journal of Private International Law* 447–470; Christopher Bisping, ‘The common European

applicable irrespective of the *lex causae*.² It is being that these are substantive law norms, which have consequences for private international law.³ These are the rules that reject the application of the *lex causae*, even if it was chosen by the parties.

Although the application of overriding mandatory rules is a part of the protection of public policy of the forum state (usually), these rules have to be distinguished from the classical *ordre public* clause. They can be seen as two sides of the same coin. *Ordre public* is usually conceived as a negative exception, which aims to exclude foreign rules if they are incompatible with the public order of a forum state,⁴ whereas overriding mandatory rules, since they apply irrespective of the applicable law, can be considered as positive exceptions. This characteristic can be the main distinction between these rules and *ordre public*. Moreover, it can be claimed that disregarding the overriding mandatory rules can constitute a violation of the *ordre public* of the state of the forum.

Overriding mandatory provisions, similar to *ordre public*, limit the application of foreign law. However, owing to their direct application, unlike the *ordre public*,⁵ they do not create a gap that needs to be filled. Hence, at first glance, it would seem that their application is less complicated than the application of the *ordre public* clause, and the concept of overriding mandatory rules itself is less vague.⁶ Unfortunately, this is a misleading thought. The concept of overriding mandatory rules proved to be one of the most difficult within the general part of private international law. It is caused by its ambiguous nature. Therefore, a deeper consideration of the possible notion of overriding mandatory norms is needed.

Both *ordre public* and overriding mandatory provisions give voice to fundamental legal principles. Overriding mandatory norms usually favour the weaker party, who could be (*inter alia*) children, women, employees or consumers.⁷ Together with the *ordre public* clause, they serve as a 'general correction mechanism'⁸. However, it has to be emphasised that not every mandatory rule of the state of the forum will be considered an overriding mandatory provision

sales law, consumer protection and overriding mandatory provisions in private international law' (2013) 62 (2) International and Comparative Law Quarterly 463–483; Xandra E. Kramer, 'EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017, New York, 285–316).

² Michael Wilderspin, 'Overriding mandatory provisions' in Jurgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds) *Encyclopedia of Private International Law* (Edward Elgar 2017, Cheltenham, 1330–1336) 1330.

³ Andrzej Mączyński, 'Przepisy szczególne o dziedziczeniu gospodarstw rolnych a prawo prywatne międzynarodowe (1986)' in Andrzej Mączyński (ed), *Rozprawy i studia z prawa prywatnego międzynarodowego* (Wolters Kluwer 2017, Warszawa 852–871) 863.

⁴ Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (Brill/Nijhoff 2011) Vol. 348; *Recueil des Cours: Collected Courses of The Hague Academy of International Law* 1–512, 182.

⁵ The term *ordre public* in this work is used to describe any general public policy clause.

⁶ Dalia Palombo, 'Business and Human Rights: The Obligations of the European Home States' (Hart Publishing 2020, Oxford) 69.

⁷ Bogdan (n 4) 183.

⁸ Laura Maria van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) (3) *Erasmus Law Review* 148.

of private international law. These should only be the rules of fundamental importance, referred to in the doctrine as ‘internationally mandatory’⁹. They pursue the aim of protecting the public interest, those that are of extreme importance for the interests of the state.¹⁰ At the European Union level, these are also the rules protecting the fundamental principles of EU law¹¹.

The overriding mandatory rules are more common in contractual relations; however, they have recently become relevant in family law as well. Martiny explains that this is a consequence of a growing ‘contractualisation’ of family law and growing recognition of party autonomy therein¹². Unlike *ordre public*, which protects more general legal principles (for instance, some constitutional values as a principle of non-discrimination), overriding mandatory norms are more specific. These are usually precise norms allowing or forbidding something; for instance, particular rules protecting employees. Hence, *ordre public* is less flexible than overriding mandatory provisions. The legislator can amend or suspend the overriding mandatory norms at any time.

Aside from the national provisions of fundamental importance the rules to which the state has to adhere due to its international obligations may also be considered as overriding mandatory, for instance, international treaties and the rules anchored therein. In terms of family law and names, these could be provisions of the European Convention of Human Rights,¹³ as well as the Charter of the Fundamental Rights of the European Union¹⁴ and finally Articles 18 and 19 of the TFEU.¹⁵ However, protection of fundamental rights is usually guaranteed by the general *ordre public* clause and not the overriding mandatory norms,¹⁶ although some of the literature links the protection of fundamental rights with overriding mandatory provisions.¹⁷ This does not seem to be incorrect; however, it can also be regarded as a positive function of the general *ordre public* clause.¹⁸ As such, the distinction between the two concepts becomes even more blurry. Moreover, despite the lack of consensus regarding the notion of overriding mandatory provisions, their belonging to the national legal system is hardly questioned.

⁹ Dieter Martiny, ‘Overriding mandatory provisions in EU family law regulations’ in Gillian Douglas, Mervyn Murch, Victoria Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Intersentia 2018, 297–312) 299; Bogdan (n 4).

¹⁰ Wilderspin (n 2) 1331.

¹¹ Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* [2000] ECR I-9305 para 21–22.

¹² Martiny (n 9) 298.

¹³ *Convention for the Protection of Human Rights and fundamental freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁴ The Charter of the Fundamental Rights of the European Union [2012] OJ C 326/02.

¹⁵ Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47.

¹⁶ Frank Vischer, ‘General Course on Private International Law’ vol. 232 (Martinus Nijhoff Publishers 1993, Alphen aan de Rijn); Recueil des Cours: Collected Courses of The Hague Academy of International Law 101; Bogdan (n 4) 166; Tim Corthaut, ‘EU Ordre Public’ (Kluwer Law International 2012, Alphen aan de Rijn) 299.

¹⁷ Dalia Palombo, ‘Business and Human Rights: The Obligations of the European Home States’ (Hart Publishing 2020, Oxford) 69.

¹⁸ Frank Vischer, ‘General Course on Private International Law’ Vol. 232. (Martinus Nijhoff Publishers 1993, Alphen aan de Rijn); Recueil des Cours: Collected Courses of The Hague Academy of International Law 102.

Therefore, in this work, overriding mandatory provisions are understood as substantive norms of the state of the forum or another state that have to be applied in the case, irrespective of the law applicable thereto. These are the substantive law rules that are internationally mandatory. These should be only the most fundamental rules, protecting a particular state interest within the legal system, disregarding which cannot be justified by applying the foreign law. Although the above definition does not present all the particularities of the overriding mandatory rules in different legal systems and does not reflect all the doctrinal discussion, it presents their core meaning.

2 Duty or Possibility to Apply the Overriding Mandatory Norms

The existence and legitimacy of overriding mandatory rules are confirmed by the provisions of conventions, EU regulations, and national conflict-of-laws rules referring to ‘mandatory rules’, ‘peremptory norms’¹⁹, ‘self-limiting rules’ or ‘rules of immediate application’²⁰. For instance, Article 1.11 of the Lithuanian PIL stipulates that: ‘[...] 2. Mandatory provisions of laws of the Republic of Lithuania or those of any other state most closely related to a dispute shall be applicable, although another foreign law has been agreed upon by the parties. In deciding on these issues, the court shall take into consideration the nature of these provisions, their purpose, and the consequences of application or non-application thereof [...]’. Therefore, the overriding mandatory provisions of the *lex fori* and the other, closely connected, state apply.²¹ Similarly, Article 8 of the Polish PIL provides that the provisions of the national or the foreign law that is closely connected with the case should apply if it follows that those provisions should be applicable irrespective of the law governing the given relationships. In deciding whether to apply such provisions, a relevant authority should consider their nature and purposes, and the consequences of their application or non-application.

An important question is whether the courts are obliged to apply the overriding mandatory rules or shall only consider their application. This is a particularly important issue considering foreign overriding mandatory rules: to what extent shall they be considered? Application of the national overriding mandatory provisions does not raise serious doubts,²² whereas application of foreign rules might be considered but there is no strict duty to apply them.²³

¹⁹ Bogdan (n 4) 182–183.

²⁰ Friedrich K. Juenger, ‘General Course on Private International Law (1983)’ Vol 193. (Martinus Nijhoff 1985); *Recueil des Cours: Collected Courses of The Hague Academy of International Law* 1–388, 201.

²¹ However, there is no case-law referring to the foreign overriding mandatory provisions.

²² Hans Jürgen Sonnenberger, ‘Overriding mandatory provisions’ in Stefan Leible (ed), *General principles of European private international law* (Wolters Kluwer 2016, Alphen aan den Rijn 116–129) 122.

²³ Maciej Tomaszewski, ‘Przepisy ogólne’ in Jerzy Poczobut (ed), *Prawo prywatne międzynarodowe. Komentarz* (Wolters Kluwer Polska 2017, Warszawa 234–249) 241.

Sometimes the answer to the question lies in the relevant provisions. For instance, the In the Article 1.11 of the Civil Code Lithuanian legislator uses the expression ‘shall be applied’, which implies mandatory application. However, further in the same article, the legislator gives room for the considerations of the court. Following the case-law, it can be stated that the second sentence refers to determining whether the rule is an overriding mandatory provision. Subsequently, once the court determined that the rule is an overriding mandatory provision, it shall be applied. Moreover, an expression ‘foreign law has been agreed upon by the parties’ needs to be further elaborated. A formulation of the given expression could suppose that the rule applies only if the parties have chosen a foreign law. However, the established case-law leads to the conclusion that this rule also applies if the applicable law is determined according to a conflict-of-law rule. In other words, this rule applies whenever the court has to apply foreign law.²⁴ Similar conclusions can be drawn from the wording of Article 9 of the Rome I Regulation,²⁵ which provides that nothing precludes the application of national overriding mandatory provisions, and the effect may be given for other countries’ overriding mandatory provisions.

It seems, however, that even national overriding mandatory rules will not have an absolute character. Whenever *lex causae* gives the same or greater protection than national overriding mandatory norms, their application would not be justified.²⁶

It remains an open question whether to apply the overriding mandatory rules if the case falls within the scope of a regulation or convention that does not provide for overriding mandatory provisions. There might be two ways to approach this question. First, it is possible to assume that the international or the European legislator consciously omitted these provisions. Therefore, nothing shall preclude the application of *lex causae*. Second, it still can be argued that, given the particular significance of the interest that those provisions protect, nothing shall preclude applying them. For instance, the latter approach was taken by Lithuanian courts in maintenance cases; although neither the Hague Protocol of 2007²⁷ nor the Hague Convention of 1973²⁸ provided for overriding mandatory provisions, the courts applied them.²⁹

²⁴ Judgment of the Court of Appeal of the Republic of Lithuania of 21 April 2011, Civil case No 2-703/2011.

²⁵ 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.

²⁶ Bogdan (n 4) 186.

²⁷ *Protocol on the Law Applicable to Maintenance Obligations* opened for signature 23 November 2007, 2956 UNTS (entered into force 1 August 2013).

²⁸ *Convention on the Law Applicable to Maintenance Obligations* opened for signature 2 October 1973, 1056 UNTS 199 (entered into force 1 October 1977).

²⁹ This issue will be elaborated in the analysis of the following parts of the paper.

II Overriding Mandatory Rules Related to Matrimonial Relations

1 Overriding Mandatory Provisions Related to the Conclusion of Marriage

Determination of the law applicable to the conclusion of marriage is left to national private international laws. Neither international conventions³⁰ nor the EU regulations address this issue, and so it is necessary to refer to the national laws in this regard. Both Lithuanian³¹ and Polish PIL³² provide special rules related to the conclusion of a marriage. Traditionally, these are rules related to the capacity to marry and the form of marriage. Lithuanian law provides that matrimonial capacity is governed by Lithuanian law (Article 1.25 of the Civil Code). However, in respect of foreign citizens and stateless persons without Lithuanian domicile, matrimonial capacity and other marriage conditions may be determined by the *lex domicili* of both persons intending to marry, provided such marriage is recognised in the state of domicile of either of them. Polish law provides that capacity to marry shall be governed by the *lex patriae* of each person intending to marry (Article 48 of the Polish PIL). Both countries have signed several bilateral agreements on cooperation in civil matters; however, conflict-of-law rules related to marital conditions do not differ much from those established in national laws.³³

Both Lithuanian and Polish laws provide that the form of the marriage should be governed by the law of the state where the marriage has been concluded. However, it is sufficient if the form of marriage complies with the requirements of the law of the state of nationality or habitual residence of both spouses according to Polish law, and either of the spouses according to Lithuanian law.

The list of conditions for or impediments to marriage is similar across the world. They relate to the minimum age of the future spouses, voluntariness, affinity, or consanguinity of the persons intending to marry and not being married.³⁴ Not long ago, the future spouses' different gender was quite a common precondition for marriage. However, lately and increasingly

³⁰ *The New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* of 7 November 1962 does not provide any standards regarding marital conditions; however, it obliges its signatories to provide a minimum marital age as well as to adopt provisions foreseeing entrance into marriage with the full and free consent of both parties, and to regulate the registration of marriages. However, the Convention leaves a broad margin of flexibility for the contracting states in this regard.

³¹ The main act regulating private international law in Lithuania (hereinafter Lithuanian PIL) is the Civil Code of 2000 Lietuvos Respublikos Civilinis kodeksas (The Civil Code of the Republic of Lithuania), *Valstybės žinios*, 6 September 2000, Nr. 74-2262, VIII-1864.

³² The main act regulating private international law in Poland (hereinafter Polish PIL) is the Act on Private International Law of 2011 Ustawa z 4.2.2011 r. Prawo prywatne międzynarodowe), Dz.U. Nr 80, poz. 43.

³³ For instance, Article 25 of the Bilateral Agreement between the Republic of Poland and the Republic of Lithuania regarding legal assistance and legal relationships in civil, family, employment and criminal cases from 23 January 1993 provides that capacity to marry is governed by the national law of each person intending to marry. The form of the conclusion of marriage shall comply with the law of the state where the marriage is concluded.

³⁴ For instance, Articles 3.12-3.17 of the Lithuanian Civil Code.

often, gender-neutral marriages are allowed, and yet, since marriage is closely connected to the traditions of a particular state or religion, it is impossible to provide a general list of mandatory provisions related to the conclusion of a marriage. The understanding of marital conditions could significantly vary from state to state, and only in some cases could conditions for or impediments to marriage be considered as mandatory provisions. However, this primarily requires an analysis of the national laws and the significance of particular rules therein.

A particularly good example could be issues related to the minimum age of the future spouses. It has been widely recognised that child marriages are harmful and discriminatory.³⁵ Some countries have adopted strict measures prohibiting such marriages. For instance, Article 13 (3) of the EGBGB³⁶ in Germany provides a prohibition to marry for a person under the age of 16, irrespective of the applicable law. Therefore, the rules related to age can be considered as mandatory provisions.

In other countries, like Poland and Lithuania, although an age limit exists it is not given such importance as in Germany. In both countries, the minimum marital age is 18; however, due to particular circumstances, the age can be lowered by the court. In Poland, the minimum age upon the decision of the court can be 16 years, in Lithuania 15 years old.³⁷ It is notable that, in this case, other countries, as in Lithuania or Poland, could consider applying the German rule if the case is closely connected to Germany.

Both in Lithuania and Poland, the gender aspect is of particular importance. Article 3.12 of the Lithuanian Civil Code provides that marriage can be concluded only by persons of the opposite gender. This rule has to be interpreted in conjunction with Article 38 of the Lithuanian Constitution,³⁸ which stipulates that marriage shall be concluded upon the free mutual consent of a man and a woman. The Constitutional Court of Lithuania holds that the Lithuanian Civil Registry cannot register any different kind of marriage.³⁹ The situation is similar in Poland, where the gender of spouses is a question of particular sensitivity. The Polish Constitution⁴⁰ in Article 18 provides that ‘marriage, being a union of a man and

³⁵ Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child. 2014 ‘Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices’ CEDAW/C/GC/31/CRC/C/GC/18.

³⁶ Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (Introductory Act to the Civil Code) (BGBl. I S. 2494; 1997 I S. 1061), das zuletzt durch Artikel 3 des Gesetzes vom 21. Dezember 2019 (BGBl. I S. 2911) geändert worden ist.

³⁷ See, accordingly: Article 10 of the Polish Family and Guardianship Code from 1964 and Article 3.14 of the Lithuanian Civil Code.

³⁸ Lietuvos Respublikos Konstitucija įsigaliojo 1992 m. lapkričio 2 d. skelbta: Lietuvos Aidas, 1992, Nr. 220 (1992-11-10); Valstybės Žinios, 1992, Nr. 33-1014 (1992-11-30) (the Constitution of the Republic of Lithuania from 25 October 1992).

³⁹ Judgment of the Constitutional Court of the Republic of Lithuania of 11 January 2019.

⁴⁰ Konstytucja Rzeczypospolitej Polskiej z 2.4.1997 r., Dz.U. z 1997 Nr 78, poz. 483 ze zm. (The Constitution of the Republic of Poland from 2 April 1997).

a woman, [...] shall be placed under the protection and care of the Republic of Poland'. The Polish Family and Guardianship Code remain in line with the Constitution, since Article 1§1 of the Code provides that 'a marriage is concluded when a man and woman simultaneously present make a declaration to the civil registrar that they are entering into a marriage relationship'. Representatives of the Polish legal doctrine are strict in their considerations regarding the meaning of Article 18 of the Constitution,⁴¹ explaining that marriage is possible only between persons of different genders. Lately, the Polish Constitutional Court was asked to assess the compatibility of the Article 1§1 of the Polish Family and Guardianship Code with Article 47 in conjunction with Articles 31(3), 32 and 30 of the Constitution.⁴² The question at stake relates to the impossibility of same-sex persons to conclude a marriage in Poland. Therefore, both in Poland and Lithuania, irrespective of the law governing marital conditions, the rules providing that marriage can be concluded only between persons of a different gender could be regarded as mandatory provisions.

In conclusion, overriding mandatory provisions related to the conclusion of marriage could stem either from well-established international standards, such as minimum age requirements, or national standards. In the latter case, those standards should be of fundamental importance for the national legal system.

2 Overriding Mandatory Provisions Related to the Dissolution of Marriage

Unlike in the conclusion of marriage, the variety of legal sources related to the law applicable to the dissolution of marriage is wider. Along with national laws, there is a Rome III Regulation,⁴³ which applies in the area of the law applicable to divorce and legal separation. However, the Regulation applies only in those Member States that agreed upon enhanced cooperation. The other countries can join enhanced cooperation at any time. Lithuania, which did not initially participate in enhanced cooperation, joined its application in 2012. Poland still does not apply the Rome III Regulation.

The Rome III Regulation does not provide for the possibility to apply overriding mandatory rules. Therefore, it remains unclear whether the state still can apply national mandatory rules related to divorce if the main legal act in terms of determining the applicable law is the Rome III Regulation. It can be argued that, in a situation where the regulation has to be applied, it shall be applied in its entirety. This means that a lack of possibility to apply mandatory rules

⁴¹ See, Andrzej Mączyński, 'Konstytucyjne podstawy prawa rodzinnego' in Włodzimierz Wróbel, Piotr Kardas, Tomasz Sroka (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*. Tom I (Wolters Kluwer Polska 2012, Warszawa, 757–778) 765; Bolesław Banaszkiewicz, 'Małżeństwo jako związek kobiety i mężczyzny. O niektórych implikacjach art. 18 Konstytucji' (2013) 3 *Kwartalnik Prawa Prywatnego* 591.

⁴² Article 47 foresees protection of private and family life; Article 31(3) relates to the possibility of limiting constitutional rights; Article 32 protecting equality and non-discrimination; Article 30 foresees protection of dignity.

⁴³ 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.

on the grounds of the Regulation does not imply a possibility to apply those rules based on national law. If the EU legislator had wished to provide for a possibility to apply the mandatory rule, the relevant provisions would have been added to the Regulation, as it was in the case of other EU regulations.⁴⁴ It has to be recognised that the possibility to apply overriding mandatory rules would undermine the already narrow choice of law in divorce cases.⁴⁵ In conclusion, states that participate in enhanced cooperation in the area of applicable law in divorce matters should not apply any mandatory rules, since the Regulation does not foresee such a possibility.

In non-participating countries such as Poland, overriding mandatory rules can also be applied in a divorce case if national laws provide so. In Poland, the main conflict-of-law rule related to divorce is established in Article 54 of the Polish PIL. The law does not provide separate provisions regarding the application of the overriding mandatory rules in family cases, and the general rule of Article 8 of the Polish PIL therefore applies. However, neither the doctrine nor the case-law gives an answer as to which national divorce rules are mandatory. The Polish Supreme Court had an opportunity to elaborate on that issue when it was considering whether Article 57 (decision on the party at fault) of the Polish Family and Guardianship Code is a mandatory rule.⁴⁶ The explanation of the court clarifies that this rule belongs to the *lex fori processualis*, not substantive law. However, it applies only if the applicable law entails substantive legal effects with the decision on fault. The Court stated that the provision mentioned above is not an overriding mandatory one.

3 Property and Personal Relations between Spouses

International society faces difficulties in adopting uniform conflict-of-law rules in matrimonial property matters. Nevertheless, states have been striving to accomplish this goal for over a century. For instance, two conventions could be mentioned within the works of The Hague Conference on Private International Law. The Convention of 17 July 1905 on the conflict of law relating to the effects of marriage on the personal relations between spouses and their matrimonial property relations was ratified by nine countries⁴⁷ and later renounced by six of them and Convention of 14 March 1978 on the law applicable to matrimonial property regimes, which was ratified by only three countries.⁴⁸ The latter does not provide for overriding mandatory provisions. The EU Matrimonial Property Regulation⁴⁹ was adopted

⁴⁴ See, for instance, Article 9 of the Rome I Regulation.

⁴⁵ Anna Sapota, *Wybór prawa w międzynarodowym prawie rodzinnym* (Wydawnictwo C.H. Beck 2016, Warszawa) 267.

⁴⁶ Judgement of the Supreme Court of the Republic of Poland from 26 March 2016, Case No III CZP 112/15.

⁴⁷ Belgium, France, Germany, Italy, The United Kingdom, Poland, Portugal, Romania, and Sweden.

⁴⁸ France, Luxembourg, and the Netherlands.

⁴⁹ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016.

within the enhanced cooperation scheme, thus applicable only in participating member states.⁵⁰ Therefore, in other cases, the law governing matrimonial property regimes will be determined according to national laws. Neither relevant international conventions⁵¹ nor EU regulations regulate conflict-of-laws issues in matters of personal relations between spouses; therefore it is left within the scope of application of national laws.

Article 30 of the EU Matrimonial Property Regulation allows the application of the overriding mandatory provisions of the *lex fori* in exceptional cases. In the same article, it is explained that mandatory provisions may be applied if the member state considers it as crucial for safeguarding its public interest, such as its political, social, or economic organisation. Those provisions can 'are applicable to any situation falling within their scope irrespectively of the law otherwise applicable to the matrimonial property regime' pursuant the Regulation. The preamble of the Regulation specifies that the concept of overriding mandatory provisions shall cover the rules of an imperative nature, such as rules protecting the family home. Given the exceptional nature of those rules, their application requires strict interpretation and the implementation of the 'compatibility' test.⁵² For that reason, the authorities should verify whether the rule is crucial for safeguarding the public interest and if its implementation is both necessary and proportionate to the objective pursued. Significantly, and unlike the Rome I Regulation, the Matrimonial Property Regulation does not allow the application of the overriding mandatory provisions of a state other than the state of the forum, which is considered to be a weakness.⁵³

The Regulation does not specify more precisely which rules could be overriding mandatory provisions. The only guidance in this regard is recital 53 of the preamble, which gives an example of rules protecting family homes. Clarification of which rules are crucial for safeguarding the public interest is left for the member states. It can be argued whether the member states participating in the application of the Regulation shall consider the well-established case-law of the Court of Justice of the European Union regarding the overriding mandatory provisions in contractual and non-contractual matters. Given that the wording of Article 30 reiterates the wording of Article 9 (1)(2) of the Rome I Regulation, they should be interpreted similarly. Furthermore, a similar interpretation, based on the case-law of the CJEU, would allow coherence in the interpretation of overriding mandatory provisions within European private international law to be maintained.

The CJEU elaborated on the overriding mandatory rules on several occasions. General guidelines regarding the application of overriding mandatory provisions can be learned from

⁵⁰ On 25 March 2020 there were 18 EU countries: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland, and Cyprus. The other member states are free to join the Regulation at any time.

⁵¹ Although personal relations between spouses fall within the scope of The Hague convention of 1905, its contemporary relevance is limited.

⁵² Sandrine Clavel, Fabienne Jault, 'Public Interest Considerations – Changes in Continuity' (2017/2018) Vol. XIX Yearbook of Private International Law 235, 241.

⁵³ *Ibid.*, 246.

such cases as *Ingmar*,⁵⁴ *Unamar*,⁵⁵ *Nikiforidis*,⁵⁶ and *da Silva Martins*.⁵⁷ For instance, in *Unamar*, the CJEU held that mandatory rules are not exempt from compliance with EU law, since the uniformity of application of the latter would otherwise be undermined.⁵⁸ It is worth recalling that, in *Unamar*, the CJEU does not distinguish a ‘public’ from a ‘private’ interest rule; it requires an assessment of whether the national legislator ‘adopted it in order to protect an interest judged to be essential by the Member State concerned’⁵⁹. The CJEU presented the same line of argumentation in *da Silva Martins*.⁶⁰ This is particularly important in family cases, since there will often be a significant interest at stake, although not necessarily a purely public interest. In *Nikiforidis*, the CJEU stated that the courts are not permitted to apply overriding mandatory provisions of the legal systems other than those that are expressly referred to in the Regulation, since this could jeopardise the full achievement of its general goal, which is legal certainty.⁶¹ The interpretation presented by the Court regarding the Rome I Regulation remains equally relevant for the application of the EU Matrimonial Property Regulation: since one of its objectives is ‘to provide married couples with legal certainty as to their property and offer them a degree of predictability, all the rules applicable to matrimonial property regimes should be covered in a single instrument’⁶².

In *da Silva Martins*, the Court emphasises that in order to assess whether the national rule is an overriding mandatory rule, a national court is required to perform a ‘detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the applicable law’⁶³. In the same ruling, the Court also pointed out that a national court, while determining if a national rule has to be applied irrespective of the law applicable otherwise, also has to consider the scope of application of the generally applicable law.⁶⁴ The application of a national rule instead of the one belonging to a generally applicable law governing the relationship, despite the scope of applicable law prescribed by the Regulation, requires particularly important reasons. Article 27 of the EU Matrimonial Property Regulation enshrines the scope of application of the applicable law determined according to the given Regulation. However, the list of matters prescribed in Article 27 is not exhaustive. Notably, regardless of whether the matter is listed in Article 27 or not, the national court is required to justify the

⁵⁴ Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* [2000] ECR I-9305.

⁵⁵ C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663.

⁵⁶ Case C-135/15, *Hellenic Republic v Grigorios Nikiforidis*, ECLI:EU:C:2016:774.

⁵⁷ Case C-149/18, *Agostinho da Silva Martins v Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84.

⁵⁸ Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 46.

⁵⁹ Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 50.

⁶⁰ Case C-149/18, *Agostinho da Silva Martins v Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84, Rec. 30.

⁶¹ Case C-135/15, *Hellenic Republic v Grigorios Nikiforidis*, ECLI:EU:C:2016:774, para 46.

⁶² The EU Matrimonial Property Regulation, Rec. 15.

⁶³ Case C-149/18, *Agostinho da Silva Martins v Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84, para 31.

⁶⁴ *Ibid*, para 33.

application of national overriding mandatory rules; however, once the matter is listed, this justification has to be substantive.

However, member states that do not participate in the EU Matrimonial Property Regulation, as well as all states in cases related to personal matters between the spouses, may be more flexible in the application of overriding mandatory provisions. Moreover, if the national law allows, the authorities can also apply foreign overriding mandatory provisions but, given the exceptional nature of the overriding mandatory rules, they should not be used as a mere justification for the application of the *lex fori*, and the courts should provide a thorough justification for the derogation from the application of the national law governing personal or property relations between spouses.

It is for the national court to decide whether a particular provision pursues an aim of fundamental importance to the state. Neither Lithuanian nor Polish case-law provides much clarification as to which national rules related to matrimonial matters can be considered as overriding mandatory provisions. However, some authors provide valuable examples in this regard. For instance, these could be the provisions protecting the right of the surviving spouse to live in the house used as the family home.⁶⁵ According to Polish law, rules related to mutual assistance and cooperation in ensuring the welfare of the family by spouses during the marriage⁶⁶ are applicable irrespective of the matrimonial property regime.⁶⁷ During drafting the EU Matrimonial Property Regulation, Italy presented comments on overriding mandatory provisions and identified several examples of possible national provisions that could be considered internationally mandatory. Those were the rules related to mutual assistance and maintenance obligations of spouses during the marriage; moreover, obligations in the event of divorce (or separation), where the other spouse has no means of subsistence and was not at fault for the divorce.⁶⁸ In conclusion, as overriding mandatory rules related to matrimonial relations can be considered those not only of importance to the persons concerned but also representing some fundamental values of society, which are important to general public order and hence also constitute the public interest.

⁶⁵ Maria Anna Zachariasiewicz, 'O potrzebie wskazania w nowej ustawie o prawie prywatnym międzynarodowym podstawy stosowania przepisów wymuszających swoje zastosowanie' (2010) 7 *Problemy Prawa Prywatnego Międzynarodowego* 40. The same example is given in the para 53 of the preamble of the EU Matrimonial Property Regulation.

⁶⁶ Articles 23, 27–29 of the Polish Family and Guardianship Code.

⁶⁷ Sylwia Jastrzemska, 'Małżeńskie ustroje majątkowe' in Hanna Bzdak (ed), *Zbiór orzeczeń z zakresu prawa rodzinnego i opiekuńczego wraz z komentarzami Wybrane zagadnienia* (Krajowa Szkoła Sądownictwa i Prokuratury 2015, Krakow 103–202) 110.

⁶⁸ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships – Comments from the Italian delegation on overriding mandatory provisions, Brussels, 14 November 2012, 16188/12.

III Parental Responsibility Issues, Maintenance, and Protection of Adults

1 Parental Responsibility

The protection of children is usually a core objective of family law; therefore, it is not surprising that, in some instances, national laws contain provisions pursuing an objective of protecting the interests of the child that are applicable regardless of *lex causae*. The ground for the application of overriding mandatory provisions can mainly be found in national private international laws. The concept of overriding mandatory rules is unknown to the Hague conventions. Neither the Hague Abduction Convention⁶⁹ nor the Hague Child Protection Convention,⁷⁰ nor the Hague Protocol⁷¹ provide for a possibility to derogate from the applicable law on the basis of overriding mandatory provisions. Therefore, whether it is possible to apply national general private international law rules (for instance, related to overriding mandatory provisions) if the Convention does not provide for is an open question.

The Hague Child Protection Convention is a comprehensive⁷² legal act covering matters related to the protection of children. Consequently, a national authority should consider its application primarily due to the priority of international legal acts over national laws. The Convention does not ignore the general part of private international rules entirely. It includes the rules on *ordre public* (Article 22) and *renvoi* (Article 21). However, according to the explanatory report to the Convention, the possibility of applying overriding mandatory provisions is not entirely excluded.⁷³ Although the Convention does not provide for rules allowing the application of overriding mandatory rules, they could potentially be applied under national provisions. Since a simultaneous application of the different legal acts in the same matter can complicate more already complicated international cases, it has to be justified by the best interest of the child. As an example of rules requiring their application irrespective of the law otherwise applicable may be provisions prohibiting psychological or physical violence against the child. For instance, the Lithuanian Framework Law on the protection of the rights of the child⁷⁴ provides that it has priority over any other Lithuanian law, except

⁶⁹ *Convention on the Civil Aspects of International Child Abduction* signed 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).

⁷⁰ *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* signed 19 October 1996, UNTS I-31922 (entered into force 1 January 2002).

⁷¹ *Protocol on the Law Applicable to Maintenance Obligations* (n 27).

⁷² Comprehensive is understood as covering all main issues like jurisdiction, applicable law, and recognition of judgments.

⁷³ Paul Lagarde, 'Explanatory Report on the 1996 Hague Child Protection Convention' provisional edition (The Hague, Permanent Bureau of the Conference 1997) 575.

⁷⁴ Lietuvos Respublikos vaiko teisių apsaugos pagrindų įstatymas (Framework Law on the protection of the right of the child of the Republic of Lithuania), *Valstybės žinios*, 1996-04-12, Nr. 33-807.

international conventions and relevant European Union law. In other words, this law provides the basis of child protection in Lithuania. In many cases, the law reiterates the provisions of the United Nations Convention on the rights of the child, which sets minimum standards in terms of child protection.⁷⁵

Nevertheless, some provisions of the national law are stricter than those of the Convention. For instance, the law defines violence against the child and forbids any kind of violence or physical punishment against the child, even those that can be considered mild. Since the understanding of the acceptable means of raising a child differs in particular countries and cultures, it can raise tensions in the case of migrant families.

Various parental responsibility matters are excluded from the application of international conventions. These, include establishing or contesting a parent-child relationship and the names of the children. Name-related issues are often omitted within the international legal framework, or the instruments have very limited applicability and so these issues, irrespective of whether they concern children or adults, will be addressed in the next part of this paper.

The best interest of the child is one of the main objectives of both the international and national legal frameworks. This is reflected in both substantive law and private international law. For instance, Article 1.31 of the Lithuanian Civil Code provides several alternative connecting factors for the determination of the law governing the establishment of the origin of the child; however, it obliges the court to apply the most beneficial for the child. With regard to determining the origin of the child, recent issues regarding surrogacy arrangements and the paternity and the maternity of the intending parents raise many discussions. In many instances, rules prohibiting surrogacy arrangements could be considered as overriding mandatory rules that apply irrespective of the law otherwise applicable.⁷⁶ However, despite the controversies surrounding surrogacy arrangements and their effects, their inclusion in overriding mandatory provisions requires a thorough assessment of their purpose and function, and the effects of their application, particularly towards the interest of the child. It has to be kept in mind that non-recognition of the paternity and maternity of the intending parents can lead to the uncertain situation of the child, since it would affect the nationality and responsibility for taking care of the child, and other legal and practical issues.

The other provisions within the parent-child relationships that could be considered overriding mandatory provisions are those related to the duty of maintenance of the child regarding both parents. On several occasions, the Lithuanian Supreme Court held in international maintenance cases that Article 3.194 of the Lithuanian Civil code regarding maintenance orders is an overriding mandatory provision.⁷⁷ Article 3.194 § 3 provides that the

⁷⁵ *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷⁶ Piotr Rodziejewicz, 'International surrogacy – conflict-of-laws and procedural issues of judicial cooperation in civil matters' in Piotr Mostowik (ed), *Fundamental legal problems of surrogate motherhood. Global perspective* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2019, Warsaw 899–934) 926.

⁷⁷ The ruling of the Supreme Court of the Republic of Lithuania of 23 January 2007, Civil case No 3K-7-130/2007.

court shall issue an order for maintenance until the child reaches the age of majority. Notably, the amount of maintenance for the child must be proportionate to the parent's financial situation. Parental wealth must be assessed based on all the facts: parents' income, movable and immovable property, investments, health, dependency, and the willingness of parents to earn and to maintain their children. Since the obligation of parents to provide maintenance to their child is imperative; any failure to do so cannot be justified by the minimum income they receive or by their careless or dishonest behaviour. The case-law of the Supreme Court recognises that, in determining the financial situation of a parent, it is not only his or her property and income that is to be assessed, but also the steps he or she has taken in order to receive income.⁷⁸

2 Adoption

International adoption is a problematic matter, often requiring the simultaneous application of several applicable laws. The main reason for that is the protection of the best interest of the child, since international adoption often means a change of the habitual residence and even the nationality of the child. It is therefore crucial to ensure compliance with different laws that are closely related to the case. For instance, Articles 57–58 of the Polish PIL provide that the national law of the adoptive parent governs the adoption,⁷⁹ however, the adoption cannot take place without assessing the rules of the national law of the adoptee, concerning his and his legal representative's consent to the adoption, and the permission of the competent state authority in this regard, as well as restrictions related to the change of residence of the adoptee. Lithuanian conflict-of-law rules are constructed differently. The main connecting factor in determining applicable law is the domicile of the adoptee. However, if it becomes evident that the adoption performed according to *legem domicili* of the adoptee will not be recognised in the state of the domicile or citizenship of the adopters, the adoption may be performed according to the law of the state of domicile or citizenship of the adoptive parents. Nevertheless, the latter should comply with the best interests of the child. If the recognition of adoption remains uncertain, adoption shall not be allowed. The court therefore has to assess several laws in order to ensure that the adoption is recognised. All of these laws could differ in terms of adoption. However, only some provisions can be considered overriding mandatory provisions. Polish authors argue whether provisions regarding the obligation to hear the child can be considered overriding provisions.⁸⁰ However, neither of the opinions is supported by the case-law.

⁷⁸ The ruling of the Supreme Court of the Republic of Lithuania of 3 February 2016, Civil case No 3K-3-16-706/2016.

⁷⁹ In the case of a joint adoption by the spouses, the law of their common nationality applies, if they do not have common nationality then the law of the state where they are permanently resident or, failing that, the law of their common habitual residence or, failing that, another law closely connected to the spouses.

⁸⁰ Bernadetta Fuchs, 'Przepisy wymuszające swoje zastosowanie w nowej ustawie – Prawo prywatne międzynarodowe' in Jerzy Poczobut (ed), *Współczesne wyzwania prawa prywatnego międzynarodowego* (Wolters Kluwer Polska 2013, Warsaw 69–81) 77–78; Bogusława Gneta, 'Przysposobienie' in Jerzy Poczobut (ed), *Prawo prywatne międzynarodowe. Komentarz* (Wolters Kluwer Polska 2017, Warszawa 879–914) 893.

National substantive law rules can be considered as overridingly mandatory insofar as they provide for specialised requirements concerning international adoption. For instance, the Lithuanian Civil Code sets additional requirements for adoptive parents who are foreign citizens. The most important condition, the one from which the court cannot derogate, is that foreign citizens can only adopt a child in Lithuania if, for six months following the registration of the child in the list of children offered for adoption, no application has been received from Lithuanian citizens to adopt the child or place the child under guardianship. The court can derogate from the other provisions, hence they are neither imperative in domestic cases nor in those with an international dimension.

3 Protection of Adults

Finally, considerations regarding overriding mandatory provisions should not omit other vulnerable groups. The newest Adult Protection Convention,⁸¹ unlike the earlier Hague conventions, also introduces the possibility to apply overriding mandatory provisions. Article 20 stipulates that if the law of the state in which the adult is to be protected has provisions that are mandatory irrespective of the law otherwise applicable, the Convention does not prevent their application. The Convention introduces even further protection of the state's right to apply its mandatory provisions, providing for the non-recognition of a measure contrary to a mandatory law of the state concerned. According to the explanatory report accompanying the Convention, it was primarily the medical field that was in mind while constructing those provisions.⁸² National laws can require, for instance, a special representation of the adult person in medical matters, particularly if the adult person has to be placed in a psychiatric hospital or geriatric clinic.

IV Names

The question of given and family names is always a very sensitive issue. It is at the threshold of traditions, religion, history, language and, finally, law. To have a name means to be someone in society. This is why states seem to be attached to the national rules regarding names and not willing to cooperate in this field. For many years, the International Commission on Civil Status attempted to have unified rules on different matters regarding names, and civil status in general, adopted. Some of the conventions, for instance, its 16th Convention,⁸³ were quite successful, others not.⁸⁴ A unification of at least some issues related to family names in the EU

⁸¹ *Convention on the International Protection of Adults* signed 13 January 2000, 2600 UNTS 3 (entered into force 1 January 2009).

⁸² Paul Lagarde, 'Explanatory Report on the 2000 Hague Protection of Adults Convention' (Hague Conference on Private International Law 2017, The Hague) 77.

⁸³ *Convention on the issue of plurilingual extracts from civil status records*, signed 8 September 1976, 1327 UNTS 3 (entered into force 30 July 1983).

⁸⁴ See, for instance, or *Convention on the recognition of surnames* signed 16 September 2005 (not yet in force).

is also missing. Since the Green paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'⁸⁵ the Commission's work has not progressed, and so national private international laws continue to apply regarding the determination of the law applicable to names.

It could seem that the states are so reluctant to adopt any unified measures related to names because they consider all their provisions in this regard mandatory. However, due to globalisation and intense migration, states face challenges in protecting the inviolability of applying national name laws. Consequently, national conflict-of-law rules can lead to the application of foreign law and only some national rules, the overriding mandatory rules, will continue to apply. As an example of such rules can be Turkish rules on the names of the spouses. Pursuant to Turkish law, the husband is not allowed to acquire his wife's family name, and accordingly, the wife cannot stay solely with her maiden name; she has to either change her name to her husband's name or add it to her current name.⁸⁶

For a long time, rules regarding the spelling of the names of Lithuanian citizens were considered overriding mandatory provisions in Lithuania. According to the Lithuanian law, the names of the Lithuanian citizens in the personal identification documents must be spelled in accordance with the Lithuanian language rules, regardless of the law otherwise applicable or the fact that the family name was acquired abroad.⁸⁷ This was a consequence of the strict language policy pursued after the restoration of independence in 1990. The Lithuanian language became a constitutional value, and the application of foreign law could not diminish this status. For instance, in one of its rulings, the Supreme Court refused to allow the law of the United States of America to be applied,⁸⁸ as it would allow name of a Lithuanian citizen to be written in violation of Lithuanian law.⁸⁹ An interesting issue is that the court considers Lithuanian rules as both part of the public policy and overriding mandatory rules. Such a conclusion is justified by the fact those rules were applied irrespective of the law otherwise applicable, and at the same time, they constitute the ground for refusing to recognise names acquired abroad. However, in the newer case-law, courts no longer follow this reasoning, and therefore it is not justified to consider the provisions mentioned above as overriding mandatory provisions.

⁸⁵ Green paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records', Brussels, 14.12.2010, COM (2010) 747 final.

⁸⁶ Zeynep Derya Tarman, Başak Başoğlu, 'Surname and the law applicable to surname under Turkish law' in Mirko Živković (ed), *4th Balkan Conference. Conference Proceedings: Personal Name in Internal Law and Private International Law* (University of Niš 2016, Niš, 47–70) 50–51.

⁸⁷ Lietuvos Respublikos asmens tapatybės kortelės įstatymas (Law concerning identity cards) *Valstybės žinios*, 2001-11-21, Nr. 97-3417, and Lietuvos Respublikos paso įstatymas (Law concerning passports) *Valstybės žinios*, 2001-11-28, Nr. 99-3524, and Nutarimas dėl vardų ir pavardžių rašymo Lietuvos Respublika piliečio pase (Decree concerning the writing of surnames and forenames in passports of citizens of the Republic of Lithuania) Lietuvos aidas, 1991-02-06, Nr. 26-0 provide that information set out on identity cards and in passports must be entered according to Lithuanian orthography.

⁸⁸ The question of a possible application of Nevada state law was at stake.

⁸⁹ Ruling of the Supreme Court of the Republic of Lithuania of 8 June 2006, Civil Case No 3K-7-20/2006.

Conclusions

A brief analysis of the overriding mandatory provisions in family matters and names allows several conclusions to be drawn. In many instances, family and personal matters are left outside the scope of application of the international and European legal instruments. Issues such as the conclusion of marriage, personal relations between spouses, establishment of the origin of the child and finally names are left within the scope of application of national conflict-of-law rules. Hence, the possibility of applying overriding mandatory provisions is also subject to national conflict-of-law rules. The more questionable situation is when the applicable law is determined according to an international convention or the EU regulation. Sometimes the international or EU legal instrument does not foresee the provisions on overriding mandatory rules. The question is whether a national court can apply relevant national rules in this regard.

The analysis reveals that there can be drawn general guidelines concerning the rules that can be considered as overriding mandatory provisions. However, the important rules in one legal system do not have any relevance in another (for instance, rules regarding the different gender of the spouses in Poland are important, and in Denmark are not; and those regarding the change of the family name after marriage in Turkey and in Poland: one requires a woman to change, the other leaves the decision to the spouses). It is therefore impossible to make a list of overriding mandatory provisions in particular matters, although it can be stated that overriding mandatory rules must be of particular importance for the state and cannot solely protect private interests, although the latter are not unimportant.