

# Chapter 2

## Introduction to Private International Law

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### 2.1 Introduction

This research has as its subject the impact of the rights guaranteed in the ECHR on private international law. A necessary first step in such a discussion is an introduction to private international law. It should be understood from the outset that every country has its own system of private international law. This also applies to the Contracting Parties to the ECHR. Moreover, what is exactly understood as private international law even differs from country to country. While every State has its own national rules on private international law, many States are also party to international or bilateral treaties regarding issues of private international law. Furthermore, the EU Member States, which are all also Contracting Parties to the ECHR, are bound by EU rules on private international law.

It is, of course, impossible to discuss all the different rules of private international law in this chapter, or to do justice fully to all the intricacies of private international law.<sup>1</sup> The aim of this chapter is merely to introduce the general notion of private international law and some of its particularities to the reader who may be less familiar with issues of private international law. Additionally, a first foray into the discussion of the impact of the ECHR on private international law will be offered, by discussing how private international law has traditionally dealt with fundamental rights.

In order to do so, first the notion of private international law will be further introduced (in Sect. 2.2). Next, some of the goals of private international law will be examined (Sect. 2.3). Thereafter, the sources of private international law will be discussed (Sect. 2.4). Finally, a first foray into the subject of this research will be made by an examination of the role of the public policy exception in private international law, particularly with regard to fundamental rights. The notion of mandatory rules will also come up here (Sect. 2.5).

## 2.2 The Notion of Private International Law

As stated above, every legal order in the world has its own rules relating to matters of private law. Private law is concerned with all legal relationships between private entities and thus includes, for example, family law and the law of contracts and obligations. These laws differ from country to country. However this does not stop interaction between people in different countries. People may, for example, marry someone from another country or find a job in a different country. As has been remarked in Chap. 1, it is this simple fact that is the *raison d'être* of private international law. Private international law is the area of law that comes into play whenever a court is faced with a question that contains a foreign element, or a foreign connection. The mere presence of such a foreign element in a legal matter raises a number of questions and it is the function of private international law to provide an answer to these questions and to ensure just solutions.

It has been established in Chap. 1 that private international law is concerned with three main issues. The first issue with which one may be faced in a case with a foreign element is the issue of jurisdiction: which court is competent to hear such an international case? If, for example, a conflict arises concerning a contract between an English company and a Dutch company, should this issue be brought before a court in England or the Netherlands? The second issue that could arise after a decision on the competent court has been made is whether, for example, English or Dutch law would be applied to this case. Or, perhaps, the parties have

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<sup>1</sup> See for a general overview with regard to private international law, e.g., Bucher 2011; Cheshire et al. 2010; Clarkson and Hill 2011; Dicey et al. 2012; Dutoit 2005; Niboyet and De Geouffre de la Pradelle 2011; Siehr 2002; Strikwerda 2012.

chosen the law of a third country, or a uniform international law may even apply to their dispute. Finally, after the case has been decided, it is necessary to determine if, and under what circumstances, this decision can be recognized and enforced in another country.

These three issues could be considered to be the nucleus of private international law, as it is generally accepted in most countries that these issues are part of private international law.<sup>2</sup> As noted above, the rules of private international law are not understood to include exactly the same topics in every country. For example, in France and Belgium the rules on nationality are considered part of private international law.<sup>3</sup> In Switzerland one may, for example, find rules on (international) arbitration in the private international law statute.<sup>4</sup> However these topics will not be included in this book.<sup>5</sup>

One of the particularities of private international law rules is that they merely refer to either a competent court, the applicable law, or whether recognition and enforcement are possible. One could therefore think of private international law rules as procedural rules, or perhaps rather as technical or formal rules, which are not concerned with the substance of a dispute.<sup>6</sup> One should, incidentally, also note that the nature of private international law rules relating to the applicable law (conflict rules) is generally considered to be different from the rules relating to jurisdiction and recognition and enforcement, if solely because only conflict rules may lead to the application of foreign law.<sup>7</sup> The latter rules are thus considered to be of a more substantive nature, while rules regarding jurisdiction and the recognition and enforcement have a procedural character.

It is important to note that in this book, the impact of the Court's case law on issues of private international law will be examined in the first place.<sup>8</sup> As has been noted in Chap. 1, the Court, in principle, does not review measures taken by the Contracting Parties *in abstracto* and will consequently only assess the result of the application of private international law rules. Therefore, the impact of the ECHR on the three main issues of private international law should be understood as the impact of this instrument on the result of the application of private international law rules. The peculiar nature of private international law rules is thus of little consequence for this book.

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<sup>2</sup> Cf. Kegel 1994, Chap. 1, pp. 1–2.

<sup>3</sup> See with regard to France, e.g., Audit 2008, p. 767ff; see with regard to Belgium, e.g., Erauw 2006, pp. 7–8.

<sup>4</sup> See *infra* n. 38.

<sup>5</sup> See also *supra* Chap. 1.

<sup>6</sup> See, e.g., Bogdan 2011, p. 71ff.

<sup>7</sup> See, e.g., Bogdan 2011, p. 85.

<sup>8</sup> See *supra* Sect. 1.1.

## 2.3 Objectives of Private International Law

One of the main reasons for States to have a system of private international law—which will occasionally lead to the assertion of jurisdiction in a case with international connections, the application of a foreign law, or the recognition and enforcement of foreign judgments—is the reasonable and legitimate expectations of the parties.<sup>9</sup> Completely disregarding foreign laws and decisions, or even the willingness to entertain international cases, would lead to injustices for the parties involved in such international proceedings.<sup>10</sup>

Another important objective of private international law is the international harmony of decisions.<sup>11</sup> This classic goal of private international law was first introduced by von Savigny.<sup>12</sup> It entails that countries should strive to reach the same decisions in problems of private international law. This latter objective, however, is difficult to achieve, as every country is, in principle, free to decide how to deal with issues of private international law. This does not take anything away from the importance of this notion. The international harmony of decisions is not an empty vessel. The taking into account of foreign laws and decisions by States helps avoid ‘limping’ legal relationships, i.e., legal relationships that are recognized in one country but not in another. One should not lose sight of the fact that rules of private international law are also in the interest of the (forum) State, as it benefits from stability with regard to cross-border legal relationships.<sup>13</sup>

## 2.4 Sources of Private International Law

Another particularity of private international law is the variety of its sources. Rules of private international law can be found not only in the national legislation of States, but also in international treaties and European law. The internationalization (and Europeanization) of rules of private international law is becoming increasingly more important for this area of law.<sup>14</sup> For Member States of the EU, for example, the European legislator is by now the most important legislator in the area of private international law. This is due to what has been called the ‘Europeanization’ of private international law (Sect. 2.4.1). Many rules of private international law have traditionally also been concluded between different States and laid down in international or bilateral treaties (Sect. 2.4.2). Finally, every State also has national legislation on private international law (Sect. 2.4.3).

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<sup>9</sup> See, e.g., Dicey et al. 2012, pp. 4–5; Clarkson and Hill 2011, pp. 9–12.

<sup>10</sup> See, e.g., Dicey et al. 2012, p. 5.

<sup>11</sup> See, e.g., Clarkson and Hill 2011, pp. 18–19.

<sup>12</sup> Von Savigny 1880, p. 64ff.

<sup>13</sup> Bogdan 2011, pp. 49–70.

<sup>14</sup> See, e.g., Gaudemet-Tallon 2005, p. 47.

### 2.4.1 *The Europeanization of Private International Law*

The most important recent development for private international law in Europe is the so-called Europeanization or—at the time—‘Communitarization’ of private international law,<sup>15</sup> which essentially entails the continued involvement of the European Union legislator in the field of private international law. It was not truly possible for the European Community (now Union) legislator to introduce legislation in the area of private international law until the Treaty of Amsterdam.<sup>16</sup> It should not be forgotten that before this development there were also private international law instruments created in a European context, but these had the form of international conventions, which had to be signed and ratified by all participating countries. Examples of such initiatives are the Brussels Convention concerning jurisdiction and the recognition and enforcement of foreign judgments<sup>17</sup> and the Rome Convention concerning applicable law.<sup>18</sup> The Brussels Convention has, incidentally, been copied by the Lugano Convention,<sup>19</sup> thus enlarging the number of States party to the Convention with some non EU-Member States.<sup>20</sup> The disadvantage of merely cooperating by way of international conventions in the field of private international law is evident. Upon every accession of a new member State, the convention had to be updated and ratified again by all the members. This has happened several times with regard to both the Brussels and the Rome Convention, but this ultimately proved to be too slow and difficult a process and it became more burdensome with the increasing number of Member States.<sup>21</sup>

With the entry into force of the aforementioned Treaty of Amsterdam on 1 May 1999, the Community legislator entered the field of private international law, and one could say that it has not held back. Numerous new initiatives have been taken on the European level. The Brussels and Rome Conventions have, for example,

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<sup>15</sup> See, e.g., Basedow 2000, pp. 687–708; Kuipers 2012, pp. 6–27; Stone 2010. The (increasing) importance of European law has also been the subject of study at the Hague Academy a number of the times during the past years: see, e.g., Borrás 2005, pp. 313–536; Fallon 1995, pp. 8–282; Struycken 1992, pp. 256–383.

<sup>16</sup> *Treaty of Amsterdam*, OJ 1997, C 310. With this Treaty the responsibility for creating legislation with regard to international judicial co-operation in civil matters was shifted from the third pillar to the first pillar, i.e. the Community legislator.

<sup>17</sup> The Brussels Convention on jurisdiction and the enforcement of foreign judgments in civil and commercial matters, 27 September 1968, OJ 1998, C 27/1 (consolidated version following the accession of Austria, Finland, and Sweden).

<sup>18</sup> The Rome Convention on the law applicable to contractual obligations, OJ 1998, C27/34 (consolidated version following the accession of Austria, Finland, and Sweden).

<sup>19</sup> Lugano Convention, 24 October 1988, OJ 1988, L 319/9. The Lugano Convention has since been replaced by a new Lugano Convention. See OJ 2007, L 399/1.

<sup>20</sup> These States are the Member States to the European Free Trade Association: Iceland, Norway, and Switzerland.

<sup>21</sup> The Commission became so concerned that it even openly discussed sanctions for states that did not approve amendments. See the answer by Commissioner Monti to the European Parliament, OJ 1997, C83/85.

both been transformed into EU instruments, and are now known respectively as the Brussels I Regulation<sup>22</sup> and the Rome I Regulation.<sup>23</sup> A number of complementary instruments to the Brussels I Regulation have been introduced, which basically deal with smaller, simple claims.<sup>24</sup> The so-called Rome II Regulation has been introduced with regard to the law applicable to non-contractual obligations.<sup>25</sup> The EU legislator has also delved into the area of family law with the Brussels II *bis* Regulation<sup>26</sup> and the Rome III Regulation.<sup>27</sup>

It is clear that the ongoing harmonization of the rules of private international law of the EU Member States is here to stay and that the further Europeanization of the rules of private international law will undeniably have major consequences for the respective systems of private international law of the Member States. An important factor therein is the fact that the Europeanization of private international law not only brings further harmonization, but concomitantly adds objectives following from European law which are unfamiliar to private international law, to the conflict of laws methodology in Europe. Important elements of European law thus suddenly enter the realm of private international law and in this way an ‘instrumentalisation’ of private international law in Europe has been introduced.<sup>28</sup> Rules of private international law are thus permeated by the four fundamental freedoms of the EU Treaty, by a focus of the principle of non-discrimination, the impact of fundamental rights, and the rule of mutual recognition.<sup>29</sup> Since the entry into force of the Lisbon Treaty the harmonization of the rules of private international law is now governed by Title V, which will bring further changes to private international law within the EU.<sup>30</sup>

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<sup>22</sup> Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). This instrument has already a successor: 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 (Recast), *OJ* 2012, L 351/1. The Recast will apply from 10 January 2015 (see Article 81 of the Recast).

<sup>23</sup> Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I).

<sup>24</sup> See, e.g., Regulation (EC) No. 805/2004 creating European Enforcement Order for Uncontested Claims, *OJ* 2004, L 143 (Amending Act Regulation (EC) 1869/2005, *OJ* 2005, L 300) and the Regulation EC 861/2007 establishing a European Small Claims Procedure, *OJ* 2007, L 199.

<sup>25</sup> Regulation (EC) 864/2007 on the law applicable to non-contractual obligations, *OJ* 2007, L199/40 (Rome II Regulation).

<sup>26</sup> Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, *OJ* 2003, L 338/1 (Brussels II*bis* Regulation).

<sup>27</sup> Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2010, L 343/10 (Rome III Regulation).

<sup>28</sup> Meeusen 2007, pp. 287–305.

<sup>29</sup> von Hein 2008, p. 1676ff; Meeusen 2007, p. 291ff.

<sup>30</sup> See further, e.g., de Groot and Kuipers 2008, pp. 109–114.

### 2.4.2 *International Treaties*

The Hague Conference of Private International Law, an international organization established in 1893, is the most prominent organization in the field of private international law and as such is responsible for many conventions concerning issues of private international law. Over the years the Hague Conference has developed conventions in the areas of international family law, international legal cooperation and litigation, and international commercial law.<sup>31</sup> It should be noted that the European Community decided to accede to the Hague Conference of Private International Law in 2006.<sup>32</sup> In the field of international trade law and arbitration the United Nations (UN) is an important player.<sup>33</sup>

In addition to multilateral treaties, there are also many bilateral treaties between countries in the area of private international law. Such bilateral treaties only operate between two countries and the precise content of such agreements varies. One could say with regard to European countries that such bilateral treaties are generally being replaced by multilateral conventions, but the varying contents of bilateral agreements preclude them from becoming totally meaningless, as some aspects of private international law issues between the two countries may fall outside the scope of the multilateral conventions.<sup>34</sup>

### 2.4.3 *National Legislation*

The importance of national legislation on private international law has declined within Europe. Many of the relevant rules of private international law have an international origin,<sup>35</sup> while for the EU Member States, EU legislation is of particular importance. Nevertheless, this has not stopped European countries from

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<sup>31</sup> See for an overview of the conventions the website of the Hague Conference [[www.hcch.net](http://www.hcch.net)].

<sup>32</sup> See Council Decision (EC) 2006/719 of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, *OJ* 2006 L 297/1.

<sup>33</sup> Particularly, the United Nations Commission on International Trade Law (UNCITRAL) has drafted some important conventions. The number of conventions concerning private international law concluded by the UN pales in comparison to the number concluded by Hague Conference. Nevertheless, some of them are very important. Examples are the Vienna Convention on the Law Applicable to the International Sale of Goods and the New York Convention on the Recognition and Enforcement of Arbitral Awards.

<sup>34</sup> See, e.g., Articles 69–72 of the Brussels I Regulation (*supra* n. 22). See with regard to the concurrence of international and bilateral treaties on private international law, e.g., de Boer 2010, pp. 308–315.

<sup>35</sup> See with regard to the impact of such treaties on national legislation Siehr 1996, pp. 405–413.

developing new codifications of private international law. This development started in Switzerland and many European countries have since followed suit.<sup>36</sup>

In Switzerland, for example, private international law is governed by the Federal Law on Private International Law of 18 December 1987.<sup>37</sup> This law regulates virtually all aspects of private international law in Switzerland.<sup>38</sup> The Netherlands has recently finally codified a number of rules of private international law (mostly choice of law rules) in Book 10 of the Dutch Civil Code.<sup>39</sup> In England, private international law rules consist of both statutes and case law. Historically, case law was the most important source of private international law, England being a common law country, but legislation now also has an important role.<sup>40</sup>

## 2.5 The Impact of Fundamental Rights on Private International Law

In the next chapter the rights guaranteed in the ECHR will be discussed, and thereafter the examination of the impact of this instrument on the three main issues of private international law will begin in earnest.<sup>41</sup> However, this would appear to be the proper place to further reflect on the fact that private international law has previously dealt with the impact of fundamental rights. The public policy exception has historically been the instrument of private international law used to deal with the impact of fundamental rights.<sup>42</sup> Therefore, it deserves separate discussion

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<sup>36</sup> Switzerland's codification came into force in 1987. See on the development of this law, e.g., Vischer 1977, pp. 131–145; Belgium has, for example, introduced a codification of private international law rules in 2004. See with regard to the realization of this law, e.g., Erauw 2006, pp. 19–21. The Netherlands has recently also codified a number of rules of private international law. See *infra* n. 39. See generally on the codification of private international law Siehr 2005, pp. 17–61.

<sup>37</sup> Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP), RS 291, RO 1988 1776.

<sup>38</sup> The Swiss Private International Law Act has 12 chapters and roughly 200 articles. In the first chapter of the Law general issues of jurisdiction, applicable law, and the recognition and enforcement of foreign judgments are dealt with, in addition to a definition of domicile and nationality. This general chapter is followed by chapters on natural persons (Chap. 2), marriage (Chap. 3), children and adoption (Chap. 4), guardianship (Chap. 5), succession (Chap. 6), property (Chap. 7), intellectual property (Chap. 8), obligations (Chap. 9), corporations (Chap. 10), international bankruptcy (Chap. 11), and international arbitration (Chap. 12).

<sup>39</sup> *Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek* [Determination and Implementation Book 10 of the Dutch Civil Code], 19 May 2011, *Stb.* 2011, 272. See on the realization of this codification, e.g., Vlas 2010, pp. 167–182.

<sup>40</sup> See, e.g., Dicey et al. 2012, pp. 10–11.

<sup>41</sup> See *infra* Chaps. 5–8.

<sup>42</sup> See Kinsch 2007, pp. 171–192 for an overview of the historical use of the public policy exception in this regard. See also Kinsch 2004, pp. 419–435.



here in this introduction to private international law. In the subsequent chapters the precise role of this instrument with regard to the impact of the rights guaranteed in the ECHR will also be further discussed.<sup>43</sup>

When the application of a foreign law or the recognition or enforcement of a foreign judgment would result in a violation of the fundamental values of the forum, the public policy exception or *ordre public* will be invoked in order to set aside such a repugnant result.<sup>44</sup> The public policy exception is present in virtually all systems of private international law and can be found in statutes, codes, and international conventions. It has even been referred to as a general principle of international law by Judge Lauterpacht in his separate opinion in the *Boll* case.<sup>45</sup> He opined that:

[I]n the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized. (...) On the whole, the result is the same in most countries – so much that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law.<sup>46</sup>

This would indicate that the public policy exception may even be invoked in cases in which an international treaty is silent on the matter.<sup>47</sup> However, this is not to say that the public policy exception cannot be consciously left out of a treaty. If a public policy exception has been deliberately omitted in an international treaty, it cannot be invoked.<sup>48</sup> This, incidentally, leaves unanswered the question of whether it is possible to invoke one of the rights guaranteed in the ECHR in such a situation. This is essentially a question of the hierarchy between international instruments and will be discussed in relation to the ECHR in the next chapter.<sup>49</sup>

The public policy exception is clearly the safety valve, or the escape hatch, of private international law. As was discussed above, private international law by its nature leaves room for judicial solutions that are alien to the forum. Such flexibility is necessary in order to regulate cross-border affairs efficiently and reasonably. However, this flexibility finds its limits in the public policy exception.

<sup>43</sup> See particularly *infra* Sects. 4.4; 4.4.3.2; 6.3; 8.2.3.

<sup>44</sup> See for an extended discussion of the public policy exception, e.g., Lagarde 1994, Chap. 11; Mills 2008, pp. 201–236.

<sup>45</sup> International Court of Justice, *Netherlands v. Sweden (Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants)*, Judgment of 28 November 1958), ICJ Rep. 55.

<sup>46</sup> Separate Opinion of Judge Sir Hersch Lauterpacht in the *Boll* case, p. 92 (41) (*supra* n. 45).

<sup>47</sup> Cf. Mills 2008, p. 201. See also HR 10 September 1999, *NJ* 2001, 41.

<sup>48</sup> An (in)famous historical example of an international convention without a public policy exception is the 1902 Hague Convention relating to the settlement of the conflict of the laws concerning marriage. Instead of a general public policy exception, this convention contained a list of outlawed marriage impediments. However, racial impediments were not on the list, which became a problem in many countries party to this convention during the years leading up to World War II. Cf. Strikwerda 2012. See also Bogdan 2011, pp. 169–170.

<sup>49</sup> See *infra* Sect. 3.3.

The exact composition of the public policy exception—its content—is necessarily vague, as it comprises the fundamental values of the forum. This inevitable vagueness is exactly what some regard as a fundamental problem of public policy.<sup>50</sup>

It should also be understood that public policy differs from country to country, as values differ from country to country. At the start of the twentieth century public policy was already being referred to as ‘the most evident principle of our science and at the same time the one which is the most difficult to define and to analyse.’<sup>51</sup> In addition to national fundamental values, it has generally been accepted in most countries that human rights are part of the public policy exception. This means that in the Member States of the Council of Europe, the ECHR may be considered part of public policy, as will be further discussed in the subsequent chapters of this research.<sup>52</sup>

Compared to the inherent vagueness of the content of public policy, the invocation and working of the exception is relatively clear. The public policy exception will be invoked if the result of the application of a foreign law or the recognition or enforcement of a foreign judgment would lead to an untenable result. It should be noted that the exception is thus invoked against the actual result of the application of the foreign law; it is not the foreign law in general that is tested, but rather the result of the application of that law. Public policy should be used only under exceptional circumstances, hence the frequent use of the expression of the public policy *exception*.<sup>53</sup> It has generally been accepted that it should not be used every time the application of a foreign law would lead to an undesirable result, but only in cases in which such application would lead to a truly unacceptable result. This cautious use of the public policy exception is, in international conventions, often emphasised by the insertion of the expression ‘manifestly incompatible’.<sup>54</sup>

An important characteristic of the public policy exception is its relative character.<sup>55</sup> This naturally stems from the goals of private international law, which include the respect for other legal cultures. This relative character is manifested by the fact that it is generally observed that the operation of the public policy exception is related to the proximity between the issue and the forum. If a case has little or no connection to the forum, the public policy exception cannot be invoked—with the exception of certain extreme cases, in which the applicable law is so fundamentally against the values of the forum that the application of that law

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<sup>50</sup> See, e.g., Mills 2008, p. 202.

<sup>51</sup> Pillet 1903, p. 367. Translation provided by Dolinger 2000, p. 275.

<sup>52</sup> See further infra Sect. 6.3.3.3.

<sup>53</sup> Although some debate over this issue remains. See Dolinger 2000, p. 289ff.

<sup>54</sup> See, e.g., Article 16 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, *OJ* 1998, C27/34. This is also a condition for the application of the public policy exceptions found in national legislation. See, e.g. Articles 15 and 27 of the Swiss Private International Law Act.

<sup>55</sup> See, e.g., Lagarde 1994, p. 21ff.

would never be permitted in the forum. If a case has more connections or links with the forum, the threshold for the application of the public policy exception is lower. This thus entails that if a case has a closer connection to the forum, because, for example, the parties reside in the forum, then the public policy exception is more likely to be successfully invoked than in the event of the parties residing abroad. There are some differences of opinion as to the exact functioning of this relative character of the public policy exception—compare, for example, the German theory of *Binnenbeziehung* or *Inlandsbeziehung* and the French theory of the *effet atténué* of *ordre public*—but the general principle is widely accepted and its operation is not that different in practice.<sup>56</sup>

The aforementioned fundamental values of the forum, which would ensure that the public policy exception could be invoked regardless of the proximity of the case to the forum, are part of what has been dubbed the ‘iron core’ of public policy.<sup>57</sup> This idea has also found acceptance in other countries.<sup>58</sup> What this iron core exactly entails, though, is a matter for discussion. It has been argued that international, universal norms are being protected in this manner; this public policy has therefore also been referred to as ‘truly international public policy’.<sup>59</sup> This raises the question of whether human rights, and particularly the rights guaranteed in the ECHR, are also protected in this way, or perhaps, whether only a number of rights guaranteed in the ECHR may be so protected.<sup>60</sup> Another important question, specifically with regard to how the relative character of the public policy exception relates to the protection of human rights and particularly the basic obligation of the Contracting Parties under Article 1 ECHR, will be discussed in Chap. 4. Other aspects of the role of the public policy exception and the role of the rights guaranteed in the ECHR in this regard will naturally also be further discussed in this book.<sup>61</sup>

Finally, the public policy exception should be distinguished from another concept of private international law, the mandatory rule (also referred to as internationally mandatory rules, *lois de police*, *lois d’application immédiate*, or *Eingriffsnormen*). As noted above, the public policy exception is a corrective device, as it is invoked to alter the outcome of the application of the choice of law rules of the forum, if the application of these rules would result in the application foreign law, which in turn would lead to an unacceptable result. The public policy

<sup>56</sup> See, e.g., Bogdan 2011, pp. 174–179; Bucher 1993, pp. 47–56; Lagarde 1994, pp. 21–43 (11–24–11–51). Cf. de Boer 2008, pp. 298–300. See on the functioning of the public policy exception also the handbooks cited supra n. 1.

<sup>57</sup> See Jessurun d’Oliveira 1975, pp. 239–261.

<sup>58</sup> Bucher 2004, p. 18. See further also infra Sect. 6.3.3.3.

<sup>59</sup> See, e.g., van Houtte 2002, p. 846; cf. Mills 2008, p. 213ff. See also more recently Chong 2012, pp. 88–113. However, whether such a universal public policy exception truly exists has been questioned. See, e.g. Bogdan 2011, p. 178.

<sup>60</sup> See on the idea that not all the rights guaranteed in the ECHR may belong to a core that always needs protection also further infra Sect. 4.4.2.

<sup>61</sup> See further Sect. 6.3.3.3.

exception is thus a defensive mechanism. Mandatory rules are rules, which are deemed so important that they should be applied to a (cross-border) case by a court, even if the issue is, in principle, governed by another law according to the choice of law rules of the forum.<sup>62</sup> These mandatory rules may, incidentally, either be rules of the forum or foreign rules.<sup>63</sup> Mandatory rules thus also set aside a foreign law if a fundamental interest is at stake, and in this regard their purpose is somewhat similar to that of the public policy exception. However, mandatory rules have a positive character—they apply irrespective of the normally applicable (foreign) law—and this is what sets them apart from the public policy exception, which intervenes after the fact.<sup>64</sup> Mandatory rules do not—as of yet—play an important role in the discussion concerning the impact of the ECHR on private international law. As will be discussed in this book, though, it could be argued that the rights guaranteed in the ECHR in some ways function as mandatory rules.<sup>65</sup>

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<sup>62</sup> See with regard to mandatory rules, e.g., Bonomi 1999, pp. 215–247; Cheshire et al. 2010, pp. 150–151; Strikwerda 2012, p. 54, 63–70.

<sup>63</sup> See, e.g. Article 7(1) of the Rome Convention {look up} and Articles 17 and 18 of the Swiss Private International Law Act.

<sup>64</sup> See Bonomi 1999, pp. 229–230, who argues that the difference between the two mechanisms is very subtle.

<sup>65</sup> See further Sects. 4.4 and 6.3.3.3.

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