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Introduction by the Guest Editor

The Young European Union Private International Law Research Network was established in 2019 in order to promote academic cooperation within the young generation of private international lawyers in the European Union. The activity of the Network centres around projects and the project theme for 2020 was the application of overriding mandatory norms.

Overriding mandatory norms are beloved subjects for private international lawyers. Most often, however, they are analysed in the context of EU private international law, and principally in contract law, without due regard to other situations where overriding mandatory provisions may equally claim application. Therefore, the primary goal of the project was to reveal whether and to what extent overring mandatory provisions are applied in the autonomous private international law of the Member States, i.e. outside the scope of application of the EU private international law regulations. Some findings have been made in the general report prepared in the framework of the project, based on the contributions of national reporters from seventeen Member States. The report, however, clearly demonstrates that the application or consideration of overriding mandatory rules is also admitted in the autonomous private international law of the Member States, and most notably they involve rules on personal status and family law, property law and company law.

This enquiry on the application of overriding mandatory provisions in autonomous private international law is supplemented by the discussion of topics related to the application of overriding mandatory rules in private international law and arbitration. Martina Melcher examines which substantive law rules of EU law may qualify as overriding mandatory provisions under the Rome I and Rome II Regulations. Katažyna Bogdzevič puts the application of overriding mandatory provisions in family law and regarding names under scrutiny. Markus Petsche addresses the application of mandatory rules in international commercial arbitration. Uglješa Grušić discusses the implications of some recent English conflict-of-laws cases concerning the application of overriding mandatory provisions, such as *Lilly Icos LLC v 8PM Chemists Ltd* and *Les Laboratoires Servier v Apotex Inc.* Finally, the approach of the new Hungarian Private International Law Act towards overriding mandatory norms is presented by Csenge Merkel and Tamás Szabados.

The recent COVID-19 pandemic sadly enlightens a further category of overriding mandatory norms: public health measures. Measures related to the prevention of the spread of the coronavirus, introduced by many states around the world, can be considered as

overriding mandatory norms.[1] They include closing borders, cities and workplaces, ordering the cancellation of large-scale events, such as theatre and cinema shows or concerts, a mandatory ban on flights or road transport and the expropriation of local face masks production and stocks.

It was planned to hold a conference at ELTE Eötvös Loránd University with the participation of the project participants in March 2020 to discuss the research outcomes. The coronavirus epidemic interfered with this plan. However, academic cooperation continued without interruption. The conference has been scheduled for a later date and moved to the online space. Moreover, the written versions of the planned conference lectures can now be published in the ELTE Law Journal. The disease could reimpose borders across Europe, but this cannot prevent scholarly exchange. This is proved in this issue of the ELTE Law Journal.

Tamás Szabados
Guest editor

[1] See in particular Ennio Piovesani, 'Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus' conflictoflaws.net <https://conflictoflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/> accessed 7 June 2020.

Tamás Szabados*

Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report

Introduction

This comparative study focuses on a special group of norms, namely overriding mandatory provisions and their application outside the reach of the EU private international law regulations. Terminologically, such norms have been given various names in different jurisdictions, such as *lois de police, lois d'application immédiate*, *international zwingende Normen, Eingriffsnormen* and *norme di applicazione necessaria*. The Greek-French private international lawyer Phocion Francescakis described such norms in his famous definition as those necessary to protect the political, social and economic order of a country.[1] This definition was confirmed by the Court of Justice of the European Union (CJEU) in its *Arblade* judgment[2] and was followed by the legal literature in several EU Member States.

Although the Rome Convention on the law applicable to contractual obligations had already allowed the application of norms that we call now overriding mandatory provisions as mandatory rules,[3] it was the Rome I Regulation that first gave a legislative definition at EU level.[4] According to Article 9 (1) of the Rome I Regulation, overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation. The Rome I Regulation authorises courts to apply the overriding mandatory provisions of the *lex fori*. In addition, effect may be

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[1] Phocion Francescakis, 'Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles sur les conflits de lois' (1966) 55 Revue critique de droit international privé 1–18.

[2] Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-8453, para 30.

[3] 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] OJ L266/1, art 7.

[4] 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) [2008] OJ L177/6.

given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. The Rome II Regulation on the law applicable to non-contractual obligations,[5] as well as the regulations on matrimonial property regimes[6] and on the property consequences of registered partnerships[7] allow the application of the overriding mandatory provisions of the forum without providing for the consideration of those of any other country.

The CJEU addressed overriding mandatory provisions in *Ingmar*,[8] and interpreted Article 9 of the Rome I Regulation (and its predecessor from the Rome Convention) in the *Unamar*[9] and *Nikiforidis*[10] judgments, while Article 16 of the Rome II Regulation was interpreted in the *da Silva Martins* case.[11] The application of these Articles also arose in national judicial practice. The relevant Articles of the Rome I and II Regulations and the related case law received considerable attention from commentators, too.

The EU legal instruments and the case law of the CJEU on overriding mandatory norms were subject to a lively scholarly enquiry. However, less attention has been devoted to the treatment of overriding mandatory provisions in the law of the Member States outside the scope of application of the EU private international law regulations. This is notwithstanding the fact that the application of overriding mandatory norms may also arise in the autonomous private international law of the EU Member States, particularly in the areas of personal status and family law, property law and company law. Since comparative studies are missing in this field, it might seem useful to make an attempt to give an overview of the application of overriding mandatory rules in these fields.

The main quest of this study centres around how national legislation, judicial practice and legal scholarship treat overriding mandatory norms outside the realm of EU private international law, whether there is any practical relevance of the application of overriding mandatory norms in the autonomous private international law of the jurisdictions examined; and whether it is possible to reveal common patterns in national laws and a convergence between the approach of EU private international law and the autonomous private

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[5] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, art 16.

[6] 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 [2016] OJ L183/1, art 30.

[7] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30, art 30.

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

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

[10] Case C-135/15 *Republik Griechenland v Grigorios Nikiforidis,* ECLI:EU:C:2016:774.

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

international law of the Member States towards overriding mandatory rules.

This study was prepared on the basis of national reports submitted by the members of the Young EU Private International Law Network, concentrating on national legislation and court practice outside the scope of application of the EU private international law regulations. As such, the research gives an overview on the application of overriding mandatory norms in seventeen jurisdictions, namely Austria, Belgium, Bulgaria, Croatia, Denmark, England, Estonia, Germany, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Spain.[12]

The national reports were able to support a comparative analysis and for some more general conclusions to be drawn. It must be acknowledged, however, that the research outcomes inevitably have their own limits. Although the legislation, judicial practice and the legal literature in seventeen EU Member States could be examined with the help of the project participants, and this suffices to draw certain comparative conclusions, a fully comprehensive comparison could not be undertaken, as the law of not all Member States was examined. This general report necessarily relies on the contributions of the national reporters and the information contained in their reports and can give a static picture. We think, however, the findings of this general report would not significantly change even by the extension of the research to the remaining Member States. Research outcomes can certainly be refined in light of the shifts in court practice over time. Notwithstanding, we hope that this report gives a useful overview of the jurisdictions examined and can set the stage for further research in this area.

I Defining Overriding Mandatory Provisions

When we attempt to give an overview of the application of overriding mandatory provisions in the autonomous private international law of the EU Member States, the first two questions to be posed are whether there is any specific statutory rule on overriding mandatory norms at all in the jurisdictions concerned and, if there is such a provision, whether a legislative definition is also provided.

To answer the first question, it can be established that only a relatively small number of autonomous private international law codifications in the Member States examined provide

[12] The list of the jurisdictions covered and the reporters is as follows: Austria: Martina Melcher; Belgium: Eduardo Álvarez-Armas and Michiel Poesen; Bulgaria: Eva Kaseva; Croatia: Dora Zgrabljić Rotar; Denmark: Johan Tufte-Kristensen; England: Yu Jian Woon; Estonia: Katažyna Bogdzevič; France: Marion Ho-Dac; Germany: Holger Jacobs; Hungary: Csenge Merkel and Tamás Szabados; Italy: Stefano Dominelli and Ennio Piovesani; Latvia: Katažyna Bogdzevič; Lithuania: Katažyna Bogdzevič; Luxembourg: Marlene Brosch; Poland: Ewa Kamarad and Anna Wysocka-Bar; Slovenia: Neža Pogorelčnik Vogrinc; Spain: María Asunción Cebrián. The author of the general report is grateful to all national reporters who undertook to take part in this research project. Although the report relies on the materials and information given by the reporters and footnotes indicate the relevant jurisdiction, the statements and conclusions of the general report represent the opinion of the author only.

specific rules, let alone a definition for overriding mandatory provisions. Some private international law codes (Belgian Private International Law Act Article 20; Bulgarian Private International Law Act Article 46; English Private International Law (Miscellaneous Provisions) Act Section 14 (4); Hungarian Private International Law Act Article 13; Lithuanian Civil Code Article 1.11 (2); Polish Private International Law Act Article 8) contain rules on overriding mandatory provisions without defining this concept. Without providing a full definition, the legislation usually hints at certain features of overriding mandatory norms. In other countries, there is no specific provision on the application of overriding mandatory norms at all (Austria, Denmark, Estonia, Germany, Latvia, Slovenia).

Article 3 (1) of the French Civil Code provides that laws protecting public policy as well as safety bind everybody living on the territory. In some legal systems influenced by French law, such as Luxembourg[13] and Spain,[14] this rule has been typically taken over. Article 3 (1) of the French Civil Code was not originally intended to express a rule on the application of overriding mandatory provisions as we understand them today. However, in these legal systems, based on this legislative provision, overriding mandatory norms are seen as provisions of territorial application that claim direct application in cases connected to the state territory.[15] These rules also acknowledge that domestic public law is only applicable in the national territory of the issuing state.[16]

As to the definition of this peculiar group of rules, the single state where a fully-fledged legislative definition was created is Croatia. The definition in Article 13 of the Croatian Private International Law Act follows to a large extent Article 9 (1) of the Rome I Regulation. Accordingly, a court can apply a provision of Croatian law that is regarded as crucial for safeguarding Croatian public interests, such as political, social or economic organisation, to such an extent that it is applicable to any situation falling within their scope irrespective of the law otherwise applicable. In none of the other jurisdictions examined do we find a comprehensive legislative definition of overriding mandatory norms. This implies that the task of defining overriding mandatory norms is left to courts and legal scholars. In the legal literature, it is often asserted that no exact definition for overriding mandatory provisions may be made,[17] or that it is not even possible to provide a definition of overriding mandatory rules.[18] The view also appears that, in the absence of a legislative definition, a definition in positive law is undesirable; a functional approach should be followed instead.[19]

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[13] Luxembourg Civil Code, art 3 (1).

[14] Spanish Civil Code, art 8.

[15] Luxembourg: Jean-Claude Wiwinius, *Le droit international privé au Grand-Duché de Luxembourg* (3rd edn, Bauler 2011, Luxembourg) para 213.

[16] Spain: Alfonso Luis Calvo Caravaca and Javier Carrascosa González, *Derecho Internacional Privado,* vol 1 (10th edn, Comares 2009, Granada) 223.

[17] Hungary: Raffai Katalin, 'Az imperatív normák jelentőségéről az európai uniós nemzetközi magánjogban' Pázmány Law Working Papers 2014/24, 3 <http://plwp.eu/docs/wp/2014/2014-24_Raffai.pdf> accessed 21 February 2020.

[18] Germany: Klaus Schurig, 'Zwingendes Recht, «Eingriffsnormen» und neues IPR' (1990) 54 Rabels Zeitschrift, 217–250, 247.

[19] Belgium: François Rigaux and Marc Fallon, *Droit International Privé* (Larcier 2005, Brussels) 139.

Overriding mandatory norms were circumscribed by both courts and legal scholars, taking their characteristics into account. In doing this, courts often relied on scholarly views, while the literature also referred to the evolving case law in this field. It is illustrative that, in Austria, in the absence of legislative definition courts defined the concept of overriding mandatory provisions by taking scholarly views into account. In this way, a joint literary-judicial definition has evolved. It is interesting to note that Austrian courts have also drawn from German legal scholarship.[20] Moreover, without providing for a comprehensive definition, statutory provisions specified some characteristics of overriding mandatory provisions that can be taken as a point of departure by courts and legal scholars.

In the jurisdictions examined, the scientific and judicial definitions circumscribe overriding mandatory norms, in particular with the following – often overlapping – characteristics:

– norms imperatively or directly regulating legal relationships;[21]
– norms applicable irrespective of the governing law;[22]
– norms applicable irrespective of the operation of conflicts of laws, i.e. they switch off the operation of conflict of laws;[23]
– norms that cannot be avoided by choice of law;[24]
– norms that state explicitly that they require application to all sorts of legal relationships, including domestic and international situations, irrespective of the law designated by conflict-of-laws rules (self-limiting norms).[25] The characteristic of these norms that they claim

[20] See, for example, the decision of the Austrian Supreme Court of Justice OGH 5 Ob 125/05a.

[21] Slovenia: Miroslava Geč Korošec, *Mednarodno zasebno pravo, druga knjiga – posebni del* (Uradni list RS, 2002, Ljubljana) 165; Spain: Calvo Caravaca and Carrascosa González (n 16) 227.

[22] Bulgaria: Nikolay Natov, *Komentar na Kodeksa na mejdunarodnoto chastno pravo, kniga purva*, chlen 1–47 (Siela 2006, Sofia) 390; Todor Todorov, *Mejdunarodno chastno pravo. Evropeiskiat sujuz i Republika Bulgaria* (3rd edn, Sibi 2010, Sofia) 147; Vessela Stancheva-Mincheva, *Komentar na Kodeksa na mejdunarodnoto chastno pravo* (Sibi 2010, Sofia) 95; England: Cox v Ergo Versicherung AG (formerly known as Victoria) [2014] UKSC 22, para 28; Master Harry Roberts (a child and protected party by his mother and litigation friend Mrs Lauren Roberts) v The Soldiers, Sailors, Airmen and Families Association – Forces Help, The Ministry of Defence, Allgemeines Krankenhaus Viersen GmbH [2019] EWHC 1104 (QB), para 83; Hungary: Private International Law Act art 13; Poland: Maria Anna Zachariasiewicz, 'Art. 8. Przepisy wymuszające swoje zastosowanie' in Maksymilian Pazdan (ed), *Prawo prywatne międzynarodowe. Komentarz* (Beck 2018, Warsaw) 156; Slovenia: Geč Korošec (n 21) 16; Stojan Cigoj, *Mednarodno zasebno pravo, 1. knjiga, Splošni nauki* (ČZ Uradni list SRS 1977, Ljubljana) 76; Stojan Cigoj, *Mednarodno pravo osebnih in premoženjskih razmerij, Mednarodno zasebno pravo: pravo razmerij z inozemskimi sestavinami, Prva knjiga, Splošni nauki* (Uradni list SRS 1984, Ljubljana) 154.

[23] Slovenia: Geč Korošec (n 21) 16; Martina Repas and others (eds), *Mednarodno zasebno pravo Evropske unije* (Uradni list RS 2018, Ljubljana) 40; Jerca Kramberger Škerl, 'Kolizijskopravno varstvo potrošnikov pri sklepanju klasičnih in elektronskih pogodb (Consumer Protection in Choice-of-Law in Classic and Electronic Contracts) – 2017' 17 <https://www.academia.edu/34423097/Kolizijskopravno_varstvo_potro%C5%A1nikov_pri_sklepanju_klasi%C4%8Dnih_in_elektronskih_pogodb_Consumer_Protection_in_Choice-of-Law_in_Classic_and_Electronic_Contracts_-_2017?auto=download> accessed 21 February 2020.

[24] Slovenia: Repas and others (n 23) 40.

[25] Belgium: Johan Meeusen, 'Onrechtmatige daad, wetten van politie en voorrangsregels in het Belgische internationaal privaatrecht' (case note) (1996–97) 60 Rechtskundig Weekblad 813–817, para 8; Rigaux and Fallon (n 19) 129–130; Italy: Rodolfo De Nova, 'I conflitti di leggi e le norme con apposita delimitazione della sfera di

application to any situation falling within their scope, irrespective of the otherwise applicable law, is also described by the notion of *internationaler Geltungsanspruch* in German-language literature;[26]

– norms having extraterritorial application;[27]
– norms having a pivotal importance for the enacting state;[28]
– norms intruding on private relationships to serve public interests or the interests of the enacting state.[29]

The above criteria by which overriding mandatory norms have been circumscribed are fairly flexible, which makes it difficult in practice to decide whether a rule can qualify as an overriding mandatory norm. It may happen that legislation refers explicitly to the overriding nature of a rule. Impediments to the conclusion of registered partnerships,[30] as well as provisions stipulating the 'uniqueness of the status of the child'[31] are explicitly labelled by the Italian Private International Law Act as overriding mandatory *provisions (norme di applicazione necessaria).* Legislation may attribute an overriding mandatory character to a norm, indicating that the provision applies irrespective of the applicable law or a choice of law by the parties. In the majority of the cases, however, such a clear indication is lacking and the overriding mandatory nature of a norm is established by the courts or legal literature.

English case law makes a distinction between express and implied mandatory provisions. In the view of the UK Supreme Court, a provision may qualify as overriding mandatory in an implied manner if '(i) the terms of the legislation cannot effectually be applied or its purpose

efficacia' (1959) Diritto internazionale 13ff; Rodolfo de Nova, 'Conflict of Laws and Functionally Restricted Substantive Rules' (1966) 54 California Law Review 1569–1574.

[26] Germany: Jette Beulker, *Die Eingriffsnormenproblematik in internationalen Schiedsverfahren* (Mohr Siebeck 2005, Tübingen) 27; Stephan Lorenz, 'Einleitung zum Internationalen Privatrecht' in Heinz Georg Bamberger, Herbert Roth, Wolfgang Hau and Roman Poseck (eds), *Beck'sche Online-Kommentare – BGB* (51st edn, C.H. Beck 2019, Munich), para 49; Martin Schäfer, 'Eingriffsnormen im deutschen IPR – eine neverending story?' in Ernst C. Stiefel and others (eds), *Iusto Iure: Festgabe für Otto Sandrock zum 65. Geburtstag* (Recht und Wirtschaft 1995, Heidelberg, 37–53) 39; Michael Becker, 'Zwingendes Eingriffsrecht in der Urteilsanerkennung' (1996) 60 Rabels Zeitschrift 691–737, 693f; Marc-Philippe Weller, Charlotte Harms, Bettina Rentsch and Chris Thomale, 'Der internationale Anwendungsbereich der Geschlechterquote für Großunternehmen' (2015) Zeitschrift für Unternehmens- und Gesellschaftsrecht 361–395, 370.

[27] England: Cox v Ergo Versicherung AG (formerly known as Victoria) [2014] UKSC 22, para 28.

[28] Italy: Sperduti, 'Norme di applicazione necessaria e ordine pubblico' (1976) Rivista di diritto internazionale privato e processuale 469ff.

[29] Germany: Jan Kropholler, *Internationales Privatrecht* (6th edn, Mohr Siebeck 2006, Tübingen) 18 and 498; Bernd von Hoffmann and Karsten Thorn, *Internationales Privatrecht* (9th edn, C.H. Beck 2007, Munich), para 93; Christian von Bar and Peter Mankowski, *Internationales Privatrecht,* vol 1 (2nd edn, C.H. Beck 2003, Munich) 262–264; Ingo Ludwig, 'Art. 3, 3a, 4 EGBGB' in Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth and Markus Würdinger (eds), jurisPK-BGB (8th edn, C.H. Beck 2017, Munich) para 128; Beulker (n 26) 29; Boris Handorn, *Das Sonderkollisionsrecht der deutschen internationalen Schiedsgerichtsbarkeit* (Mohr Siebeck 2005, Tübingen) 181; Hans-Jürgen Sonnenberger, 'Eingriffsrecht – Das trojanische Pferd des IPR oder notwendige Ergänzung?' (2003) Praxis des Internationalen Privat- und Verfahrensrechts 104–116 and 105f; Becker (n 26) 694; Schäfer (n 26) 39; Weller, Harms, Rentsch and Thomale (n 26) 370.

[30] Italy: Private International Law Act, art 32-ter.

[31] Italy: Private International Law Act, art 33 (4).

cannot effectually be achieved unless it has extra-territorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply.'[32]

Nevertheless, courts often categorise certain rules as overriding mandatory norms without justifying this. In most jurisdictions, no coherent foreseeable criteria are provided in the case law, which renders it difficult to identify overriding mandatory norms.

When ascertaining whether a rule qualifies as an overriding mandatory norm, usually its purpose and nature, as well as the intention of the legislature and legislative history[33] are examined. The context and the systemic relationship with other provisions of the legal system are also factors that may be taken into consideration.[34] Furthermore, the overriding mandatory nature of the norm is inferred from the *ratio* of the norm, the object of protection and the legal consequences attached to the norm (e.g. a criminal sanction). It is widely suggested that the interests and values represented by the norm are examined and it is also often stressed that its claim to be applied even in international situations must clearly follow from the norm *(internationaler Anwendungswille).*[35] It may be also stated that substantive law norms with a specific content are more likely to qualify as overriding mandatory norms[36] than those with a more nebulous content. It is also found that private law rules that can be derogated by the parties by agreement may not qualify as overriding mandatory norms.[37] The characteristic of a norm, that it cannot be derogated by the parties' agreement, however, is rather the consequence of qualifying a norm as being overridingly mandatory, and not the converse.

Overriding mandatory norms are delimited from simple mandatory rules in most jurisdictions, and it is generally accepted that overriding mandatory provisions constitute a narrower category than the latter. At the same time, the mandatory nature of a norm is a pre-requisite for classifying a norm as overriding mandatory.[38] The Luxembourgish Court of Appeal found a prescription deadline to be non-mandatory and pointed out that if it is not

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[32] England: Cox v Ergo Versicherung AG (formerly known as Victoria) [2014] UKSC 22, para 29.

[33] Austria: see, for example, the Austrian Supreme Court of Justice, OGH 2 Ob 40/15v regarding section 9 VOEG (Bundesgesetz über die Entschädigung von Verkehrsopfern of 29 June 2007, BGBl I No 37/2007).

[34] Lithuania: Decision of the Supreme Court of the Republic of Lithuania of 9 November 2010, Civil case No 3K-3-446/2010. See also the Bulgarian report.

[35] Austria: Bea Verschraegen, Internationales Privatrecht (Manz 2012, Vienna) 1321f; Brigitta Lurger and Martina Melcher, *Handbuch Internationales Privatrecht* (Verlag Österreich 2017, Vienna) 49; Michael Schwimann, *Internationales Privatrecht* (Manz 2001, Vienna) 21 and 68; see also the decision of the Austrian Supreme Court of Justice OGH 14 Ob 180/86.

[36] Italy: Milan Court of Appeal, judgment of 6.2.1998 (1998) Rivista di diritto internazionale privato e processuale 582.

[37] Spain: Alfonso Luis Calvo Caravaca and Javier Carrascosa González, Litigación Internacional en la Unión Europea II. La Ley aplicable a los contratos internacionales. Comentarios al Reglamento Roma I (Thomson Reuters Aranzadi 2017, Navarra) 218; Lithuania: decision of the Kaunas Regional Court of 26 September 2016, Civil case No 2-457-173/2016.

[38] Croatia: Dora Zgrabljić Rotar and Tena Hoško, 'Zaštita cedentovih stečajnih vjerovnika kod cesije s međunarodnim obilježjem' 69 (2019) Zbornik Pravnog fakulteta u Zagrebu 89–116, 108.

mandatory, it cannot be qualified as an internationally mandatory norm, either.[39] Simple mandatory norms may usually be avoided in the case of the application of foreign law designated based on choice of law or an objective connecting factor, while overriding mandatory norms apply irrespective of the otherwise governing law.[40]

As a remarkable attempt to distinguish overriding mandatory norms from other rules of the legal system, in the course of the recodification of the Hungarian Civil Code,[41] a proposal was put forward according to which a special act should have been adopted with a non-exhaustive list of those rules of the Hungarian Civil Code that are considered as overriding mandatory provisions.[42] Although the proposed legislative solution could have facilitated the identification of the overriding mandatory norms contained in the Civil Code, both for domestic and foreign courts, the proposal was not taken over by legislature.

The autonomous definitions worked out in the national case law and legal literature and the characteristics attributed to overriding mandatory norms largely correspond to the definition provided by the Rome I Regulation. The definition in Article 9 (1) of the Rome I Regulation directly inspired, for instance, the relevant provision of the Croatian Private International Law Act. In Germany, the Federal Court of Justice had recourse to the definition of Article 9 (1) of the Rome I Regulation in a case *ratione temporis* falling outside the scope of application of the Rome I Regulation.[43] Scholarly opinions also confirm that the definition of the Rome I Regulation can also be used outside the scope of the EU private international law regulations.[44] Some deviations may be noticed, though. First, while the definition given in the Rome I Regulation requires that the norms serve the public interest, it is not always considered a necessary element. In Belgian legal literature, the definition given by Article 9 (1) of the Rome I Regulation was criticised as being too restrictive, because overriding mandatory norms are linked to the organisation of state ('…provisions, the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation…'). It is stressed that, in deviation from the Rome I Regulation, certain private interests may be equally protected under the Belgian autonomous private international law rules.[45]

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[39] Luxembourg: Cour d'appel (commercial), 13 October 2010, Pasicrisie luxembourgeoise, vol 35, 2011–2012, 270f.

[40] See Hungary: Explanatory memorandum of the Hungarian Private International Law Act to Section 13.

[41] Hungary: *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code).

[42] Hungary: Palásti Gábor, 'Javaslat az új Ptk. imperatív szabályainak alkalmazásáról szóló jogszabály alkotására' <https://ptk2013.hu/szakcikkek/palasti-gabor-javaslat-az-uj-ptk-imperativ-szabalyainak-alkalmazasarol-szolo-jogszabaly-alkotasara/2165> accessed 21 February 2020.

[43] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 20 November 2014 – IX ZR 13/14, Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht (NJW-RR) 2015, 305.

[44] See Germany: Weller, Harms, Rentsch and Thomale (n 26) 370; Peter Kindler, 'Teil 10. Internationales Handels- und Gesellschaftsrecht' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* vol 12 (7th edn, C.H. Beck 2018, Munich), paras 568 and 575; Italy: Franco Mosconi and Cristina Campiglio, *Diritto internazionale privato e processuale, Parte generale e obbligazioni*, vol 1 (Utet 2015, Torino) 280; Hungary: Mádl Ferenc and Vékás Lajos, *Nemzetközi magánjog és a nemzetközi gazdasági kapcsolatok joga* (Eötvös 2018, Budapest) 175.

[45] Belgium: Rigaux and Fallon (n 19) 139; Stéphanie Francq 'Loi applicable aux obligations contractuelles (Matières civile et commerciale)' (2013) 7 Répertoire Dalloz de droit communautaire 56–57.

II Overriding Mandatory Norms and the Public Law – Private Law Divide

This leads us to the question whether both public and private law rules may qualify as overriding mandatory norms, or whether rules protecting private interests are excluded from this group of norms. In the jurisdictions examined, there is a distinction between public law and private law. The delimitation of the two takes place along various criteria, including the interests protected, the relationship between the parties (subordination or a hierarchically equal position), the involvement of public power or whether the rules concerned aim at regulating the structure of the state.

In some Member States, such as Spain, it seems that only public law norms can be categorised as overriding mandatory norms, as they contribute to safeguarding the public interest, unlike private law norms. In this approach, the protection of private interests is, at the most, collateral to the protection of public interests. Although most often overriding mandatory rules aim at protecting public interests, overriding mandatory provisions may embrace both public and private law norms and they may serve the protection of public as well as private interests (Croatia, Denmark, Poland, Slovenia). Moreover, in practice, it is difficult to distinguish whether a norm serves public interests, private interests or both. Very often public and private interests are simultaneously protected by overriding mandatory provisions. Protecting of private interests may contribute to the protection of broader societal interests.[46] Consequently, private law rules may not be a *priori* excluded from the concept of overriding mandatory provisions.

At the same time, private law norms predominantly or exclusively providing protection for private interests may be excluded from overriding mandatory norms (Germany).[47] In this sense, it may be required that the provision concerned must safeguard a public interest going beyond the accommodation of private interests.[48] To address the differentiation between public and private law norms, French legal scholarship proposed, a distinction between classical overriding mandatory provisions aiming at protecting public interest, following Francescakis' definition, and a second generation of overriding mandatory norms

[46] Belgium: Rigaux and Fallon (n 19) 139; Francq (n 45) 56–57; France: Among other authors, see Pierre Mayer, 'Lois de police' in Dominique Carreau and others (eds), *Répertoire de droit international* (Dalloz 1998, Paris), para 20.

[47] Germany: Bundesarbeitsgericht [German Federal Labour Court], decision of 21 March 2017 – 7 AZR 207/15, beck-online.Rechtsprechung (BeckRS) 2017, 119476; Ansgar Staudinger, 'VO (EG) 593/2008 Art. 9' in Franco Ferrari and others, *Internationales Vertragsrecht* (3rd edn, C.H. Beck 2018, Munich), para 8; Andreas Spickhoff, 'VO (EG) 593/2008 Art. 9' in Heinz Georg Bamberger, Herbert Roth, Wolfgang Hau and Roman Poseck (eds), *Beck'sche Online-Kommentare – BGB* (51st edn, C.H. Beck 2019, Munich), para 11. Bundesgerichtshof [German Federal Court of Justice], decision of 20 November 2014 – IX ZR 13/14, NJW-RR 2015, 305; Beulker (n 26) 29; Weller, Harms, Rentsch and Thomale (n 26) 370; Markus Rehberg, 'Teil 2 § 6' in Horst Eidenmüller (ed), *Ausländische Kapitalgesellschaften im deutschen Recht* (C.H. Beck 2004, Munich), para 112.

[48] Germany: von Bar and Mankowski (n 29) 262f; Marc-Philippe Weller, 'Einleitung' in Holger Fleischer and Wulf Goette (eds), *Münchener Kommentar zum GmbHG*, (3rd edn, C.H. Beck 2018, Munich), para 467.

safeguarding private law interests.[49] In that sense, the latter could be called half-mandatory provisions.[50]

III Illustrations for Overriding Mandatory Norms Applicable Outside the Scope of Application of EU Private International Law Regulations

Undoubtedly, the application of overriding mandatory norms arises most often in the area of contract law, but they may also influence, among others, matrimonial property regimes or the property relationship of registered partners and succession cases. These issues are largely covered by EU private international law regulations. Nonetheless, based on the national reports referring to domestic court decisions and opinions of representatives of the legal literature, it is possible to identify several overriding mandatory norms that may be applicable outside the scope of application of EU private international law regulations. The relevant fields include personal status and family law, property law, company law and certain contracts. It must be stated that the summary below is only illustrative; it does not intend to be exhaustive. Nevertheless, the ubiquity of overriding mandatory provisions can be clearly demonstrated by the following examples, even without a deeper analysis of the rules concerned.

1 Personal Status and Family Law

In the realm of the autonomous private international law of EU Member States, perhaps the fields of personal status and family law provide the most fertile soil for overriding mandatory norms. Overriding mandatory rules have appeared in particular in the following areas:

– impediments to marriage. Section 26 (4) of the Hungarian Private International Law Act states that the marriage may not be celebrated in Hungary if there is an unavoidable impediment to the celebration of the marriage under Hungarian law and the rules on unavoidable impediments to the celebration of a marriage are thereby qualified as overriding mandatory norms. Unavoidable impediments to the celebration of a marriage in Hungarian law include an already existing marriage or certain close family relationships between the parties.[51] The fact that the parties are of the same sex is also considered as an unavoidable obstacle, because under the Hungarian Fundamental Law only a man and a woman may enter into a marriage.[52] Certain impediments to marriage are also considered as overriding

[49] France: Dominique Bureau and Horatia Muir Watt, *Droit international privé*, vol 1, (4th edn, PUF 2017 Paris), para 554.

[50] France: Bureau and Muir Watt (n 49) 556.

[51] Hungary: Mádl and Vékás (n 44) 300.

[52] Hungary: Nagy Csongor István: *Nemzetközi magánjog* (HVG-ORAC 2017, Budapest) 50.

mandatory norms under Italian law.[53] In a recent judgment of the Milan Court of Appeal,[54] the nullity of a marriage concluded between two U.S. nationals in the State of New York was established because one of the parties had been already married to an Italian national. Article 86 of the Italian Civil Code, which excludes parties with an existing marriage to conclude another marriage, was considered as a directly applicable overriding mandatory norm, even though the validity of the marriage was governed by the law of New York. The impediments to the conclusion of marriage, including an already existing marriage, kinship and mental incapacity, also qualify as overriding mandatory provisions in Croatian legal literature, even in the absence of an express provision to this end in the Croatian Private International Law Act.[55] It is to be noted here that the former private international law legislation, from 1982, expressly provided that, in the case of these obstacles to marriage, a marriage may not be celebrated even if a foreign law had been applied. On the contrary, in Germany, the similar prohibition of a pre-existing marriage[56] was not seen as an overriding mandatory provision; instead, in the case of an already existing marriage, the conclusion of a further marriage by either of the parties before a German registrar would be contrary to the general *ordre public* clause, even if this would be permitted under the domestic law of both parties that were to be married.[57]

– minimum age for marriage. Pursuant to Article 13 (3) of the German EGBGB, if the capacity to marry is subject to foreign law, the marriage is invalid if the party concerned had not reached the age of 16 at the time of the marriage and the marriage may be annulled if the party concerned had reached the age of 16 but not 18 at the time of the marriage. This provision is considered in the legal literature as a reflection of Article 1303 of the BGB on the minimum age for concluding marriage, so the EGBGB provision aims to give an overriding mandatory status to Article 1303 of the BGB.[58] Article 13 (3) is, however, seen by the Federal Court of Justice as a special *ordre public* clause that precedes the application of the general *ordre public* clause in Article 6 EGBGB;[59]

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[53] Italian Civil Code, arts 85, 86, 87 paras 1, 2 and 4, 88 and 89.

[54] Italy: Milan Court of Appeal, Minors Division, judgment of 24.4.2019 – *T.J.F. c. S.M. and S.M.*

[55] Croatia: Hrvoje Sikirić, 'Zakon o međunarodnom privatnom pravu' Tradicionalno XXXIII. Savjetovanje – Aktualnosti Hrvatskog zakonodavstva i pravne prakse, Godišnjak 25 (2018) Organizator 61–140, 89.

[56] Germany: BGB § 1306.

[57] Germany: Bundesfinanzhof [German Federal Fiscal Court], decision of 6 December 1985 – VI R 56/82, Neue Juristische Wochenschrift (NJW) 1986, 2210; Michael Coester, 'EGBGB Art. 13' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* vol 12 (7th edn, C.H. Beck 2018, Munich), para 68; Gerald Mäsch, 'Art. 13 EGBGB' in Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth and Markus Würdinger (eds), jurisPK-BGB (8th edn, C.H. Beck 2017, Munich), para 40; Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th edn, C.H. Beck 2004, Munich) 801.

[58] Germany: Mäsch (n 57), para 38.1; Dagmar Coester-Waltjen, 'Kinderehen – Neue Sonderanknüpfungen im EGBGB' (2017) Praxis des Internationalen Privat- und Verfahrensrechts 429–436, 432.

[59] Germany: Bundesgerichtshof [Federal Court of Justice], decision of 14 November 2018 – XII ZB 292/16, NZFam 2019, 69; see also Marina Wellenhofer, 'BGB § 1303' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol 12 (7th edn, C.H. Beck 2018, Munich), para 17; Juliana Mörsdorf, 'EGBGB Art. 13' in Heinz Georg Bamberger, Herbert Roth, Wolfgang Hau and Roman Poseck (eds), *Beck'sche Online-Kommentare – BGB* (51st edn, C.H. Beck 2019, Munich), para 26.

– obligations of the spouses. The French Court of cassation qualified the spouses' core obligations related to the marriage *(régime primaire impératif),*[60] including their mutual assistance obligation or their duty of fidelity, as overriding mandatory provisions;[61]
– certain rules on names (Belgium);[62]
– the minimum age difference between the person to be adopted and the adoptive parents as a validity requirement for adoption as laid down by Article 291 (1) of the Italian Civil Code was seen as an overriding mandatory provision.[63]
– obligations of the parents. The Italian Private International Law Act makes it clear that the provisions of Italian law on the imposition of parental responsibility and duty of maintenance on both parents and on the possibility of Italian courts to adopt exceptional measures concerning parental responsibility apply irrespective of the otherwise applicable law;[64]
– rules protecting the child. Section 25 of the Hungarian Private International Law Act establishes that Hungarian law must apply regarding family law relationships concerning a child, provided that it is more favourable to the child. A previous version of this rule with identical content was considered as an overriding mandatory provision in the legal literature.[65] A decision of the French Court of cassation established that the provisions on assistance for children in danger are applicable within French territory to every minor living there, regardless of their nationality or the nationality of their parents and the operation of conflict-of-laws rules was excluded;[66]
– provisions on medically assisted reproduction were held by the Austrian Constitutional Court as overriding mandatory provisions that apply irrespective of the personal law of the persons concerned.[67]

Interestingly, in Belgian law, the overriding mandatory nature of certain rules is established in light of obtaining or exercising some public law rights. Thus, the rule on the nullity of a fraudulent declaration of parentage has been interpreted as an overriding mandatory norm insofar as the declaration of parentage has an impact on the right of at least

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60 French Civil Code, arts 212 and 215.

61 France: Cass. Civ. 1re, 20 octobre 1987, Cressot, (1988) Revue critique de droit international privé 540, commented by Yves Lequette; (1988) Journal du droit international 446, commented by André Huet.

62 Belgium: Article 335 Civil Code. CA Liège 28 November 1986, JT 1987, 89; Johan Meeusen, *Nationalisme en Internationaal Privaatrecht* (Intersentia 1997, Antwerpen Groningen), para 794; C. Vanlede, 'Schijnhuwelijken en Ontduiking van de Verblijfswetgeving' (1994) 4 Echtscheidingsjournaal 60, 11.

63 Italy: Milan Tribunal, 9th Division, judgment of 16.4.2009.

64 Italian Private International Law Act, art 36-bis.

65 Hungary: Réczei László, Nemzetközi magánjog (Tankönyvkiadó 1961, Budapest) 81 with regard to 1952. évi 23. törvényerejű rendelet a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény hatálybalépése és végrehajtása, valamint a személyi jog egyes kérdéseinek szabályozása tárgyában (Decree-Law 23 of 1952 concerning the entry into force and the execution of Act IV of 1952 on the marriage, family and guardianship, and concerning the regulation of certain issues of personal law), art 17 (3).

66 France: Cass. Civ. 1re, 27 October 1964, bulletin n° 472.

67 Austria: VfGH (Austrian Constitutional Court) 14.12.2011, B 13/11-10, paras 19–22; see Fortpflanzungs-medizingesetz (FMedG) BGBl.Nr. 275/1992.

one of the parties involved to reside in Belgium.[68] Similarly, the rule banning fraudulent marriages when they have been exclusively concluded with the aim of obtaining a right of residence, has been qualified as overriding mandatory norm.[69]

2 Property Law

Legal literature opines that certain norms of cultural property protection legislation belong to the group of overriding mandatory provisions.[70] Moreover, in the context of organ trafficking, national transplant laws may also be regarded as overriding mandatory provisions.[71]

3 Company Law

Overriding mandatory provisions related to company law include:

– certain requirements and legal consequences concerning the acquisition of a company. Article 15 (3) of the German Foreign Trade and Payments Act,[72] according to which a legal transaction which serves the acquisition of a domestic company is provisionally invalid where a reporting requirement exists that is linked to an authorisation by the Federal Government to prohibit the acquisition within a certain deadline (e.g. if the acquisition concerns a company which manufactures military equipment), is seen as an overriding mandatory provision;[73]

– requirements concerning the establishment of a branch. The formalities of establishing branches by foreign companies in Belgium were seen as overriding mandatory norms;[74]

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[68] Belgium: Civil Code, art 330 (1). Explanatory memorandum, Parl.St./Doc. Federal House of Representatives 2016–17, nr. 54-2529/001, 9, 18; Ministerial memorandum, BS/MB 26 March 2018, 29.599, sub C–D. See Jinske Verhellen and Sarah Den Haese, 'De wet frauduleuze erkenningen – Nieuw hoofdstuk in de strijd tegen het gebruik van het familierecht voor verblijfsrechtelijke doeleinden' (2019) 82 Rechtskundig Weekblad 1682–1697, para 28.

[69] Belgium: Civil Code, art 146bis. HvB Antwerp 31 October 1990, Tijdschrift voor Belgisch Burgerlijk recht/Revue Générale de Droit Civil 1992, 358; HvB Antwerp 17 October 1990, Tijdschrift voor Belgisch Burgerlijk recht/Revue Générale de Droit Civil 1992, 355; Rb. Bruges 21 October 1991, Rechtskundig Weekblad 1991–92, 991; Vz. Rb. Antwerp 26 June 1991, Rechtskundig Weekblad 1991–92, 235; Ministerial memorandum, BS/MB 7 July 1994; Rigaux and Fallon (n 19) 539.

[70] Germany: see Michael Anton, *Internationales Kulturgüterprivat- und Zivilverfahrensrecht* (De Gruyter 2010, Berlin), paras 910ff; Amalie Weidner, *Kulturgüter als res extra commercium im internationalen Sachenrecht* (De Gruyter 2001, Berlin) 159ff; Handorn (n 29) 181; Christiane Wendehorst, 'EGBGB Art. 43' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol 12 (7th edn, C.H. Beck 2018, Munich), para 193; von Bar and Peter Mankowski (n 29) 257.

[71] Wendehorst (n 70), para 18.

[72] Germany: Außenwirtschaftsgesetz vom 6. Juni 2013 (BGBl. I S. 1482), das zuletzt durch Artikel 4 des Gesetzes vom 20. Juli 2017 (BGBl. I S. 2789) geändert worden ist.

[73] Germany: Weller, Harms, Rentsch and Thomale (n 26) 371f; Marc-Philippe Weller, Nina Benz and Chris Thomale, 'Rechtsgeschäftsähnliche Parteiautonomie' (2017) Zeitschrift für europäisches Privatrecht 250–282, 276f; Peter Kindler (n 44) para 589.

[74] Belgium: 1999 Code of Corporations (Code des sociétés / Wetboek van Vennootschappen), arts 81–89 (and possibly art 58) restated by Articles 2:23–2:29 and 2:141 of the 2019 Code of Corporations and Associations (Code des Sociétés et Associations/Wetboek van Vennootschappen en Verenigingen); Rigaux and Fallon (n 19) 982–984.

– power of representation of corporate bodies. In Belgium, the Court of Appeals of Liège held that the rules on the power of representation of the governing bodies of a corporation were overriding mandatory provisions;[75]
– accounting obligations and the related liability of managers under Luxembourg law were qualified as overriding mandatory provisions and apply to all foreign commercial companies whose corporate or subsidiary seat is located in Luxembourg;[76]
– employee representation. A decision of the French State Council, called by a foundational case book of French private international law, as the leading case related to overriding mandatory provisions,[77] stated that under article 1 of the 22 February 1945 legislation, a company that employs more than 50 employees in France must establish an employee representative committee, even if the *lex societatis* of the company was Belgian law;[78]
– keeping documents. Courts in Luxembourg have qualified the obligation to keep certain documents and information for ten years laid down in Article 16 (2) of the Code of Commerce as an overriding mandatory provision.[79]

Regarding several company law provisions, the question arose whether they constitute over-riding mandatory norms. The qualification of several other provisions as overriding mandatory norms related to company law is debated in German legal literature. These provisions include the application of the gender quota in Article 96 (2) of the German Stock Corporation Act[80] to companies incorporated abroad, but having their central administration in Germany,[81] as well as the rules on *Existenzvernichtungshaftung* on the liability of the shareholder against the company when the shareholder contributed to the insolvency of the company by depriving the company of its assets.[82] In Belgian scholarship, the question arose whether the provisions of the 2019 Code of Corporations and Associations on the liability of a manager of a Belgian branch of a foreign company[83] and on the liability of directors of a company vis-à-vis third parties[84] may qualify as overriding mandatory norms.

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[75] Belgium: *CA* Liège 27 March 2001, *Tijdschrift voor Belgisch Handelsrecht/Revue de Droit Commercial belge* 2003, 144 (annotated by V Marquette).
[76] Luxembourg: Loi modifiée du 10 août 1915 concernant les sociétés commerciales, Mémorial A 1066/2017, art 160.
[77] Bertrand Ancel and Yves Lequette, *Les grands arrêts du droit international privé* (5th edn, Dalloz 2006, Paris), para 43.
[78] France: Conseil d'État, 29 June 1973, n°77982.
[79] Luxembourg: Cour d'appel (commercial), 13 October 2010, Pasicrisie luxembourgeoise, Volume XXXV, 2011–2012, 270f.
[80] Germany: Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 9 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2446) geändert worden ist.
[81] Weller, Harms, Rentsch and Thomale (n 26) 361; Weller (n 48) para 475; Weller, Benz and Thomale (n 73) 277; Kindler (n 44), paras 568f; see also Rehberg (n 47), paras 117ff.
[82] See Weller (n 48), paras 469–472.
[83] Belgium: 2019 Code of Corporations and Associations, art 2:149; see Marc Fallon, 'La dimension externe du Code des sociétés et des associations' in Olivier Caprasse, Henri Culot and Xavier Dieux (eds), *Le nouveau droit des sociétés et des associations – Le CSA sous la loupe* (Anthemis 2019, 67–152) 2019, 121ff.
[84] Belgium: 2019 Code of Corporations and Associations, arts 2:56 to 2:58; see Fallon (n 83) 121ff.

4 Contract Law

Although most contracts are covered by the Rome I Regulation, there are some contractual relationships for which the governing law remains designated on the basis of autonomous conflict-of-laws rules. The Rome I Regulation excludes from its scope of application questions involving the status or legal capacity of natural persons.[85] The rule of Hungarian law on the nullity of contracts or unilateral declarations limiting legal capacity is considered as an overriding mandatory norm in Hungarian private international law.[86]

Agreements on surrogacy qualify as contractual relationships. However, they fall outside the scope of application of the Rome I Regulation because contractual obligations involving the status or legal capacity of natural persons, as well as contractual obligations arising out of family relationships, are excluded from its material scope of application.[87] Consequently, the validity of international surrogacy agreements are to be examined in light of autonomous private international law. In this context, Spanish law makes clear that the prohibition of surrogacy is an overriding mandatory norm: A contract on surrogate motherhood is void under Spanish law regardless of the *lex contractus*.[88] Similarly, in Germany, it was argued that German law prohibits surrogacy agreements and this prohibition invalidates such agreements, irrespective of the otherwise applicable law.[89]

IV The Range of the Application or Consideration of Overriding Mandatory Provisions

After having addressed the definition of overriding mandatory norms and giving some examples of overriding mandatory rules, it must be analysed which overriding mandatory norms of which countries may be applied or given otherwise effect. Overriding mandatory norms may be found in the *lex fori*, in the *lex causae* or in the law of a third state other than the *lex fori* and the *lex causae*. It is to be examined to what extent national legislation and court practice give room to the overriding mandatory rules of domestic law, the *lex causae* and the law of a third country. Regarding foreign overriding mandatory provisions, which are often public law norms, a preliminary issue is whether national law admits applying foreign public law at all.

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[85] Rome I Regulation art 1 (2) a).

[86] Hungary: Explanatory memorandum to Section 13 of the Hungarian Private International Law Act.

[87] Laurence Brunet, Janeen Carruthers, Konstantina Davaki, Derek King, Claire Marzo, Julie McCandless, A Comparative Study on the Regime of Surrogacy in EU Member States (European Union, Brussels, 2013) 148.

[88] Spain: Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción asistida BOE núm. 126, de 27 de mayo de 2016.

[89] Germany: Chris Thomale, *Mietmutterschaft: Eine international-privatrechtliche Kritik* (Mohr Siebeck 2015, Tübingen) 39f.; Konrad Duden, *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht* (Mohr Siebeck 2015, Tübingen) 127.

1 The Principle of the Non-application of Foreign Public Law

The principle of the non-application of foreign public law has often been considered a significant hurdle to the application of foreign overriding mandatory norms of a public law origin. This principle has generally been justified by the concept of territoriality:[90] Public law provisions do not have any effect beyond the borders of the enacting state.[91]

A comparative overview demonstrates that such a principle only prevails in a few Member States (Belgium, England, Germany). Several English court decisions stated the principle that foreign tax, penal and other public law is not enforced by English courts.[92] In Germany, the principle also evolved in court practice.[93] According to the case law, foreign public law is only given effect where the foreign state is in a position to actually enforce the law.[94] Additionally, it is recognised that foreign public law that exclusively or predominantly serves private interests may, under certain conditions, have an impact on private legal relationships.[95] However, this exception has never been invoked by courts. Finally, there may be treaty obligations to apply foreign public law.[96] At the same time, it must be noted that, in German legal literature, the principle of the non-application of foreign public law is a subject of controversy,[97] and some authors have called into question the reason for the existence of such a principle.[98]

In most of the Member States, however, the obstacle of the principle of the non-application of foreign public law does not exist. In some of these Member States, legislation makes it even explicit that the law designated by the conflict-of-laws rules even includes public law norms. Foreign public law may accordingly be applied as part of the governing law. This may be well illustrated by Article 6 (1) of the Polish Private International Law Act, which was inspired by the similar provision of Article 13 of the Swiss Private International Law Act.

In a third group of states, no clear position exists, as the legislation does not address this issue and case law and legal literature have not taken a firm position in this question (Denmark, Luxembourg, Slovenia, Spain). This uncertainty may give rise to diametrically

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[90] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 17 December 1959 – VII ZR 198/58, NJW 1960, 1102.

[91] Ibid.

[92] England: see Government of India v Taylor [1955] AC 491.

[93] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 17 December 1959 – VII ZR 198/58, NJW 1960, 1102.

[94] Ibid.

[95] Germany: Daniel Busse, 'Die Berücksichtigung ausländischer „Eingriffsnormen" durch die deutsche Rechtsprechung' (1996) 95 Zeitschrift für Vergleichende Rechtswissenschaft 386–418, 396f; Jette Beulker (n 26) 66.

[96] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 19 April 1962 – VII ZR 162/60, BeckRS 1962, 31189874; Bundesgerichtshof [German Federal Court of Justice], decision of 8 March 1979 – VII ZR 48/78, NJW 1980, 520; Dirk Looschelders, 'Einleitung zum IPR' in Dieter Henrich (ed), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebensgesetzen BGB, Internationales Privatrecht* (Sellier 2019, Berlin), para 33; Busse (n 95) 393.

[97] See Looschelders (n 96), paras 32ff.

[98] Beulker (n 26) 68f; von Bar and Mankowski (n 29) 258.

opposite approaches. For instance, in Spanish legal scholarship, it was argued that, in the absence of legislative prohibition, the application of foreign public law should be allowed through judicial development of law.[99] On the contrary, the lack of regulation may equally interpreted as the denial of the possibility of applying foreign public law. Domestic public law rules can be applied as they protect the economic, social and political order of the forum state, but courts are not in a position to protect the economic, political and social organisation of a foreign state.[100]

2 Overriding Mandatory Provisions of the Lex Fori

There seems to exist a consensus among the EU Member States that the overriding mandatory rules of the forum can be applied. This is also explicitly acknowledged in jurisdictions where there is an express provision on the application of overriding mandatory provisions, but this is also the case even if there is no legislative provision to this end in the jurisdiction concerned. This uniformity may be traced back to the fact that courts are obliged to apply and enforce those domestic rules that are crucial in terms of the public interest.[101]

The legislation in some countries explicitly allows only the application of domestic overriding mandatory provisions. From this, it could be inferred that only domestic overriding mandatory norms could be applied, but not foreign ones; however, as will be discussed below, even in such states, courts sometimes acknowledge that foreign overriding mandatory provisions can equally be applied or otherwise given effect.

In some Member States, such as Germany, the application of domestic overriding mandatory rules is not seen as automatic. In German legal literature, we find opinions that the application of German overriding mandatory provisions against the otherwise applicable foreign law normally[102] presupposes a certain connection between the case and the forum *(Inlandsbeziehung)*.[103]

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[99] José Antonio Pérez Beviá, '*La aplicación del Derecho público extranjero*' (Cuadernos Civitas 1989, Madrid) 96 quoting Henri Batiffol and Paul Lagarde, *Droit international privé*, vol 2 (LGDJ 1981, Paris) 277.

[100] This thesis is explained but not followed by Beviá (n 99) 96. The author quotes as defenders of this thesis Karl Neumayer, *Internationales Verwaltungsrecht*, vol 4 (Schweitzer 1910–1936, Munich and Berlin) 243ff. and George van Hecke, 'Principes et methods de solution des conflits de lois' in Collected Courses of the Hague Academy of International Law, vol 126 (Brill 1969, Leiden) 399–570, 487.

[101] Bulgaria: Natov (n 22) 395.

[102] Germany: Beulker (n 26) 61f.; Mathias Kuckein, *Die 'Berücksichtigung' von Eingriffsnormen im deutschen und englischen internationalen Vertragsrecht* (Mohr Siebeck 2008, Tübingen) 71.

[103] Germany: Kropholler (n 29) 19, 498; Beulker (n 26) 61; Rainer Hausmann, '§ 3' in Rainer Hausmann and Felix Odersky (eds), *Internationales Privatrecht in der Notar- und Gestaltungspraxis* (C.H. Beck 2017, Munich), para 119; Rehberg (n 47), para 112.

3 Overriding Mandatory Provisions of the Lex Causae

As a preliminary remark, it is to be noted that, terminologically, it is misleading to use the adjective 'overriding' in this context, since norms labelled as overriding do not have to override the otherwise applicable law, as opposed to other scenarios.[104] Article 6 (1) of the Polish Private International Law Act provides that the law designated by conflict-of-laws rules must be applied, including public law rules. This suggests explicitly that the overriding mandatory provisions of the *lex causae* may be applicable, even if they are norms of public law.

In some countries, legislation only provides for the application of domestic overriding mandatory provisions without explicitly mentioning foreign overriding mandatory norms. This is the case, for example, in Luxembourg and Italy.[105] This does not exclude, however, the application of foreign overriding mandatory norms as part of the *lex causae*. In Croatia, the legislation addresses only the overriding mandatory provisions of the *lex fori* and the state of the place of performance without any reference to the application of overriding mandatory provisions of the *lex causae*. Notwithstanding this, there is a consensus that the overriding mandatory norms of the *lex causae* should be applied.[106]

German case law shows certain inconsistencies. The principle of the non-application of foreign public law was relied on in German court practice to refuse to apply the overriding mandatory provisions of the *lex causae*.[107] Notwithstanding the principle of the non-application of foreign public law, sometimes the courts applied foreign overriding mandatory provisions as part of the *lex causae*.[108] In German private international law theory, the *Schuldstatutlehre* (or *Einheitsanknüpfung*), according to which the reference to the *lex causae* includes overriding mandatory provisions of the governing law,[109] has been overcome, and today the prevailing opinion follows the *Sonderanknüpfungslehre*. Under this approach, the reference to the governing foreign law does not embrace overriding mandatory provisions. Such provisions may only be applied subject to certain preconditions.[110] Foreign overriding

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104 See Polish Report.

105 Luxembourgish Civil Code art 3 (1); Italian Private International Law Act art 17.

106 Croatia: Sikirić (n 55) 87.

107 Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 17 December 1959 – VII ZR 198/58, NJW 1960, 1102; see also Bundesgerichtshof [German Federal Court of Justice], decision of 7 December 2000 – VII ZR 404/99, NJW 2001, 1937.

108 Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 23 April 1998 – III ZR 194/96, NJW 1998, 2452; Oberlandesgericht Hamburg [Higher Regional Court Hamburg], decision of 8 February 1991 – 1 U 134/87, NJW 1992, 635; see also Johannes Fetsch, *Eingriffsnormen und EG-Vertrag* (Mohr Siebeck 2002, Tübingen) 17f.

109 Germany: Rolf Serick, 'Die Sonderanknüpfung von Teilfragen im Internationalen Privatrecht' (1953) 18 Rabels Zeitschrift 633–650, 646ff; F. A. Mann, 'Öffentlich-rechtliche Ansprüche im Internationalen Privatrecht' (1956) 21 Rabels Zeitschrift, 1–20, 2ff; Daniel Busse (n 95) 416.

110 Germany: Beulker (n 26) 101ff. and 117; Matthias Lehmann, 'Teil 12, Internationales Finanzmarktprivatrecht' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* vol 12 (7th edn, C.H. Beck 2018, Munich), para 529.

mandatory provisions should be applied if (1) the case falls in the scope of application of the provision; (2) there is a close connection between the case and the norm; and (3) the foreign overriding mandatory provision is acceptable from the perspective of German law.

In some jurisdictions, foreign overriding mandatory rules are treated in the same way, regardless of whether they constitute part of the *lex causae* or they may be found in the law of another foreign state. This may happen because neither of them is covered by a specific legislative provision (Luxembourg), or because there is a more general rule allowing the application or consideration of foreign overriding mandatory provisions without distinguishing between the overriding mandatory provisions of the *lex causae* and those of third countries (Belgium, Hungary, Lithuania, Poland). These legislations usually require, for the application or consideration of foreign overriding mandatory norms, that they must be closely connected to the case.

In some jurisdictions, there is some uncertainty as to the application of the overriding mandatory provisions of the *lex causae*. This may often be traced back to the lack of a clear rule on the applicability of the overriding mandatory provisions of the *lex causae*. However, in some of such countries, the legal literature takes the view that the overriding mandatory provisions of the governing law must or may be applied.[111]

It is generally accepted that, even if overriding mandatory provisions are applied as part of the *lex causae*, they are subject to the *ordre public* clause as well as the application of the overriding mandatory provisions of the forum.

4 Overriding Mandatory Provisions of the Law of Another Foreign Country (Other than the *Lex Causae*)

In a number of jurisdictions, legislation follows the model of Article 7 of the Rome Convention when determining the applicability of foreign overriding mandatory provisions. This is the case in Belgium, Bulgaria, Lithuania, Poland and Hungary. The legislation of these countries permits not only the application of the overriding mandatory norms of the forum, but also the application or taking into account of overriding mandatory norms of any other country with which the given legal relationship has a close connection. The reference to such rules may embrace the overriding mandatory provisions of both the *lex causae* and any other third country. The Lithuanian Civil Code allows, in addition to the application of Lithuanian overriding mandatory provisions, the application of the overriding mandatory norms of any other state most closely related to the dispute, irrespective of the law chosen by the parties. Although the legislative text concerns only the disregard of choice of law made by the parties, it seems that overriding mandatory provisions can also be applied if the governing law was designated by an objective connecting factor.

[111] Slovenia: Geč Korošec (n 21) 166.

An interesting solution has been adopted in Croatia, where, in addition to the overriding mandatory norms of the *lex fori,* the Private International Law Act also allows the application of the overriding mandatory provisions of the place of performance of an obligation following Article 9 (3) of the Rome I Regulation. Additionally, the Croatian Private International Law Act extends the scope of application of the Rome I Regulation to those contracts that are excluded from the scope of application of the Regulation.[112] This solution may be open to criticism, because the place of performance is a connecting factor for contracts but, outside the scope of application of the Rome I Regulation, there is not much room left to apply this provision, and thus to apply foreign overriding mandatory norms under Croatian autonomous private international law. English common law also recognised that the law of the state of the place of performance rendering performance illegal could be given effect that enabled courts to take foreign overriding mandatory norms into consideration. However, the admissibility of the overriding mandatory norms of the place of performance could be relied on in contract law, but not in other fields.[113] Moreover, it has been also debated whether this was a conflict-of-laws rule or a rule of substantive law.

Even in Member States where no explicit provision exists on the application of overriding mandatory provisions, the application of the overriding mandatory provisions of foreign countries is not *prima facie* excluded (Slovenia).[114] However, this is usually only a scholarly position and no case law exists confirming this.

Similarly to the Rome I Regulation, some legislative provisions explicitly require that courts examine the consequences of the application or non-application of the foreign overriding mandatory provisions (Belgium, Bulgaria, Croatia). Legislative provisions do not impose an obligation on domestic courts to apply or take into consideration of foreign overriding mandatory provisions; this is merely a possibility for them.

The application of the overriding mandatory norms of the *lex causae* and those of other states is usually dependent on the existence of a connection between the law concerned and the facts of the case. The close connection may arise from the nationality, domicile, habitual residence of the parties or the place of performance of an act by the party or parties. Overriding mandatory provisions of third countries are applied or considered to the extent that the law of the issuing state attributes an overriding character to the norms and this is revealed in the foreign legislation or court practice.[115]

In several jurisdictions, it is suggested by the legal literature that the interests or values behind the overriding mandatory rules must be examined and it must be ascertained whether

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[112] Croatian Private International Law Act, art 25 (2).

[113] England: see Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 KB 287; Foster v Driscoll [1929] 1 K.B. 470; Regazzoni v Sethia [1958] AC 301 (HL).

[114] Italy: Angelo Davì, 'Le questioni generali del diritto internazionale privato nel progetto di riforma' in Giorgio Gaja (ed), *La riforma del diritto internazionale privato e processuale. Raccolta in ricordo di Edoardo Vitta* (Giuffrè 1994, Milan) 147ff; Slovenia: Geč Korošec (n 21) 166.

[115] Poland: Maciej Tomaszewski, 'Art. 8' in Jerzy Poczobut (ed), *Prawo prywatne międzynarodowe. Komentarz* (Wolters Kluwer 2017, Warszawa) 243.

they are worthy of recognition by the forum.[116] Such an interest worthy of protection may even include the objective of international decisional harmony.[117] For taking an overriding mandatory provision of a third country into account, a coincidence between the interests and values of the forum and those represented by the foreign overriding mandatory norms should be present.

In most Member States, a distinction exists between the application of or otherwise taking foreign overriding mandatory provisions into consideration at the level of the governing substantive law. Taking a foreign norm into consideration does not imply any obligation to apply it.[118] Moreover, a foreign overriding mandatory norm does not necessarily apply in its entirety; for instance, its sanction may be modified and replaced by a sanction envisaged by the law of the forum. The difference between applying and taking into consideration foreign overriding mandatory norms is particularly relevant in those countries where the principle of the non-application of foreign public law prevails[119] or where the legislation only recognises the application of the overriding mandatory provisions of the forum. In such states (Germany, Luxembourg), foreign overriding mandatory rules may, however, be taken into account at the level of substantive law. In analysing the approach of the courts, German legal literature differentiates between the consideration of the normative content of a foreign overriding mandatory norm (e.g. on the basis of Article 138 BGB prohibiting contracts breaching good morals) and the purely factual consequences of a foreign overriding mandatory provision (e.g. within the meaning of Article 275 BGB on the impossibility of performance).[120] In the former case, a coincidence between the interests or values behind the overriding mandatory rule concerned and German interests or values is required.[121] In the Nigerian masks case, the Federal Court of Justice relied more generally on the interests of the international community (rather than on German interests) to justify the nullity of a contract under Article 138 BGB.[122] In German private law, Article 313 BGB (change of circumstances),[123] and Article 242 BGB

116 Poland: Tomaszewski (n 115) 243–244.

117 Ibid.

118 See Belgium: Cour de Cassation/Hof van Cassatie, Cass. 25 April 2013, RABG 2014, 831.

119 Germany: see for example, Bundesgerichtshof [German Federal Court of Justice], decision of 8 February 1984 – VIII ZR 254/82, NJW 1984, 1746; Bundesarbeitsgericht [German Federal Labour Court], decision of 20 October 2017 – 2 AZR 783/16 (F), NZA 2018, 443; Oberlandesgericht Frankfurt am Main [Higher Regional Court Frankfurt am Main], decision of 29 September 2006 – 8 U 60/03; Oberlandesgericht Köln [Higher Regional Court Cologne], decision of 27 November 1991 – 2 U 23/91; see generally Beulker (n 26) 69ff; Daniel Busse (n 95) 390ff. and 402ff.

120 Germany: Sybille Brüning, *Die Beachtlichkeit des fremden ordre public* (Duncker & Humblot 1997, Berlin) 149ff; Beulker (n 26) 12; von Bar and Mankowski (n 29) 285ff.

121 Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 21 December 1960 – VIII ZR 1/60 (Borax), NJW 1961, 823; see generally Beulker (n 26) 73; Busse (n 95) 404–407; Fetsch, (n 108) 123 f; Tamás Szabados, 'Wirtschaftssanktionen im Internationalen Privatrecht' in Susanne Lilian Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2017, Tübingen) 149–165, 158f.

122 Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 22. June 1972 – II ZR 113/70 *(Nigerian masks),* NJW 1972, 1576f.

123 Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 8 February 1984 – VIII ZR 254/82, NJW 1984, 1746 (*Iranian beer supply contract*); Bundesgerichtshof [German Federal Court of Justice], decision of 24 February 2015 – XI ZR 193/14, NJW 2015, 2334.

(good faith)[124] may provide further legal bases to take foreign overriding mandatory norms at the level of substantive law into consideration.[125] In other jurisdictions, rules on *force majeure* are typically used to consider foreign overriding mandatory norms.[126] On the contrary, German judicial practice made it unequivocal that Article 134 BGB, (pursuant to which legal transactions that violate a statutory prohibition are void), covers only domestic prohibitions, and the Federal Court of Justice held in several cases that a violation of a foreign statutory provision does not fall under the scope of application of Article 134 BGB.[127] Nevertheless, in German legal literature, attempts have been made to define the requirements for the application of foreign overriding mandatory rules in accordance with the *Sonderanknüpfungstheorie,* instead of considering them at the level of substantive law.[128]

It must be noted that in the jurisdictions where it is a practice to take foreign overriding mandatory norms into consideration at the level of substantive law, it is generally uncertain whether a foreign overriding mandatory norm can be considered in a case where the governing law is another foreign law. In German legal literature, several authors opine that foreign overriding mandatory provisions would be taken into consideration if this is possible under the *lex causae*.[129]

Finally, it seems that there is no difference between the treatment of overriding mandatory provisions of EU Member States and third countries in terms of their application or consideration in autonomous private international law. An occasional difference in the treatment of foreign overriding mandatory provisions by the Federal Court of Justice was sometimes explained in the legal literature by the global political situation or foreign policy interests. In particular, this was the case concerning certain overriding mandatory provisions of the Soviet Union.[130] This is not to deny that there is a higher chance of giving effect to an overriding mandatory norm enacted by an EU Member States by the courts of the Member States due to the common interests of and values shared by the Member States within the EU.[131]

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[124] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 24 February 2015 – XI ZR 193/14, NJW 2015, 2334.

[125] Germany: see generally Busse (n 95) 402–409; Beulker (n 26) 69ff.; Brüning (n 120) 144ff; Looschelders (n 96), paras 35–37; see also: Oberlandesgericht Frankfurt am Main [Higher Regional Court Frankfurt am Main], decision of 9 May 2011 – 23 U 30/10; Landesarbeitsgericht Nürnberg [Regional Labour Court Nuremberg], decision of 21 May 2014 – 4 Sa 155/12.

[126] Belgium: Meeusen, *Nationalisme* (n 62) para 759.

[127] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 22. June 1972 – II ZR 113/70 (Nigerian masks), NJW 1972, 1576; Bundesgerichtshof [German Federal Court of Justice], decision of 29 September 1977 – III ZR 164/75, NJW 1977, 2356.

[128] Germany: Paul Hauser, *Eingriffsnormen in der Rom I-Verordnung* (Mohr Siebeck 2012, Tübingen) 101ff; Beulker (n 26) 92ff.

[129] Germany: Busse (n 95) 411; von Hoffmann and Thorn (n 29) para 100; Kegel and Schurig (n 57) 1098.

[130] Germany: Fetsch (n 108) 20f; Adrian Hemler, Die Methodik der Eingriffsnorm im modernen Kollisionsrecht (Mohr Siebeck 2019, Tübingen) 67.

[131] See German report.

V Overriding Mandatory Provisions and the Ordre Public Clause

In all the jurisdictions concerned, a distinction is made between overriding mandatory provisions and the *ordre public* clause. The two are often separated in many Member States by the legal literature so that overriding mandatory provisions have a positive function in protecting public policy, while the *ordre public* clause fulfils the negative protection of public policy.[132] Overriding mandatory provisions apply anyway, regardless of the otherwise governing law switching off the operation of conflict-of-laws rules. On the contrary, the application of the *ordre public* clause may result in setting aside the applicable foreign law designated according to the conflict-of-laws rules of the forum. However, this distinction is blurred to a certain extent by the fact that, instead of the foreign law disregarded by virtue of the *ordre public* clause, national laws very often order the application of the law of the forum. In this way, even the *ordre public* clause can fulfil a positive function.[133] Views also appeared in the legal scholarship that reject this distinction between the positive and the negative way of protecting public policy, because overriding mandatory norms should be applied irrespective of the need for the protection of public policy, and they have to be applied even if the *lex causae* does not endanger the public policy of the forum.[134] Thus, in the event of applying overriding mandatory provisions examining the protection of public policy is not necessary, because they apply irrespective of the applicable law and the content of the disregarded law.[135]

Moreover, the functions of overriding mandatory norms and the *ordre public* clause have sometimes been confused in judicial practice.[136] It also happens that overriding mandatory provisions are used through the *ordre public* clause: The otherwise applicable foreign law is set aside and the domestic overriding mandatory rule is applied instead.[137]

VI Conflict of Overriding Mandatory Provisions

A conflict between two overriding mandatory provisions rarely emerges in practice and private international law codifications do not address such situations. In addition to sporadic court practice, it is the legal literature that deals with such a scenario.

In the case of a conflict between an overriding mandatory provision of the forum and that of a foreign state, according to a more broadly accepted view, the former is given priority as courts are obliged to apply the law of the forum and enforce the interests of the forum state

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[132] Slovenia: Geč Korošec (n 21) 142; Repas and others (n 23) 40; Cigoj, *Mednarodno zasebno pravo* (n 22) 76.

[133] See Ornella Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (Giuffrè 2012, Milano) 60ff; Kegel and Schurig (n 57) 516ff.

[134] Hungary: Burián László, *Nemzetközi magánjog – Általános rész* (Pázmány Press 2014, Budapest) 193; Burián László, Raffai Katalin and Szabó Sarolta, *Nemzetközi Magánjog* (Pázmány Press 2018, Budapest) 236.

[135] Hungary: Szászy István, *Nemzetközi Magánjog* (Sylvester 1938, Budapest) 108; Burián László, *Nemzetközi magánjog* (n 134) 193; Burián, Raffai and Szabó (n 134) 236.

[136] Belgium: Cass. 25 June 1975, Arr. Cass. 1975, 1146; Meeusen, *Nationalisme* (n 62), para 723.

[137] See the Slovenian report.

over any foreign law.[138] In the Member States, where a specific provision exists for the application of overriding mandatory provisions, courts are usually bound to apply the overriding mandatory norms of the forum, but they only have a possibility, and not an obligation, to give effect to the overriding mandatory norms of foreign countries. Consequently, if there is a conflict between an overriding mandatory provision of the forum and a foreign overriding mandatory rule, such courts will most probably apply the former.

Regarding the conflict between two foreign overriding mandatory norms, the conflict may be solved in favour of the one that demonstrates the closest connection to the case, or that corresponds to the values and interests of the forum state, or that can be enforced effectively by the enacting state.[139]

VII Circumvention of the Application of Overriding Mandatory Provisions through an Agreement Conferring Jurisdiction to a Court of Another State or an Arbitral Tribunal

Legislation directly addressing the issue of whether the application of an overriding mandatory rule may be avoided by a choice-of-court or an arbitration agreement is generally missing. Legislation does not even state that the application of overriding mandatory provisions would constitute an exclusive ground for jurisdiction. Instead of legislation, domestic judicial practice gives some guidance on the admissibility of such clauses.

In France, the position of courts is that the application of overriding mandatory provisions may be set aside by a valid agreement conferring jurisdiction to a foreign court. This was confirmed by the Court of cassation in the Monster Cable case where, in relation to an exclusive distribution agreement, the court recognised that an agreement conferring jurisdiction in favour of a San Francisco court cannot be ignored purely because the choice of forum results in the disregard of a French overriding mandatory norm.[140] The same approach was followed in other cases as well,[141] and was similarly applied in the context of arbitration.[142]

At the same time, the opposite judicial approach appears in other Member States. German courts have found choice-of-court and arbitration agreements void in cases where the foreign court or the arbitral tribunal would have disregarded German overriding mandatory provisions.[143]

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[138] Belgium: Meeusen, *Nationalisme* (n 62) 387–388, [734]; Germany: Kropholler (n 29) 21; Daniel Busse (n 95) 411f.

[139] Germany: Busse (n 95), 412.

[140] France: Cass. Civ. 1re, 22 octobre 2008, 07-15823, *Monster Cable*. On the ruling see Louis d'Avout, (2008) La Semaine juridique Générale (JCP G) II. 10187.

[141] France: Cass. Civ. 1re, 30 janvier 2013, n° 11-10.588.

[142] France: Cass. Civ. 1re, 8 juillet 2010, n° 09-67.013 P. On the ruling, see (2010) 186 *Recueil Dalloz* 2884 commented by Mathias Audit and Olivier Cuperlier; (2010) *Revue critique de droit international privé* 743 commented by Dominique Bureau and Horatia Muir Watt.

[143] Germany: Bundesgerichtshof [German Federal Court of Justice], decision of 15 June 1987 – II ZR 124/86, NJW 1987, 3193; Bundesgerichtshof [German Federal Court of Justice], decision of 2 March 1984 – II ZR 10/83, NJW 1984, 2037; see also Oberlandesgericht München [Higher Regional Court Munich], decision of 17 May 2006 –

This case law has received criticism by certain scholars.[144] In Luxembourgish case law, we find an illustration of denying a jurisdiction agreement if this results in the avoidance of overriding mandatory provisions of Luxembourg law. The Luxembourgish Supreme Court found that the jurisdiction of the Luxembourgish courts was mandatory regarding employees working on Luxembourgish territory and the relevant labour law provisions could not be derogated by a choice-of-court agreement.[145]

The approach of Italian courts seems to vary depending whether it concerns a choice-of-court or an arbitration agreement. Article 4 (2) of the Italian Private International Law Act states that the jurisdiction of any Italian court may be derogated by an agreement in favour of a foreign court or arbitration, provided that such derogation is evidenced in writing and the case concerns disposable rights *(diritti disponibili).* From this provision, some of the legal literature inferred that a dispute involving overriding mandatory provisions concerns non-disposable rights and, as a consequence, the jurisdiction of Italian courts cannot be derogated.[146] Italian courts, however, seem to take a different position. The Court of Cassation made clear that Article 4 (2) of the Private International Law Act does not apply to choice-of-court clauses falling under Article 25 of the Brussels I Regulation.[147] Accordingly, the parties could stipulate the jurisdiction of a Greek court in a dispute concerning the agent's right to indemnity, a right enshrined by the Commercial Agent Directive and implemented by Article 1751 Italian Civil Code.[148] In another case, the Court of cassation also found that the potential applicability of an overriding mandatory rule to the case does not affect the validity and enforceability of the jurisdiction clause.[149] This was deduced from the principle

7 U 1781/06, BeckRS 2006, 07559; Oberlandesgericht Stuttgart [Higher Regional Court Stuttgart], decision of 29 December 2011 – 5 U 126/11, BeckRS 2012, 18825; see generally: Franz-Jörg Semler, 'Der Ausgleichsanspruch des deutschen Handelsvertreters in internationalen Handelsvertreterverhältnissen – Rechtswahl und Schiedsverfahren in Zeitschrift für Vertriebsrecht' (2016) Zeitschrift für Vertriebsrecht 139–143, 141ff.

144 Germany: David Quinke, 'Schiedsvereinbarungen und Eingriffsnormen' (2007) Zeitschrift für Schiedsverfahren 246–254; Haimo Schack, *Internationales Zivilverfahrensrecht* (7th edn, C.H. Beck 2017, Munich), para 516.

145 Luxembourg: Cour de Cassation, 2 July 1959, Pasicrisie luxembourgeoise, vol 16, 1959, 443f; Dietrich Bernecker, 'Internationales Privat- und Prozessrecht im Großherzogtum Luxemburg' (1962–1963) 27 Rabels Zeitschrift, 263–346, 317.

146 Italy: See Luigi Paolo Comoglio, 'Art. 2' in Luigi Paolo Comoglio, Claudio Consolo, Bruno Sassani and Romano Vaccarella (eds), *Commentario al codice di procedura civile*, vol 1, Articoli 1-98 (Utet 2012, Milano) 58ff; Luca G. Radicati di Brozolo, 'Deroga alla giurisdizione e deroga alle norme imperative: un conflitto fra conflitti di leggi e conflitti di giurisdizioni?' in Vittorio Colesanti, Claudio Consolo, Giorgio Gaja and Ferruccio Tommaseo (eds), *Il diritto processuale civile nell'avvicinamento giuridico internazionale* (CLEUP 2009, Padova) 279ff.

147 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 [2012] OJ L 351/1.

148 Italy: Court of Cassation, Full Court, judgment of 10.5.2019 – No. 12585, Nobel Maritime Inc. v. P.L. & C. S.r.l. and Ventouris Ferries Company Limited, Blumare S.r.l, D.B.V.

149 Italy: Court of Cassation, Full Court, judgment of 20.2.2007 – No. 3841, JP Morgan Chase Bank National Association v. Poste Italiane S.p.a. and D.S., M.G, in (2008) Rivista di diritto internazionale private e processuale 160ff.

of separability, i.e. the validity of the choice-of-court agreement must be assessed separately from the validity of the contracts, including the forum selection clause, and from the principle that the determination of jurisdiction logically precedes the designation of the applicable law. However, a different interpretation has been followed regarding arbitration agreements. The Court of Cassation[150] held that, in accordance with Article 4 (2) of the Private International Law Act, Italian jurisdiction cannot be derogated by an arbitration agreement purporting to derogate Italian jurisdiction over disputes concerning the right of the commercial agent to indemnity upon the termination of the commercial agency contract by the principal under Article 1751 of the Italian Civil Code.

In other Member States, we find only very indirect statements on the admissibility of jurisdiction clauses resulting in the circumvention of the application of overriding mandatory provisions. In Hungarian judicial practice, we find a more indirect statement in the absence of explicit court decisions. In a case where the annulment of an arbitral award was requested on the ground of public policy, the Budapest-Capital Regional Court stated that the state protects the application of domestic laws having a public policy nature by a specific ground for annulment, referring to the violation of public policy in order to prevent a foreign law from being able to frustrate the purpose of overriding mandatory rules having a public policy nature.[151] This interpretation may suggest that an arbitral award ignoring the overriding mandatory rules of Hungarian law may be annulled.

Conclusions

There is a sharp contrast between the interest in the legal literature in the overriding mandatory rules and practice, which might be illustrative in a few Member States but is virtually non-existent in others. As in many other fields of private international law, doctrine very often precedes legislation and judicial practice by raising questions of interpretation and trying to provide some theoretical foundation for practice.

Case law on the application of overriding mandatory provisions outside the scope of application of the EU private international law regulations is scant. This is the case especially in smaller jurisdictions. The reasons may be manifold. First, in several Member States, a specific legislative provision on overriding mandatory provisions is missing. Although some room is acknowledged in all Member States for applying or giving effect to overriding mandatory norms, in the absence of explicit legislative guidance and a clear definition, courts might be less willing to have recourse to this instrument that interferes with the normal

[150] Italy: Court of Cassation, Full Court, judgment of 28.12.2016 – No. 27072, Maureen Skelly Bonini S.r.l. v. The Donna Karan Company (2018) Rivista di diritto internazionale privato e processuale 114ff; Court of Cassation, Full Court, judgment of 30.6.1999 – No. 369, Soc. Air Malta navigaz. aerea e Soc. Air Malta c. Soc. Scopelliti Travel (2000) Rivista di diritto internazionale private e processuale 741ff. A similar approach prevails in the practice of lower courts: Tribunal of Modena, judgment of 11.3.2009 – N.F. GmbH v. G.B. e T. S.r.l.

[151] Hungary: Budapest-Capital Regional Court G. 40.648/2014/7.

operation of conflict-of-laws rules. This holds in particular for the overriding mandatory provisions of the *lex causae* and those of third countries, because, contrary to the overriding mandatory rules of the forum, their applicability is questionable in many jurisdictions. Second, courts are more familiar with the mechanism of the *ordre public* clause, which, unlike overriding mandatory provisions, is recognised in the private international law legislation of all Member States examined. Courts sometimes have recourse to the *ordre public* clause instead of classifying and applying certain rules as overriding mandatory provisions. Third, outside the scope of application of the EU private international law regulations, and most notably the Rome I Regulation, private autonomy plays less of a role. Therefore, there might be less need to impose limits through the application of overriding mandatory norms.

Nevertheless, in some jurisdictions, legislation, courts and legal literature identified several substantive law rules as overriding mandatory norms. Some of these provisions can claim application under autonomous private international law. These rules pertain in particular to the areas of personal status and family law, property law, company law and contract law.

The provisions of the EU private international law regulations on overriding mandatory norms have some relevance even outside their scope of application, in particular from two perspectives. First, there seems to be an identicality or at least a strong proximity between the definition given by Article 9 (1) of the Rome I Regulation and national definitions on overriding mandatory norms, regardless of whether a definition was elaborated by the legislature or courts in autonomous private international law. Furthermore, legal literature in several Member States also endorsed certain elements of the definition provided by the Rome I Regulation and certain authors explicitly emphasised that the definition given by the Rome I Regulation should be applied even outside its scope of application. Second, when determining the law of which countries may be applied or taken into account, the legislature of several Member States took Article 7 of the Rome Convention (Belgium, Bulgaria, Lithuania, Poland and Hungary) or the Rome I Regulation (Croatia) as a point of departure. Although the definition of the Rome I Regulation was criticised for taking only rules serving public interest into account, it seems that, in the Member States examined, qualification as an overriding mandatory norm requires that a rule protects some public interests, even if it concerns a private law rule. In light of these impacts exercised by EU law on the evolution of autonomous private international law, a remarkable convergence may be revealed within and outside the scope of application of the EU private international law regulations as to the definition and application of overriding mandatory norms.

Martina Melcher*

Substantive EU Regulations as Overriding Mandatory Rules?

Introduction

The main research question as expressed in the title of this paper is primarily a question of coordination. It addresses the peculiar relationship between directly applicable, uniform substantive EU law and the EU Private International Law (PIL) regulations, i.e. the Rome Regulations.

On the one hand, PIL rules indicate the applicable substantive law and should therefore naturally be applied before any substantive law rule. On the other hand, certain substantive EU regulations want to be applied irrespective of the (substantive) law indicated by PIL rules. Moreover, PIL rules, such as are contained in the Rome I and Rome II Regulations, typically refer to the substantive law of a state rather than to substantive EU law. The latter would thus be applicable only as part of the law of a Member State, but could not be applied if the relevant EU PIL Regulations referred to a third-state law.

This paper examines whether substantive EU regulations qualify as overriding mandatory provisions pursuant to Article 9 Rome I Regulation and Article 16 Rome II Regulation to ensure their application irrespective of the otherwise applicable third-state law. For this purpose, this paper first confronts the idea that uniform substantive EU law enjoys a 'categorical precedence' over uniform EU PIL rules (part II). The following part of the paper explores whether and under what circumstances substantive EU regulations may *materially* qualify as overriding mandatory provisions, pursuant to Article 9 Rome I and Article 16 Rome II Regulation (part III). Finally, the paper discusses the possible *application* of such rules as overriding mandatory provisions and the role of special conflict-of-law provisions in more detail (part IV). The General Data Protection Regulation (GDPR),[1] the Passengers' Rights

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[1] Regulation (EU) 2016/670 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1.

Regulation[2] and the (abolished) draft Common European Sales Law (CESL)[3] serve as examples.

I Categorical Precedence of Uniform Substantive EU Law?

The question whether unified or non-unified substantive law (possibly of a third state) applies is a typical conflict-of-law question, which has to be asked whenever there is no worldwide unified law.[4] Hence, a conflict-of-law rule is required to determine the coordination between substantive EU regulations and the EU PIL regulations, such as the Rome I and II Regulations.

While it is true that substantive EU regulations would take precedence due to the principle of primacy before any national law, substantive EU regulations and EU PIL regulations are on the same step of the normative hierarchy.[5] For this reason, the precedence of EU substantive law cannot be based on the general principle of primacy.

Instead, EU substantive law regulations are often accorded a 'categorical precedence' in the way international uniform law is often considered to take priority over (national) conflict-of-law rules.[6] The justification of such a categorical precedence, if one is provided, varies. *Zweigert* and *Drobnig* suggest that (international) uniform substantive provisions generally supersede conflict-of-law provisions in their territorial and material scope of application due to their superiority in substance *(sachliche Überlegenheit)*.[7] In particular with regard to EU uniform law, an assumed categorical precedence of substantive regulations is based on the principle of efficiency, which demands a primacy in application of uniform substantive law before uniform conflict-of-law rules in order to respect the special scope of application of such substantive rules.[8] Moreover, the categorical precedence is hardly ever explained or discussed

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[2] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights [2004] OJ L 46/1.

[3] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635.

[4] Jan von Hein, 'Einheitsrechtliche Anwendungsnormen und Internationales Vertragsrecht' in Normann Witzleb and others (eds), *Festschrift für Dieter Martiny zum 70. Geburtstag* (Mohr Siebeck 2014, Tübingen, 365–390) 375; Peter Mankowski in Ulrich Magnus, Peter Mankowski (eds), *European Commentaries on Private International Law – ECPIL II* (Otto Schmidt 2017, Köln) Article 25 Rome I para 21.

[5] Similarly, Johannes Schilling, 'Materielles Einheitsrecht und Europäisches Schuldvertrags-IPR' [2011] EuZW 776–781, 780.

[6] See, for example, Richard Bader, *Koordinationsmethoden im Internationalen Privat- und Verfahrensrecht* (Mohr Siebeck 2019, Tübingen) 57.

[7] Konrad Zweigert, Ulrich Drobnig, 'Einheitliches Kaufgesetz und Internationales Privatrecht' (1965) 29 RabelsZ 146–165, 148–150. See also Horst Eidenmüller and others, 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law' Max Planck Private Law Research Paper No. 12/14, 21 who refer to a 'general principle that uniform substantive law takes priority over uniform conflicts rules'.

[8] Schilling (n 5) 781.

methodologically. Often, uniform substantive law is simply applied without prior consultation of the conflict-of-law rules by way of 'principle'. Given that the 'principle of categorical precedence' provides the resolution to a conflict between uniform substantive law and uniform PIL rules, methodologically, it must be qualified as a conflict-of-law rule. Hence, in an EU context, it does not give precedence to uniform substantive law over conflict-of-law rules as such, but rather represents a conflict-of-law principle which gives priority to uniform EU substantive law over the general EU conflict-of-law rules contained in the EU PIL regulations. If one follows this approach, there would be no need for substantive EU regulations to qualify as overriding mandatory provisions (or any other EU PIL rule to apply) as they would take precedence in any case.

However, while such a precedence of uniform substantive law is indeed teleologically convincing as a result, in an EU context, there is no need for a stand-alone conflict-of-law principle of categorical precedence, which must in essence be based on a *lex specialis* reasoning. In fact, the general EU conflict-of-law rules contained in the EU PIL regulations already contain several provisions which can possibly be used to resolve a conflict with substantive EU regulations, namely the rules on overriding mandatory provisions (see part III) and the *lex specialis* rules (see part IV).

II Material Qualification as an Overriding Mandatory Provision

According to Article 9 (1) Rome I, overriding mandatory provisions are 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation.'[9] In accordance with the EU PIL system, the applicable law is determined in such situations by the general conflict-of-law rules, namely the rules of the Rome I or II Regulation, but is then superseded by the respective overriding mandatory provision of the law of the forum (or the *lex causae*) in its scope of application. With regard to EU regulations, several issues deserve a more in-depth consideration.

1 Individual Private Law Rules of an Internationally Mandatory Character

First, it is always an individual rule, the overriding mandatory character of which needs to be established rather than the character of the regulation as a whole. This follows already from the wording ('provisions' rather than 'law') on the one hand and on the other hand from the exceptional character of overriding mandatory provisions, which requires a strict

[9] This definition applies also to the notion used in Article 16 Rome II, see Case C-149/18 *Agostinho da Silva Martins* ECLI:EU:C:2019:84, para 28.

interpretation,[10] and a case-by-case analysis. Thus, any suggestions that qualify whole EU regulations, such as the GDPR,[11] as overriding mandatory laws are (much) too sweeping.[12]

Second, Article 9 Rome I and Article 16 Rome II do not specify whether they refer to private law and/or public law rules. In the literature, this issue is often sidestepped in so far as it is argued that the public or private law nature of an overriding mandatory provision is irrelevant and such a distinction is not to be drawn.[13] This is particularly convincing with regard to EU law, which does not formally know a public/private divide. In fact, EU regulations often contain public and private law provisions side by side.

However, if one takes the material scope of application of the Rome Regulations into consideration, it is evident that they apply only to (contractual and non-contractual) obligations in civil and commercial matters [see Article 1 (1) respectively]. Hence, only substantive rules that deal with or haven an effect on civil and commercial matters are at risk of being disapplied due to the application of another substantive law. Public law rules that do not have such an impact are not affected by a divergent choice of law; they are applied pursuant to their own (public) conflict-of-law rules (e.g. principle of territoriality). Article 83 GDPR, regarding administrative fines imposed by a supervisory authority, might serve as an example for such a (purely) public law provision.

Given the scope of application of the Rome Regulations, particular private law rules *(Sonderprivatrecht)*[14] may qualify as overriding mandatory rules as long as they do not serve exclusively or predominantly to balance the interests between private persons (see below).[15] What this means precisely, is still subject to much discussion (and will probably continue to be so). National provisions that have been considered by the ECJ and/or national courts to have an overriding mandatory character concern, for example, the termination of a commercial agency contract by notice and related entitlements to indemnities (ECJ *Unamar*) and the reduction of allowances and remuneration of officials and other employees of public

[10] Case C-149/18 *Agostinho da Silva Martins,* para 29; Case C-184/12 *Unamar,* para 49.

[11] Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 RabelsZ 24–61, 41.

[12] Similarly, Björn Steinrötter, 'Kollisionsrechtliche Bewertung der Datenschutzrichtlinien von IT-Dienstleistern – Uneinheitliche Spruchpraxis oder bloßes Scheingefecht?' [2013] MMR 691–694, 693.

[13] Dieter Martiny in *Münchener Kommentar zum BGB* (7th edn, C.H. Beck 2018, München) Article 9 Rom I-VO para 12; Ansgar Staudinger in Franco Ferrari and others (eds), *Internationales Vertragsrecht* (2nd edn, C.H. Beck 2011, München) Article 9 para 8.

[14] See, for example, Mario Giuliano and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, OJ [1980] C282, 1, Article 7 para 4. Rightly critical Robert Freitag, 'Einfach und international zwingende Normen' in Stefan Leible and others (eds), *Grünbuch zum Internationalen Vertragsrecht* (Sellier 2004, München, 167–191) 190 ff; Felix Maultzsch, 'Rechtswahl und ius cogens im Internationalen Schuldvertragsrecht' (2011) 75 RabelsZ 60–101, 88 ff; Bonomi in Ulrich Magnus, Peter Mankowski (eds), *European Commentaries on Private International Law – ECPIL II* (Otto Schmidt 2017, Köln) Article 9 Rome I para 73 ff; Martiny (n 13) Article 9 Rom I-VO para 12.

[15] Axel Thorn in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht III* (4th edn, Otto Schmidt 2016, Köln) Article 9 Rom I-VO para 11 with further references. See also Andreas Köhler, *Eingriffsnormen – Der „unfertige Teil" des europäischen IPR* (Mohr Siebeck 2013, Tübingen) 22 ff.

authorities (ECJ *Nikiforidis*). As regards, for example, the GDPR, this means that provisions such as Article 6 and 7 or 82, which deal with the lawfulness of data processing based on consent and the right to compensation and liability, address questions of a civil or commercial nature and therefore risk being put aside if a non-EU Member State law were chosen to be applicable. Similarly, the Passengers' Rights Regulation contains only rules and obligations regarding civil and commercial matters, which could thus possibly qualify as overriding mandatory provisions due to their private law nature.

Apart from the above mentioned private law provisions and public law provisions dealing with the exercise of public power,[16] there is a huge grey area. In particular, 'supporting' provisions that do not grant a right themselves or cannot be used as a basis for a particular claim are sometimes difficult to categorise as public or private and are often of particular relevance to a private law issue despite their rather public law nature, e.g. public restrictions regarding the purchase of land. To summarize, unfortunately, the public/private divide, which is in itself quite ambiguous, can hardly be used to identify overriding mandatory rules in an unequivocal way – notably, in an EU context where the public/private divide is particularly blurred.

Third, irrespective of their private or public law character, a mandatory rule must be of such importance that it justifies a departure from the (otherwise) applicable law.[17] In other words, the rule demands to be applied as an internationally mandatory rule.[18] A strict interpretation is required.[19] The internationally mandatory character of a rule is to be determined not only according to the wording of the rule but also by taking into account the general structure of the law, its objectives and the circumstances under which it was adopted.[20] In the *Da Silva* case, which concerns a particular limitation rule, the ECJ emphasises that such rules are principally governed by the law applicable to a non-contractual obligation pursuant to Article 15 (h) Rome II Regulation.[21] Pursuant to this logic, convincing arguments are needed in order to qualify substantive provisions as overriding mandatory provisions if they are expressly part of the scope of the law applicable. If one considers EU rules to fall within the scope of Article 9 Rome I and Article 16 Rome II, it is particularly difficult to determine the internationally mandatory character of such a rule. In essence, one has to ask whether the rule in question requires supremacy also regarding third country law. In view of Article 3 (4) Rome I, it is certainly clear that EU law is not *per se* of an internationally mandatory nature. However, EU regulations often require a very broad territorial application. For example, Article 3 GDPR envisages the application of the Regulation to the processing of personal data in the EU and, in certain situations, also to their processing by a controller or processor not established in

[16] See Case C-645/11 *Land Berlin* ECLI:EU:C:2013:228, para 33.
[17] Case C-149/18 *Agostinho da Silva Martins,* para 31.
[18] Brigitta Lurger and Martina Melcher, *Handbuch des Internationalen Privatrechts* (Verlag Österreich 2017, Wien) paras 1/49, 4/50.
[19] Case C-149/18 *Agostinho da Silva Martins,* para 29; Case C-184/12 *Unamar,* para 49.
[20] Case C-149/18 *Agostinho da Silva Martins,* paras 30 and 31; Case C-184/12 *Unamar,* para 50.
[21] Case C-149/18 *Agostinho da Silva Martins,* para 25.

the EU. Such a broad scope of application often hints at an internationally mandatory character.[22]

A broad scope of application is not sufficient in itself, however. An overriding mandatory provision must have an internationally mandatory character 'to safeguard public interests'. In other words, it must serve (primarily) a public interest purpose that goes beyond a mere legislative interest. Both elements are closely linked, as a special public interest is often derived from an express international scope of application and a broad scope of application is often thought to suggest a particular public interest. In general, rules that are of an internationally mandatory character due to public interest are also referred to as 'public order legislation'.[23] Given its arguments in the *Unamar* case, the ECJ would probably qualify Article 82 GDPR (right to compensation and liability) as an overriding mandatory provision. It requires an international application within the (rather broad) confines of Article 3 GDPR[24] and there is a particular public interest in the right to data protection, given that it even qualifies as a fundamental right.[25] In contrast, Article 7 Passengers' Rights Regulation also contains a right to compensation in the event of denial of boarding or cancellation and an international scope of application, but it is doubtful whether respecting this provision is crucial for safeguarding the EU's public interests.

As can be seen, both, the public/private divide as well as the particular public interest character of a provision, as 'identifying features' of an overriding mandatory rule are rather ambiguous concepts. They give much scope of interpretation to courts and legislators, so that (almost) any provision that shall be applied mandatorily also in cross-border situations to provide an appropriate legal frame may be identified as such.[26]

2 Are Article 9 Rome I and Article 16 Rome II Applicable to EU Law?

Moreover, irrespective of their substance, it is still unclear whether mandatory rules in EU *regulations* may even qualify as overriding mandatory provisions in the sense of Article 9 Rome I and Article 16 Rome II.[27] Actually, the wording of these provisions seems to cover

[22] See also Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 ZVglRWiss 50–82, 72.

[23] Case C-184/12 *Unamar* ECLI:EU:C:2013:663, para 47.

[24] In contrast, Article 3 GDPR itself cannot qualify as an overriding mandatory provision because it only expresses the request of the substantive rules of the GDPR to be applied internationally. Dissenting Thon (n 11) 41.

[25] See also Maja Brkan, 'Data Protection and Conflict-of-laws: A Challenging Relationship' (2016) 2 EDPL 324–341, 334; Thorn (n 15) Article 9 Rom I-VO para 47a. As regards public law provisions Michael Müller, 'Amazon and Data Protection Law – The end of the Private/Public Divide in EU conflict of laws? (2016) EuCML 215–218, 218. Regarding the GDPR: Christian Kohler, 'Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union' (2016) 52 RDIPP 653–675, 661 ff; Manuel Klar in Jürgen Kühling and Benedikt Buchner (eds), *Datenschutz-Grundverordnung* (2nd edn, C.H. Beck 2018) Article 3 para 105; Lüttringhaus (n 22) 74.

[26] Similarly, Adrian Hemler, *Die Methodik der "Eingriffsnorm" im modernen Kollisionsrecht* (Mohr Siebeck 2019, Tübingen) 171.

[27] Affirmative (pro EU law inclusion) Martiny (n 13) Article 9 Rom I-VO para 27; Ulrich Magnus in Staudinger, *BGB XIII* (Sellier 2016, München) Article 9 Rom I-VO para 164; (rather) affirmative Bonomi (n 14) Article 9 Rome I

national law only, as they refer to 'provisions of the law of the forum' [Article 9 (2) Rome I], and to 'provisions the respect for which is regarded as crucial by a country' [Article 9 (1) Rome I]. Whereas EU law could be qualified as part of the 'law of the forum' in a Member State, this was not necessarily intended by the legislator, given that the Rome Regulations clearly distinguish between substantive national law of the forum and substantive EU law in other places, such as Article 3 (3) and (4) Rome I. Furthermore, the EU is certainly no country but a regional institution *sui generis,* so that – *prima facie* – it does not matter that the EU regards the respect for a certain EU provision as crucial. However, one could argue that the Member States are bound by the principle of loyalty and that therefore any EU regulation, the respect for which is regarded as crucial by the EU, is necessarily as essential to the Member States as it is to the EU.

Furthermore, from a teleological and systematic point of view, there is no need for EU legislation to be addressed by Article 9 Rome I and Article 16 Rome II. Especially with regard to substantive EU regulations, the literature often regards the application of the exception for overriding mandatory rules as pointless, because the substantive EU regulations ought to supersede otherwise applicable national rules anyway, due to the EU principle of supremacy of application.[28] While this is certainly true for the national law of the Member States, which is superseded by (substantive) EU law, a supremacy-based application of directly applicable secondary EU law is less certain with regard to the law of third countries.[29] The assumed non-applicability of an automatic supremacy in these cases is also supported by Article 3 (4) Rome I, which addresses EU law in all its forms including that of an EU regulation. Such a rule would be superfluous if the principle of supremacy applied to directly applicable EU law also in the above situations. Even if the general principle of supremacy is inapplicable, however, there is no need for Article 9 Rome I or Article 16 Rome II to be applied to EU regulations (and also direct transpositions of EU directives) if one agrees that Article 23 Rome I and Article 27 Rome II cover such situations (see below part IV).

As regards national rules that implement EU *directives*, the ECJ case law ostensibly clarified that such rules may qualify as overriding mandatory provisions.[30] At a closer look, however, the *Unamar* and *Da Silva* cases, in which the ECJ explicitly referred to Article 7 Rome Convention and Article 9 Rome I respectively, actually concerned national provisions that had been drafted in the context of minimum harmonisation and were based on the legislative autonomy of the Member States, i.e. they did not (precisely) reflect corresponding EU stipulations. In *Unamar,* the ECJ stipulated that, with regard to national law *transposing* the EU rules in question, 'reference must be made to Article 7 of the Rome Convention.'[31]

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para 51; rejecting Wulf-Henning Roth, 'Handelsvertretervertrag und Rom I-Verordnung – Eine Skizze' in Jörn Bernreuther and others (eds), *Festschrift für Ulrich Spellenberg* (Sellier 2010, München, 309–328) 320.

[28] Staudinger (n 13) Article 9 para 12 f; Ulrich Magnus in *Staudinger, BGB XIII* (Sellier 2016, München) Article 9 Rom I-VO para 35 und Einl IPR para 9.

[29] Bonomi (n 14) Article 9 Rome I para 51.

[30] Case C-381/98 *Ingmar* ECLI:EU:C:2000:605; Case C-184/12 *Unamar,* para 40.

[31] Case C-184/12 *Unamar,* para 41.

This is however a rather general instruction at the beginning of its analysis of the specific situation and not an analysis of the situation at hand. In fact, the national provisions under scrutiny for conformity with Article 7 Rome Convention did not only transpose EU law but went beyond ('goldplating') the demands of the EU directive, which did not contain very precise instructions to begin with, thereby constituting (genuine) national law rather than EU law. In other words, the final assessment and ruling of the ECJ, which suggests a link to Article 7 Rome Convention actually concerns national (overriding mandatory) provisions rather than EU (overriding mandatory) provisions. Similarly, in *Da Silva,* the ECJ effectively deals with a *national* rule in a minimum harmonisation context, which represents the Member State's reaction to a general allowance of the EU Directive in question to maintain or bring into force provisions that are more favourable rather than a simple prescribed implementation of EU law. Hence, the *Unamar* and the *Da Silva* cases do not support the idea that EU regulations may qualify as overriding mandatory law in accordance with Articles 9 Rome I and 16 Rome II.

It is only in the *Ingmar* case that the national rule in question actually reflects the EU specification to a significant extent. Due to the temporal setting of the *Ingmar* case, however, the ECJ[32] did not (have to) refer to Article 9 Rome I or Article 7 Rome Convention, but merely argued that the purpose of the rules in question requires that they be applied 'irrespective of the law by which the parties intended the contract to be governed'.[33] Contrary to the prevailing view in academic literature, this is certainly not an unequivocal qualification as overriding mandatory law.[34] Hence, although the ECJ case law links the *Ingmar* and *Unamar* cases argumentatively (i.e. by citation), thus suggesting their coherence,[35] (at least) some ambiguity remains as to whether the ECJ would have relied on these rules if the case had fallen into their scope *rationae temporis*.

III Application as Overriding Mandatory Provision

Irrespective of the material character of an EU provision as an overriding mandatory provision, its application as such is a different question. If a special conflict-of-law rule takes precedence and results in the application of the directly applicable, unified substantive EU law instead of the (otherwise) applicable (national) law, there is no need for this law to be applied on the basis of Article 9 Rome I or Article 16 Rome II – even if it would (also) qualify as overriding mandatory provision.[36] In this sense, Article 9 Rome I and Article 16 Rome II

[32] Interestingly, the Advocate General did refer to the content of said rules anyway, see Case C-381/98 *Ingmar* ECLI:EU:C:2000:230, Opinion of AG Léger, para 88.

[33] Case C-381/98 *Ingmar,* para 25.

[34] See Hemler (n 26) 221 (also for further references).

[35] Similarly, Jan Lüttringhaus, 'Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar' [2014] IPRax 146–152, 147.

[36] See also Hemler (n 26) 162, who states that overriding mandatory rules are based on a *lex specialis* principle.

represent only the 'second exit' for rules that cannot 'leave' the Rome Regulations through the 'first exit', namely Article 23 Rome I or Article 27 Rome II.[37]

1 Overriding Mandatory Provisions and the L*ex Specialis* Principle

Article 23 Rome I and Article 27 Rome II contain a *lex specialis* principle for rules on contractual and non-contractual obligations respectively. According to these provisions, the respective general PIL regulation (i.e. Rome I or Rome II) shall not prejudice the application of provisions of [Union] law which, in relation to particular matters, lay down conflict-of-law rules' for contractual/non-contractual obligations.

As regards traditional reference rules *(Anknüpfungsnormen),* there is little doubt that they qualify as conflict-of-law provisions in this sense. Examples include Article 3 Regulation 3921/91[38] and Article 129 (2), 130 (2) EU trade mark Regulation[39]. However, it is disputed whether Article 23 Rome I and Article 27 Rome II also apply regarding the coordination with uniform substantive EU rules. For them to be applicable, the substantive EU regulations in question have to contain (scope of) application rules (also called *Abgrenzungsnormen* [delimitation rules][40]) and these application rules have to be encompassed by the *autonomous EU notion* of 'conflict-of-law rule', which is used in Article 23 Rome I and Article 27 Rome II.[41]

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[37] Peter Mankowski in Ulrich Magnus, Peter Mankowski (eds), *European Commentaries on Private International Law – ECPIL II* (Otto Schmidt 2017, Köln) Article 23 Rome I para 13. See also Felix Maultzsch in *beck-online.Grosskommentar* (1.8.2018) Article 9 Rom I para 203.

[38] Council Regulation No 3921/91 of December 1991 laying down conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State, OJ 1991 L 373, 1.

[39] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark, OJ 2017 L 154, 1.

[40] Jan Kropholler, *Internationales Einheitsrecht* (Mohr Siebeck 1975, Tübingen) 190 ff [*Abgrenzungsnormen* (delimitation rules)]; Ulrich Drobnig, 'Anwendungsnormen in Übereinkommen zur Vereinheitlichung des Privatrechts' in Walter Stoffel and Paul Volken (eds), *Mélanges en l'honneur d'Alfred von Overbeck* (Editions universitaires Fribourg Suisse 1990, Fribourg, 15–30) 15 [*Anwendungsnormen* (application rules)]. Generally, Jan von Hein in *Münchener Kommentar zum BGB* (6th edn, C.H. Beck 2015, München) Einl IPR para 97. Another commonly used notion for such rules is statutistic conflict-of-law rules *(statutistische Kollisionsnormen)*, see Karl Kreuzer, 'Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts' (2006) 70 RabelsZ 1–88, 46; Rolf Wagner, 'Normenkonflikte zwischen den EG-Verordnungen Brüssel I, Rom I und Rom II und transportrechtlichen Rechtsinstrumenten' [2009] TranspR 103–109, 107.

[41] Affirmative Peter Mankowski, 'Rechtswahlklauseln in Luftbeförderungs-AGB auf dem Prüfstand' [2014] RRa 118–123, 123; Mankowski (n 37) Article 23 Rome I para 11 (both with reference to the Passengers Rights Regulation). See also Erik Jayme and Carl Nordmeier, 'Multimodaler Transport: Zur Anknüpfung an den hypothetischen Teilstreckenvertrag im Internationalen Transportrecht – Ist § 452a HGB Kollisions- oder Sachnorm?' [2008] IPRax 503–507, 507; von Hein (n 4) 375; Florian Eichel in Rainer Hüßtege, Heinz-Peter Mansel, *Bürgerliches Gesetzbuch Rom-Verordnungen – HUP – EuErbVO VI* (3rd edn, Nomos 2015, Baden-Baden) Article 27 Rom II-VO para 3; Maultzsch (n 37) Article 9 Rom I para 205; Schulze in *beck-online.Grosskommentar* (1.8.2018) Art 23 Rom I-VO Rz 18 und Art 27 Rz 13. Rejecting, Johannes Schilling, *Das Internationale Privatrecht der Transportverträge* (Mohr Siebeck 2016, Tübingen) 87 ff; see also Wagner (n 40) 107 (regarding Article 25 Rome I-VO); Leible in Rainer Hüßtege, Heinz-Peter Mansel, *Bürgerliches Gesetzbuch Rom-Verordnungen – HUP – EuErbVO VI* (3rd edn, Nomos 2015, Baden-Baden) Article 23 Rom I-VO para 8; Eva-Maria Kieninger in Franco

2 Application Rules as Special Conflicts Rules

Scope of) Application rules have a dual function:[42] On the one hand, they (unilaterally) determine the (international territorial) scope of application of uniform law. They are similar to what is commonly understood as overriding mandatory law, insofar as the question posed is not *which law is applicable* but rather *whether the rule in question is applicable* according to its application rule. The applicable law is determined on the basis of the particular substantive rule rather than on the basis of the situation, which is characteristic for traditional conflict-of-law rules (i.e. reference rules) according to *Savigny*. On the other hand, application rules contain a coordination mechanism regarding conflicting rules. In this sense, traditional conflict-of-law rules and applicability criteria address exactly the same problem. Unlike reference rules, however, the conflict-of-law character of rules that determine the (territorial) scope of application of the instrument of which they are part is disputed.

First, the nature and character of the principal provisions of the Rome Regulations as reference rules argue in favour of a strict understanding of the term 'conflict-of-law rule', which does not cover application rules.[43] However, the wording of Article 23 Rome I and Article 27 Rome II is not limited to reference provisions and does not distinguish between various types of conflict-of-law rules. Furthermore, EU law contains conflict-of-law rules that deviate from the standard reference rules, such as Article 9 Rome I, which allows a national provision to apply unilaterally.

Second, application rules are often only ancillary provisions.[44] However, Article 23 Rome I and Article 27 Rome II do not refer to instruments consisting *solely* of conflict-of-law rules, but also encompass EU regulations that *contain* conflict-of-law rules, as they refer to (individual) provisions rather than whole instruments.[45] Thus, a single conflict-of-law rule could suffice, e.g. older consumer law directives containing only a single conflict-of-law rule are often referred to as examples.[46]

Third, the purpose of Article 23 Rome I and Article 27 Rome II is to allow an amendment for substantive rules that require the application of a different law.[47] Such a demand also characterises substantive EU regulations (or of individual provisions therein) that determine

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Ferrari and others, *Internationales Vertragsrecht* (2nd edn, Beck 2011, München) Article 23 para 3 (regarding the Passengers Rights Regulation); Magnus in Staudinger, *BGB XIII* (Sellier 2016, München) Article 23 Rom I-VO para 17. Inconclusive Dieter Martiny in *Münchener Kommentar zum BGB* (7th edn, C.H. Beck 2018, München) Article 23 Rom I-VO para 8.

[42] See in detail Kropholler (n 40) 190.

[43] Wagner (n 40) 107 ff; Schilling (n 5) 778 ff.

[44] Wagner (n 40) 107 ff.

[45] Similarly Jayme and Nordmeier (n 41) 507 (regarding Article 25 Rom I-VO).

[46] Leible (n 41) Article 23 Rome I para 9. Regarding the possibly (exclusive) external competence of the EU also for uniform substantive law due to such a broad understanding of conflict of laws (also) in the context of Article 25 Rome I and Article 28 Rome II see Wagner (n 40) 108 (footnote 61); Schilling (n 5) 779. See also Dieter Martiny in *Münchener Kommentar zum BGB* (7th edn, C.H. Beck 2018, München) Article 25 Rom I-VO para 4.

[47] Roth (n 27) 323.

their territorial/international scope of application independent from the otherwise applicable law.[48] As a test, one could ask whether the substantive provisions in question want to be applied without reference to the general conflict-of-law rules. In this regard, the ECJ pays particular attention to the wording and objectives of the EU legislation in question, insofar as it asks whether the legislation intends to lay down conflict-of-law rules.[49] If this question is answered in the affirmative, such application rules must be qualified as (accessory) unilateral conflict-of-law rules *(akzessorische Kollisionsnormen).*[50] Primacy of uniform law can be justified, as application rules take precedence due to the *lex specialis*-principle.[51] With this in mind, Article 23 Rome I and Article 27 Rome II are not applicable if an EU legal instrument does not display any conflict-of-law character but rather requires the national legislator to devise protective measures in general.[52] Therefore, Article 28 Directive 2009/103, which allows the Member states to maintain or bring into force more favourable provisions, was not regarded as a conflict-of-law rules by the ECJ.[53]

Besides express provisions regarding the scope of application, Article 23 Rome I and Article 27 Rome II ought to encompass implicit application rules as well, in spite of referring to 'provisions'.[54] To distinguish formally between express and implied application rules would result in an artificial distinction that cannot be justified. Moreover, Article 23 Rome I and Article 27 Rome II probably should not be limited to directly applicable EU rules, but should be understood to encompass also national law that transposes EU law.[55] Article 20 Rome Convention, the predecessor of the Rome I Regulation, even mentioned harmonised law explicitly; however, one must keep in mind that the legislator altered the wording of the provision. Also, EU Directives (and national law implementing such EU Directives) pose particular challenges, as they rarely contain unambiguous provisions and differing Member State transpositions cause further divergences (e.g. Article 3 E-Commerce Directive). [56]

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[48] Similarly, as regards overriding mandatory provisions, Hemler (n 26) 180.

[49] Case C-149/18 *Agostinho da Silva Martins,* para 38; Joined Cases C-359/14 and C-475/14 *ERGO Insurance* ECLI:EU:C:2016:40, para 39.

[50] Kreuzer (n 40) 46; Jan Kropholler, *Internationales Privatrecht* (6th edn, Mohr Siebeck 2006, Tübingen) 97; Maultzsch (n 37) Article 9 Rom I para 205.

[51] Extensively, Kropholler (n 40) 189 ff. See also Kieninger (n 41) Article 23 para 3; von Hein (n 40) Einl IPR paras 96–98.

[52] Thorn in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht III* (4th edn, Otto Schmidt 2016, Köln) Article 23 Rom I-VO para 6. Similarly Stefan Leible and Matthias Lehmann, 'Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I")' [2008] RIW 528–543, 531.

[53] Case C-149/18 *Agostinho da Silva Martins.*

[54] Roth (n 27) 314.

[55] See also Case C-149/18 *Agostinho da Silva Martins,* para 36 ff; Joined Cases C-359/14 and C-475/14 *ERGO Insurance,* para 38 ff; Leible (n 41) Article 23 Rome I para 5; Eichel (n 41) Article 27 Rome II para 2.

[56] Roth (n 27) 315.

3 Some Examples

Contrary to – for example – Article 14b Directive 2009/103,[57] which does not qualify as a conflict-of-law provision for subrogation between insurers according to the ECJ,[58] Article 3 GDPR expresses a request for the substantive rules of the GDPR to be applied despite the otherwise applicable national law. It defines independently a particular international scope of application for EU data protection law. Such a rule would be redundant if the general PIL provisions were to be nonetheless applied, as data processors could choose a foreign substantive law to apply and thus deselect the (probably) more protective EU law. Actually, the ECJ considers Article 4 (1) (a) Data Protection Directive 95/46, which precedes Article 3 GDPR, to be a conflict-of-law rule, as it refers to this rule in order to determine the applicable law in the *Verein für Konsumenteninformation/Amazon* Case.[59] Similarly, the Austrian Supreme Court considers Article 4 (1) (a) Data Protection Directive to be 'a special rule' in the context of Article 6 (1) Rome I.[60] Although it is true that – contrary to Article 4 Data Protection Directive – Article 3 GDPR does not indicate the applicable national law but rather the applicable EU law, both rules determine the scope of application of the substantive rules contained in the respective instrument. As such, they have a conflict-of-law character although they do not qualify as traditional all-sided reference rules and thus qualify as special conflict rules according to Article 23 Rome I and Article 27 Rome II.[61] To differentiate between both rules on account of their wording would seem artificial.

Similarly, the Passengers' Rights Regulation contains, in its Article 3, an application rule that should be qualified as special conflict-of-law provision pursuant to Article 23 Rome I.[62] It stipulates in Article 3 (1) a that it shall apply to 'passengers departing from an airport located in the territory of a Member State to which the Treaty applies'. It demands the application of its rules, irrespective of a dissenting choice of law or the substantive law applicable to the transportation contract. By qualifying Article 3 as a special conflict-of-law provision, one also avoids the categorisation of all substantive rules of the Passengers' Rights Regulation as overriding mandatory provisions and an accompanying overextension of this notion.

As a final example, the – discarded – proposal for a Common European Sales Law (CESL) can be named. It also contains a provision that determines its international and territorial

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[57] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

[58] Joined Cases C-359/14 and C-475/14 *ERGO Insurance,* paras 38–42; generally Case C-149/18 *Agostinho da Silva Martins,* paras 36–42.

[59] Case C-191/15 *Verein für Konsumenteninformation* ECLI:EU:C:2016:612, paras 72–81. In detail Müller (n 25) 215 *passim*.

[60] OGH 2 Ob 155/16g, JBl 2018, 464 = jusIT 2018, 54 *(Thiele; Mader)* = ÖBl 2018, 249 *(Handig).*

[61] See Martina Melcher, 'Es lebe das Territorialitätsprinzip?' in Susanne Gössl and others (eds), *Politik und Internationales Privatrecht (?)* 129–147, 137 ff. See also Maultzsch (n 37) Article 9 Rom I para 271. Dissenting Brkan (n 25) 341 (differentiating between Article 4 Data Protection Directive and Article 3 GDPR).

[62] Similarly, Roth (n 27) 314.

scope of application. However, according to its recitals 10 and 15, it was not intended that the CESL should be applied before the determination of the applicable law, but was meant to be subject to the applicable conflict-of-law rules. Notwithstanding the (convincing) critique issued by some scholars regarding the intended link between the applicability of a Member State's law and the CESL as an optional 2nd regime[63] and the likely competence-inspired nature of this approach,[64] this shows that application rules should not qualify as conflict-of-law rules in a categorical manner, but subject to a case-by-case analysis only.

Conclusion

As this paper illustrates, a coordination of traditional PIL rules that determine the applicable law 'from the facts' *(vom Sachverhalt aus)* and substantive provisions, which lay down their own (international) scope of application ('from the rule'; *von der Norm aus*) is challenging. In this paper it is suggested that application rules should qualify as *leges specialis,* which penetrate the general PIL connecting system (also) in EU law. This approach respects normative hierarchies and avoids an overloading of Article 9 Rome I and Article 16 Rome II and of the (ambiguous) notion of an 'overriding mandatory provision', which require a strict interpretation.[65] At the same time, it provides a way to deal with an increasing number of EU legislative acts that determine their own scope of application.

Despite these advantages, this approach also provides some challenges, in particular as regards questions of competence. If (scope of) application provisions may be qualified as conflict-of-law rules, one might argue in favour of Article 81 TFEU as an (additional?) competence base. Given the ancillary nature of these provisions, the assumption of an ancillary competence might however resolve this issue in a simple manner. It might prove more complex, though, with regard to the external competence of the EU if one applies this extended understanding of conflict-of-law provisions – as seems only reasonable – also to Article 25 Rome I and Article 28 Rome II regarding uniform substantive law in international conventions.

This research question therefore certainly merits further attention and a more in-depth discussion. In the end, however, the question of whether uniform substantive law is to be applied as overriding mandatory law, due to special conflict-of-law rules, or enjoys a principled 'categorical precedence' remains primarily a methodological one – the result is the same: substantive EU rules that demand to be applied, irrespective of the otherwise applicable (national) law, take precedence.

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63 Eidenmüller and others (n 7) 21; von Hein (n 4) 375, 389.

64 See Jan von Hein in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht III* (4th edn, Otto Schmidt 2016, Köln) Article 25 para 8a.

65 See also Mankowski (n 37) Article 23 Rome I para 15. In this regard, also the case C-381/98 *Ingmar* (and C-184/12 *Unamar*) and its broad understanding of an overriding mandatory provisions should be challenged.

Theses

1. A (principle of) categorical precedence which gives priority to uniform substantive law over uniform PIL laws must be qualified as a conflict-of-law rule. Although, a methodological account is often missing, it must in essence be based on a *lex specialis* reasoning. References to such a general principle are superfluous, if explicit EU conflict-of-law provisions already ensure such a precedence.
2. The material qualification of a rule as an overriding mandatory provision should be distinguished from its application as an overriding mandatory provision.
3. Whether a provision is of an overriding mandatory nature has to be determined individually for each provision and cannot be generalised for a legislative act as such.
4. Article 9 Rome I and Article 16 Rome II encompass only overriding mandatory provisions that qualify as rules relating to civil and commercial matters. Other rules fall outside the scope of application of the Rome Regulations, so there is no actual conflict of (different substantive) laws as regards rules which do *not* relate to civil and commercial matters. However, the dividing line is blurred and a distinct and precise categorisation of rules on this basis is hardly possible.
5. Substantive rules that (primarily) address and regulate private interests cannot qualify as overriding mandatory provisions according to Article 9 Rome I and Article 16 Rome II. Only rules that are of an overriding mandatory nature *due to* the public interest they address are covered; but, unfortunately, the term 'public interest legislation' leaves much discretion and EU law generally seeks to advance particular social and economic interests.
6. Article 9 Rome I and Article 16 Rome II focus on the substance and intention of a rule and address national provisions rather than EU provisions.
7. Even if a rule materially qualifies as an overriding mandatory provision, it is not necessarily to be applied as such. Several coordination/conflict-of-law rules exist in the context of the Rome Regulations, such as Article 9 Rome I and Article 16 Rome II regarding overriding mandatory provisions and Article 23 Rome I and Article 27 Rome II regarding *leges speciales*.
8. Application rules that form part of EU substantive regulations (usually) qualify as *leges speciales* according to Article 23 Rome I and Article 27 Rome II. A case-by-case analysis is necessary.
9. If an overriding mandatory rule is backed up by a special conflict-of-law rule, Article 23 Rome I and Article 27 Rome II already stipulate their precedence, so there is no need to refer to Article 9 Rome I or Article 16 Rome II (or to employ a general principle of categorical precedence).

Katažyna Bogdzevič*

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

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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 law[11].

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 therein[12]. 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 overridingly 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 Union[14] 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.

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[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]

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[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 2007[27] nor the Hague Convention of 1973[28] provided for overriding mandatory provisions, the courts applied them.[29]

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[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 conventions[30] nor the EU regulations address this issue, and so it is necessary to refer to the national laws in this regard. Both Lithuanian[31] and Polish PIL[32] 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

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[30] T*he 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 EGBGB[36] 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 Constitution[40] 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 countries[47] 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 Regulation[49] 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 conventions[51] 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 stated 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 marriage[66] 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.

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[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 Convention[69] nor the Hague Child Protection Convention,[70] nor the Hague Protocol[71] 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 comprehensive[72] 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 child[74] provides that it has priority over any other Lithuanian law, except

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[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

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[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 Rodziewicz, '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.

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[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 Gnela, '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.

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[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.

Markus Petsche*

The Application of Mandatory Rules[1] by Arbitral Tribunals – Three Salient Issues

Introduction

When arbitral tribunals have to decide whether to apply or give effect to certain mandatory rules, they often face serious challenges. First of all, they are likely to receive no, or only very limited, guidance under the governing arbitration law,[2] the relevant institutional arbitration rules (if any),[3] and any domestic choice-of-law rules that they may consider relevant.[4] Second, they may be called upon to ponder over basic theoretical questions such as the role of arbitrators (must arbitrators seek to defend certain state or public interests and, if so, which ones?) and the legal significance of the place of arbitration (including the 'classic' question of whether, or to what extent, arbitrators can be regarded as having a forum).

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1 Two clarifications need to be made with regard to the meaning of the term 'mandatory rules' (or 'mandatory norms') used in this article. First, this article only deals with the application of mandatory substantive rules, i.e. it is not concerned with the application of mandatory procedural rules (an issue that is far less controversial than the one discussed in this contribution). Second, unless the opposite is expressly stated, the terms 'mandatory rules' or 'mandatory norms' must be understood as referring to 'international' or 'overriding' mandatory norms, not to 'domestic' mandatory norms. For an explanation of this distinction, see s I(3).

2 There does not appear to be a single arbitration statute that contains provisions addressing the application of mandatory rules by arbitral tribunals. For illustrative examples of legislation that is silent on this question, see, for example, UNCITRAL Model Law on International Commercial Arbitration art 28, English Arbitration Act s 46, Swiss Private International Law Statute art 187 and French Code of Civil Procedure art 1511.

3 The rules of arbitration institutions are generally silent as regards the application of mandatory rules. See, for example, ICC Rules art 21, LCIA Rules arts 22(3) and (4), ICDR Rules art 31, VIAC Rules art 24.

4 While domestic private international law statutes generally deal with the issue of the application of mandatory rules, the relevant provisions are typically rather ambiguous, providing limited practical guidance to decision-makers with regard to (a) the identification of mandatory rules and (b) the determination of whether a particular mandatory rule is applicable or should be applied in a given case. See, for example, Swiss Private International Law Statute art 19, which defines mandatory rules as those that reflect 'interests that are legitimate and clearly preponderant according to the Swiss conception of law'. It provides for the application of the mandatory rules of the governing law and also allows for the application of the mandatory rules of a 'foreign law' that is closely connected to the case, provided that their application is appropriate in light of the aims pursued by such rules and the consequences of their application. By any standard, art 19 fails to lay down simple and user-friendly rules governing the application of mandatory norms.

Another factor that complicates the legal analysis and, arguably, casts doubts on whether the question asked (can/should arbitral tribunals apply mandatory rules and, if so, which ones?) is at all appropriately framed pertains to the considerable heterogeneity of the rules that are commonly considered as mandatory norms. Indeed, these rules range from general public law norms, such as antitrust and currency exchange regulations, to decisions of the executive branch of the government (e.g. trade sanctions) to private law norms, in particular those aimed at the protection of weaker parties (consumers, workers, commercial agents etc.).[5] One might wonder whether it is a realistic aim to elaborate a single set of rules that would offer sensible solutions for all these categories of mandatory norms.[6]

Despite the above-mentioned difficulties, scholarly commentators and arbitral tribunals have reached some degree of consensus on a number of fundamental issues:

a) arbitral tribunals *can* apply mandatory norms (i.e. that the applicability of such norms does not render the relevant dispute non-arbitrable);[7]

b) arbitral tribunals *should* or even *must* apply such rules under certain circumstances;[8]

c) the mandatory rules of the *lex contractus* are, in principle always applicable;[9]

d) it is wise to apply the mandatory rules of the seat in the light of enforcement considerations[10] and;

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[5] See, for example, Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27–70, 31 (mentioning that typical examples of 'international' mandatory rules notably include 'rules concerning exchange regulations, antitrust laws, and import and export prohibitions,' while observing that s 27(2) of the English Unfair Contract Terms Act also constitutes such a mandatory norm. See also, with respect to the specific context of the 1980 Rome Convention, Council Report on the Convention on the law applicable to contractual obligations OJ [1980] C282/1 (the 'Guiliano–Lagarde report'). Commenting on Art. 7 of the Rome Convention – which deals with the application of mandatory rules – the authors of the report mention 'rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage' as examples of mandatory norms.

[6] One argument presented in this article, namely the idea that one needs to distinguish between public and private law mandatory norms (and that, as far as the *lex contractus* is concerned, only the mandatory rules of contract law are per se applicable) suggests that the answer to this question is in the negative.

[7] See, for example, Pierre Mayer, 'Mandatory rules of law in international arbitration' (1986) 2 Arbitration International 274–293, 277 (observing that arbitrators have 'nearly unanimously' answered the question of the arbitrability of disputes involving the application of mandatory rules in the affirmative); Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Commercial Arbitration' (1997) 14 (4) Journal of International Arbitration, 23–40, 29–31 (focusing on Swiss arbitration law); Donald Francis Donovan, Alexander K. A. Greenawalt, 'Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators' in Loukas A. Mistelis, Julian David Mathew Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006, 11–60) (examining the arbitrability of antitrust disputes under US law).

[8] See Mayer (n 7), 280–86; Constantin Calavros, 'The application of substantive mandatory rules in International Commercial Arbitration from the perspective of an EU UNCITRAL Model Law jurisdiction' (2018) 34 Arbitration International 219–240, 224 (apparently arguing that where the *lex contractus* is the law of the seat, the mandatory rules of the *lex contractus*/seat must be applied).

[9] See s I.B.

[10] See s I.B. For example, Marcus Commandeur, Sebastian Gößling, 'The determination of mandatory rules of law in International Arbitration – An attempt to set out criteria' (2014) 12 SchiedsVZ 12–20, 16 (observing that, '[g]iven the chance of vacating an award in its forum, mandatory rules are almost considered as a matter of fact

e) the mandatory rules of third countries (i.e. countries other than those of the *lex contractus* and of the seat) may also, under certain circumstances (in particular, when there is a special connection with the parties or the dispute), be applied.[11]

The purpose of this article is not to reiterate any of these points of agreement. Rather, it is to contribute to the academic debate by addressing controversial or unresolved issues and highlighting common misconceptions. Specifically, this study will discuss (a) the still controversial question of whether arbitral tribunals called upon to apply certain mandatory norms have to resort to the conflict norms of the seat, (b) the very widespread, but inaccurate, view that arbitral tribunals necessarily have to apply the mandatory rules of the *lex contractus,* and (c) the legal significance of the territorial scope of application of mandatory rules, an issue frequently overlooked by commentators.[12]

This contribution is divided into four main sections. Section I provides a brief overview of the relevant issues, describing the current state of the academic debate and arbitral case law. Section II argues that arbitral tribunals do not have to apply the conflict norms of the seat. Section III shows that the scope of the *lex contractus* should be construed as covering only rules of contract law and that only the mandatory rules of contract law of the *lex contractus* are thus necessarily applicable. Section IV explains the legal significance of the territorial scope of application of mandatory norms for the purposes of determining whether such norms may or should be applied by arbitral tribunals.

I Overview of Issues

1 Application of Conflict Norms of the Seat

When an arbitral tribunal has to decide on the application of certain mandatory rules, it may ask itself whether it must or should decide this issue on the basis of the conflict of laws (choice-of-law) norms of the seat. The expression 'conflict of laws norms of the seat' (or simply, 'conflict norms of the seat') refers to those conflict norms that the courts of the relevant country are obliged to apply. For example, an arbitral tribunal seated in an EU Member State may ask itself whether it has to apply the Rome I Regulation on the law applicable to contractual obligations (which must be applied by EU courts) and, more particularly, its Art. 9 dealing with the application of overriding mandatory norms.

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by many tribunals'); Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 205–244, 223–24 ('Enforceability concerns should therefore give mandatory rules of the seat a strong claim to be applied, at least insofar as they reflect the relevant public policy').

[11] See Barraclough, Waincymer (n 10) 227–235 (arguing that arbitral tribunals possess discretion in determining whether to apply the mandatory rules of third countries); Commandeur, Gößling (n 10) 16–17 (discussing the application of the so-called 'special-connection' test).

[12] See s I.C.

Scholars generally provide a negative answer to this question. Gary Born, for example, when discussing what he perceives as the 'historic view that international arbitral tribunals were mandatorily required to apply the arbitral seat's choice-of-law rules',[13] observes that 'virtually all developed jurisdictions have abandoned this approach'.[14] A similar view is expressed by other authoritative writers such as the authors of Redfern and Hunter on International Arbitration[15] and those of Fouchard Gaillard Goldman on International Commercial Arbitration.[16] The present author has expressed an opinion that is largely identical to such views.[17]

To a very large extent, arbitral case law confirms the view that arbitral tribunals do not have to apply the choice-of-law norms of the seat. While there are of course arbitral tribunals that have applied the conflict norms of the seat (which does not necessarily imply that they considered themselves *obliged* to apply those rules), many arbitral tribunals have followed different approaches. For example, a number of tribunals have chosen to apply the conflict norms involved cumulatively, i.e. the conflict rules of the parties' respective legal systems and, at times, those of the seat.[18] Other tribunals have resorted to what they perceive as general principles of choice of law,[19] again refusing to consider themselves bound by the seat's conflict norms.

However, the opposite view nevertheless remains alive. In the specific context of the question of the application of mandatory rules, several authors either consider the conflict norms of the seat to be necessarily applicable or advocate their application. Calavros, for example, observing that the Rome I Regulation requires the application of the mandatory rules of the forum, concludes that those mandatory rules must thus be applied by arbitral

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[13] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2630.

[14] Ibid 2631.

[15] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International, Oxford University Press 2015) 222: 'The seat of the arbitration is invariably chosen for reasons that have nothing to do with the conflict rules of the law of the place of arbitration. This has led to the formulation of a doctrine that has found support in both the rules of arbitral institutions and the practice of international arbitration – namely, that, unlike the judge of a national court, an international arbitral tribunal is not bound to follow the conflict-of-law rules of the country in which it has its seat.'

[16] Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999, The Hague – Boston – London) 867–868.

[17] Markus Petsche, 'Choice of Law in International Commercial Arbitration' in Sai Ramani Garimella, Stellina Jolly (eds) *Private International Law – South Asian States' Practice* (Springer 2017, Singapore, 19–37) 21–26 (discussing arbitral discretion in choice-of-law determinations and several approaches followed by arbitral tribunals in the exercise of such discretion).

[18] See, for example, *Egyptian Company (buyer) v Yugoslav Company (seller)* (Final Award, ICC Case No. 6281, 26 August 1989) (1990) 15 Yearbook Commercial Arbitration 96, 97–98; *Manufacturer v Distributor* (Partial Award, ICC Case No. 7319, 1992) (1999) 24 Yearbook Commercial Arbitration 141, 145; *Licensor and buyer v Manufacturer* (Interim Award and Final Award, 17 July 1992 and 13 July 1993) (1997) 22 Yearbook Commercial Arbitration 197, 203. Evidently, such an approach is only feasible where the different conflict norms all refer to the same law.

[19] See, for example, *Indian Company v Pakistani Bank* (Award, ICC Case No. 1512, 1971) (1976) 1 Yearbook Commercial Arbitration 128, 130; *Seller v Buyer* (Interim Award, ICC Case No. 6149, 1990) (1995) 20 Yearbook Commercial Arbitration 41, 54.

tribunals, 'provided that the Rome I Regulation is effective in the State of the place of arbitration.'[20] Even Born, who is otherwise critical of the idea that arbitral tribunals should be bound by the conflict norms of the seat, argues that, when determining the applicability of mandatory rules, arbitral tribunals 'should presumptively apply the choice-of-law rules of the arbitral seat.'[21]

In arbitral practice, it is not uncommon for arbitral tribunals to apply the conflict norms of the seat. It is true that it is not always clear whether arbitral tribunals apply those rules because they are the rules of the seat or for some other reason. However, in the absence of any contrary indication, it is reasonable to consider that such determinations are based on the assumption that arbitral tribunals must or should apply the choice-of-law rules of the seat. Thus, decisions of arbitral tribunals seated in the Netherlands and Sweden applying Art. 7 of the 1980 Rome Convention can be regarded as illustrative of this approach.[22]

2 Application of the Mandatory Rules of the *Lex Contractus*

The clearly predominant view in both scholarship and case law is that arbitral tribunals must apply the mandatory rules of the *lex contractus,* i.e. of the law governing the contract. Neither scholars, nor arbitral tribunals seem to have subjected this proposition to any restrictions arising from (a) the specific choice-of-law norms that may be held to be applicable or (b) the nature or type of the particular mandatory rule in question (in particular, no distinction is made based on the public or private law nature of the relevant rule).

It can be assumed that this understanding originates, at least in part, from the language used in the relevant provisions of domestic conflict of laws statutes, and the generally accepted interpretation of those provisions. In Switzerland, for example, Art. 19(1) of the PILA provides that 'a mandatory provision of another law than the one referred to by this Act [i.e. in contractual matters, the *lex contractus*] may be taken into consideration, provided that the situation dealt with has a close connection with such other law'. Although this is not an inevitable conclusion, this sentence may reasonably be understood as implying that the mandatory provisions of the *lex contractus* are by definition applicable.

A very similar rule can be found in the 1980 Rome Convention. Art. 7 provides that '[w]hen applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection…' Like Art. 19(1) Swiss PILA, this provision can be understood as implying that the mandatory rules of the *lex contractus* are necessarily applicable. Additional support for such an interpretation is provided by the semi-official commentary to the Convention, the well-known Guiliano-

[20] Calavros (n 8) 225.

[21] Born (n 13) 2707.

[22] See *Austrian Company (Seller) v Dutch Company (Buyer)* (Award, 11 January 1982) (1983) 8 Yearbook Commercial Arbitration 158, 160 (applying, without expressly referring to it, Art. 7 of the Rome Convention); *Distributor (EU country) v Manufacturer (EU country)* (Final Award, SCC Case No. 158/2011) (2013) 38 Yearbook Commercial Arbitration 253, 269–70.

Lagarde report.[23] In their commentary, the authors explain that Art. 7 of the Convention reflects the established 'principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract',[24] clearly suggesting that the mandatory provisions of the *lex contractus* are applicable as such.

Art. 9 of the Rome I Regulation (which transforms the Convention into a piece of EU legislation, while introducing some changes) can similarly be read as supporting the view that the mandatory rules of the *lex contractus* are necessarily applicable. Like its predecessor, it singles out the mandatory rules of the forum (which courts can always apply).[25] As regards the mandatory rules of other countries, it does not use language similar to that employed in the Convention, given that it only condones the application of the mandatory rules of the place of performance.[26] However, the mere fact that Art. 9 specifically addresses the application of the mandatory rules of both the forum and the place of performance, while omitting to deal with the mandatory norms of the *lex contractus,* suggests that the applicability of the latter was considered to be self-evident.

Scholarly writers almost unanimously acknowledge the general recognition of the principle that the mandatory rules of the *lex contractus* must be applied. However, most of them, including Mayer,[27] Zhilsov,[28] Barraclough/Waincymer,[29] and Calavros,[30] fail to provide a specific justification for this principle, seemingly taking it for granted. Amongst the few authors who have sought to explain the applicability of the mandatory norms of the *lex contractus,* two basic approaches can be distinguished. Under one approach, the applicability of those mandatory norms results from the fact that they fall, presumably as a purely legal matter, within the scope of the *lex contractus*.[31] Under another approach, the mandatory norms of the *lex contractus* are not applicable per se; whether or not they are will depend on

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[23] See n 5.

[24] Ibid 26.

[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) [2008] OJ L177/6 (Rome I Regulation) art 9(2).

[26] Rome I Regulation art 9(3).

[27] Mayer (n 7) 280 (stating, without any particular explanation, that the mandatory rules of the *lex contractus* are unquestionably applicable when (a) they have not been excluded by the parties and (b) one party has invoked them before the tribunal).

[28] A.N. Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 Netherlands International Law Review 81–119, 109 (observing, without offering a personal opinion or analysis, that 'most commentators agree that an arbitrator should apply the law as it stands, including its mandatory rules').

[29] Barraclough, Waincymer (n 10) 219–223 (discussing in some detail – but without examining its foundation – the view that the mandatory rules of the *lex contractus* should in general be applied and, what is more, regardless of whether the *lex contractus* was chosen by the parties or determined by the arbitral tribunal).

[30] Calavros (n 8) 227 ('It follows from the foregoing considerations [which are unfortunately very difficult to comprehend] that the mandatory rules of law of the *lex contractus* are in any event applicable for the resolution of the underlying dispute submitted to international arbitration').

[31] See Commandeur, Gößling (n 10) 15 (noting that 'the mandatory rules of that substantive law [the *lex contractus*] must be applied… [because] [t]he selection of the law of a particular jurisdiction is considered to naturally include the selection of mandatory rules and public policies of that jurisdiction').

the will of the parties and, more specifically, on the wording of the choice-of-law provision contained in the contract, if any.[32]

Unsurprisingly, numerous arbitral tribunals have recognised the applicability of the mandatory rules of the *lex contractus*. Illustrative examples notably include the award in ICC case No. 4237 (affirming, in general terms, that arbitrators can apply trade usages and contractual stipulations only to the extent that 'they do not deviate from the mandatory rules of the applicable law');[33] the award in ICC case No. 14046 (examining compliance of a contractual provision contained in a contract governed by Italian law with Italian antitrust law);[34] and the award in ICC case No. 12127 (applying French competition law to a contract subjected to French law).[35]

3 Territorial Scope of Application of Mandatory Rules

Like all legal norms, mandatory rules necessarily have a particular scope of application. They have, first of all, a material or substantive scope of application, i.e. they will only apply to certain categories of contracts or certain types of actions or conduct. Mandatory rules protecting commercial agents, for example, only apply to commercial agency agreements. Likewise, mandatory rules of competition law only apply to conduct that has the effect of excluding or distorting competition in a particular market.

Mandatory rules also have a territorial scope of application. Broadly speaking, one can distinguish between so-called 'domestic mandatory rules' and 'international mandatory rules'.[36] The former consist of norms of a particular legal system that are mandatory in a domestic context only, i.e. in connection with contracts that do not present any connection with countries other than the country that has enacted the relevant mandatory rule. The latter comprise norms that are mandatory in an international context, i.e. when the contract is connected to more than one country. It has to be noted that certain mandatory norms are by definition (only) applicable in an international context because they are not concerned with purely domestic conduct (e.g. currency exchange regulations, import/export restrictions, etc.). In some cases, the determination of the specific territorial scope of application of a mandatory norm may be difficult.[37]

When a particular situation or contract falls within both the material and the territorial scope of application of a specific mandatory rule, then – to use the customary expression –

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[32] See Born (n 13) 2708 (noting that 'the question whether a particular mandatory rule is within the scope of the choice-of-law agreement will require interpretation of the choice-of-law agreement').

[33] *Syrian State trading organization, buyer v Ghanaian State enterprise, seller* (Award, ICC Case No. 4237, 17 February 1984) (1985) 10 Yearbook Commercial Arbitration 52, 55.

[34] *Company A (Italy) v 6 Respondents (Italy)* (Final Award, ICC Case No. 14046) (2010) 35 Yearbook Commercial Arbitration 241, 243.

[35] *Licensor (France) v Licensee* (US) (Award, ICC Case No. 12127, 2003) (2008) 33 Yearbook Commercial Arbitration 82, 84.

[36] See, for example, Chong (n 5) 31.

[37] See s IV.A.

that rule is applicable 'on its own terms'.[38] Applicability on its own terms (which can also be referred to as 'internal' applicability) is of course not generally viewed as sufficient for a court or arbitral tribunal to apply the mandatory norm at stake[39] (with the exception of the mandatory norms of the forum, which are necessarily applied by the courts concerned). The crucial issue – which renders the analysis so complex and controversial – is in fact whether, or under what circumstances, certain mandatory norms that are applicable on their own terms must or should be applied by courts or arbitral tribunals (i.e. their 'external' applicability).

It is due to this focus on the external applicability of mandatory rules that legal scholars have largely neglected the analysis of the scope of application of such rules and, more particularly, of their territorial scope of application. This has led to some confusion and created misunderstandings. In fact, as has been explained above, many authors consider the mandatory norms of the *lex contractus* to be necessarily applicable, apparently implying that those rules are applicable regardless of whether their own territorial applicability requirements are met.[40] Thus, Swiss competition law would in principle be applicable to a contract between a US and a Japanese party subjected to Swiss law, even though the contract is very unlikely to fall within its territorial scope of application (given that it most probably cannot have any effect on the Swiss market) – a solution which defies common sense.[41]

As will be explained in Section IV, the determination of the territorial scope of application of mandatory norms constitutes a significant aspect of the broader question of the application of mandatory norms by arbitral tribunals and thus deserves closer examination. As will be shown, arbitral tribunals should never apply mandatory rules if the contract or situation does not fall within their territorial scope of application. In addition, the territorial scope of application of a mandatory norm may be relevant to determine whether such norm qualifies at all as an 'overriding' or 'international' mandatory norm, i.e. whether it meets the threshold generally required in the context of international litigation and arbitration.[42]

II Arbitral Tribunals neither Must, nor Should Apply the Conflict Norms of the Seat

As has been explained above, the question of whether arbitral tribunals must or should apply the conflict norms of the seat is still rather controversial. Tackling this controversy, this Section answers both questions in the negative, i.e. it argues first that arbitral tribunals are not

[38] This terminology is commonly used by authors from common law jurisdictions. See, for example, Chong (n 5) 48; Born (n 13) 2711 (noting that, 'by their own terms, the public policies and mandatory laws of the seat may not be applicable to the parties' dispute').

[39] See Chong (n 5) 48 (observing that '[i]t is obvious that the fact that the foreign rule may be applicable on its own terms to the contract in question is not sufficient to render it applicable').

[40] See ns 27–32.

[41] See s IV.A.

[42] See s IV.B.

obliged to apply the seat's conflict norms and, second, that it is generally not advisable for them to do so. The first argument finds support in the absence of any relevant statutory or institutional requirements (1). The second argument is based on the observation that the application of the conflict norms of the seat would be incompatible with established choice-of-law principles in the field of international commercial arbitration (2) and the fact that domestic conflict rules governing the application of mandatory rules are likely to be unsuitable in the context of international arbitration (3).

1 Absence of Statutory or Institutional Requirements to Apply the Conflict Rules of the Seat

It would, in theory, not be impossible for arbitration laws and institutional arbitration rules to require arbitral tribunals to apply the choice-of-law norms of the seat. The arbitration statute of country X could indeed provide for the mandatory application of X's domestic conflict norms, or a specific part thereof (e.g. the part dealing with contractual obligations). A similar approach could, in principle, also be adopted by the drafters of institutional arbitration rules.

However, as a matter of positive law, no such provisions are contained in either arbitration statutes or institutional arbitration rules. Most arbitration statutes contain one single article dealing with the law applicable to the merits,[43] typically laying down two basic principles: (1) that the parties are free to choose the applicable law (party autonomy)[44] and (2) that, absent a choice of law by the parties, arbitral tribunals enjoy broad discretion in the determination of the applicable law.[45] No reference whatsoever is generally made to the domestic conflict norms of the seat (or any other country, for that matter).

The absence of any obligation to follow the conflict rules of the seat also characterises institutional arbitration rules. In fact, the rules of leading institutions such as the ICC, LCIA, ICDR, and VIAC do not provide for any such duty.[46] Like arbitration statutes, they are typically limited to a statement of the two basic principles referred to above, i.e. of choice-of-law party autonomy and arbitral discretion.[47]

[43] See, for example, Model Law art 28, English Arbitration Act s 46, Swiss Private International Law Statute art 187, French Code of Civil Procedure art 1511.

[44] See, for example, Model Law art 28(1): 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.'

[45] See, for example, Model Law art 28(2): 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'

[46] ICC Rules art 21, LCIA Rules arts 22(3) and (4), ICDR Rules art 31, VIAC rules art 24.

[47] Ibid.

2 Incompatibility of the Application of the Conflict Norms of the Seat with Established Choice-of-Law Principles in the Field of International Arbitration

As has been explained above, the two basic choice-of-law principles in the field of international commercial arbitration are party autonomy and arbitral discretion. As far as party autonomy is concerned, it is characterised by a particularly high level of such autonomy, insofar as the parties are generally entitled not only to choose whichever domestic law they deem suitable, but also to opt for the application of so-called non-national or transnational law (for the sake of simplicity, reference will be made hereinafter to 'non-national' law only). In fact, most arbitration statutes do not allow the parties to select the applicable 'law', but 'rules of law',[48] a concept that is generally understood as encompassing non-national law. The ability of the parties to choose non-national law is, today, almost universally recognised.[49]

The second principle, arbitral discretion, means that arbitral tribunals have considerable power in determining the applicable law. The specific level of arbitral discretion may vary from one jurisdiction to another. Under the laws of a few countries, arbitral tribunals enjoy particularly broad discretion, given that they are empowered not only to select a particular domestic law, but also to choose non-national law.[50] In most legal systems, however, arbitral tribunals are free to choose the applicable law, but that law must be a particular domestic law. In fact, under the relevant statutes, arbitral tribunals must apply conflict norms (which they can freely choose), which implies that they will ultimately apply a particular country's domestic law.[51]

The application of the domestic conflict norms of the seat (or any other country) is likely to conflict with the well-established principles of party autonomy and arbitral discretion. In fact, as regards the former principle, it has to be observed that domestic choice-of-law rules in matters of contract do not generally allow parties to opt for non-national law. The Rome I Regulation, for example, recognises the principle of choice-of-law party autonomy, enabling parties to a contract to choose the applicable law freely.[52] However, as the language used in the relevant provision suggests (the parties are free to choose the 'law' governing the contract), the parties must choose a particular domestic law, i.e. they cannot select non-national rules.[53]

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[48] See, for example, Model Law art 28(1).

[49] See, for example, Blackaby (n 15) 206–11 [discussing the use of the *lex mercatoria* (a particular form of non-national law) in international arbitration].

[50] An example is French arbitration law. See French Code of Civil Procedure art 1511 which provides that, in the absence of a choice of law by the parties, an arbitral tribunal shall apply 'the *rules of law* it considers appropriate' (emphasis added).

[51] See, for example, Model Law art 28(2).

[52] See Rome I Regulation art 3, which provides that: 'A contract shall be governed by the law chosen by the parties.'

[53] For recent scholarly commentary on this particular feature of the Rome I Regulation, see, for example, Markus Petsche, 'The Application of Transnational Law (Lex Mercatoria) by Domestic Courts' (2014) 10 Journal of Private International law 489–515, 493–94.

The application of the conflict norms of the seat would also undermine arbitral choice-of-law discretion. In fact, domestic conflict of laws statutes do not generally grant any discretionary powers to courts. Instead, they lay down rather detailed choice-of-law rules using various connecting factors. Under the Rome I Regulation, for example, there are specific conflict norms for different categories of contracts. For example, a contract for the sale of goods is, in the absence of a choice of law by the parties, in principle governed by the law of the country where the seller has his habitual residence,[54] while a distribution agreement would in principle be governed by the law of the country where the distributor has his habitual residence.[55] It is true that the Regulation contains a so-called escape clause, under which a different law may be determined to be applicable.[56] However, this escape clause is not intended to confer broad discretionary powers upon courts (or arbitrators); rather, it is intended to apply in those (presumably very rare) cases in which the relevant connecting factors fail to lead to the application of the law of the country presenting the closest connection to the contract.[57]

The incompatibility of domestic conflict norms with the principles of choice-of-law party autonomy and arbitral choice-of-law discretion is not merely a formal problem; it affects the substance of the parties' interests. In fact, the principles concerned have not been elaborated randomly or without reason; rather, they serve specific underlying purposes. The parties' ability to select non-national law (such as, for example, general principles of law, the UNIDROIT Principles of International Commercial Contracts, or rules common to the parties' respective legal systems) is intended to address the perceived deficiencies of domestic laws and to allow the parties to select rules that they consider as neutral and/or well-balanced.[58] Arbitral choice-of-law discretion has developed in response to the perceived rigidity and obscurity of domestic conflict norms and seeks to promote the fairness and predictability of arbitral choice-of-law determinations.[59] The achievement of both of these objectives would be compromised if arbitral tribunals had to apply the conflict norms of the seat (or any other domestic conflict norms, for that matter).

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[54] Rome I Regulation art 4(1)(a).

[55] Rome I Regulation art 4(1)(f).

[56] Rome I Regulation art 4(3).

[57] Rome I Regulation art 4(3) provides that: 'Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 [which contains specific choice-of-law rules for different categories of contracts] or 2 [which provides for the application of the characteristic-performance test in the event that the applicable law cannot be determined under paragraph 1], the law of that other country shall apply.'

[58] See, for example, Blackaby (n 15) 201 (referring to the search for a neutral law in the specific context of State contracts and beyond).

[59] See, for example, Petsche (n 17) 26–28 (explaining arbitral choice-of-law discretion on the basis of the need to ensure the predictability and legitimacy of choice-of-law determinations). Based on a concrete example, the author explains the paradoxical idea that increased autonomy in the determination of the applicable law may, in individual cases, improve the predictability of such determinations.

3 Questionable Suitability of Domestic Conflict Norms Governing the Application of Mandatory Rules

As has been shown above, the application of the conflict norms of the seat may conflict with established principles of choice-of-law in international commercial arbitration. It is thus preferable if arbitral tribunals do not apply such rules or, at the very least, ensure that their application does not threaten the parties' legitimate interests. Now, it could of course be argued that arbitral tribunals should only apply those conflict norms of the seat that deal with the application of mandatory rules, a suggestion that would entail some form of 'dépeçage' at the level of choice-of-law rules. However, this would not be a suitable approach. For one, such dépeçage could be a source of potential complications. Moreover, and more importantly, it is questionable whether domestic conflict norms addressing the applicability of mandatory rules are at all suitable for use by arbitral tribunals.

First of all, those conflict norms almost inevitably allow (or require?) domestic courts to apply the mandatory rules of the forum.[60] An Italian court, for example, will always be entitled (and will generally make use of this right) to apply mandatory rules of Italian law. The well-known reason for this is that the Italian court is an organ of the Italian state, charged with the application of the law and the protection of the basic public interests of the Italian legal order. Quite clearly, the same cannot be said about an arbitral tribunal seated in Italy. It might be argued that such a tribunal, due to the dual contractual and judicial nature of arbitration,[61] should take into account and protect certain State interests, but there appears to be no reason why the interests of the place of the seat should receive priority over those of any other country.[62] It is true that enforcement considerations may ultimately prompt an arbitral tribunal to apply the mandatory rules of the seat, but it is also true that the internationally binding nature of annulment decisions of the seat is questioned with increasing frequency, i.e. the courts of a number of countries have on occasion enforced arbitral awards that had been set aside at the seat.[63] Thus, the non-application by an arbitral tribunal of the mandatory rules of the seat does not necessarily preclude the enforcement of the award in third countries.

Second, as regards the mandatory rules of third countries (i.e. countries other than the forum), two basic justifications are generally provided for their application by domestic courts:

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[60] See Rome I Regulation art 9(2) ('Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.'); Swiss Private International Law Statute art 18 ('This Act is subject to those mandatory provisions of Swiss law which, by reason of their special aim, are applicable regardless of the law referred to by this Act.').

[61] On this dual nature of arbitration, see, for example, Barraclough, Waincymer (n 10) 209–11 (discussing contractual, jurisdictional, and hybrid theories of arbitration).

[62] See Mayer (n 7) 283: 'Such a distinction [between the *lex fori* and foreign law] is clearly not to be made by arbitrators, because they do not have a forum. They are not faced with domestic mandatory rules as opposed to foreign mandatory rules, but simply with mandatory rules external to the *lex contractus*… For this reason, the arbitrator's position is more favourable to an objective weighing of the interests that militate in favour of applying the mandatory rules and the *lex contractus,* respectively: he views all laws as being of equal dignity.'

[63] For discussion of the relevant case law, see Blackaby (n 15) 634–638.

first, the actual interest in their application of the State concerned and, second, comity, a principle that requires respect for the rules and decisions of other jurisdictions, notably to ensure peaceful and harmonious relations between the countries concerned.[64] None of these underlying rationales is necessarily applicable in the context of international arbitration. In fact, if one views arbitration primarily (or exclusively) as a creature of contract, there is no compelling reason why arbitral tribunals should take State interests into account, whether those of the country of the seat or any other country. As to comity, this is plainly not applicable because arbitral tribunals are not charged with the task of preserving healthy relationships between the country of the seat and other countries.

Last, the relevant domestic conflict norms may not be suitable inasmuch as they might simply unduly restrict the right of arbitral tribunals to assess freely which mandatory rules, if any, to apply. Under the Rome I Regulation, for example, mandatory norms other than those of the forum can only be applied if (a) the rules are rules of the country of the place of performance and (b) those rules render the performance of the contract unlawful.[65] In other words, the Rome I Regulation does not authorise the application of rules of countries other than those of the place of performance, even though they may be closely connected with the dispute.[66] Moreover, the Regulation only allows the application of those mandatory rules of the place of performance that invalidate the underlying contract, i.e. it does not, for instance, authorise the application of protective provisions such as, for example, consumer protection laws or laws protecting commercial agents, which do not have an invalidating effect. Arguably, such restrictions may unduly interfere with the ability of arbitral tribunals to render appropriate decisions.

III Only the Mandatory Rules of Contract Law of the *Lex Contractus* Are Necessarily Applicable

As has been explained above, the vast majority of commentators are of the opinion that the mandatory rules of the *lex contractus* are necessarily applicable. They affirm the applicability of those rules in general terms, without drawing any distinctions between different categories or types of mandatory rules. In particular, they fail to draw a distinction between mandatory norms of public and private law. Thus, according to the prevailing opinion, if Indian law applies to the contract (either because it has been chosen by the parties or because it is otherwise

[64] See Chong (n 5) 35–40.

[65] Rome I Regulation art 9(3): 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.'

[66] This approach is different from the seemingly more flexible one followed in the Swiss Private International Law Statute, art 19 of which merely requires the existence of a close connection between the situation and the law concerned.

deemed to be applicable), all Indian mandatory norms (for example, currency exchange regulations, trade restrictions and competition law rules) will necessarily be applicable.

While most scholars provide little to no justification for the application of the mandatory rules of the *lex contractus,* those that do offer either of two explanations.[67] One explanation consists of the idea that, as a matter of legal principle, the applicable law (and this is not necessarily confined to the *lex contractus,* but also applies to other areas) extends to all rules of the relevant legal system, including its mandatory rules. The alternative explanation focuses on the intent of the parties and posits that the application of the mandatory rules of the *lex contractus* depends on such intent and, more particularly, on the wording of the choice-of-law provision contained in the contract (if any).

As will be shown below, both approaches are flawed or, at the very least, highly questionable. In fact, it is much more sensible to hold that the scope of the *lex contractus* is confined to rules of (private) contract law, thus excluding public law rules and private law rules outside the field of contract law (e.g. tort law). Also, considering that the application of mandatory rules rests upon the importance of the State interests concerned, the intent of the parties should not be a relevant factor, i.e. it should not be possible for the parties to either choose or exclude the application of such rules.

1 The Scope of the *Lex Contractus* Is Confined to Rules of (Private) Contract Law

It is true that domestic conflict of laws statutes do not generally specify that the applicable law refers only to the relevant area of private law (in contractual matters, to the relevant contract law). The Rome I Regulation, for example, specifies which issues fall within the scope of the *lex contractus,* without however expressly restricting such scope to rules of private law. Under Art. 12 of the Rome I Regulation, the *lex contractus* governs: (a) contract interpretation, (b) performance, (c) remedies, (d) the extinction of obligations, as well as prescription and limitation of actions, and (e) the consequences of nullity of the contract.[68] A separate provision of the Regulation essentially extends the scope of the *lex contractus* to the issue of substantive validity.[69]

While the Rome I Regulation does not expressly state that the rules falling within the scope of the *lex contractus* are only rules of (private) contract law, the nature of the issues governed by the *lex contractus* rather clearly suggests that the relevant rules are extremely likely to be rules of contract law. Indeed, one will, for example, not be able to find rules governing remedies for breach of contract outside the boundaries of the relevant contract law. One may, however, hesitate when it comes to the issue of substantive validity. Here, one may indeed

[67] See s I.B.

[68] Rome I Regulation art 12.

[69] Rome I Regulation art 10(1): 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

consider that competition law rules that prohibit certain categories of restrictive agreements are in fact rules that govern the validity of a contract in the sense of the relevant provision of the Regulation. In principle, such rules could thus be considered as falling within the scope of the *lex contractus*.

This is, however, not a sensible approach. There are three – somewhat connected – reasons for understanding the *lex contractus* as exclusively comprising rules of contract law. The first pertains to the very object of the choice of law as a legal area or discipline. In fact, although this may not always be expressly stated, choice of law deals with the determination of the law governing legal relationships or situations of *private* law, which suggests that choice of law is merely concerned with designating the applicable *private* law.[70] This is also implicit in the terminology used in a number of countries to refer to the broader field of conflict of laws (which covers jurisdiction and enforcement of judgments in addition to choice of law), namely the commonly used terms 'private international law' and 'international private law'. In short, choice of law is not, as a matter of principle,[71] concerned with the determination of applicable rules of public law.

The second reason pertains to choice-of-law methodology. It is based on the observation that the determination of the applicable law and the determination of applicable mandatory rules are two separate, entirely independent, issues. They are separate in the sense that different conflict rules or 'standards'[72] are applied to determine the application of a particular governing law, on the hand, and the application of certain mandatory rules, on the other. They are independent insofar as the applicable law is determined without having regard to possibly applicable mandatory rules, and vice versa. Thus, the fact that, say, Chinese law is determined to govern a particular contract has no implications for the determination of possibly applicable mandatory norms other than those that are part of the *lex contractus*.

The third and last reason, which is connected to the second, relates to the fact that the determination of the applicable law and the determination of possibly applicable mandatory norms are based on entirely different considerations. The former focuses on the private interests[73] of the parties and, more particularly, on the need to ensure predictability of the applicable law, which explains the quasi-universal recognition of choice-of-law party autonomy

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[70] See, for example, Gilles Cuniberti, *Conflict of Laws: A Comparative Approach* (Edward Elgar 2017, Cheltenham-Northampton) 1 (defining the object of choice of law as the determination of 'the law governing private relationships').

[71] There is, of course, an exception to this principle. That exception is precisely that choice-of-law rules also address the issue of the application of mandatory rules, many of which are rules of public law. However, arguably, such provisions are largely superfluous because the relevant norms may be applied even without an express legal basis in the relevant choice-of-law principles.

[72] The term 'standard' is used here because it is debatable whether a provision such as Rome I Regulation art 9 can properly be considered as a conflict norm. See also Cuniberti (n 70) 19 (explaining that mandatory rules 'are applied directly, as opposed to other substantive rules which only apply if designated by the relevant multilateral choice of law rule').

[73] See, for example, Cuniberti (n 70) 18 (explaining that choice-of-law rules do not in principle take into account State interests because 'most private law disputes are only concerned with private interests').

in matters of contract. The latter, on the other hand, focuses on the (public) interests of States in the application of specific rules that are considered instrumental for the preservation of vital public interests.[74]

The present author is not the only, or first, person to express the view that only the mandatory rules of *contract* law of the *lex contractus* are necessarily applicable. Such a view appears to be implicit in the reservations that a few scholars have expressed vis-à-vis the principled application of all mandatory norms of the *lex contractus*.[75] The approach advocated in this article has also been adopted by the arbitral tribunal in ICC case No. 7528.[76] In that case, the tribunal refused to apply mandatory provisions of French law governing sub-contracts, arguing that the scope of the *lex contractus* was confined to general contract law.[77]

2 The Parties Can neither Choose, nor Exclude the Application of Mandatory Rules

Some authors argue that whether the mandatory norms of the *lex contractus* apply or not essentially depends on the parties' intent. Thus, they argue, it is primarily a matter of interpretation of the choice-of-law clause contained in the contract. Born, for example, maintains that a choice-of-law clause providing that the contract 'shall be interpreted in accordance with the laws of State X' does not in principle cover non-contractual mandatory provisions.[78] He reaches the same conclusion in relation to a broader (standard) choice-of-law clause under which '[t]his contract shall be governed by the laws of State X', arguing that non-contractual mandatory provisions (he specifically lists competition law, trade controls, and intellectual property rules) would not in principle fall within the scope of such a clause.[79]

Other authors also attach importance to the parties' actual or presumed intent. Derains, for example, claims that whether the mandatory norms of the *lex contractus* apply notably depends on whether it (i.e. the *lex contractus*) has been chosen by the parties (in which case they must be applied)[80] or determined by the arbitral tribunal (in which case they may or may

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[74] Ibid 19.

[75] See, for example, Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 American Review of International Arbitration 319–357, 339–340 ('[T]here is no justification for assuming that the mandatory rules of the *lex contractus* have a special and paramount position and that therefore the interests of the state that provides the *lex contractus* have to be respected with less scrutiny than the interests of other states, simply because they are part of the chosen law.').

[76] *Sub-contractor v Contractor* (Partial Award, ICC Case No. 7528, 1993) (1997) 22 Yearbook Commercial Arbitration 125.

[77] Ibid 128.

[78] Born (n 13) 2708.

[79] Ibid.

[80] Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration,* ICCA Congress Series vol 3 (Kluwer Law International 1987, 227–256) 244 (stating that, 'when the parties have chosen a law to apply to their contract, it will be concluded from the outset that the arbitrator has to apply the mandatory rules of that law').

not be applied),[81] thus attaching significance to the presumed intent of the parties. Even Mayer considers (negative) party intent to be relevant, insofar as he considers that the absence of an express exclusion of the mandatory norms of the *lex contractus* by the parties strongly militates in favour of their application.[82]

The views of these authors are not correct. In fact, they disregard what has been explained above, namely that mandatory rules, by their very nature (and by reason of the public interests involved in their application), are outside the sphere of party autonomy. Thus, the parties should not be allowed to exclude the application of mandatory rules.[83] Conversely, they should not be allowed to choose specific mandatory rules either. More generally, the parties' intent or preference should not be a factor having any impact on whether certain mandatory rules are held to be applicable or not.

IV The Territorial Scope of Application of Mandatory Rules

1 Mandatory Rules Only Apply if the Contract Falls within Their Territorial Scope of Application

It may seem obvious that mandatory rules should only be applied if they are applicable on their own terms and, more particularly, if the territorial requirements for their application are met. However, as has been mentioned above, the categorical affirmation of the applicability of the mandatory rules of certain countries (in particular, of the seat and the *lex contractus*) by a number of authors appears to imply that mandatory norms could be applied even if those requirements are not met. It is thus important to clarify that satisfaction of the territorial requirements of a particular mandatory norm is a necessary prerequisite for its application and should constitute the first step in the analysis performed by arbitral tribunals.

In practice, this first step may often be the end of the analysis, rendering any further inquiry into the appropriateness of applying the mandatory norms of certain jurisdictions (which, as has been seen, may be a very complex exercise) unnecessary. For example, as Born suggests, it is very unlikely for a purely domestic Zambian transaction to fall within the territorial scope of application of either Swiss or US competition law (which may be the law of the seat).[84] Also, an export ban adopted by the country of the seat is obviously not territorially applicable to a transaction that does not involve any exports originating from that country.

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[81] Ibid 245 (noting that in such a case the mandatory provisions of the *lex contractus* do not enjoy any special status when compared to the mandatory rules of other countries).

[82] Mayer (n 7) 280.

[83] That one cannot derogate from, or exclude the application of, mandatory rules is actually part of the very definition of the concept of mandatory rules. See, for example, Rome I Regulation art 9(1), which defines overriding mandatory norms as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, *to such an extent that they are applicable to any situation falling within their scope*, irrespective of the law otherwise applicable to the contract under this Regulation.' (emphasis added).

[84] Born (n 13) 2711.

One may of course argue that by choosing a particular *lex contractus,* the parties have implicitly agreed on the application of all mandatory rules of such law, regardless of whether those rules are applicable on their own terms. For example, one could argue that, by choosing German law to govern their contract, a US and a Japanese party have agreed on the application of EU competition law. This is not, however, a sensible approach. Indeed, as has already been explained, the application of mandatory norms is outside the sphere of party autonomy and parties should thus not be allowed to affirmatively choose certain mandatory norms.

In practice, it may often be difficult to determine the exact territorial scope of application of a given mandatory norm, in particular as far as mandatory rules of private law are concerned. The mandatory French rule prohibiting parties from excluding judicial adaptation of contractual penalties,[85] for example, does not specify its territorial scope of application.[86] Thus, it is only certain that such a prohibition necessarily applies in connection with purely French contracts, i.e. contracts that do not present a connection with any other country, but whether it also applies (and whether a French court would thus necessarily apply such prohibition) in relation to a contract involving a foreign party (or two foreign parties) is a question that is not answered by the provision itself.

Uncertainty may also arise as to the extent to which a particular mandatory norm is applicable in an international context. Under the EU Agency Directive and domestic implementing legislation,[87] for example, provisions protecting commercial agents in the event of contract termination by principals are expressly stated to be of a mandatory nature.[88] This means that they are unquestionably mandatory in a purely EU context, i.e. in connection with contracts involving an EU principal and an EU agent. But what if the principal is not established in the EU? What if the agent is not established in the EU? And what if neither party is established in the EU? None of these questions finds an express answer in the Directive and it is thus for the CJEU to clarify its territorial scope of application.[89]

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[85] French Civil Code art 1231-5 provides:
'Where a contract stipulates that the person who fails to perform shall pay a certain sum of money by way of damages, the other party may be awarded neither a higher nor a lower sum.
Nevertheless, a court may, even of its own initiative, moderate or increase the penalty so agreed if it is manifestly excessive or derisory. Where an undertaking has been performed in part, the agreed penalty may be reduced by a court, even of its own initiative, in proportion to the advantage which partial performance has procured for the creditor, without prejudice to the application of the preceding paragraph. Any stipulation contrary to the preceding two paragraphs is deemed not written.'

[86] Ibid.

[87] Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC) (Agency Directive) [1986] OJ L382/17.

[88] See Agency Directive art 19: 'The parties may not derogate from Articles 17 and 18 [pertaining to the payment of an indemnity or compensation upon termination by the principal of the agency contract] to the detriment of the commercial agent before the agency contract expires.'

[89] The Court has answered the first question in the affirmative, while providing a negative answer to the second one. See Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9325 (first question), Case C-507/15 *Agro Foreign Trade & Agency Ltd v Petersime NV* (second question).

2 Relevance of the Territorial Scope of Application for the Determination of the 'Overriding' or 'International' Character of Mandatory Norms

As has been explained above, one habitually distinguishes mandatory norms that are mandatory in a domestic context (only) from those that are mandatory in an international context. The former are generally referred to as 'domestic mandatory norms', while the latter are labelled 'international mandatory rules'. Since this terminology might suggest that the second category of norms are norms of international law (in particular treaty law), it would in fact be more appropriate to use the terms 'domestically' and 'internationally' mandatory norms instead, emphasising the specific context in which the rules concerned possess a mandatory character (those expressions will be preferred for the remainder of this article).

It should be noted that the distinction between domestically and internationally mandatory norms is not entirely compelling, given that the latter concept is not particularly precise. In fact, there is no such thing as an 'international context'; rather, there are different ways in which a particular transaction may be connected to a plurality of countries. For example, as has been explained above, it does not make much sense to affirm, in general terms, that the EU Agency Directive is applicable in an international context. Indeed, it may apply in some such contexts, but not in others, depending on the specific connections that exist with EU countries.[90]

In arbitral practice, it is well-established that only 'internationally' or 'overriding' mandatory rules should be applied – domestically mandatory norms are essentially irrelevant.[91] In light of the close connection between this particular threshold (overriding mandatory rules) and the territorial scope of application of mandatory rules, it is clear that the territorial scope will generally be decisive as regards whether particular norms meet the relevant threshold. Where this threshold is not met, the application of the mandatory rule concerned is excluded, and there is no need for any further inquiry or assessment.

Conclusion

This article has aimed to contribute to the academic discussion of the application of (substantive) mandatory rules by arbitral tribunals by examining selected controversial or neglected issues, namely: (a) the duty of arbitral tribunals to apply the conflict norms of the seat, (b) the applicability of the mandatory rules of the *lex contractus,* and (c) the relevance of the territorial scope of application of mandatory rules.

Specifically, this contribution has argued that (a) arbitral tribunals are neither bound by the conflict rules of the seat, nor generally well-advised to apply those rules, (b) it is incorrect

[90] See n 88.

[91] See, for example, *Grantor of exclusive distributorship v (Former) exclusive distributors* (Final Award, ICC Case No. 6752, 1991) (1993) 18 Yearbook Commercial Arbitration 54, 56.

to affirm in general terms that all mandatory rules of the *lex contractus* are necessarily applicable, the better view being that only the mandatory norms of *contract* law of the *lex contractus* are applicable *per se,* and (c) the territorial scope of application of mandatory rules is relevant, not only because it constitutes a necessary prerequisite for their application (contrary to what a number of authors suggest), but also because it frequently proves decisive in resolving any threshold issue that may arise.

Uglješa Grušić*

Some Recent Developments Regarding the Treatment of Overriding Mandatory Rules of Third Countries

Introduction

The story of the treatment of overriding mandatory rules of third countries (i.e. the law of which is neither the *lex fori* nor the *lex causae*)[1] in private international law in Europe[2] is well known. Before the adoption of the Rome Convention,[3] national systems of private international law had dealt with third countries' overriding mandatory rules in different ways. English courts pursued a relatively strict approach in the field of choice of law in contract. Most other national systems of private international law were at least as, if not more, open to the idea of giving effect to third countries' overriding mandatory rules. The Rome Convention introduced an era of partially unified treatment of mandatory rules in the field of contract in the European Economic Community. Article 7(1) of the convention allowed the courts of Contracting States to give effect to the overriding mandatory rules of a foreign country with which the situation had a close connection, even if the law of that country was not the *lex causae.* However, seven Contracting States, including the United Kingdom, considered Article 7(1) to be too radical and reserved the right not to apply its provisions. The Rome I Regulation[4] replaced the Rome Convention on 17 December 2009. It achieved a full unification of the treatment of mandatory rules in the field of contract in the European Union ('EU'). The cost of this was a new Article 9(3), which was modelled on the English common law rules on foreign illegality and has significantly curtailed the ability of Member State courts to give effect to third countries' overriding mandatory rules. The drafters of the Rome II Regulation[5] eventually decided not

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1 This article does not deal with the overriding mandatory rules of the *lex fori* and rules which cannot be derogated from by agreement in purely domestic situations.

2 This article deals with some recent developments regarding the treatment of third countries' overriding mandatory rules in Europe. It does not address developments elsewhere.

3 *Convention on the law applicable to contractual obligations, opened for signature on 19 June 1980* [1980] OJ L266/1 (entered into force 1 April 1991).

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

to include a general provision on the treatment of third countries' overriding mandatory rules, although Article 17 of the Rome II Regulation allows Member State courts to take into account the rules of safety and conduct at the place and time of the event giving rise to liability.

The story does not end there. There are some recent developments that bring into question the wisdom of curtailing the ability of the courts to give effect to overriding mandatory rules of third countries. One development is the judgment of the Court of Justice of the EU ('CJEU') in *Greece v Nikiforidis,*[6] in which the court adopted an approach that appears more in line with Article 7(1) of the Rome Convention than Article 9(3) of the Rome I Regulation. Another development is the recent English judgments in *Lilly Icos LLC v 8PM Chemists Ltd*[7] and *Les Laboratoires Servier v Apotex Inc,*[8] in which the courts seem to have expressed a willingness to take foreign illegality into account in a wider set of circumstances than the English common law would have traditionally allowed. These developments prompt us to consider whether the courts should have a wider discretion to give effect to third countries' overriding mandatory rules or whether the CJEU and English judgments rest on shaky foundations.

This article is divided into eight sections. Following this introduction, the next two sections briefly outline the treatment of overriding mandatory rules of third countries under the English common law conflict of laws and pre-Rome Convention Continental systems of private international law. The fourth section describes the solutions adopted in the EU private international law of obligations, namely the Rome Convention, Rome I Regulation and Rome II Regulation. The following two sections present the two abovementioned recent developments. The last section discusses the relevance of these developments for the future of private international law in the EU and England. The final section provides conclusions.

I English Common Law Conflict of Laws

At common law, the law applicable to a private law relationship is in principle determined by virtue of the operation of choice-of-law rules. There are some exceptions to this principle, the most important of which are the operation of domestic overriding statutes and public policy.[9]

The UK constitution is based on the principles of parliamentary sovereignty and legislative supremacy. This has two consequences for choice of law. The first is that English courts apply an English statute to all situations falling within its scope and do not apply an English statute to situations falling outside it.[10] Some statutes expressly define their territorial reach. Usually,

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[6] Case C-135/15 ECLI:EU:C:2016:774, [2016] IL Pr 39. See also *Dana Gas PJSC v Dana Gas Sukuk* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep 177.

[7] [2009] EWHC 1905 (Ch), [2010] FSR 95.

[8] [2014] UKSC 55, [2015] AC 430.

[9] T. Hartley, 'Mandatory Rules in International Contracts: The Common Law Approach' (1997) 266 Hague Recueil 341.

[10] *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823, para 6, referring to *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 (HL), 152: the question of territorial scope 'requires an inquiry to be made as to

however, statues are silent in this respect. If asked to apply such a statute to a private law relationship with an international element, an English court has to construe the statute in order to determine its territorial scope. In performing this task, the courts are guided by the general principle of construction that UK statutes are *prima facie* territorial.[11] Consequently, almost all UK statutes have either express or implied territorial limits. The second consequence is that the determination of the territorial scope of an English statute that contains rules of substantive law does not directly depend on the operation of choice-of-law rules. Parliamentary commands contained in a statute that contains rules of substantive law cannot be restrained by choice-of-law rules. Of course, an English statute can provide expressly or impliedly that it applies only to relationships governed by English law by virtue of the operation of choice-of-law rules, but this is because Parliament so wills, not because a choice-of-law rule so demands.

Because foreign parliaments are not sovereign and foreign legislation does not enjoy supremacy in the UK, an English court will apply a foreign statute only when the foreign law of which it forms part applies by virtue of the operation of English choice-of-law rules. The application of a foreign statute before an English court does not, therefore, depend on the will of the foreign legislature. In order to apply a foreign statute, an English court has to determine whether the issue before the court fits into one of the recognised choice-of-law categories, apply the relevant choice-of-law rule and determine the applicable law – the court will be able to apply the foreign statute only if it forms part of the applicable law so determined. Importantly, statutory claims are not a recognised choice-of-law category as such in English law. Unless the party relying on a foreign statute can plead the application of the foreign law of which the statute forms part by relying on one of the recognised choice-of-law categories, such as contract, tort, unjust enrichment etc., it will not be able to invoke the statute. For this reason, it is said that 'the conflict of laws does not do statutes well'.[12]

Public policy in the English common law conflict of laws operates in negative and positive ways. English courts can refuse to apply a rule of the foreign applicable law if either that rule or its application is contrary to English public policy (negative aspect of English public policy).[13] Even if a relationship is legal under its foreign applicable law, English courts can in some circumstances apply an English rule on illegality, even if that rule is not of statutory origin (positive aspect of English public policy).[14]

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the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?' (Lord Wilberforce). See also Hartley (n 9) 354–55; A. Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] Singapore Journal of Legal Studies 189; cf M. Keyes, 'Statutes, Choice of Law and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 20–21.

[11] *Lawson,* para 6.

[12] Briggs (n 10) 190. See also A. Briggs, *Private International Law in English Courts* (OUP 2014) 13–15.

[13] *Oppenheimer v Catermole* [1976] AC 249 (HL) (foreign racist laws); *British Nylon Spinners v ICI Ltd* [1953] Ch 19 (CA) (application of American anti-trust legislation in England).

[14] *Lemenda Trading Co v African Middle East Petroleum Co* [1988] QB 448, 458-60 (English rule prohibiting contracts to promote sexual immorality and contracts involving corruption in British public life or defrauding the British tax authorities).

Sometimes, a party might argue before an English court that a relationship governed by the law of one country is affected by the operation of an overriding mandatory rule of a third country. The problem of overriding mandatory rules of third countries traditionally arises in the field of contracts. At common law, every contract is governed by its proper law.[15] Two exceptions to this principle, namely the operation of domestic overriding statutes and public policy, have been mentioned. Another exception is often said to have been laid down in cases in which English courts took foreign illegality into account, even if the contract in question was governed by English law in which there was no equivalent illegality. An English court will not enforce an English contract to the extent to which its performance is illegal under the law of the contractual place of performance.[16] Although the matter is controversial, the prevailing view is that this rule forms part of English contract law only, and not of English private international law.[17] An English court will also hold an English contract invalid if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country an act which is illegal under the law of that country, even if that act is not necessarily required by the terms of the contract.[18] The prevailing view is that this is a conflicts rule, not merely a rule of English contract law.[19]

II Pre-Rome Convention Continental Systems of Private International Law

Before the adoption of the Rome Convention, national systems of private international law on the Continent also subjected private law relationships to the law determined as applicable by virtue of the operation of choice-of-law rules. The courts also applied overriding mandatory rules of the *lex fori* to situations falling within their scope[20] and recognised the negative aspect of public policy.

The treatment of overriding mandatory rules of third countries was less uniform. Comparative analyses of the key Continental systems of private international law[21] reveal two

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[15] *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 (HL).

[16] *Ralli Bros v Cia Naviera Sota y Aznar* [1920] 2 KB 287 (CA). See also *Lemenda*.

[17] L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell 2012), paras 32-094, 32-096-32-103; *Ryder Industries Ltd v Chan* [2015] HKCFA 85, para 43 (Lord Collins).

[18] *Foster v Driscoll* [1929] 1 KB 470 (CA); *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 (HL).

[19] *Dicey, Morris and Collins*, para 32-193.

[20] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infant (Netherlands v Sweden) (Advisory Opinion)* [1958] ICJ Rep 55.

[21] T.G. Guedj, 'The Theory of the Lois de Police: A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories' (1991) 39 AJCL 661; A. Bonomi, 'Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment' (1999) I YBPIL 215; P. Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 217–26; M. Wojewoda, 'Mandatory Rules in Private International Law with Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 Maastricht Journal of European and Comparative Law 183;

facts; first, the cases in which Continental courts gave effect to third countries' overriding mandatory rules concerned international contracts; and second, the courts in Europe were willing to give effect to overriding mandatory rules of third countries, in certain circumstances, even before the adoption of the Rome Convention.

Around the middle of the 20th century, German courts and academics developed two theories that justified giving effect to overriding mandatory rules of third countries, namely the *Schuldstatuttheorie* and the *Sonderanknüpfungstheorie*.[22] According to the former, the violation of a law that is neither the *lex fori* nor the *lex causae* can lead to the invalidity of a contract by virtue of the application of a rule of the *lex causae*. In the famous *Kulturgüterfall,*[23] for example, the *Bundesgerichtshof* held an insurance contract governed by German law to be invalid for lack of an insurable interest, because it concerned the insurance of goods of cultural heritage illegally exported out of Nigeria, an immoral act under §138 of the German Civil Code. The court held that the parties violated justified and commonly respected interests of a foreign state and, therefore, did not deserve protection of the law. Vischer mentions that this was in line with other examples of the application of the *Schuldstatuttheorie,* which concerned cases of contraband and smuggling, in which German courts usually held that intentional offences against foreign import restrictions were immoral acts invalidating the contract: 'Immorality thus becomes the collecting vessel for State interests when foreign compulsory law outside the proper law is deliberately disregarded and when that interest of the foreign State is considered legitimate by German standards.'[24] The *Sonderanknüpfungstheorie* was developed by Wengler, Zweigert and Neumayer.[25] These authors called for a uniform treatment of domestic and foreign overriding mandatory rules and advocated the direct application of foreign public laws that interfered with private law relationships.

A. Bonomi, 'Article 7(1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules' (2001) 114 Harvard Law Review 2462; A. Mills, *Party Autonomy in Private International Law* (CUP 2018) 484–86.

[22] F.A. Mann, 'Contracts: Effect of Mandatory Rules' in K. Lipstein (ed), *Harmonization of Private International Law by the EEC* (IALS 1978) 31, 31–32; F. Vischer, 'General Course on Private International Law' (1992) 232 Hague Recueil 21, 168 and 170; Wojewoda (n 21) 186; A. Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27, 40–42; M. Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?' (2009) 5 Journal of Private International Law 447, 448-49; M. Renner, 'Article 9 Overriding Mandatory Provisions' in G.-P. Callies (ed), *Rome Regulations* (2nd edn, Wolters Kluwer 2015) 242, 259–61; M. Lehmann and J. Ungerer, 'Applying or Taking Account of Foreign Overriding Mandatory Provisions – Sophism under the Rome I Regulation' (2017/2018) 19 YBPIL 53, 71–75; R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (5th edn, Sweet and Maxwell 2019), paras 12-034-12-057.

[23] BGH, 22 June 1972, BGHZ 59, 82.

[24] Vischer (n 22) 170-1. See also Bonomi, 'Article 7(1) of the European Contracts Convention' (n 21) 2471.

[25] W. Wengler, 'Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht' (1941) 54 Zeitschrift für Vergleichende Rechtswissenschaft 168; K. Zweigert, 'Nichterfüllung auf Grund ausländischer Leistungsverbote' (1942) 14 RabelsZ 283; K.H. Neumayer, 'Autonomie de la volonté et dispositons impératives en droit international privé des obligations' (1957) 46 Revue critique de droit international privé 577; (1958) 47 Revue critique de droit international privé 53; W. Wengler, 'Les conflits de lois et le principe d'égalité' (1963) 52 Revue critique de droit international privé 203.

The *Schuldstatuttheorie* is similar to the way in which the English common law approaches illegality under the law of the contractual place of performance, whereas the *Sonderanknüpfungstheorie* is an idea that has no equivalent in the English common law conflict of laws. It appears that French law had adopted a similar approach as the English common law in the pre-Rome Convention times. After summarising the practice of German courts applying the *Schuldstatuttheorie,* Bonomi writes the following in an article reviewing the practice of applying foreign overriding mandatory rules before the adoption of the Rome Convention:

> French appeals courts used similar rationales to take into account the 'public policies' of foreign states regardless whether the applicable law was the forum law, the law of another state as chosen by the parties, or the law of another state as provided for by the conflicts rules employed in the absence of party choice. For example, French courts have invalidated contracts that provide for smuggling, citing the strong interest of the smugglers' destination state in regulating such activities. Also relying on the mandatory rules of a foreign state, the Tribunal de la Seine invalidated a loan governed by French law that would have supported a revolution in Venezuela.[26]

The *Sonderanknüpfungstheorie* was further developed in the Netherlands. The work of de Winter, who advocated the application of overriding mandatory rules of third countries sufficiently closely connected with the legal relationship in question,[27] is particularly important because it influenced the *Hoge Raad* in the famous *Alnati* case.[28] The question in this case was whether the court should give effect to a Belgian overriding mandatory rule to invalidate a clause in a contract for the carriage of goods from Belgium to Brazil that limited the liability of the ship-owner and which the parties subjected to Dutch law. The court stated that:

> it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.[29]

The *Alnati* case was not an isolated decision. In *Compagnie Européenne des Pétroles SA v Sensor Nederland BV,*[30] the District Court at the Hague was confronted with the question

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[26] Bonomi, 'Article 7(1) of the European Contracts Convention' (n 21) 2471-2 (footnotes omitted; all cases cited in these footnotes involved contracts governed by French law).

[27] L.I. de Winter, 'Dwingend recht bij internationale overeenkomsten' (1964) 11 Nederlands Tijdschrift voor Internationaal Recht 329. See J.C. Schultz, 'Dutch Antecedents and Parallels to Article 7 of the EEC Contracts Convention of 1980' (1983) 47 RabelsZ 267.

[28] *Van Nievelt, Goudriaan and Co's Stoomvaartmij NV v NV Hollandsche Assurantie Societeit,* HR 13 May 1966, [1967] Nederlandse Jurisprudentie No 3 at p 21, annotated by H. van den Bergh; (1967) 56 Revue critique de droit international privé 522, annotated by T.H.D. Struyken. The Advocate General in *Alnati* referred to de Winter's article cited in the preceding footnote.

[29] Quoted in M. Giuliano and P. Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' [1980] OJ C282/1, 26.

[30] Pres Rb Den Haag, 17 September 1982, (1983) 22 International Legal Materials 66.

whether an embargo placed by the United States on the export by American companies and their foreign subsidiaries of equipment for the trans-Siberian pipeline provided a defence against the enforcement of a Dutch contract that did not involve performance in the US. The court held that:

> Under the rules of Netherlands private international law, even where Netherlands law has to be applied to an international contract, as in the present case, the Netherlands courts are nevertheless, under certain circumstances, bound to accord priority over Netherlands law to the application of mandatory provisions of foreign law.
>
> Among the circumstances under which the Netherlands courts are required to accord such priority is the situation in which the contract meets the condition of showing a sufficient nexus with the foreign country concerned.[31]

Although the courts in the *Alnati* and *Sensor* cases did not apply overriding mandatory rules of third countries, their willingness to do so if the right case presented itself caught the imagination of private international lawyers on the Continent. What followed was a codification of the practice of giving effect to third countries' overriding mandatory rules in international treaties concerning choice of law in contract and trust[32] and in the Swiss statute on private international law, where it was codified as a provision of general application.[33] The culmination of this trend was Article 7(1) of the Rome Convention.

III Overriding Mandatory Rules of Third Countries in EU Private International Law

The first step towards the unification of treatment of mandatory rules in the field of private international law in the European Economic Community was the 1972 draft convention on the law applicable to contractual and non-contractual obligations. Article 7 of the draft convention provided:

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[31] Ibid 73-4.

[32] *Benelux Treaty concerning a Uniform law on private international law,* signed 3 July 1969, which never entered into force and is reproduced in (1979) 18 AJCL 420, art 13(2) of the Uniform law (concerning choice of law in contract); *Convention on the law applicable to agency,* signed 14 March 1978 (entered into force 1 May 1992), art 16 (binding on Argentina, France, Netherlands and Portugal); *Convention on the law applicable to trusts and on their recognition,* signed 1 July 1985 (entered into force 1 January 1992), art 16(2) (binding on Australia, some Canadian provinces, Cyprus, Italy, Liechtenstein, Malta, Netherlands, Panama, San Marino and Switzerland; the following countries and territories reserved the right not to apply art 16(2): Alberta, Hong Kong, Luxembourg, Monaco and the UK). See also Institute of International Law, 'The Autonomy of the Parties in International Contracts between Private Persons or Entities' (Resolution, Basel, 31 August 1991), art 9(2); Principles on Choice of Law in International Commercial Contracts (The Hague, approved 19 March 2015), art 11. See further *Convention on the law applicable to traffic accidents,* signed 4 May 1971 (entered into force 3 June 1975), art 7; *Convention on the law applicable to product liability,* signed 2 October 1973 (entered into force 1 October 1977), art 9.

[33] Swiss Private International Law Act 1987, art 19(1).

> Where the contract is also connected with a country other than the country whose law is applicable under Articles 2, 4, 5, 6, 16, 17, 18 and 19, paragraph 3, and the law of that other country contains rules which govern the matter compulsorily in such a way that they exclude the application of every other law, these rules shall be taken into account to the extent that the exclusion is justifiable by the particular character and purpose of the rules.[34]

With respect to non-contractual obligations, Article 12 provided that the courts could in some cases take into account the rules of a law that was not the *lex causae:*

> Irrespective of which law is applicable under Article 10 [setting out choice-of-law rules for determining the law applicable to certain non-contractual obligations], in the determination of liability, account shall be taken of such rules issued on grounds of security or public order as were in force at the place and time of occurrence of the event which resulted in damage or injury.

The draft convention project never came to fruition. The European Economic Community scaled down its ambition and instead focused on what eventually became the Rome Convention. Article 7(1) of this convention concerned the operation of overriding mandatory rules of third countries and provided that:

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Although the group that drafted the Rome Convention was of the opinion that Article 7 merely embodied principles that existed in Member State laws,[35] Article 7(1) largely remained a dead letter. Not only did seven Contracting States reserve the right not to apply this provision,[36] there are also few reported decisions of national courts from the countries that did not opt out of the application of Article 7(1) on the application of this provision.[37]

During the drafting of the Rome I Regulation, the treatment of overriding mandatory rules of third countries proved to be a deal-breaker for the UK. In its original proposal of the Rome I Regulation, the European Commission proposed a provision in essentially identical

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[34] Art 2 allowed the parties to a contract to choose the applicable law. Arts 4–6 set out choice-of-law rules for determining the law applicable to a contract in the absence of an effective choice of law by the parties. Arts 16–19 concerned the assignment of claims, formal validity, presumptions of law, burden of proof and admissibility of evidence.

[35] Giuliano–Lagarde Report (n 29) 26.

[36] Rome Convention, art 22(1)(a). The seven states were Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the UK.

[37] See the judgment of the French Cour de cassation No 330 of 16 March 2010 *(Moller v Maersk).* Plender and Wilderspin (n 22), para 12-038, fn 129 argue that this judgment is not particularly strong authority on the application of art 7(1) since the decision of the Court of Appeal was annulled not because the court had wrongly interpreted that provision but because it had failed even to consider its application.

terms to that of Article 7(1) of the Rome Convention from which Member States could not opt out.[38] As the UK Ministry of Justice explains in its consultation paper 'Rome I Regulation: Should the UK Opt In?': 'The prospect of applying this provision gave rise to widespread concern in commercial circles, particularly in the City of London […] This issue subsequently became a key factor in the Government's decision not to opt in to the Rome I proposal.'[39] The current wording of Article 9 is a compromise that the UK and other negotiating parties reached – a provision that allowed the courts to give effect to third countries' overriding mandatory rules was retained, but its scope was significantly curtailed. Article 9(3) concerns the operation of overriding mandatory rules of third countries and provides that:

> Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

The inspiration for the drafting of Article 9(3) was the English common law rules on foreign illegality,[40] in particular *Ralli Bros*. However, Article 9(3) represents a significant improvement on the common law. As mentioned above, the common law has never clearly answered whether the rules on foreign illegality form part of English contract law only or of English private international law.[41] If the rules on foreign illegality form part of English contract law only, they can only apply if the contract is governed by English law. But if the rules on foreign illegality form part of English private international law, they can apply even if the contract is governed by foreign law and can lead to the invalidity or unenforceability of that contract, regardless of what the *lex causae* says. In contrast, Article 9(3) of the Rome I Regulation clearly provides that effect may be given to the overriding mandatory rules of a law that is neither the *lex fori* nor the *lex causae*.

In its original proposal of the Rome II Regulation, the European Commission proposed a provision modelled on that of Article 7(1) of the Rome Convention.[42] This provision, however, was abandoned. Article 16 of the Rome II Regulation only provides for the application of overriding mandatory rules of the *lex fori*. There is, however, a provision in Article 17 that allows the courts to take into account in some cases the rules belonging to a law that is not the *lex causae:*

> In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

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[38] European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations ("Rome I")' [COM(2005) 650 final, 15 December 2005], art 8(3).

[39] (Consultation Paper CP05/08, 2 April 2008), para 77.

[40] Ibid paras 79–80.

[41] Nn 16–19 above.

[42] European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")' [COM(2003) 427 final, 22 July 2003], art 12(1).

IV Recent Development 1: *Nikiforidis*

The first recent development that prompts us to consider whether the courts should have a wider discretion to give effect to overriding mandatory rules of third countries is the judgment of the CJEU in *Nikiforidis*. Nikiforidis, a Greek national, was employed as a teacher at the Greek primary school in Nuremberg, Germany. The school was run by the Greek state. Nikiforidis' employment relationship was governed by German law. Following the Greek financial crisis, the European Council required Greece, among other things, to adopt a reform of its wage legislation in the public sector with a view to reducing its public deficit.[43] Greece also entered an agreement with the European Commission, the European Central Bank and the International Monetary Fund in which it agreed to reduce its public deficit in return for receiving support from these institutions. Pursuant to the Council's request and the agreement, Greece implemented a number of measures, including Law No 3833/2010, which provided for an immediate freeze of any salary increases and imposed a reduction of 12% in the allowances of any kind, reimbursement and remuneration of officials and employees of public authorities, and Law No 3845/2010, which imposed a further pay cut of 3%. Following the entry into force of these provisions, Greece reduced Nikiforidis' salary, despite the fact that this was not in accordance with German employment law. Nikiforidis then commenced proceedings in Germany, seeking unpaid wages and payslips.

The *lex fori* and the *lex causae* were both German law. Greek law was, therefore, the law of a third country. It was undisputed that the provisions of Laws Nos 3833/2010 and 3845/2010 were overriding mandatory rules within the meaning of Article 9(1) of the Rome I Regulation. Prima facie, however, the requirements for giving effect to the overriding mandatory rules of a third country laid down in Article 9(3) were not met – Germany, not Greece, was the place of performance of the contract. The German *Bundesarbeitsgericht* was presented with a dilemma. On the one hand, it appeared that Article 9(3) prevented it from giving effect to the Greek provisions. On the other hand, the Greek provisions were an implementation of a decision of the European Council and of an international agreement which, among other things, was supposed to stabilise the Eurozone, a matter of concern for many EU Member States, including Germany. The *Bundesarbeitsgericht* referred the following two questions to the CJEU:

[43] Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L145/6; Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (recast) [2011] OJ L296/38.

> Does Article 9(3) of the Rome I Regulation exclude solely the direct application of overriding mandatory provisions of another country in which the obligations arising out of that contract are not to be performed, or have not been performed, or does that provision also exclude indirect regard to those mandatory provisions in the law of the Member State the law of which governs the contract?
>
> Is the principle of sincere cooperation enshrined in Article 4(3) TEU relevant, for legal purposes, for the decision of national courts on whether overriding mandatory provisions of another Member State are directly or indirectly applicable?[44]

The CJEU followed the Opinion of Advocate General Spuznar regarding these two questions.[45] With respect to the first question, the CJEU adopted the following line of reasoning. Article 9 is an exception from the general principle of party autonomy.[46] That exception is designed to enable the courts to take into account considerations of public interest in exceptional circumstances.[47] Article 9 must be interpreted strictly.[48] More generally, Article 9 is a derogation from the normal operation of choice-of-law rules, which is all the more reason for its strict interpretation.[49] The application of the overriding mandatory rules of a third country that is not the place of performance of the contract would undermine the general objectives of legal certainty[50] and foreseeability[51] and the particular objective of the choice-of-law rules for individual employment contracts of protecting employees.[52] It followed that 'the list, in Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive.'[53] Surprisingly, however, this was not the end of the CJEU's reasoning. Although Article 9 must be interpreted as preventing the court of the forum 'from applying, as legal rules,' overriding mandatory rules other than those of the *lex fori* or the law of the place of performance, with the consequence that the German courts could not 'apply, directly or indirectly,' the Greek provisions,[54] the CJEU held that:

> Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation.[55]

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44 There was a further question concerning the temporal application of the Rome I Regulation, which will not be examined here.

45 ECLI:EU:C:2016:281, [2016] IL Pr 39.

46 *Nikiforidis,* paras 42–43.

47 Ibid, para 43.

48 Ibid, para 44.

49 Ibid, para 45.

50 Ibid, para 46.

51 Ibid, para 47.

52 Ibid, para 48.

53 Ibid, para 49.

54 Ibid, para 50.

55 Ibid, para 51.

This is because the Rome I Regulation does not have the harmonisation of substantive contract law as one of its objectives. Consequently, if the substantive rules of the *lex causae* provide that the court is to take into account, as a matter of fact, overriding mandatory rules other than those of the *lex fori* or the law of the place of performance, Article 9 cannot prevent the court from taking into account that fact.[56] This is for the referring court to ascertain.

With respect to the second question, the CJEU concluded that the principle of sincere cooperation enshrined in Article 4(3) TEU did not authorise Member States to circumvent the obligations imposed on them by EU law, namely by Article 9(3) of the Rome I Regulation.[57] Consequently, the German courts could not give effect, as legal rules, to the Greek provisions on this basis.

The *Bundesarbeitsgericht* eventually refused to take the Greek provisions into account and held that Nikiforidis was entitled to unpaid wages and payslips under German law: 'Even in times of financial crisis, the employer may not reduce the agreed remuneration unilaterally'.[58]

V Recent Development 2: *Lilly* and *Les Laboratoires*

It is possible that a similar, although much less obvious, development is taking place in the English common law conflict of laws. The traditional approach to foreign illegality has been brought into question by three cases, the High Court judgment in *Lilly* and, more importantly, the recent Supreme Court judgments in *Les Laboratoires* and *Patel v Mirza*.[59] The first two cases concerned enforcement of cross-undertakings in damages following the grant of injunctions ultimately held to have been wrongly granted. Claims for enforcement of cross-undertakings in damages are not contractual claims, but are enforceable in equity. The third case restated the law on domestic illegality in English private law.

In *Lilly,* the claimants argued that the defendants were not entitled to recover profits for lost sales of pharmaceutical products to Canadian internet pharmacies because the drugs would have been imported into the US in breach of US law. Arnold J first confirmed the traditional approach to foreign illegality in the field of contract.[60] He then turned to the defence of illegality in tort. After reviewing some of the leading English cases on domestic illegality in the law of torts,[61] Arnold J stated that it was not clear whether the principles stated in these

[56] Ibid, para 52.
[57] Ibid, para 54.
[58] BAG, 26 April 2017, 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0.
[59] [2016] UKSC 42, [2017] AC 467.
[60] *Lilly,* paras 262–264.
[61] Ibid, paras 267–270. The most important case reviewed by Arnold J is *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 where the House of Lords mentioned a principle that a person could not recover for damage that was the consequence of his own criminal act.

cases applied where the acts in question were unlawful because they were criminal offences under foreign law. But, he said, 'the principle of international comity suggests that they should'.[62] The claim in *Lilly* was neither a contractual nor a tortious one, but one in equity. Arnold J thus also dealt with the effect of foreign illegality on an English equitable claim for damages under a cross-undertaking. Arnold J rejected a submission made by the claimants that the contract and tort cases were merely instances of a broader principle, namely that the court would not order a defendant to compensate a claimant for loss, or a head of loss, that arose out of the claimant's own involvement in an illegal activity, whether under English law or foreign law.[63] Arnold J then concluded that:

> the court will not award compensation under a cross-undertaking for the loss sustained by an unlawful business or where the beneficiary of the cross-undertaking has to rely to a substantial extent upon his own illegality in order to establish the loss. As a matter of international comity, it does not matter for this purpose whether the acts in question are unlawful under English law or under foreign law.[64]

Arnold J rejected the claimants' argument on the basis that the defendants did not have to rely on their own illegality in order to establish their loss, since their business of purchasing the pharmaceutical products in Turkey, importing those products into the UK, transhipping and exporting those products under a suspensive customs procedure known as 'inward processing relief' and selling those products to the Canadian internet pharmacies upon terms that title and risk passed at the point where Royal Mail collected the goods was not illegal; it was the claimants who sought to rely on the illegal acts of importation into the US by others.[65]

Les Laboratoires also concerned a claim for damages on a cross-undertaking given by the claimant that it would comply with any order the court might make if it later found that an interim injunction the claimant had obtained against the defendant caused loss to the defendant. The claimant raised as a defence that the defendant's lost profits would have accrued from sales in England of a product, the manufacture of which in Canada would have infringed a Canadian patent. The matter came before Arnold J at first instance, who applied his decision in *Lilly* and held that the defendant failed because its claim was founded on its own illegality.[66] It was conceded in the Court of Appeal that the illegality defence could apply where the source of the profits from sales in England was illegal under foreign law: 'In such a case, an important policy consideration, and possibly the principal one, is comity, that is to say respect for the law and courts of other countries'.[67] The Supreme Court did not discuss English cases on foreign illegality and apparently proceeded on the basis that violations of

[62] *Lilly,* para 271.
[63] Ibid, paras 273–281.
[64] Ibid, paras 287.
[65] Ibid, paras 289–290.
[66] [2011] EWHC 730 (Pat), [2011] RPC 20.
[67] [2012] EWCA Civ 593, [2013] Bus LR 80, para 69.

foreign laws were to be treated in the same way as violations of domestic laws for the purposes of applying substantive English law rules founded on the maxim *ex turpi causa non oritur actio*.[68] The Supreme Court held that the infringement of the Canadian patent did not constitute a relevant illegality ('turpitude') for the illegality defence to operate. Had the Supreme Court considered English cases on foreign illegality, it should have assessed whether the claim in *Les Laboratoires* should have been refused on the basis that Canadian law could simply not be taken into account because it was neither the proper law nor the law of the place of performance of the relevant obligation to pay under the cross-undertaking.

The Supreme Court discussed *Les Laboratoires* in *Patel v Mirza*. Since this case did not concern the conflict of laws but domestic illegality in English substantive private law, its facts need not be presented. The majority of the Supreme Court departed from rule-based approaches to domestic illegality that had been set out in the preceding case law, including in *Les Laboratoires,* and laid down a flexible, policy-based approach. Lord Toulson summarised the majority's approach to domestic illegality as follows:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality […]). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.[69]

Since *Patel v Mirza* concerned domestic, not foreign illegality, the Supreme Court neither approved nor disapproved the aspect of *Les Laboratoires* concerning foreign illegality. Nevertheless, it is important to note that, whilst the majority in *Patel v Mirza* disagreed and the minority agreed with the rule-based approach to domestic illegality adopted in *Les Laboratoires,* none of the judges in *Patel v Mirza* questioned the assumption in *Les Laboratoires* that the infringement of a Canadian patent would have been relevant for the illegality defence to operate had it constituted a relevant illegality ('turpitude'). It is impossible to draw any solid conclusions about the correctness of the omission of a conflicts analysis in *Les Laboratoires* from the mere fact that such an omission was not questioned in *Patel v Mirza*. But, as the editors of *Dicey, Morris and Collins* conclude, there may be scope to extend the flexible,

[68] L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws: Fifth Supplement to the 15th edn* (Sweet and Maxwell 2018), para 32–102.

[69] Ibid, para 120.

policy-based approach to illegality of the majority in *Patel v Mirza* to foreign illegality and reconsider the rule-based approach to foreign illegality of the preceding English case law.[70] This could entail giving English courts a discretion to take into account illegality under the law of a foreign country, even if that law is not the proper law of the contract and if the place of performance of the contract is not in that country. This could further entail the extension of this flexible approach to other fields of law, whereby English courts would be given discretion to take into account illegality under the law of a foreign country closely connected with the situation. This would be a tectonic shift in the common law conflict of laws. On the one hand, foreign illegality would become the concern of conflict of laws in general and not just an awkward doctrine in the field of contract. On the other hand, this would harmonise the methodological approach to illegality in English substantive law and the common law conflicts of laws.

The effect of *Lilly* and *Les Laboratoires* (but not *Patel v Mirza*) on foreign illegality was recently reviewed by Lord Collins, sitting as a Non-Permanent Judge of the Hong Kong Court of Final Appeal in *Ryder Industries*, a case that concerned the enforcement of a contract with cross-border elements. After reviewing the relevant English case law, which is in this respect identical to the law of Hong Kong,[71] Lord Collins stated that 'It is possible that the line between foreign illegality and domestic illegality has been blurred in two recent cases on enforcement of cross-undertakings in damages following the grant of injunction ultimately held to have been wrongly granted'.[72] However, after reviewing *Lilly* and *Les Laboratoires,* Lord Collins concluded that 'No principle can be derived […] which is relevant to the present case, or which suggests that purely domestic rules of illegality can be applied to the consequences of the illegal performance of a contract in a foreign country'.[73] Lord Collins also dismissed as much too broad an obiter dictum from *Barros Mattos Jnr v MacDaniels Ltd* that a contract which is valid by the governing English law may be refused enforcement if it has been 'performed in such a way that one party (or both parties) commits a legal wrong'.[74] But Lord Collins also stated, somewhat cryptically, that:

> There may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state […] may be such that it would be contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that every breach of foreign law would come into this category.[75]

[70] Dicey, Morris and Collins: *Fifth Supplement to the 15th edn,* para 32–102.
[71] And in particular *Ralli Bros, Foster v Driscoll* and *Regazzoni.*
[72] *Ryder Industries,* para 52.
[73] Ibid, para 55.
[74] [2004] EWHC 1188, [2005] 1 WLR 247, para 30 (Laddie J).
[75] *Ryder Industries,* para 57.

VI Lessons for the Future

European systems of private international law accept that there is a sharp distinction between the application of overriding mandatory rules of third countries and their taking into account as fact. This is indeed an old distinction. Its antecedents lie in English cases on foreign illegality[76] and the German *Schuldstatuttheorie* and *Sonderanknüpfungstheorie*. It has become quite prominent in EU private international law.[77] In theoretical terms, it was Currie who started to shed light on the phenomenon of taking into account foreign law as fact, local datum.[78]

In theory, the distinction appears clear at first sight. When a third country's overriding mandatory rule is applied as law to a particular set of facts, it itself provides a legal sanction. When a third country's overriding mandatory rule is taken into account as fact, it is the *lex causae* that is being applied and provides a legal sanction; the factual situation created by the third country's overriding mandatory rule is taken into account in the context of application of a rule of the *lex causae,* such as a rule concerning frustration, force majeure, hardship, morality, illegality, good faith, breach of duty etc.

The reality is, however, that in many cases there is no real distinction between the application of a third country's overriding mandatory rule as law and taking it into account as fact. Consider the facts of *Ralli Bros* and *Kulturgüterfall*. In the former case, a supervening illegality in the place of performance led to the frustration of the contract under English law, the *lex causae*. In the latter case, an insurance contract governed by German law was held to be invalid for lack of an insurable interest because it concerned the insurance of goods of cultural heritage illegally exported out of Nigeria, an immoral act under §138 of the German Civil Code. In both cases, the *lex causae* was applied and a third country's overriding mandatory rule was taken into account in the context of application of a rule of the *lex causae.* The contracts were held to be invalid and were not enforced. However, the outcome of these cases would have been the same had the courts adopted an alternative approach of directly applying the foreign overriding mandatory rule in question and deriving the sanction for its breach from the law of which the rule formed part. In other words, in cases like *Ralli Bros* and *Kulturgüterfall,* the application of a third country's overriding mandatory rule as law and taking it into account as fact are functional equivalents.[79] This indicates that there is a close

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[76] *Ralli Bros*; *Foster v Driscoll*; *Regazzoni*; *Dicey, Morris and Collins*, paras 32-094, 32-096-32-103 and 32-193.

[77] Rome I, art 9(3); *Nikiforidis;* Rome II, art 17; European Commission, 'Explanatory Memorandum Accompanying the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")' 25.

[78] B. Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 67–71, 178. See also H.H. Kay, 'Conflict of Laws: Foreign Law as Datum' (1965) 53 California Law Review 47; A. Ehrenzweig, 'Local and Moral Data in the Conflict of Laws: Terra Incognita' (1966) 16 Buffalo Law Review 55; T.W. Dornis, 'Local Data in European Choice of Law: A Trojan Horse from across the Atlantic' (2016) 44 Georgia Journal of International and Comparative Law 305.

[79] See also Bonomi, 'Mandatory Rules in Private International Law' (n 21) 234–35; Chong (n 22) 42 (the application of a third country's mandatory rule as law is 'a more honest way forward'); W.A. Reppy Jr, *Eclecticism in Methods*

functional link between Article 9(3) of the Rome I Regulation and Article 17 of the Rome II Regulation. Article 9(3) of the Rome I Regulation allows a court to take a foreign rule prohibiting certain conduct into account and to hold the contract invalid or unenforceable on the basis that the performance of the contract would violate the prohibition. Similarly, Article 17 of the Rome II Regulation allows a court to take a foreign rule mandating or prohibiting certain conduct into account and to hold a party liable for the breach of a non-contractual obligation on the basis that the defendant's conduct fell short of the conduct required by the rule.

There are cases, however, where the distinction between the application of a third country's overriding mandatory rule as law and taking it into account as fact matters. For example, if a foreign overriding mandatory rule creates a cause of action, a party to a private law relationship will be able to advance the foreign cause of action if the law that creates the cause of action is the *lex causae*. However, if the application of third countries' overriding mandatory rules as law were allowed, that party could advance a cause of action created by a foreign overriding mandatory rule, even if the law that creates the cause of action is not the *lex causae*. A foreign overriding mandatory rule which creates a cause of action is not suitable to be treated as fact and be given effect on this basis. Briggs gives the following example to make a related point:

> Take for example legislation which requires entities associated with a company whose pension fund has been depleted to make specified payments into it. Would it be possible for such a law to be applied by an English court if proceedings were to be brought in England, against an English company liable according to such a rule for an order for payment? The answer appears to be that there is nothing wrong with the law as such, but that an English court would not apply it. The explanation for this result is that an English court could only arrive at the point at which foreign law might be applied if the issue before the court were characterised as one on which a court might look to foreign law. The rules which regulate the exercise of characterisation are rigid. If the claim were contractual in nature, a court might apply a foreign *lex contractus,* but such a claim against an associated entity is not contractual. If the matter were tortious in nature, the court might apply, or at least take account of, the *lex loci delicti commissi,* but there is no basis for arguing that the associated entity has committed a tort. If the matter were one which fell within the principle which prevents unjust enrichment at the expense of another, it might apply a foreign law if that were the

for Resolving Tort and Contract Conflict of Laws: The United States and the European Union (2008) 82 *Tulane Law Review* 2053, 2086–87 (the distinction is 'bizarre'); Hellner (n 22) 469 ('Using rules of contract law also makes it possible to give effect to foreign mandatory rules as local data but it is a little bit like trying to get out a key from your left hand pocket with your right hand – it works but is quite awkward.'); J. von Hein, 'Article 17 Rules of Safety and Conduct' in Callies (ed) (n 22) 741, 743 ('From a methodological point of view, however, it is not always easy to draw a bright line between taking a foreign law into account and actually applying it'); Dornis (n 78) 319–20 (taking into account of a third country's mandatory rule as fact is a 'terminological masquerade' and a 'misnomer'); Lehman and Ungerer (n 22). See further the Opinion of Advocate General Spuznar in *Nikiforidis,* para 101: 'It is true that the practical difference between the *application* of, and *substantive regard* to, an overriding mandatory provision is almost imperceptible.'

> law which was closest to the supposed obligation. But if the issue in the matter before the court could not be said to be any of these, there would be no mechanism for applying foreign law, even though the legislation was plainly designed to apply and even though the foreign law of which the particular statute was a part may well have been the law with which the claim was most closely connected. In short, there would be no rule or category of private international law for 'foreign statutory claims'.[80]

It is clear that the rules of private international law exclusively determine and limit the effectiveness of foreign overriding mandatory rules that create causes of action. Article 9(3) of the Rome I Regulation, for example, provides that third countries' overriding mandatory rules can only operate in a negative way, to deprive a contract of its validity or enforceability; it does not allow the application of third countries' overriding mandatory rules that create causes of action. The Rome II Regulation does not allow the application of third countries' overriding mandatory rules, but only contains a provision that allows the rules of safety and conduct at the place and time of the event giving rise to liability to be taken into account even if those rules do not belong to the *lex fori* or the *lex causae*. In English law, a foreign cause of action can be advanced if the foreign law that creates the cause of action is the *lex causae;* the doctrine of public policy (normally) operates as a shield, not a sword.[81] Comparative analyses of the key Continental systems of private international law[82] do not mention any examples of the application of third countries' overriding mandatory rules creating causes of action.

Do the rules of private international law also exclusively determine and limit the effectiveness of foreign overriding mandatory rules that do not create causes of action but affect private law relationships in other ways? The abovementioned recent developments suggest that the answer to this question is 'no' because substantive law also has a role to play in determining and limiting the effectiveness of foreign overriding mandatory rules that do not create causes of action.

Three questions arise. Should the rules of private international law allow the application of overriding mandatory rules of third countries that create cause of actions; in other words, should the rules of private international law allow third countries' overriding mandatory rules to operate as a sword, and not just as a shield? Should the rules of private international law allow the courts to take into account an overriding mandatory rule of a third country, even if performance or the event giving rise to liability does not take place in that country? Should the rules of private international law exclusively determine and limit the effectiveness of foreign overriding mandatory rules that do not create causes of action but affect private law relationships in other ways, despite the statements of the CJEU in *Nikiforidis* and the English courts in *Lilly* and *Les Laboratoires?*

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[80] Briggs, *Private International Law in English Courts* (n 12) 14 (footnotes omitted).

[81] *Peer International Corp v Termidor Musical Publishers Ltd* [2003] EWCA Civ 1156, [2004] Ch 212; cf A. Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield' (2002) 6 Singapore Journal of International and Comparative Law 953, 973–78.

[82] N 21 above.

1 A Sword, not Just a Shield?

The answer to the question whether the rules of private international law should allow third countries' overriding mandatory rules to operate as a sword, and not just as a shield, depends on the theory of private international law to which one subscribes.[83] As Buxbaum explains, the justification for a doctrine that permits courts, in certain circumstances, to apply not only overriding mandatory rules of the forum and the *lex causae* but also overriding mandatory rules of other countries connected with the transaction in question lies in perceptions of the appropriate role for courts in addressing international disputes:

> In its fullest form, the doctrine supports two different aspects of that role. First, vesting courts with broad authority to apply foreign law recognizes their ability to correct for imbalances in the bargaining process […] Second, recognizing the authority of courts to apply foreign law validates judicial participation in the processes of cross-border governance, in the sense of supporting the important regulatory and policy goals of other nations.[84]

The first aspect of the courts' role focuses on the individual private dispute between the parties in question. The goal is to achieve private justice and fairness in individual cases. This accords with the traditional theory which finds justification for private international law in that it implements 'the reasonable and legitimate expectations of the parties;'[85] in the need to avoid 'gross injustice and inconvenience' that would arise if the courts refused to apply foreign law in appropriate cases,[86] and in the 'desire to do justice' to the parties.[87] An alternative view of private international law perceives this field of law as primarily concerned with the collective, public, systemic interests involved in the allocation of regulatory authority among states over private law relationships.[88] The difference between the individualistic and systemic views of private international law is reflected in two influential articles on third countries' overriding mandatory rules. In an article published in the Journal of Private International Law in 2006, Chong put forward two principal reasons for giving effect to third countries' overriding mandatory rules: the interests of third countries in having their laws applied and comity; in her opinion, these reasons justify a provision like Article 7(1) of the Rome Convention.[89] In an article published in the same journal a year later, Dickinson argued that giving effect to third countries' overriding mandatory rules should be limited because

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[83] See A. Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts' (2008) 10 YBPIL 285 298-9.

[84] H. Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalisation' (2007) 18 American Review of International Arbitration 21, 22–23.

[85] *Dicey, Morris and Collins,* para 1-005.

[86] Ibid, paras 1-006-1-007.

[87] P. Torremans (gen ed), *Cheshire, North and Fawcett: Private International Law* (15th edn, OUP 2017) 4.

[88] A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009).

[89] Chong (n 22) 35–40.

a provision like Article 7(1) of the Rome Convention undermines party autonomy and legal certainty and increases economic costs and risks.[90] Dickinson proposed replacing this article with a provision that resembles what is now Article 9(3) of the Rome I Regulation.[91]

English cases on foreign illegality are based on two ideas. The prevailing view is that the rule laid down in *Ralli Bros,* namely that an English court will not enforce an English contract to the extent to which its performance is illegal under the law of the contractual place of performance, forms part of English contract law only, and not of English private international law.[92] This suggests that the main concern of this rule is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance. On the other hand, *Foster v Driscol* and *Regazzoni,* which stand for the proposition that an English court will hold an English contract invalid if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country an act that is illegal under the law of that country, are based on the idea of comity and the prevailing view is that this is a conflicts rule.[93] The main concern of this rule is to avoid embarrassment that would arise if an English court were to enforce a contract whose purpose is to commit an illegal act in a foreign and friendly country; the court thereby indirectly supports the important regulatory and policy goals of that country. The recent cases on foreign illegality that concerned enforcement of cross-undertakings in damages following the grant of injunctions ultimately held to have been wrongly granted lay down rules that are also based on the idea of comity.[94]

Article 7(1) of the Rome Convention is based on the idea that the appropriate role for courts in addressing international disputes is to support the important regulatory and policy goals of other nations. Advocate General Spuznar indicated in his Opinion in *Nikiforidis* that Article 9(3) of the Rome I Regulation is principally based on the same idea.[95] But the drafting history of this provision shows that its main concern is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance. The original proposal of the Rome I Regulation contained a provision in essentially identical terms to that of Article 7(1) of the Rome Convention. In order to encourage the UK to opt into the regulation, a compromise was reached and Article 9(3) of the Rome I Regulation was modelled on the rule laid down in *Ralli Bros.* Given that the main concern of this rule is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance, it is logical to conclude that the main concern of Article 9(3) of the Rome I Regulation is the same. Important regulatory and policy goals of other nations can only

[90] A. Dickinson, 'Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?' (2007) 3 Journal of Private International Law 53, 56–73.
[91] Ibid, 86–88.
[92] N 17 above.
[93] N 19 above.
[94] *Lilly,* paras 271, 287; *Les Laboratoires* EWCA, para 69.
[95] *Nikiforidis*, paras 74, 80, 88, 90, 92.

be given effect within the narrow confines of Article 9(3). That is why, from the perspective of the individualistic view of private international law, *Nikiforidis* can be criticised for undermining legal certainty and predictability by not interpreting Article 9(3) as preventing the courts from taking third countries' overriding mandatory rules into account as a matter of substantive law under the *lex causae*.[96] On the other hand, authors who subscribe to the systemic view of private international law use *Nikiforidis* to support an argument for the amendment of Article 9(3) of the Rome I Regulation along the lines of Article 7(1) of the Rome Convention.[97]

Given that the main concern of the key rules of English law and European private international law concerning third countries' overriding mandatory rules is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance, and that even the rules of English private international law concerning third countries' overriding mandatory rules that are based on comity can only lead to the refusal of a claim, it follows that the rules of private international law are not open to the idea of allowing third countries' overriding mandatory rules to operate as a sword, and not just as a shield. In order for the rules of private international law to allow third countries' overriding mandatory rules to supply a cause of action, a paradigm shift would first have to take place.

2 Giving Effect to Overriding Mandatory Rules of a Third Country that Is not the Country of the Place of Performance or of the Event Giving Rise to Liability?

In the field of contract, our understanding of the interaction between the *lex fori,* the *lex causae* and third countries' overriding mandatory rules is relatively advanced because most of the relevant cases and academic literature discuss the problem of third countries' overriding mandatory rules in this context. If one adopts the individualistic view of private international law and rejects the possibility of third countries' overriding mandatory rules operating as a sword, one accepts that the role that third countries' overriding mandatory rules may play is negative, in the sense that they may deprive a contract of its validity or enforceability. A contract's validity or enforceability can be potentially affected not only by a rule that exists in the place of performance of the contract but also by a rule from another legal system closely connected to the contract, such as the law of the place of a party's habitual residence, domicile or nationality[98] or the law of the place of a party's parent company's habitual residence, domicile or nationality.[99] The law as it stands achieves a balance between the individual private

[96] E. Avato and M.M. Winkler, 'Reinforcing the Public Law Taboo: A Note on *Hellenic Republic v Nikiforidis*' (2018) 43 ELR 569.

[97] Lehman and Ungerer (n 22) 66. See also S. Rammeloo, '"From Rome to Rome" – Cross-Border Employment Contract. European Private International Law: Intertemporal Law and Foreign Overriding Mandatory Laws' (2017) 24 Maastricht Journal of European and Comparative Law 298, 322. Similarly, Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation' (n 83) 297–99.

[98] Cf *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678 (CA).

[99] Cf *Sensor*.

interests of the parties concerned by allowing a court to give effect to the overriding mandatory rules in the place of performance, not those in another legal system closely connected to a contract.[100]

With respect to the other parts of the law of obligations, our understanding of the interaction between the *lex fori,* the *lex causae* and third countries' overriding mandatory rules is rudimentary. In that sense, we still find ourselves in *terra incognita*.[101] We know, however, that the principles and rules applicable to international contracts are not necessarily applicable in the other parts of the law of obligations.[102]

In the field of torts, the *lex fori* and the *lex causae* can differ from the law of the place of conduct. Although the Rome II Regulation does not contain a provision equivalent to Article 9(3) of the Rome I Regulation, Article 17 allows the courts to give effect to the rules of safety and conduct at the place and time of the event giving rise to liability. According to Recital 34 of the regulation, the main concern of Article 17 is not to support the important regulatory and policy goals of other nations, but to achieve an adequate balance between the individual private interests of the parties concerned: 'In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country.' A similar rule was not needed in England before May 1st 1996, the date of entry into force of part III of the Private International Law (Miscellaneous Provisions) Act 1995[103] because of the operation of the double actionability rule. However, some of the recent cases decided under the 1995 Act can be interpreted as giving effect to the foreign rules of conduct at the place and time of the event giving rise to liability, even if the law of which those rules were part was not the law supplying the cause of action.[104] Some national systems of private international law on the Continent, in particular Germany, also traditionally give effect to the rules of safety and conduct at the place of conduct.[105]

With respect to issues other than the standard of conduct that may arise in the context of a claim based on a non-contractual obligation, we do not yet have a good understanding of the role that overriding mandatory rules of third countries potentially play. *Lilly* and *Les Laboratoires* are rare examples of this phenomenon. They can be regarded as supporting the proposition that, in the context of an equitable claim, the claimant cannot recover damages 'for the loss sustained by an unlawful business' or where the claimant 'has to rely to a substantial extent upon his own illegality in order to establish the loss. […] it does not matter for this purpose whether the acts in question are unlawful under English law or under foreign

[100] Rome I Regulation, art 9(3); see also the two cases cited in the two preceding footnotes.
[101] Ehrenzweig (n 78).
[102] *Lilly; Les Laboratoires.*
[103] Private International Law (Miscellaneous Provisions) Act 1995 (Commencement) Order 1996, SI 1996/995, art 2.
[104] See *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621; [2007] UKHL 58, [2008] 1 AC 332; *Belhaj v Straw* [2013] EWHC 4111 (QB); [2014] EWCA Civ 1394, [2015] 2 WLR 1105; [2017] UKSC 3, [2017] 1 AC 964.
[105] O. Kahn-Freund, 'Delictual Liability and the Conflict of Laws' (1968-II) 124 Hague Recueil 5, 93–94.

law.'[106] *Lilly* can also be regarded as supporting the proposition that the defence of illegality in the English law of torts can be applied where the acts in question are unlawful because they are criminal offences under foreign law.[107]

Nevertheless, more research is needed in order to understand whether, and in what circumstances, the rules of private international law should allow the courts to give effect, in the context of a non-contractual claim, to an overriding mandatory rule of a third country even if the event giving rise to liability does not take place in that country.

3 Should Private International Law Preclude Taking Foreign Overriding Mandatory Rules into Account?

Private international law rejects the possibility of third countries' overriding mandatory rules operating as a sword. In that sense, the rules of private international law exclusively determine and limit the effectiveness of foreign overriding mandatory rules that create causes of action. The question arises whether the rules of private international law should also exclusively determine and limit the effectiveness of foreign overriding mandatory rules that do not create causes of action but affect private law relationships in other ways.

The application of a third country's overriding mandatory rules as law and taking them into account as fact can be regarded in some cases as functional equivalents. By not incorporating the provision of Article 7(1) of the Rome Convention into the Rome regulations and by restricting the range of third country's overriding mandatory rules that can be given effect, the EU legislator has made a decision on where the adequate balance between the individual private interests of the parties concerned should lie. This was a political decision that, among other things, paved the way for the UK to opt into the Rome I Regulation. Academics can debate whether the Rome regulations strike the right balance between the individual private interests of parties concerned, but that balance can be disturbed only in a future amendment of the regulations. Seen from this perspective, the judgment in *Nikiforidis* cannot be regarded as correct.

The same cannot be said about the judgments in *Lilly* and *Les Laboratoires*. The English common law conflict of laws has not had an opportunity to consider the interaction between the *lex fori,* the *lex causae* and third countries' overriding mandatory rules outside of the contractual context. *Lilly* and *Les Laboratoires* are the first steps in this direction. The rules laid down in these cases are based on the idea of comity, the same idea that inspired the rules laid down in *Foster v Driscol* and *Regazzoni*.

[106] *Lilly,* para 287.
[107] Ibid.

Conclusions

This article has described the treatment of overriding mandatory rules of third countries in private international law in Europe, focusing on the recent developments in *Nikiforidis, Lilly* and *Les Laboratoires* and the lessons that these developments hold for the future of private international law in the EU and England. The article reaches the following conclusions.

The distinction between the application of overriding mandatory rules of third countries and taking them into account as fact matters where a party to a private law relationship wishes to advance a cause of action created by a foreign overriding mandatory rule. A foreign overriding mandatory rule which creates a cause of action is not suitable to be treated as fact and be given effect on this basis.

There is no real distinction between the application of a third country's overriding mandatory rule as law and taking it into account as fact in many cases where the overriding mandatory rule does not create a cause of action but affects private law relationships in other ways. The application of a third country's overriding mandatory rule as law and taking it into account as fact can be regarded as functional equivalents in such cases. This indicates that there is a close functional link between Article 9(3) of the Rome I Regulation and Article 17 of the Rome II Regulation.

Whether the rules of private international law should allow the application of overriding mandatory rules of third countries that create cause of actions depends on the theory of private international law to which one subscribes. The individualistic view of private international law prevents the rules of private international law from allowing third countries' overriding mandatory rules to operate as a sword, and not just as a shield. In that sense, the rules of private international law exclusively determine and limit the effectiveness of foreign overriding mandatory rules that create causes of action.

In the field of contract, the rules of private international law allow a court to give effect to the overriding mandatory rules of the place of performance.

More research is needed in order to understand whether, and in what circumstances, the rules of private international law should allow the courts to give effect, in the context of a non-contractual claim, to an overriding mandatory rule of a third country even if the event giving rise to liability does not take place in that country.

The EU legislator has made a decision in the Rome regulations of where the adequate balance between the individual private interests of the parties concerned should lie. Seen from this perspective, the judgment in *Nikiforidis* cannot be regarded as correct.

The English common law conflict of laws has not had an opportunity to consider the interaction between the *lex fori,* the *lex causae* and third countries' overriding mandatory rules outside of the contractual context. *Lilly* and *Les Laboratoires,* which are based on the idea of comity, are the first steps in this direction.

Csenge Merkel* – Tamás Szabados**

The Application of Overriding Mandatory Rules in Hungarian Private International Law

Introduction

One of the novelties of the new Hungarian Private International Law Act (PIL Act) is that, for the first time in autonomous Hungarian private international law, it provides explicitly for the possibility of applying overriding mandatory provisions.[1] However, prior to this change, legal literature and court practice had already acknowledged that certain rules apply irrespective of the otherwise governing law. Moreover, with Hungary's accession to the EU, Hungarian private international law had to adapt itself to the EU private international law regime, which includes several legal sources addressing the application of overriding mandatory rules.[2]

At EU level, the notion of overriding mandatory provision was defined for the first time by Article 9 (1) of the Rome I Regulation.[3] According to this Article, overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation. In addition, the Rome II Regulation on the law applicable to non-contractual obligations also contains a rule on overriding mandatory norms.[4] However, not all fields of private law are covered by the EU private international law regulations and these remain in the regulatory competence of the Member States. The areas concerned may include personal status, family law, property law and company law.

This paper intends to give an overview primarily on the application of overriding provisions outside the scope of application of the EU private international law regulations in light of Hungarian legislation, the judicial practice of domestic courts and Hungarian legal science.

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1 *2017. évi XXVIII. törvény a nemzetközi magánjogról* (Act XXVIII of 2017 on private international law).

2 See Tamás Szabados, 'EU Private International Law in Hungary: An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EU' (2018) 2 ELTE Law Journal 41–64.

3 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) [2008] OJ L177/6.

4 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 16.

The authors' view is that the PIL Act undoubtedly clarifies several questions concerning the application of overriding mandatory norms in autonomous Hungarian private international law. Legislation gives little help to practice in identifying overriding mandatory rules, though. The questions related to the application of overriding mandatory provisions in Hungary were answered on the basis of the PIL Act, the relevant case law and legal literature. The PIL Act entered into force on 1 January 2018, and we are not aware of any court practice related to overriding mandatory provisions under the PIL Act since then. Therefore, regarding cases falling under the scope of autonomous private international law, the article relies on the case law based on the preceding private international law legislation, Decree-Law 13 of 1979 on Private International Law (PIL Decree-Law).[5]

I Overriding Mandatory Rules in the New PIL Act

The PIL Act contains an explicit rule on overriding mandatory norms in Section 13 (1). Section 13 (1) does not give a precise definition, but specifies certain characteristics of overriding mandatory rules. The appearance of an explicit provision on overriding mandatory norms is a novelty introduced by the PIL Act. The PIL Decree-Law did not contain any provision on overriding mandatory provisions; nevertheless, private international law scholarship found it possible to apply overriding mandatory rules even in the absence of a statutory provision. Court practice also accepted the applicability of overriding mandatory provisions and mostly cited the definitions given by the legal literature.[6]

In the new PIL Act, Section 13 of the PIL Act addresses overriding mandatory provisions in the following way:

> (1) Those provisions of Hungarian law whose content and purpose unequivocally establish their mandatory application in the legal relationships falling under the scope of application of this Act shall apply irrespective of the law governing under this Act (overriding mandatory provisions).
> (2) The overriding mandatory provisions of another state may be taken into consideration if they are closely connected to the facts and they have decisive significance as to the determination of the case.[7]

The PIL Act describes overriding mandatory provisions as norms that gain application irrespective of the law governing under the PIL Act. The need for their application can be deduced from their content and scope. In the explanatory memorandum prepared for the PIL Act, further information may be found on overriding mandatory provisions.[8] The memorandum

[5] *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* (Decree-Law 13 of 1979 on private international law).
[6] BH 1997. 489., Tatabánya Regional Court 9.G.40.074/2013/4.
[7] Translation by Tamás Szabados, 'Hungary: Act XXVIII of 2017 on Private International Law' (2018) 82 Rabels Zeitschrift 1004–1045.
[8] Explanatory memorandum to the PIL Act. *T/14237. számú törvényjavaslat a nemzetközi magánjogról:* <https://www.parlament.hu/irom40/14237/14237.pdf> accessed 24 February 2020.

is an explanation and justification of the provisions of the PIL Act drafted by the Hungarian Ministry of Justice. As it states, the direct objective of overriding mandatory provisions is the protection of public interests, such as political, social or economic organisation. Overriding mandatory provisions hence include rules that have a sufficiently close relationship with the political, social or economic system of Hungary. The explanatory memorandum adds that the purpose of overriding mandatory provisions is the protection of the fundamental values of Hungary. Whenever a Hungarian judge faces a situation that is regulated by an overriding mandatory provision of Hungarian law, the judge is obliged to apply it.

Section 13 (1) of the PIL Act does not determine exactly what kinds of norms are included in the category of overriding mandatory rules. For this reason, in Hungarian law it may raise a problem to decide whether a provision may qualify as an overriding mandatory provision. Section 13 (1) of the PIL Act refers to the content and purpose of the legislation as factors to be taken into account as to whether a norm requires application irrespective of the otherwise governing law.

Overriding mandatory norms, as their name suggests, have to claim mandatory application. From this perspective, it must be stated that national legislation, court practice and literature clearly delimit mandatory norms and overriding mandatory provisions.[9] Overriding mandatory provisions are far 'more' than mandatory rules. Internationally mandatory provisions are a narrower category than mandatory norms.[10] Mandatory norms may be usually avoided if foreign law is applied, due to the operation of conflict of laws, while overriding mandatory norms apply irrespective of the otherwise applicable law.[11]

It happens that the PIL Act gives some guidance on the nature of the norm. Despite the difficulties of having an exact list of overriding mandatory provisions, as a specific expression of overriding mandatory norms, Section 26 (4) of the PIL Act states that the marriage may not be celebrated in Hungary if there is an unavoidable impediment to the celebration of the marriage under Hungarian law. Unavoidable impediments to the celebration of marriage in Hungarian law are an already existing marriage or certain close family relationships between the parties.[12] In such a way, the PIL Act rules out double marriage or a marriage between close relatives, even if it was permissible under the personal law of the persons to be married. The fact that the parties are of the same sex is also considered as unavoidable obstacle, because under the Hungarian Fundamental Law, only a man and a woman may enter into a marriage.[13] Thus, Article L of the Fundamental Law, according to which the marriage is a life community between a man and a woman based on a voluntary decision, is deemed to be an overriding mandatory norm.[14]

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[9] Raffai Katalin, 'A nemzetközi magánjogi közrend rétegei – különös tekintettel a közösségi és a magyar jogra' (doctoral thesis) 37 <https://www.ajk.elte.hu/file/DI_Raffai_Katalin_dis.pdf> accessed 24 February 2020.

[10] Nagy Csongor István, *Nemzetközi magánjog* (HVG-ORAC 2017, Budapest) 48.

[11] See Explanatory memorandum to Section 13.

[12] Mádl Ferenc and Vékás Lajos, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (Eötvös 2018, Budapest) 300.

[13] Nagy (n 10) 50.

[14] Nagy (n 10) 50.

Another example may be Section 25 of the PIL Act, by virtue of which Hungarian law shall apply to family law relationships concerning a child, provided that it is more favourable to the child. A rule similar to the current Section 25 of the PIL Act was considered an overriding mandatory provision in the legal literature.[15]

Apart from these rules, the PIL Act does not provide much help in identifying overriding mandatory norms. Examples for overriding mandatory provisions given by the explanatory memorandum of the PIL Act include the prohibition of expropriation without compensation, the nullity of contracts or a unilateral declaration limiting legal capacity, and the nullity of contracts limiting consumers' possibility to enforce their rights before courts or otherwise.[16]

Judicial practice has rarely had to address overriding mandatory norms; it mainly occurred in contract law disputes. The Kúria, the supreme court of Hungary, stated that the resolutions of the UN Security Council and the measures of the European Union imposing economic sanctions are overriding mandatory provisions that are applicable irrespective of the law governing the contract under the Rome I Regulation.[17] Regarding a contract falling under the scope of application of the Rome Convention, it was held that Hungarian legislative provisions determining the coming into existence, form, validity, content, the scope and extent of the rights and obligations, the performance and the termination of a loan agreement do not qualify as overriding mandatory provisions.[18]

Legal literature tries to give some support to identifying overriding mandatory rules and the explanatory memorandum also relied on these scholarly opinions when having formulated the abovementioned examples. It can be assumed that the constitutional provisions and respect for human rights form part of overriding mandatory provisions.[19] The constitutional provisions stating that all persons have legal capacity and the corresponding rules in the Civil Code that state that a legal declaration restricting legal capacity is null and void are often-cited examples of overriding mandatory provisions in textbooks.[20] It may also be noted that, among the norms which have a sufficiently specific content, those standing at a higher level of the hierarchy of legal sources (e.g., the Fundamental Law) have a bigger chance of qualifying as overriding mandatory norms than those at an inferior level. Legal literature mentions export and import restrictions,[21] foreign exchange provisions,[22] competition law, the protection

[15] Réczei László, *Nemzetközi magánjog* (Tankönyvkiadó 1959, Budapest) 81 with regard to *1952. évi 23. törvényerejű rendelet a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény hatálybalépése és végrehajtása, valamint a személyi jog egyes kérdéseinek szabályozása tárgyában* (Decree-Law 23 of 1952 concerning the entry into force and the execution of Act IV of 1952 on the marriage, family and guardianship, and concerning the regulation of certain issues of personal law), art 17 (3).

[16] See Explanatory memorandum to Section 13.

[17] A Kúria tájékoztatója a Gfv.V.30.045/2019/9. számú egyedi ügyben. See also Budapest-Capital Regional Court of Appeal Gf. 40.608/2017/12.

[18] Győr Regional Court of Appeal Gf. 20.062/2015/8.

[19] Raffai (n 9) 55.

[20] Mádl and Vékás (n 12) 175; Burián László, Kecskés László and Vörös Imre, *Magyar nemzetközi kollíziós magánjog* (Krim 2006, Budapest) 133; Nagy (n 10) 50.

[21] Réczei (n 15) 81; Mádl and Vékás (n 12) 174.

[22] Mádl and Vékás (n 12) 174.

of cultural property and environmental protection legislation,[23] as well as the rules protecting workers[24] and consumers. Further examples may be brought from the area of labour law; the rules on industrial relationships and works councils are considered as overriding mandatory norms and cannot be avoided by agreement if the seat or the independent establishment of the employer is in the territory of Hungary.[25]

Since there is no limitation in the PIL Act as to the nature of overriding mandatory provisions, the concept of overriding mandatory norms might embrace both public and private law provisions. In the Hungarian legal tradition, public and private law have been differentiated. The most common demarcation principle is functionality, which considers whether the legal relationship concerned involves exercising public power. Public law provisions regulate the structure of the state, the exercise of public authority and the relationship between the state and the citizens.[26] Private law comprises norms governing the legal relationships between parties in a non-hierarchical relationship.

Furthermore, the PIL Act does not differentiate between public or private interests regarding overriding mandatory provisions. Some of the examples provided by the explanatory memorandum include rules protecting public interests, such as those serving the protection of the environment or cultural goods. However, other rules provided as examples of overriding mandatory norms do not only protect public interests, but also private interests (e.g., the nullity of contracts limiting legal capacity, interests of consumers and workers).[27]

It is worth noting that a proposal was put forward by Palásti, according to which a special act should be adopted with a non-exhaustive list of those rules of the Hungarian Civil Code that are considered overriding mandatory provisions.[28] Such a solution would facilitate the identification of overriding mandatory norms contained in the Civil Code for both domestic and foreign courts. The proposal was, however, not endorsed by the legislature.

It must be noted that the approach of the legislative provision and the explanatory memorandum, as well as the scholarly definitions, largely correspond to the definition of the Rome I Regulation. The explanatory memorandum of the PIL Act lists the same interests to be taken into account as the Rome I Regulation: public interests, including political, social or economic interests.[29] There is no explicit rule in the PIL Act or case law according to which

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[23] Nagy (n 10) 49.

[24] Réczei (n 15) 81.

[25] *2012. évi I. törvény a munka törvénykönyvéről* (Act I of 2012 on the Labour Code), s 3 (3); see Kártyás Gábor, Petrovics Zoltán, Takács Gábor, *Kommentár a munka törvénykönyvéről szóló 2012. évi I. törvényhez* (Wolters Kluwer 2019, Budapest).

[26] Trócsányi László and Schanda Balázs, *Bevezetés az alkormányjogba; Az Alaptörvény és Magyarország alkotmányos intézményei* (HVG-ORAC 2014, Budapest).

[27] Explanatory memorandum to Section 13.

[28] Palásti Gábor, Javaslat az új Ptk. imperatív szabályainak alkalmazásáról szóló jogszabály alkotására. <https://ptk2013.hu/szakcikkek/palasti-gabor-javaslat-az-uj-ptk-imperativ-szabalyainak-alkalmazasarol-szolo-jogszabaly-alkotasara/2165> accessed 24 February 2020; *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code).

[29] Explanatory memorandum to Section 13.

EU law or the case-law of the Court of Justice of the European Union should be followed when interpreting overriding mandatory provisions in autonomous private international law. However, in light of the similarity of their approaches, it can be inferred that they may be interpreted in the same way. In their book, Mádl and Vékás note that the definition accepted in EU private international law, in particular in Article 9 (1) of the Rome I Regulation, can be helpful in interpreting domestic overriding mandatory provisions.[30]

For the first time, in autonomous Hungarian private international law, the PIL Act contains an explicit provision on overriding mandatory rules. It lays down that overriding mandatory rules are norms that must be mandatorily applied, irrespective of the governing law, on the basis of their content and purpose. The general reference to the content and the purpose of the norms and their mandatory claim for application provides quite flexible pivots and it remains largely uncertain which norms have an overriding mandatory nature. Although legal literature and the explanatory memorandum give some examples of overriding mandatory rules, in practice it may be difficult to ascertain whether a norm qualifies as an overriding mandatory rule.

II The Application of Overriding Mandatory Rules of the *Lex Fori, Lex Causae* and the Law of Another Foreign Country

Overriding mandatory provisions may appear in the *lex fori,* the *lex causae* and in the law of a third state. In the absence of a legislative provision on the application of overriding mandatory provisions prior to the adoption of the PIL Act, but based on the legal literature and some court decisions, it was quite clear that the overriding mandatory norms of Hungarian law could be applied; however, it remained questionable whether the overriding mandatory norms of the *lex causae* or another foreign country may be applied or given effect. The application of foreign overriding mandatory norms could find some support in a decision of the Hungarian Constitutional Court. Hungarian private international law does not follow the principle of the non-application of foreign public law.[31] On the contrary, the Hungarian Constitutional Court pointed out that courts have the possibility to take the public law provisions of the governing foreign law into consideration in private law disputes.[32] This could suggest that overriding mandatory norms having a public law origin could be applied as part of the governing law. No guidance could be found, however, on the potential impact of overriding mandatory norms of third countries.

The PIL Act has clarified the situation. As far as the overriding mandatory rules of the forum are concerned, section 13 (1) of the PIL Act requires domestic courts to apply the

[30] Mádl and Vékás (n 12) 175.

[31] Palásti Gábor, 'A magyar nemzetközi kollíziós közjog alapvonalai' (2005) 23 Sectio Juridica et Politica, Miskolc 439–487.

[32] Decision 30/1998. (VI. 25.) AB of the Constitutional Court of Hungary, ABH 1998, 220, IV. 4.

overriding mandatory provisions of Hungarian law. Regarding overriding mandatory norms other than those of the forum, the PIL Act follows the approach of Article 7 (1) of the Rome Convention. Section 13 (2) of the PIL Act provides that the overriding mandatory provisions of another state may be taken into consideration if they are closely connected to the facts and they have decisive significance as to the determination of the case. From this paragraph, it follows that both the overriding mandatory norms of the *lex causae* and of another foreign country may be taken into account, and the PIL Act does not make any difference between the overriding mandatory provisions of the *lex causae* and those of third countries. In order to give them effect, the same conditions have to be fulfilled: the provisions of the foreign law have to be closely connected to the factual situation and they have to have decisive significance as to the assessment of the case. The close connection may, in particular, be based on the nationality, domicile or habitual residence of the party or parties concerned. It is more difficult to see what the requirement on decisive significance involves. If a rule qualifies as overridingly mandatory by definition, it claims application to any case falling in its scope of application, regardless of the governing law. In this sense, all overriding mandatory norms closely related to the case seem to be decisive. Section 13 (2) of the PIL Act gives the possibility of taking the overriding mandatory provisions into consideration, but does not impose an obligation on Hungarian courts to give effect to the overriding mandatory norms of a foreign country. Legislation does not make a distinction between overriding mandatory provisions of EU Member States and third countries in areas outside the scope of application of the EU private international law regulations. We are not aware of any difference in treatment in the case law.

In conclusion, the PIL Act makes it clear which states' overriding mandatory norms can be applied or given effect. The overriding mandatory provisions of the *lex fori* shall be applied by the judges. The overriding mandatory provisions of the *lex causae* and the law of another country may be taken into account provided that they are closely connected with the factual situation and are of decisive importance regarding the assessment of the case.

III Delimitation of the Ordre Public Clause and Overriding Mandatory Provisions

Legal literature distinguishes the *ordre public* clause and overriding mandatory provisions, although it is often considered that they constitute two methods for the same purpose, namely the protection of public policy.[33] Several textbooks deem the *ordre public* clause as the negative way of protecting public policy, since it rules out the application of foreign law breaching public policy, while overriding mandatory provisions constitute the positive method of protecting public policy.[34]

[33] Mádl and Vékás (n 12) 174–180; Burián, Kecskés and Vörös (n 20) 133–134.
[34] Mádl and Vékás (n 12) 174.

Accordingly, the PIL Act contains two different sections for the two different techniques. As we have seen, Section 13 addresses overriding mandatory provisions, while Section 12 contains the *ordre public* exception. According to Section 12:

> (1) The application of the foreign law governing under this Act breaches Hungarian public policy and therefore shall be disregarded if the result thereof in the given case obviously and seriously violated the fundamental values and constitutional principles of the Hungarian legal system.
> (2) If the violation of public policy cannot be prevented in any other way, the provisions of Hungarian law shall apply instead of the disregarded provision of foreign law.

As mentioned above, in literature it is common to begin with the concept of public policy, and then explain that, in private international law, there are two legal techniques in the hands of the national legislature to protect it: overriding mandatory provisions and the *ordre public* clause. Certain representatives of the legal literature insist on the function of overriding mandatory provisions to protect public policy positively. Public policy consists of the main principles that reflect the core ethical values of a society. Világhy considered the concept of overriding mandatory norms as part of the broader *ordre public* clause.[35] In his formulation, overriding mandatory provisions are those rules that directly protect the bases of the Hungarian social and economic order expressed in the Constitution. Mádl and Vékás similarly define overriding mandatory norms as those rules that directly serve and protect the foundations of the economic and social order mostly expressed in the Fundamental Law of Hungary as well.[36] Case law usually cites the definition given in the leading private international law textbook written by Professor Mádl and Professor Vékás.[37]

Other authors reject the above distinction, because overriding mandatory norms should be applied irrespective of the need to protect of public policy, and they have to be applied even if the *lex causae* does not endanger the public policy of the *lex fori*. In 1938, István Szászy wrote about the *'absolute ordre public clause'* that enabled the application of certain provisions of domestic law, irrespective of any potentially applicable foreign law. Szászy stated that in the case of the *'absolute ordre public clause,'* the dismissal of the application of the designated foreign law does not depend on its content.[38] Réczei also underlines the difference between the *ordre public* clause and overriding mandatory provisions.[39] Overriding mandatory provisions prevent the application of conflict of laws rules and courts decide a dispute based on the overriding mandatory provisions. What is excluded is not the application of foreign law, but the collision itself. In his view, in such a case there is no collision. The *ordre public* clause intervenes and prevents the application of foreign law once the collision between legal systems has already been decided in favour of the foreign law. There are scholars today who share the

[35] Világhy Miklós, *Bevezetés a nemzetközi magánjogba* (Tankönyvkiadó 1974, Budapest) 65.
[36] Mádl and Vékás (n 12) 175.
[37] Mádl and Vékás (n 12) 173–175.
[38] Szászy István, *Nemzetközi Magánjog* (Sylvester Irodalmi és Nyomda Intézet Rt. 1938, Budapest) 108.
[39] Réczei (n 15) 81–82.

above opinion that the examination of public policy protection is unnecessary with regard to overriding mandatory provisions.[40]

IV Conflicts between Overriding Mandatory Provisions

A situation might occur whereby two overriding mandatory provisions are in conflict. In the PIL Act, there is no concrete provision on how to resolve a conflict between two mandatory provisions. There is no guidance in court practice either. However, the interpretation of Section 13 of the PIL Act may help to resolve conflicts between Hungarian and foreign overriding mandatory norms.

The PIL Act explicitly states that Hungarian overriding mandatory provisions have to be applied by Hungarian courts, whilst there is no obligation imposed on the courts to apply foreign ones. Hungarian courts only have the possibility to take foreign overriding mandatory provisions into consideration provided that they are closely connected to the factual situation and are of decisive importance regarding its assessment. Consequently, if there was a contradiction between a Hungarian overriding mandatory provision and a foreign overriding mandatory rule, the Hungarian overriding mandatory provision would prevail, because courts are bound to apply the overriding mandatory norms of Hungarian law, but not those of a foreign law. In the legal literature, the same view is accepted for conflicts between the overriding mandatory provisions of the forum and those of a third state.[41]

The legislative provision does not provide guidance in a case where a Hungarian court should decide on the conflict between two foreign overriding mandatory norms. In our view, in resolving such a conflict, several factors can be taken into account. The court has to ascertain which overriding mandatory norm is more closely connected to the case and it is also to be examined which overriding mandatory norm is more in accordance with the interests and values represented by Hungarian legal order.

Conclusions

Due to the gradual expansion of EU law within the field of private international law, the role of autonomous private international law is becoming increasingly limited. In certain areas not covered by EU law, however, the PIL Act keep its relevance. This also holds for the application of overriding mandatory norms. The PIL Act has introduced an express rule on overriding mandatory provisions in autonomous Hungarian private international law for the first time. Thereby, the PIL Act makes the difference between the application of overriding

[40] Burián László, *Nemzetközi magánjog – Általános rész*. (Pázmány Press 2014, Budapest) 193; Burián László, Raffai Katalin and Szabó Sarolta, *Nemzetközi Magánjog*. (Pázmány Press 2018, Budapest) 236.

[41] Vékás Lajos, 'Európai és tagállami nemzetközi magánjog' (2017) 10 Magyar Jog 589–601, 597.

mandatory norms and the *ordre public* exception unequivocal. Section 13 of the PIL Act provides for the application of overriding mandatory rules and at the same time describes some elements of such norms. However, the rule seems to be fairly flexible. Which norms can be applied under the new PIL Act as overriding mandatory rules is essentially left to court practice.

Prior to the adoption of the new PIL Act, it was not clear whether courts could only apply the overriding mandatory rules of Hungarian law, or those of other states could be applied or taken into consideration as well. The PIL Act distinguishes the overriding mandatory provisions of the *lex fori* and those of a foreign country. Hungarian courts are to apply the overriding mandatory provisions of the *lex fori*. In addition, the PIL Act unequivocally states that Hungarian courts have the option (but not an obligation) to give effect to the overriding mandatory provisions of a foreign country, provided that the overriding mandatory provision is closely connected to the underlying case and is decisive in terms of the assessment of the case. This formulation largely corresponds to the solution of the Rome Convention.

Articles

Doris Folasade Akinyooye*

Africa – EU Trade Relations: Legal Analysis of the Dispute Settlement Mechanisms under the West Africa – EU Economic Partnership Agreement

Introduction

The European Union (EU) – Southern African Development Community (SADC) Economic Partnership Agreement (EPA) is the first regional EPA in Africa to become fully operational. West Africa (WA) is the EU's largest trading partner in Sub-Saharan Africa. Yet, the WA – EU EPA has not been ratified. Although the recent entry into force of the African Continental Free Trade Agreement (AfCFTA)[1] signals progress in the regional integration of the fragmented African economies, the regional EPAs – considered as its building blocks – are slowly aligning. Inflexibility and insufficient financial guarantees from the EU to help the African States deal with the detrimental fiscal impacts of the EPAs are the key reasons for the reluctance to ratify. Nigeria, the largest economy on the continent has blocked the WA – EU EPA from coming into force. The WA – EU EPA deserves a focused legal analysis to establish its strengths and weaknesses. In the event of a dispute in trade relations under the EPA, is the current dispute settlement mechanism suitable and effective? The article analyses the text of the WA – EU EPA to determine the characteristics of the legal safeguard provisions and the dispute settlement procedures applicable. It also assesses the legal implications of these legal safeguards to illustrate why they act as disincentives to ratification. The article concludes that the current form of the dispute settlement mechanism is not sufficiently reassuring to the WA States especially in the context of a purportedly development-friendly trade agreement.

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[1] Agreement establishing the African Continental Free Trade Area between the Member States of the African Union. Signed in Kigali on 21 March 2018 (Entry into force 30 May 2019) (hereafter AfCFTA).

I Dispute Settlement Mechanism in the WA – EU EPA

Prevailing factors in WA States such as a lack of diversification of economy and limited sources of fiscal revenue are common. These challenges provide fertile ground for trade barriers.

The European Commission considers dispute settlement as 'a precious tool to address trade barriers'.[2] The provisions embodied in the EPAs should give a legitimate expectation of legal certainty, predictability, and protection to both parties. The extent of their interpretation, application, and enforcement arguably relies on the effectiveness of the underlying dispute settlement mechanism. The EPAs are a partnership based on economic and development cooperation. Although, the EPAs makes many references to the WTO Agreements, the dispute resolution mechanism in the WA – EU EPA cannot be said to be modelled on the WTO Dispute Settlement System. The dispute settlement mechanism provided in the WA – EU EPA have presumably been legally scrubbed in the course of negotiations, however, there remain weaknesses.

Firstly, the lack of capacity, in terms of technical and financial capacity, of the WA States to initiate or participate in the dispute settlement mechanisms is not new, nor does it come as a surprise. This is explicitly acknowledged in the WA – EU EPA under the provision on Cooperation:[3]

> The Parties agree to cooperate, including financially, in accordance with the provisions of Part III of this Agreement[4], with regard to legal aid and in particular with regard to building up capacities in order to make possible the use by the West Africa Party of the dispute settlement mechanism provided for in this Agreement.

The agreement to cooperate can be interpreted as meaning that the EU party would provide financial and technical support in the form of legal aid. On the other hand, the WA party would need to cooperate by respecting the terms and conditions of the aid. Although it can be argued that the (financial) legal aid is a precondition or a prerequisite before the WA party can be expected to 'make possible the use'[5] of the dispute settlement mechanism. The article is phrased to imply that the (financial) legal aid and capacity building is neither a unilateral obligation of the EU party, nor an absolute right of the WA party. Several EU Civil Society

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[2] Report from the Commission to the Parliament and the Council on Trade and Investment Barriers, January–December 2017, 24. <http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156978.pdf http://trade.ec.europa.eu/doclib/ docs/2018/june/tradoc_156978.pdf> accessed 01 June 2019.

[3] Economic partnership agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part (hereafter WA – EU EPA), art 86.

[4] PART III: Cooperation for Implementation of Development and Achievement of the Objectives of the Agreement, WA – EU EPA.

[5] Ibid.

Organisations (CSOs)[6] have remarked on the implied non-committal of the WA – EU EPA provisions on development cooperation in general.[7] They note that the EU resisted ACP requests for EPAs to contain development cooperation provisions from the start of the negotiations and since then the EU has only accepted non-committal language. It should be recalled that the development objective/dimension, that is, an intentional support by the EU party to the WA party in this regard, has always been espoused as the *raison d'être* of past and pending ACP-EU trade agreements. The development finance cooperation commitment enshrined under Part 4 of the CA, which is the foundation of the WA – EU EPA states:

> ARTICLE 55 Objectives
> The objectives of development finance cooperation shall be, through the provision of *adequate financial resources* and *appropriate technical assistance,* to support and promote the efforts of ACP States to *achieve the objectives* set out in this Agreement on the basis of *mutual interest and in a spirit of interdependence*.

Without an unequivocal commitment to financial and technical aid, it is unsettling to consider that one party in a dispute has an outright comparative advantage over the other, as would be the case since the WA party would rely on the EU party, if it so wishes, to provide the technical and financial means for consultations, mediation, and arbitration. The fairness and equality (key principles of public international law) implications of this are not hard to imagine.

The Africa – EU regional EPAs are intended to be building blocks for the AfCFTA.[8] The general provisions of the AfCFTA are very similar to the EPAs. For example, Article 26 (e) of the AfCFTA covers the same matters (except data privacy and protection) to Article 87(c) of the WA – EU EPA. However, the AfCFTA is said to be 'still very weak and needs a lot of work which could take at least three more years' to finalise.[9] There are also the same outstanding regulatory issues as in the EPA such as investment, intellectual property, competition, rules of origin, and e-commerce.[10] Notably, Benin, Eritrea, and Nigeria have not signed the AfCFTA. Nigeria's main objection is that, just as with the EPA, the protection of domestic industry is not guaranteed. To add to the complexity of the lacking harmonisation between the WA – EU EPA and the AfCFTA, some authors argue that the iEPAs disrupt regional

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[6] Afrikagrupperna/Africa groups of Sweden; AITEC, France; ATTAC France; 11.11.11, Belgium; Both Ends, Netherland; Coordinadora de ONGD de Euskadi, Spain; CNCD 11.11.11, Belgium; Comhlamh, Ireland; Fair, Italy; Forum Syd, Sweden; German Stop EPA Coalition www.stopepa.de; Germany; IBIS, Denmark; Micah Challenge, Portugal; MS ActionAid, Denmark; Oxfam International; Setem-Catalunya, Spain; Traidcraft, UK; Trocaire, Ireland; World Development Movement, UK; World Rural Forum, Spain.

[7] Critical issues in the EPA negotiations, An EU CSO discussion paper, August 2009, <https://www.ft.dk/samling/20081/almdel/euu/bilag/555/718662.pdf> accessed 10 March 2020.

[8] 'Strengthening the EU's partnership with Africa Africa-Europe Alliance for Sustainable Investment and Jobs' <https://ec.europa.eu/commission/sites/beta-political/files/factsheet-africaeuropeallianceprogress-18122018_en.pdf> accessed 04 May 2019.

[9] Landry Signé and Colette van der Ven, 'Keys to success for the AfCFTA negotiations' May 30, 2019 <https://www.brookings.edu/research/keys-to-success-for-the-afcfta-negotiations/> accessed 03 June 2019.

[10] Ibid.

integration because borders will need to be established in those countries, which have not signed iEPAs in order to prevent EU imported goods into the iEPA States from coming into their territories.[11] There is potential for dispute. In this regard, although another key tenet of the WA – EU EPA is the promotion of regional integration, it is difficult to see how the WA – EU EPA could co-exist compatibly with the continent-wide trade agreement: the African Continental Free Trade Agreement (AfCFTA). Furthermore, like the WTO system, the AfCFTA makes provision for a Dispute Settlement Body to be established, which can form a dispute settlement panel and appellate body to assist the DSB in making recommendations or rulings on a dispute. It also allows the State Parties to request/undertake the process of good offices, conciliation, and mediation.[12] This option is not given in the WA – EU EPA. There is also the risk of procedural and jurisdictional confusions that can affect legal certainty due to the fact that the issues of dumping and subsidies fall under a distinct dispute resolution mechanism in the EPA [Article 20(6)]. This special legal review procedure is to be applied where the dispute concerns anti-dumping duties, countervailing measures, and multilateral safeguards. Although Article 20(1) WA – EU EPA allows for both parties to individually or collectively take anti-dumping or countervailing measures *under the relevant WTO Agreements* (including the Agreement on Subsidies and Countervailing Measures (SCM)), on the other hand, Article 20 (8) WA – EU EPA curtails the dispute settlement procedure to be applied. It states: 'The provisions of this Article shall not be subject to the dispute settlement provisions of this Agreement'. This implies that these measures can neither be subjected to arbitration, nor to the extensive special or additional dispute settlement rules and procedures under the SCM Agreement, nor to the invocation of the WTO dispute settlement mechanism. The following flow chart illustrates the special procedure [Article 20(6)] proposed in the WA – EU EPA:

[11] K. Nnamdi and K. Iheakaram, 'Impact of Economic Partnership Agreements (EPA) on African Economy: A legal perspective' <http://cega.berkeley.edu/assets/miscellaneous_files/6-ABCA-Nnamdi-Impact_of_EPA_on_AFR_economy.pdf> accessed 17 May 2019, 12.

[12] AfCFTA, Protocol on Rules and Procedures on the Settlement of Disputes, art 8.

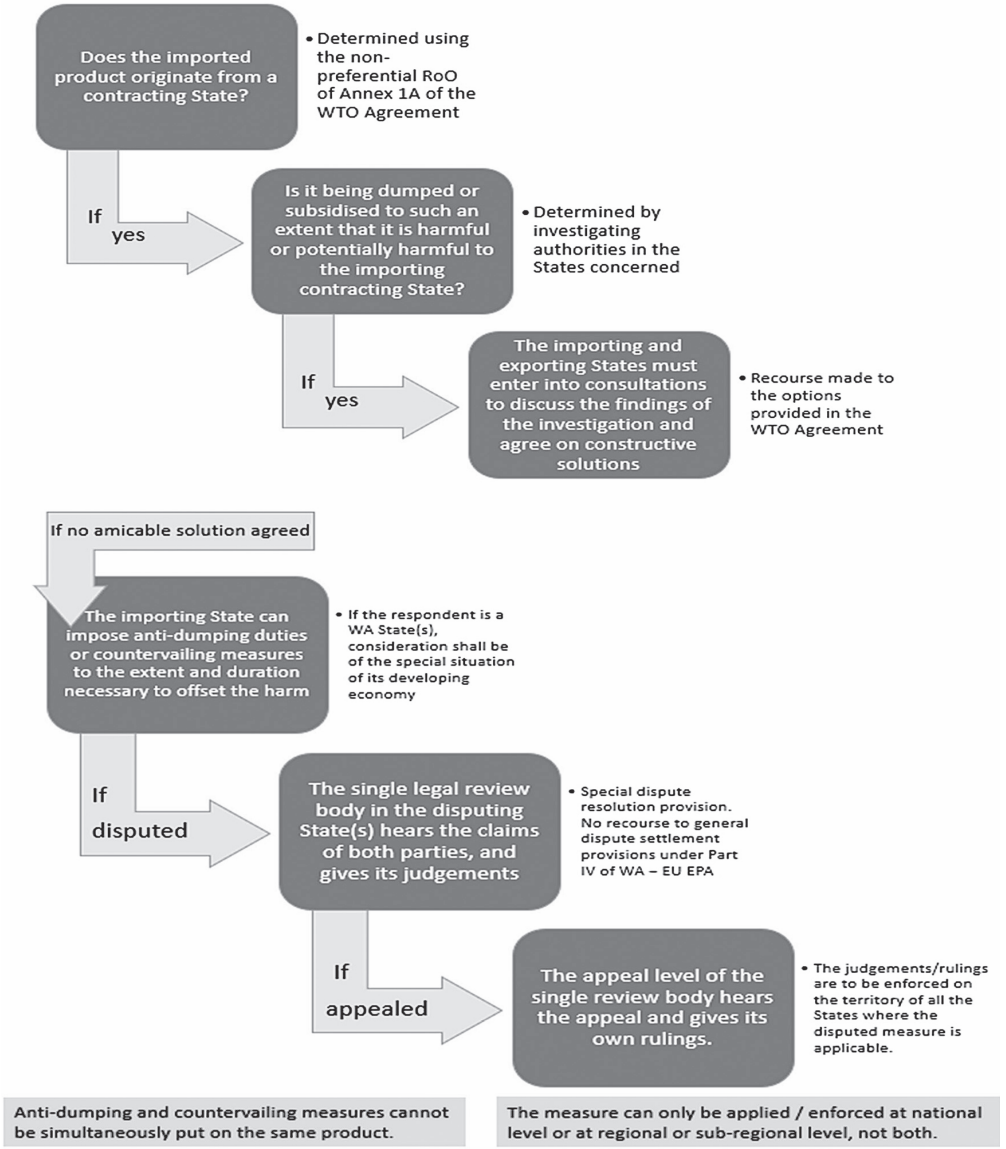

Figure 1.
Source: (D. F. Akinyooye) Author's illustration

II Stepping Stone Agreements under the WA – EU EPA

As an illustration of the nature of Stepping Stone Agreements, the Ghanaian case is briefly examined. The Stepping Stone Agreement (iEPA) with Ghana was signed on 28 July 2016, and ratified by the Ghanaian Parliament on 3 August 2016. A recent headline points to alleged dissatisfaction with the EPA by the local private sector.[13] The Chief Executive Officer of the Private Enterprises Federation (PEF) criticised the EPA stating 'they can ban our products anytime they want without arbitration; without recourse to us'. To judge this statement, the relevant provisions of the EPA are assessed. Firstly, under Article 24(2), the EU cannot impose multilateral safeguards on imports from Ghana within five years of the coming into force of the iEPA. At the end of that period, the EPA Committee will need to review the development situation of Ghana to determine if this exception should be extended.[14] If it is not, and the EU enforces multilateral safeguards, such as those having the effect of a 'ban', the matter can only be addressed using the WTO Dispute Settlement mechanism, and not that of the EPA.[15]

Concerning bilateral safeguards only between the EU and Ghana, the EPA lays down prerequisite scenarios (either of them would suffice, they need not be accumulated) that would warrant the imposition of a safeguard measure by the EU on Ghana, and vice versa:

(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party, or

(b) disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party; or

(c) disturbances in the markets of like or directly competitive agricultural products or mechanisms regulating those markets.[16]

However, only one or more of any of the following safeguard measures (including surveillance measures are also permitted[17]) can be imposed to remedy any of the above situations:

(a) suspension of the further reduction of the rate of import duty for the product concerned, as provided for under this Agreement;

(b) increase in the customs duty on the product concerned up to a level which does not exceed the customs duty applied to other WTO Members; and

(c) introduction of tariff quotas on the product concerned

Presumably, these measures would fall under the general dispute settlement mechanism (including arbitration) provided for in the EPA, but this is not explicitly mentioned under the

[13] 'Ghana's private sector will block implementation of EPAs in its current form', New Ghana, 01 June 2019: <https://www.newsghana.com.gh/ghanas-private-sector-will-block-implementation-of-epas-in-its-current-form/> accessed 02 June 2019.

[14] Stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part. Signed in December 2014. (Entry into force December 2016) (Hereafter Ghana – EU Stepping Stone Agreement), art 24(3).

[15] Ghana – EU Stepping Stone EPA, art 24(4).

[16] Ghana – EU Stepping Stone EPA, art 25(2).

[17] Ghana – EU Stepping Stone EPA, art. 25(4)–(5).

article. Instead, there is a repeated emphasis on notification to, and periodic consultations within, the EPA Committee.[18] It follows that PEF's interpretation holds true in the case of bilateral safeguards too. This illustrates that the concerns of the private sector have not been allayed, even in an EPA that has been heralded as a showcase of the WA – EU trade relations.[19]

The main issues are similar to those put forward by Nigeria, that is, the lack of local capacity to develop indigenous industries and to implement the EPA without adequate support for the local transformation process and reforms.[20]

III Dispute Avoidance in the WA – EU EPA

Some legal reports opine that the dispute settlement mechanism in the EPA will not be used in practice since state-to-state disputes are rather addressed through alternative, less adversarial means.[21] The first joint meeting of the SADC – EU EPA Implementation Committee already gives an indication of this preference.[22] As the excerpt below shows, the parties agreed to disagree on the legality of the investigation into the South African safeguard duty on EU poultry;[23] the EU party disputed the findings and recommendations of the South African International Trade Administration Commission (ITAC)[24]:

> 1. SAFEGUARD INVESTIGATION ON POULTRY
> • A discussion took place on the safeguard measure. The EU reiterated its disagreement on using Article 34 EPA as a basis for the continuation of the investigation. The parties noted their disagreement on this issue.
> • SACU stressed that the ITAC investigation is closed and that any measure needs to be based on facts and on the applicable legal provisions.
> • EU to provide a comprehensive written submission on the ITAC recommendation within 14 days.
> • Parties agreed to hold a technical discussion on that basis in the week of 21 November 2017 with a view to finding a solution acceptable to the parties concerned.

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[18] Ghana – EU Stepping Stone EPA, art 25(7) (a–e).

[19] See <https://eeas.europa.eu/delegations/ghana/7766/eu-welcomes-ghanas-signing-and-ratification-of-the-epa_en> accessed 02 June 2019.

[20] See <https://www.newsghana.com.gh/ghanas-private-sector-will-block-implementation-of-epas-in-its-current-form/> accessed 02 June 2019.

[21] Andrew Mizner, 'EU – Africa deal comes into effect' (November 2016) African Law and Business <https://www.africanlawbusiness.com/news/6863-eu-africa-deal-comes-into-effect> accessed 02 June 2019.

[22] ECONOMIC PARTNERSHIP AGREEMENT between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed on 10 June 2016 (Entry into force February 2018) (hereafter SADC – EU EPA). The SADC – EU EPA is used as an example here because there are no publicly accessible records on such issues with the WA – EU EPA or the Ghana / Ivory Coast iEPAs.

[23] It concerned a 13.9% provisional safeguard duty in 2016, expired in 2017, then renewed in 2018 to 35.3% imposed by South Africa on bone-in chicken imports from the EU. It will decrease to 15% over 4 years between March 2021–2022. Brazil and the US are strong competitors in the sector where the EU has lost some of its market share.

[24] Joint Report of the 2nd Meeting Of The Trade And Development Committee Of The Economic Partnership Agreement Between The European Union And The Southern African Development Community (SADC) EPA

Since then, the safeguard duty has been maintained and extended resulting in lost competitiveness for the EU.[25] The case is significant because it illustrates the two separate adjudicatory paths available for a State party (the South African Minister of Trade and Industry) and for a private entity (the South African Association of Meat Importers and Exporters and the South African Poultry Association) on the valid interpretation and application of the EPA.[26] SADC brought the dispute before the Trade and Development Committee for consultations and periodic reviews in line with Article 34 (7) (e).

The measure is prohibited under Article 34 (10) from being dealt with using the WTO Dispute Settlement mechanism. The private entity can only bring a case before the domestic courts for a judgment on the validity of a State entity's actions in accordance with national legislation. Such a judgment could impact the State's application of the EPA. As some legal academics have rightly opined:

> A claim by a private party that executive action is invalid because transitional arrangements in successive trade agreements have been wrongly interpreted, takes arguments about rationality and respect for the rules on the intra vires exercise of powers, into new territory.[27]

The information exchanged and positions adopted by both parties during consultations and mediation remain confidential.[28]

IV Arbitration under the WA – EU EPA

The WA – EU EPA can be deemed a contract between the EU and WA. The Rome Treaty,[29] and subsequently the Maastricht, Amsterdam, and Lisbon Treaties,[30] provide that the Court of Justice of the EU shall have jurisdiction to give judgement pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law. Furthermore, the legal basis for jurisdiction of the General Court in the WA – EU EPA context is also supported by case law.[31] During the first

States, 21 October 2017, Brussels: <http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156355.pdf> accessed 04 May 2019.

25 South Africa: South Africa Extends Safeguard Duty on EU Bone-in Broiler Meat, 22 October 2018: <https://www.fas.usda.gov/data/south-africa-south-africa-extends-safeguard-duty-eu-bone-broiler-meat> accessed 04 May 2019.

26 Gerhard Erasmus and Willemien Viljoen: The Battle over Safeguards on Poultry Imports from the EU continues, September 2017: <https://www.tralac.org/discussions/article/12101-the-battle-over-safeguards-on-poultry-imports-from-the-eu-continues.html> accessed 04 May 2019.

27 Ibid.

28 WA – EU EPA, art 65(3) and art 66(6).

29 *Treaty establishing the European Economic Community* (EEC Treaty, hereafter Rome Treaty) Signed in: Rome (Italy) 25 March 1957. (Entry into force: 1st January 1958), art 181.

30 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (OJ C 306, 17.12.2007); (entry into force on 1 December 2009) (hereafter Lisbon Treaty), art 272.

31 C-274/97 *Commission v Coal Products;* T-401/07 *Caixa Geral de Depósitos v Commission;* C-43/17 P *Jenkinson v Council and Others,* etc.

ten years of implementation of the WA – EU EPA, the SDT applied with respect to dispute settlement is to abstain from arbitration. It is not clear though whether this obligation is to be observed by the WA States too.

> ARTICLE 82 Transitional provision
> To take account of the special situation of West Africa, the Parties agree that, for a transitional period of ten (10) years following the entry into force of this Agreement, the European Union Party shall give full preference to consultation and mediation as ways of settling disputes and shall display moderation in its demands.

In the WA – EU EPA, arbitration is the last resort. There is no appeal procedure. The nature of arbitration deserves some analysis. It is said that the substance of arbitration is procedure as has been famously quoted 'arbitration as a subject is procedure'[32] In international commercial arbitration, the duty of the arbitration panel is to give full satisfaction to party autonomy while simultaneously maintaining fairness and efficiency between the parties.[33] This is especially important for the parties with different legal traditions and norms. Expediency and flexibility are key expectations by the parties in a dispute. Arbitration is also invariably expensive, not least because of the fees charged by highly experienced private lawyers, and rental costs of arbitration forums. It can be inferred that the absence of an appeal level in the EPA is deliberate in the interest of saving cost and time. But where time is paramount, quality and accuracy might be subverted. Given that the arbitration panel rulings may or may not be publicised,[34] it will be difficult to determine how decisions were reached.

Under the CA, if a party requests for arbitration, within thirty days from the request, both parties are to appoint one arbitrator each. The two arbitrators appoint a third arbitrator. In the event of failure to do so, either Party may ask the Secretary General of the Permanent Court of Arbitration to appoint an arbitrator.[35]

Interestingly, the CA does not provide for mediation as a dispute avoidance / resolution mechanism. It only encompasses consultations in general terms[36] and arbitration as the specific dispute settlement mechanism.[37]

The rules of interpretation applicable to the CA, (as for the regional WA – EU EPA), are the customary rules of interpretation of public international law, including those set out in the Vienna Convention of 1969 on the Law of Treaties.[38]

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[32] J. Gillis Wetter, 'The International Arbitral Process, Public and Private' (1979) Vol. II, 288, cited in Jeff Waincymer, Part I: *Policy and Principles,* Chapter 1: The Nature of Procedure and Policy Considerations, in Procedure and Evidence in International Arbitration, Volume 4 (Kluwer Law International 2012).
[33] Waincymer, ibid, 8.
[34] WA – EU EPA, art 81 (2).
[35] CA, art 98.
[36] CA, art 38A.
[37] CA, art 98.
[38] WA – EU EPA, art 80.

Under the WA – EU EPA, the same measure cannot simultaneously be initiated before the WTO Dispute Settlement Body and the EPA Arbitration Panel.[39] The initiated proceeding must first be concluded. A party can suspend observance of its obligations under the EPA if the WTO DSB authorises it to do so. Conversely, if a party is authorised under the EPA to suspend benefits, the WTO Agreement cannot prevent it.[40] Arbitration under the EPA cannot rule on any WTO-related rights and obligations of each Party.[41] The *Table 1* below outlines the three main dispute settlement options under the WA – EU EPA.

Table 1. Comparison of the dispute settlement options in the WA – EU EPA

WA – EU EPA	**Consultation** Art. 65	**Mediation** Art. 66	**Arbitration** Art. 67
Means of notification	Written request	Written request	Written request
Party to inform	– The other party – The JIC	– The other party – The JIC	– The other party – The JIC
Aim of request	Formal initiation of consultations	Agree to mediation	Request for arbitration panel establishment
Characteristics of the adjudicator	The JIC presides	1 mediator – Parties to select within 10 days, or – JIC to select w/in 20 days	3 arbitrators selected from the List (21 general list + 15 sectoral list)
Action	Consultation	Convene mediation	Establish panel
Time limits modifiable?	Yes	Yes	Yes
Time limit for general cases	60 days	30 days from date of agreement	Within 10 days from the request, each party appoints an arbitrator. If not, request JIC to appoint within 5 days.
Undertake within	40 days	Within 45 days of appointment, give non-binding Opinion	Within 120 days of establishment, the panel presents an interim report. The parties have 15 days to send written comments.
Conclude within	60 days	Within 15 days from date of meeting collect parties' submissions.	Within 150 days of establishment, the panel ruling. Time extension until 180 days from the date of establishment.
In urgent cases	15 days until 30 days		Within 75 days of establishment until 90 days Within 10 days of establishment, the panel can give a preliminary ruling on urgency of the case

[39] WA – EU EPA, art 84 (2).
[40] WA – EU EPA, art 84 (3).
[41] WA – EU EPA, art 84 (1).

WA – EU EPA	**Consultation** Art. 65	**Mediation** Art. 66	**Arbitration** Art. 67
Outcome option	Mutually agreed solution	Non-binding opinion (may include recommendation)	A binding arbitral ruling that sets out the findings of fact, the applicability of the relevant provisions of the EPA and the reasoning for the
	No consultation held		Arbitral ruling within 150 days from the date of establishment of the panel, or 180 days, at the latest, after notifying the Parties and the Joint Implemen-tation Committee (JIC) in writing.
			Within 90 days from establishment, arbitral ruling is to be given in urgent cases.
Next step available	By mutual agreement, seek a mediator	Request arbitration	Actions formulated to achieve compliance with ruling.
	Request arbitration		Agreement on reasonable time to comply with ruling.
			Within 30 days from ruling, the Defendant party informs the Complainant and the JIC of the time it will take to comply.
			If there is disagreement, the Complainant must send a written request within 30 days from receipt of Defendant's estimated time, to the panel to rule on reasonable time.
			The reasonable period of time can be extended by mutual agreement of the parties.
Status of information	Confidential	Confidential	Arbitral ruling can be publicised or kept confidential if the JIC so decides.
			Before end of reasonable compliance time, the Defendant notifies the Complainant and the JIC of the measure taken to comply.
			Complainant can send a reasoned written request for a ruling on the compatibility of the measure to the Panel.
			Within 90 days from date of request, Panel gives its ruling on compliance. Within 45 days, for urgent cases. Within 105 days from request, if original Panel cannot reconvene.

WA – EU EPA	**Consultation** Art. 65	**Mediation** Art. 66	**Arbitration** Art. 67
			If Defendant fails to notify before end of reasonable time, or if ruling determines non-compliance, Complainant can ask for compensation (incl. financial).
			If no mutual agreement on compensation is reached within 30 days from end of reasonable time or from delivery of ruling, Complainant can adopt appropriate measures after notifying Defendant. The measure(s) must be those which least affect the attainment of the objectives of the EPA.
			Where the Defendant is the EU, and the complaining Party is entitled to adopt appropriate measures, but asserts that the adoption of such measures would result in significant damage to its economy, the EU shall consider providing financial compensation. The EU shall exercise due restraint in asking for **compensation** or adopting appropriate **measures**. These must be temporary until the dispute is settled or the violation is rectified.
			The Defendant shall notify the Complainant and the JIC of the measures taken to comply with the EPA and request that the appropriate measures be ended.
			If the Complainant does not agree that the measure is compliant, it can request within 30 days from notification, the original Panel to rule on the compliance. It must also inform the Defendant and the JIC of this request.
			Within 45 days, the Panel gives a ruling on compliance notifying the parties and the JIC. If incompatible, the Panel determines whether the Complainant may continue to apply appropriate measures. If compliant, the measures must be terminated. If original Panel unable to reconvene, the ruling can be given within 60 days from receipt of request.

WA – EU EPA	Consultation Art. 65	Mediation Art. 66	Arbitration Art. 67
			Panel sessions may be open to the public unless requested otherwise by the parties or the Panel.
			Interested entities are authorised to submit amicus curiae briefs to the arbitration panel. The Panel must notify the Parties of these submissions and allow them to comment.
			Panel rulings are taken by consensus or, if not possible, then by majority vote.
Mutually agreed solution can be reached at any time. It should be notified to the JIC (and the Panel, if any) and adopted.			

Source: Author's compilation

V Legal Certainty under the WA – EU EPA

A dispute settlement mechanism should be comprehensive and reassuring to Parties that it provides legal certainty, clarity through interpretation of provisions, and security in protecting rights and enforcing obligations. It is interesting to note that the term 'arbitral award' is not used at all. There is no indication of how to overcome potential or actual deadlock. This raises questions to be further analysed. What appeal options are available beyond the arbitral ruling? What is the status of Panel recommendations (as opposed to ruling)?

A few criticisms can be drawn from these options, especially on arbitration. The set number of arbitrators on a panel is questionable. Why is it fixed to only three arbitrators? The most common composition of the arbitration panel is three as many literatures[42] highlight the speed, cost effectiveness, and efficiency of a three-person panel compared to a higher or lower number. Similarly, international arbitration courts[43] have set the number three as default, but do allow the parties to decide on the number of their choice.[44] Yet in a multiparty case such as would be the case under WA – EU EPA, the issue of party equality and influence over the nomination of arbitrators is an issue. It is probable that the parties on each side would not agree on the designations because of their differing interests. As the watershed *Dutco* case[45]

[42] J. Mair, 'Equal treatment of Parties in the Nomination Process of Arbitrators in Multi-Party Arbitration and Consolidated Proceedings' Austrian Review of International and European Law Online, 1 January 2010, pages 59–82. J-Louis Delvolvé, 'Multipartism: The Dutco Decision of the French Cour de cassation' (1993, June) 9 (2) Arbitration International 197–202.

[43] International Chamber of Commerce (ICC) Rules of Arbitration, art 10; Belgian Centre for Mediation and Arbitration (CEPANI) art 9; UNCITRAL Arbitration Rules, art 7, etc.

[44] London Court of International Arbitration (LCIA) Rules have three-person tribunal as the maximum number.

[45] *Siemens AG and BKMI Industrienlagen GmbH v Dutco Construction Co.,* Cour de Cassation, Jan. 7, 1992.

outlined, the issue of party autonomy and discretion in appointing their choice of arbitrator is a matter of public policy.[46] It is crucial that the parties to a dispute be treated fairly and equally and reach a mutual agreement on the constitution of the arbitration panel, otherwise the arbitral award risks being unenforceable and annulled. Under the Yaoundé Conventions, disputes were first addressed by the Association Council to reach an amicable settlement. Failing this, the dispute was brought before the arbitration court consisting of five arbitrators ruling by a majority vote: a president appointed by the Association Council and four judges (two appointed by the Council of the EEC, and two by the Associated States).[47] It should be noted that the arbitration court under Yaoundé (and Lomé) was a fixed institution, and it was later defunct. The current method relies on the appointment of an ad hoc arbitration panel by the parties.[48]

According to Article 68 WA – EU EPA, the applicant and the respondent are to propose one each, and agree on the chair. They are to consult one another to agree on the selection. However, what about when there are many parties on both sides of a dispute? It is not far-fetched to imagine the additional delay and difficulty of several parties agreeing on just one arbitrator in whom they could unequivocally bestow their confidence. According to general principles of international law, the dispute resolution mechanism between contracting parties should provide for a neutral forum that can guarantee the observance of impartiality and fairness. To ensure neutrality, there must be a depoliticization of the dispute resolution mechanisms. However, the Joint Implementation Committee, the executive decision-maker, or at the least, the watchdog on the interpretation and application of the EPA, is to be comprised of senior officials appointed by the Parties. These officials are representatives of the parties' governments and thus inevitably bound by political affiliations and allegiances.

Among the 79 ACP countries,[49] 28 are major common law countries (a distinct feature of their Commonwealth history): Botswana, Cameroon, Gambia, Ghana, Kenya, Kiribati, Lesotho, Malawi, Mozambique, Namibia, Nauru, Nigeria, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Jamaica.

To achieve a level of harmonization that makes the EPA provisions workable, ACP domestic laws and legal systems are undergoing reform. This can be seen as a migration of EU law. The map below illustrates the myriad of mixed legal systems across African States. Such a context adds a layer of complexity to achieving regulatory harmonisation and legal reform.

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[46] R. Ugarte & T. Bevilacqua, 'Ensuring party equality in the process of designating arbitrators in multiparty arbitration: An update on the governing provisions' (2010) 27 (1) Journal of International Arbitration 9–49, 2010.

[47] *The First Yaoundé Convention* (1963–1969) – OJ 093, 11/06/1964 P. 1431, signed on 20 July 1963, end of validity: 31/05/1969 (hereafter YC I); Expiry in 1969 with a renewable term of five years. Art 51.

[48] Eric C. Djamson, *The Dynamics of Euro-African Co-operation Being an Analysis and Exposition of Institutional, Legal and Socio-Economic Aspects of Association/Co-operation with the European Economic Community* (Martinus Nijhoff/The Hague 1976).

[49] There are 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. <http://www.acp.int/content/secretariat-acp> accessed 06 May 2019.

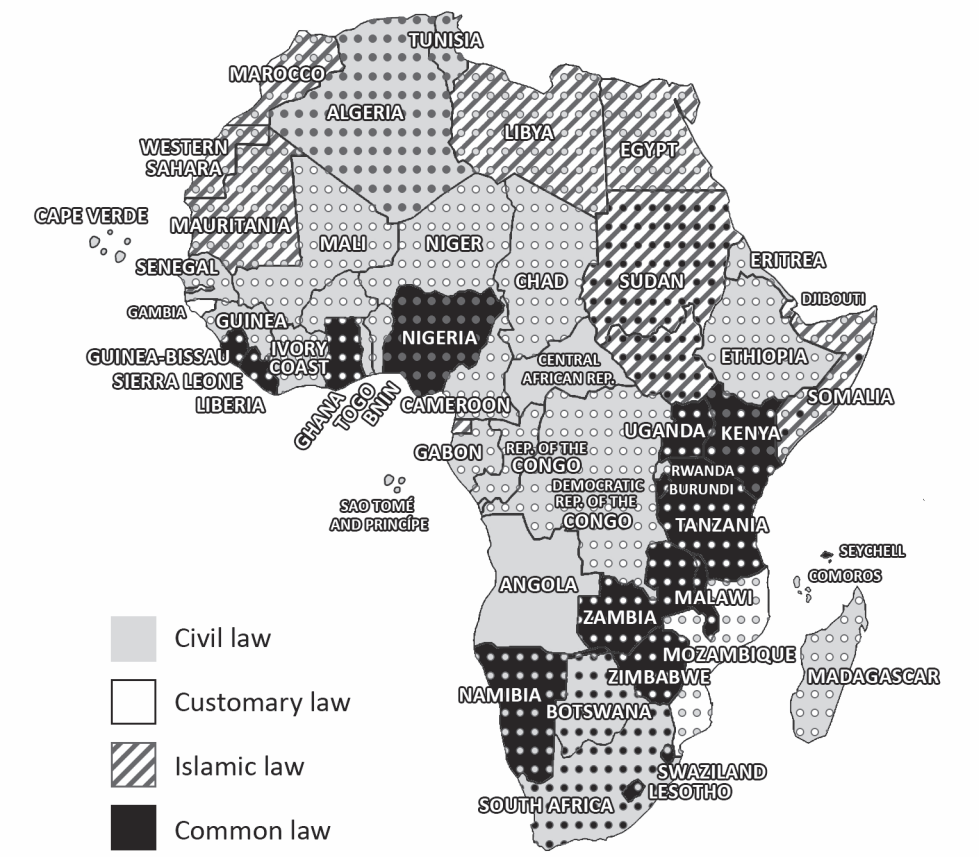

Figure 2. Geographical mapping of legal systems in Africa
Source: Opiniojuris.org

The EPA is framed as a stand-alone, self-contained agreement that is neither above nor below in the order of precedence among international economic and development cooperation laws or regulations. This is seen in provisions such as Article 87(c):

> Nothing in this Agreement shall be construed to prevent the adoption or application by either Party of measures: (c) necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement…

And Article 105(1):

> 1. Nothing in this Agreement may be interpreted as preventing the taking by the European Union Party or any of the West African States of any measure deemed appropriate concerning this Agreement in accordance with the relevant provisions of the Cotonou Agreement.

This provision implies that the EPA is subordinate to the CA because measures not sanctioned or contained in the EPA, and measures that can affect the EPA, can nevertheless be taken by the parties if they are based on the CA. However, in view of the expiration of the CA in February 2020, this provision would become obsolete, thereby rendering the any contemplated measures subject to the EPA itself.

Article 105 (2) provides that: '(2) The Parties agree that nothing in this Agreement requires them to act in a manner inconsistent with their obligations in connection with the WTO.'

Article 84 (3) raises the legal status of the EPA to the same level as the WTO. Since the EPA(s) was (were) established to rectify and regulate Africa – EU trade regimes on the principle of conformity with the WTO, it follows that the EPAs fall under the umbrella of the WTO Agreement. However, attention should be paid to Article 84 (3) which is ambiguous, and therefore can be misleading, in understanding the order of precedence of both agreements: 'The WTO Agreement cannot prevent the Parties from suspending the benefits granted under this Agreement.'

The few exceptions where parties' actions are permitted to 'subordinate' the EPA are those that concern security purposes,[50] balance of payments difficulties,[51] taxation[52]. Having said this, the EPA accumulates the existing rights and obligations under the various WTO Agreements as it makes reaffirmations of these across a significant number of provisions. Notably, mutual obligations pertaining to SPS and TBT standards.[53]

VI EU Case Law and Potential Impact on the WA – EU EPA

There are notable legal safeguards in place within EU primary law and secondary law.

The ECJ has the competence to give a preliminary ruling on the provisions of the Cotonou Agreement. In *Afasia Knits Deutschland,*[54] the Court ruled that *all* contracting states of the CA, as well as the European Commission, have the right, even when a matter does not directly concern their national authorities, to initiate an investigation into a suspected infringement of the CA provisions. The main proceedings of this particular case involved the post-clearance recovery of import duties by the German customs based on the wrongful issuing of (EUR.1) certificates of origin by the Jamaican (ACP States) authorities entitling the exported textiles to preferential treatment. The Court further held that the findings of such a verification investigation are binding on the national authorities of the importing State concerned:

[50] WA – EU EPA, art 88.
[51] WA – EU EPA, art 89.
[52] WA – EU EPA, art 90 (3): 'Nothing in this Agreement shall affect the rights and obligations of the Parties under any tax convention. In the event of any inconsistency between this Agreement and such a convention, the convention shall prevail to the extent of the inconsistency.'
[53] WA – EU EPA, art 28.
[54] Case C-409/10 *Hauptzollamt Hamburg-Hafen v Afasia Knits Deutschland GmbH* [2010] ECLI:EU:C:2011:843.

> 32. It follows that, as pointed out in the written observations of the Czech and Italian Governments and of the Commission, and as observed by the Advocate General at point 23 of his Opinion, subsequent verification must be carried out not only when the importing Member State so requests, but also, in general, when, according to one of the States party to the Agreement or according to the Commission, which, in accordance with Article 211 EC, is charged with ensuring the correct implementation of the Agreement, there are indications which point to an irregularity in regard to the origin of the imported goods.

This judgment highlights the importance of mutual trust and administrative cooperation provisions in the CA, and consequently, in the EPA. There is, as yet, no EU case law that refers to the EPA. Given the fierce economic diplomacy and internationalisation of EU trade values, it is not farfetched to posit that the long arm of the ECJ's jurisdiction will increasingly adjudicate on EPA provisions. It is only a matter of time, however, before main proceedings in an EU Member State(s), are referred by a national court to the ECJ to interpret the proper meaning of the EPA. Through Articles 56 (2) (d) and (e), and Articles 64 (2)–(5) of the Modernised Customs Code,[55] the EPA-based EU commitment to duty-free, quota-free (DFQF) ACP imports are enshrined in EU law.

It has become settled EU case law that a 'special situation'[56] such as 'ambiguous and inconsistent determinations' by an exporting State customs authority resulting in unreliability justifies an overruling of the mutual trust principle and places the onus on the Commission to take over the investigation.[57] The Court has also emphasised the key role which the exporting State has to play in order to derive the benefits of the preferential treatment:

> 50. …it is only after the authorities of the State of export have been involved that the products originating from the ACP State in question will be permitted to benefit from the arrangement introduced by Annex V to the Cotonou Agreement.[58]

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[55] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) (hereafter Customs Code).

[56] This refers to an exception to the obligation of import or export duty repayment covered under Article 239 of the Customs Code, and Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, 1), as amended by Commission Regulation (EC) No 1335/2003 of 25 July 2003 (OJ 2003 L 187).

[57] See the following judgments: Case C-204/07 P, *C.A.S.* v *Commission* [2008] EU:C:2008:446; Case C-574/17 P *Commission v Combaro* [2018] EU:C:2018:598; and Case C-589/17 *Prenatal S.A* [2019] ECLI:EU:C:2019:104, Opinion of Advocate General Sharpston delivered on 7 February 2019(1).

[58] In Case C-175/12 REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht München (Germany), made by decision of 16 February 2012, received at the Court on 13 April 2012, in the proceedings *Sandler AG* v *Hauptzollamt Regensburg,* [2013] ECLI:EU:C:2013:681, para. 50. [Per curiosum, the Court chamber was composed of Hungarian judges: E. Juhász, President of the Tenth Chamber, A. Rosas and C. Vajda (Rapporteur), Judges].

VII WTO Case Law and Potential Impact on the WA – EU EPA

Free trade can be brutal. The 'Banana wars' that lasted from 1993 to 2012 between the US and the EU illustrates this. The WTO ruled in favour of the US and demanded the EU to revoke its preferential arrangement with the Caribbean on its banana exports. It held that the special arrangement was discriminatory towards Latin American suppliers and therefore a violation of WTO rules. As at November 2018, there have been no cases brought by or against any ACP State in WTO DSU. In contrast, the EU has been a party to cases brought to the WTO DSU, with the main opponents being the US, Canada, India, China, and Argentina.[59]

There are multiple anti-dumping disputes brought against the EU by WTO Members before the WTO DSB. One such case was between China and the EU concerning anti-dumping duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from the EU.[60] The EU argued that China had contravened Article 6.9 of the WTO Anti-Dumping Agreement because it did not disclose the facts underlying its dumping determinations with respect to specific cost and sales data determining the margin of dumping, which therefore prevented the affected parties from properly defending their interests. The Panel rejected the EU's claim and instead ruled that a narrative description was sufficient to satisfy the requirement for essential facts under Article 6.9, so long as the technical details were in the possession of the investigating authority.[61]

The Panel itself referred to past WTO rulings to support its understanding of the article:

> Previous WTO dispute settlement panels have established that the basic data underlying an investigating authority dumping determination constitute "essential facts" within the meaning of Article 6.9. We agree. In addition, the panel in China – Broiler Produ[62]cts found that a narrative description of the data used cannot ipso facto be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent... We agree.

The EU appealed the Panel's ruling as erring in the interpretation and application of the said article, whereas China argued that the article can be interpreted in different ways that equally satisfy the obligation.[63] The Appellate Body considered this issue to be a point of law concerning a legal standard[64] and therefore allowed the appeal. The Appellate Body applied a logical

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[59] WTO Dispute Settlement Reports and Arbitration Awards: https://www.wto.org/english/res_e/publications_e/ai17_e/tableofcases_e.pdf accessed 25 May 2019.

[60] China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from the European Union AB-2015-5 – WT/DS460 Appellate Report: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&amp%3bquery=%40Symbol%3dWT%2fDS454%2fAB%2fR*&amp%3bLanguage=English&amp%3bContext=ScriptedSearches&amp%3blanguageUIChanged=true (accessed 25 May 2019.)

[61] WT/DS460 (n 60), EU Panel Report, (n 60), para. 7.236.

[62] WT/DS460 (n 60), EU Panel Report, para. 7.235 and fn 396 thereto. (fns 395 and 397 omitted) cited in WT/DS460/AB/R, 54.

[63] WT/DS460/AB/R, (n 60) China's appellee's submission, para. 333.

[64] WT/DS460/AB/R, (n 60) para. 5.128.

approach to construe the meaning of the Article. It referred to previous WTO rulings on, and further analysed, the word 'essential':

> Whether a particular fact is essential or "significant in the process of reaching a decision"[65] depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties… Thus, while Article 6.9 does not prescribe a particular form for the disclosure of the essential facts, it does require in all cases that the investigating authority disclose those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping.[66]

By applying both inductive and deductive interpretation methods,[67] the Appellate Body laid down the parameters of the obligation, and found that the scope of the legal standard is to be determined by having regard to the object and purpose of the obligation. This is consistent with the customary rules of interpretation, particularly Article 31 of the Vienna Convention. It held that:

> While the Panel's reading of the scope and meaning of Article 6.9 is not entirely clear, it appears to us that…contrary to what the Panel stated, it does not suffice for an investigating authority to disclose "the essential facts under consideration" but, rather, it must disclose the essential facts under consideration that "form the basis for the decision whether to apply definitive measures".[68]

Following on from its interpretation, the Appellate Body proceeded to complete the legal analysis of the merits of the case finding in favour of the EU.

This case is illustrative of the significance of *interpretation* of the legal standard applicable to investigating authorities' obligations in anti-dumping measures determination. The Appellate Body's reversal of the Panel's interpretation marked the turning point in favour of the EU's appeal.[69] China lost the case as it was requested to bring its measures into conformity with the Anti-Dumping Agreement and GATT 1994.[70]

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[65] WT/DS460 (n 60), Appellate Body Report, China – GOES, para. 240.
[66] WT/DS460/AB/R, 53.
[67] Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 (1) International Community Law Review 134–135, https://doi.org/10.1163/18719732-12341350 (This is an interesting study on the overall interpretation process by courts and tribunals and the WTO DB on customary international law).
[68] WT/DS460/AB/R, 54.
[69] Up until the issue of interpretation on Art. 6.9., the Appellate Body upheld the first set of the Panel's findings.
[70] WT/DS460/AB/R, 105–107.

VIII Development Cooperation

The EPA is not just an FTA. It is intended to be a development instrument. The rationale for the waiver is predicated on the special situation of the developing countries. The key principles of development effectiveness defined in the Busan High Level Forum on Aid Effectiveness in 2011 and renewed at the last High-Level Meeting in Nairobi (2016) are: Country ownership; Transparency and accountability; Focus on results; and Inclusive development partnerships. The EU itself regularly monitors its performance in implementing the effectiveness principles through, for example, consultancies on partner country analysis, consultations with the EU Delegations on ground, and evaluation of the progress against the development effectiveness indicators. Such continuous monitoring and reporting is a standard development management system of major donors like the EU, World Bank, USAID, ADB, and AfDB. The findings are used by the senior officials in high-level committees. This system is their means of promoting accountability among their members, in their region, and on the global stage.

One credible solution would be to define development targets and indicators to be linked to the EPA implementation and review process.[71] By setting a benchmark for the EPA, the success or failure towards its objectives can be objectively measured. In sum, as succinctly put by some authors: 'reciprocity should be based on the attainment of objective socioeconomic indicators rather than on arbitrary timeframes and percentage of traded goods'.[72]

At the expiry of the tariff-dismantling period, the trade-related part of the EPA would have served its purpose. It would essentially become obsolete and the WTO Agreement provisions would govern the trade and economic relations. What would be left of the EPA is its development cooperation dimension?

Conclusions and Recommendations

In the process of writing this article, there are a few significant events that have occurred and are worth mentioning. The French 'Yellow Vest' protest against high tax rates imposed by the Macron government. The Nigerian incumbent president was voted in again for a second four-year term. The US banned Huawei's access to US mobile networks and software updates, sparking a trade sanctions retaliation by China in ceasing its rare earth mineral supplies to the US. British Prime Minister Theresa May resigned after several failed attempts to secure a good deal to finalise Brexit. The European Parliament elections resulted in more seats for the Greens and Liberals, as well as for the far-right Eurosceptic parties. After ratification by the 24th State, the African Continental Free Trade Agreement (AfCFTA) came into force on 30 May 2019, marking a historic milestone globally. This is a short, and perhaps bewildering, list, but its purpose is to illustrate the current state of affairs across continents in this globalized world.

[71] Nnamdi and Iheakram (n 11) 16.
[72] Ibid.

Though direct and indirect impacts of all of these events on the state of the Africa – EU relations can be drawn, perhaps the most poignant for this article is the AfCFTA. When the continent-wide market of 1.2 billion people launches on 7 July 2019, the world's largest free trade area will be formed since the establishment of the WTO.

The negative consequences of market liberalization most often feared by parties of a preferential trade agreement such as the EPAs are dumping and subsidies. The EPAs explicitly provide that anti-dumping and countervailing measures shall be governed by the WTO Agreements. Disputes related to these are to be dealt with in the WTO Dispute Settlement mechanism (in the SADC – EU EPA) or by a special legal review mechanism (in the WA – EU EPA). This single legal review mechanism is not sufficiently detailed to inspire confidence about its workability. The WA States do not have the requisite level of experience, expertise, or capacity to initiate a WTO Dispute Settlement procedure, and therefore have little chance of successful claims. Reviewing the records of WTO disputes, the more active developing countries have been from Latin America and Asia. There are practically no WTO cases brought by or against African States (except South Africa). The closest experience Nigeria has had with WTO dispute settlement proceedings is as a third party.

In view of the findings of this article, there are several recommendations to be made. Firstly, the WA – EU EPA should incorporate development indicators to measure its progress at achieving its development objective. This would ensure that the original aim of the CA, to promote the growth and sustainable development of the ACP States, is respected. Secondly, the general principles of international law, particularly the need for independent and neutral dispute settlement mechanisms, can be better observed if the implementation committees of the EPAs are not politically affiliated officials of the contracting States. Instead, the role of the committee could be undertaken by dedicated officers in a neutral international institution such as the WTO, World Customs Organization (WCO), UNCTAD or OECD.

The arbitration mechanism under the EPA could be designed to better incorporate the privileges provided to developing countries under the WTO.[73] The EPA could provide for detailed rules on the possibilities for deadline extensions and accelerated procedures for the WA party. Fifthly, recalling Article 82 under which consultation and mediation are to be the only dispute settlement methods for the first ten years of EPA operation, it would be pragmatic to also include the method of good offices. Incorporating this diplomatic method into the overall dispute settlement mechanism of the EPA is logical since it is compatible with the other options of consultation and mediation. The positive impact of good offices should not be underestimated especially in the context of international trade and development relations between unequal partners as the WA, the ACP, and the EU.

The emerging political context in the EU should not be ignored either. The growing clout of the Green party in the European Parliament reflects the steady prioritization of environmental issues, which is likely to change the substance of the EPAs in the near future given the interdependence between commerce and environmental resources. Aspects like rules of

[73] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, art 11.

origin and SPS would need to be progressively revised. In view of this, the author also proffers a sixth recommendation that focuses on the influence of public policy on the reasoning of adjudicators. Dedicated trainings for the Joint Implementation Committee and the pool of arbitrators of the WA – EU EPA (but also for the other ACP-EU EPAs) on impact and causal analyses could sharpen their understanding of the relationships between market situations and factors of production. Keeping up-to-date in this regard would give them greater confidence in correctly interpreting and applying the provisions of the EPA.

The author acknowledges that there are several ways in which this topic can be further enhanced possibly within a doctoral program. For example, to attain a comprehensive picture of the strengths and weaknesses of the EPAs, a comparative legal analysis of the EU's trade agreements with the US, China, and Japan could be made. The methodology could be supplemented by quantitative analysis and an impact assessment. The findings would rank the quality of the Africa – EU EPAs within a broader global context. Another way would be to further elaborate on the regional integration dimension of the EPA. The research could hone in on the evolving process of the AfCFTA juxtaposed against the continuing negotiations of the EPAs towards becoming full and comprehensive regimes covering Services, Competition, and Investment. The findings would shed a new light on the nature of the Africa – EU EPA on how they can harmonise inter-, and intra-regional objectives.

Attila Sipos*

The Dogmatics and Modernisation of International Conventions on Aviation Security

Today it is barely conceivable but, in the post-Second World War world of international civil aviation, issues of security did not generate special concern. At that time nobody envisaged that one day terrorists would hijack airplanes or use them as weapons and unruly passengers will cause everyday problems. In the beginning, states put emphasis exclusively on flight safety. The establishment of flight safety first and foremost required the elaboration of an international system of rules concerning technical requirements. It is not accidental that air transport is one of the most regulated industries in the world. The slogan has persisted in similar forms: Safety is our priority, Safety is a priori, Safety does not allow compromise, Safety safeguards 24 hours a day, etc. Despite that, all of us are aware that safety in itself does not suffice.

Hardly had the ink dried on the Paris Peace Treaty (1947),[1] then humankind had to realise that it was returning to a battlefield, the scene of the Cold War, which again divided the world into two parts; in this way, it forestalled the way to the so-longed-for state of peace and unity. Simultaneously, terrorism emerged as well and it was manifested in manifold versions. Besides the unique nature of civil aviation embracing the world and the primacy of flight safety, the world demanded a paradigm shift, and urged for a new way of thinking and a new system of rules: aviation security.

Flight safety and aviation security, despite their close relationship, differ from each other fundamentally. Although in both areas, the dual purpose of the law-maker is preventing or

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[1] On 10 February, 1947 World War Two ended for Hungary, Finland, Bulgaria, Italy and Romania with the signature of the Paris Peace Treaties. The five peace treaties were signed simultaneously. These were similar to each other as to their basic principles, which had been formulated during the Potsdam Conference of 1945.

averting danger and thereby saving lives as well as protecting property, we are dealing with two sharply distinct areas.

– *Flight safety* means a system of capabilities, in which the performers in the industry can react effectively and competently to eventual emergencies related to operation and upkeep, as a result of which no accidents or flying incidents occur. (Regarding the fact that flight safety is never 100%, from a practical viewpoint it is more pragmatic to use the phrase 'no avoidable or as few as possible accidents or incidents occur').[2]

– Aviation *security* is a system of capabilities, due to which the performers of the industry can provide effective and competent protection to aircraft on the ground or in the air, to the passengers and crew on board the aircraft or on the grounds of airports, to the ground-staff and third persons on the ground *vis-à-vis* unlawful acts endangering their security.

Unlawful acts include all acts or attempts committed by a person endangering the safety of international civil aviation. Such acts include unlawful seizure, sabotage, taking hostages, violent intrusion (on board, at the airport, or in the area of an air navigation facility) and the placement of weapons, a dangerous tool or material with the purpose of the commission of a crime.[3] Furthermore, what frequently occur are threats of bomb attacks, imparting misleading, false information or refusing to cooperate with staff during the flight.

Beyond the difference between the notions, flight safety prevails via the completion of mainly international and transparent regulatory tasks, while aviation security, although its effect is global, consists primarily of tasks of protection to be tackled nationally. The system of rules of flight safety is open and knowable for everyone, whereas the security rules constitute a closed system, excluding access to the inherent confidential information for those not concerned. However, the safety and security of international civil aviation may only be effective if these two prominent areas cooperate continually and support each other unconditionally.

I The Tokyo Convention (1963)

Although in the early phase of aviation unlawful acts against staff, or devices used during flights also occurred, no social demand prevailed for their international regulation due to their isolated character and low number.[4] In our days, the presence of people in the air has become constant; it is therefore not accidental that, along with the incessantly growing

[2] Henri Wassenbergh, 'Safety in Air Transportation and Market Entry' (1998) 23 (2) Journal of Air and Space Law 83.

[3] The enumeration is not complete. Several crimes and criminal behaviours will be introduced, which are atypical and occur in cumulative offences or have become relevant for criminal law as new commission conducts.

[4] Jacques Charles (1746–1823) a French inventor and mathematician, released a (pilotless) balloon filled with hydrogen, the lightest gas (with 14.4 times less density than air) for the first time in the world on 26 August 1783, which, after one of its successful landings, was destroyed by the startled inhabitants of the settlement of Gonesse guided by their terror of the device. Later, the name of Gonesse near Paris was written in black in the history of civil aviation, since it was its territory on which a Concorde, a supersonic airplane of Air France crashed on 25 July, 2000. Piers Lechter, *Eccentric France, The Bradt Guide to Mad, Magical and Marvellous* (Bradt Travel Guides 2003, UK) 35–36.

number of passengers, the number of unlawful acts committed on board aircraft has also increased. Although states applied developed punishment systems as early as at the beginning of the 20th century, none of them could effectively respond to the challenges of international air traffic. The acts committed on board the aircraft, their increasingly and obviously unique situation and peculiar management coerced the rule-maker to take a different approach. Undoubtedly, any minor, insignificant act occurring at various frequencies and committed on board an aircraft in flight (e.g. smoking despite prohibition, fighting or verbal harassment) has a great impact on flight safety, and so its gravity clearly differs from similar acts committed on the ground. Moreover, at an altitude of 10 km (nearly 40,000 feet), unlawful acts committed on board aircraft overflying the sovereign airspace of various countries raise several issues, the solution of which on an international level became inevitable. For instance, during the enforcement of the territorial principle, it was difficult to determine in which country's airspace the crime was committed and, due to this uncertainty, which country could be entitled to proceed against the perpetrator of the crime. It also occurred that the country having jurisdiction did not conduct the criminal proceedings, or did not request the extradition of the perpetrator.[5] In the worst case, states could not proceed in the absence of jurisdiction, and therefore, the perpetrator's crime remained unpunished.

Although jurists had dealt with the criminal legal aspects of unlawful acts committed on aircraft since the 1910s, the first comprehensive response was formulated in 1963 under the first international treaty dealing with aviation security.[6] The *Convention on Offences and Certain Other Acts Committed on Board Aircraft,* adopted in Tokyo[7] under the auspices of the ICAO, had been framed as a result of the ten-year concerted work by the international community. In the Convention, the international community as a whole responded with proper determination primarily to *international terrorism* as the gravest danger, threatening civil aviation and damaging its interests.

The Tokyo Convention shall apply in respect of offences against penal law of the Contracting States as well as acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board irrespective of whether the acts qualify as crime pursuant to the national rules of substantive criminal law of the Contracting States [Article 1 (1) *a)–b)*]. The essence of the Convention is contained in this provision, since the wide-scale extension of the substantive scope of application facilitates holding anyone responsible for any act jeopardising flight safety as an objective to be protected to the utmost by all Contracting States.

The Convention has fulfilled its most important objective, since it unified and standardised the legal relationships that needed to be regulated at the international level. This

In March 1784 Jean-Pierre Blanchard (1753–1809) aviatician was compelled by a young man named Dupont de Chambon with a sword to take him into the clouds. The attempt was thwarted by reason of the application of physical strength. *The Encyclopaedia Britannica* (11th edn, New York 1910) 264.

[5] R. H. Mankiewicz, 'The 1970 Hague Convention' (1971) 37 Journal of Air Law and Commerce 195–196.

[6] Sami Shubber: *Jurisdiction Over Crimes on Board Aircraft* (The Hague 1973) 5.

[7] ICAO Doc 8364 *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963).

was absolutely urgent, since in the early days of commercial aviation there were several examples of unlawful acts severely jeopardising flight safety on board the aircraft where the perpetrator was not called to account under criminal law due to the deficiencies of relevant national rules.

In the *United States versus Cordova*[8] lawsuit, the defendant could not be prosecuted due to the absence of jurisdiction. On 2 August 1948, a scuffle broke out on board a United States registered DC-4 passenger plane travelling from the capital of Puerto Rico, San Juan (SJU), to New York (LGA) between the heavily inebriated Mr. Cordova and the cabin crew in the tail of the plane while it was flying above the (high seas of the) Atlantic Ocean. Due to the weight of the cabin crew and passengers hastening to help to restrain Mr. Cordova, the tail of the airplane became tail-heavy. Thanks to the rapid interference of the pilots, the resulting loss of altitude and speed could be corrected and the unruly passenger, restricted in his personal freedom, waited for landing and his transfer to the authorities. The accused, whose culpability was beyond doubt, was committed for trial, but he could not be prosecuted pursuant to the federal law then in force, since, in the event of a crime committed on the high seas, a court of the United States only had jurisdiction if the crime was committed on board a ship registered by US authorities, and the case had to be dismissed.[9]

1 Jurisdiction

The law-makers of the Tokyo Convention settled the above deficiencies deriving from diverse national rules and dealt with the issue of jurisdiction with high priority. The establishment of the system of the institutions of jurisdiction was carried out along the principle that the criminal liability of natural entities under international law due to an infringement of the rules of international law could be prosecuted and punished, by the state in the territory of which the crime was committed. With respect to the fact that national penal codes primarily apply the territorial principle, its enforcement was not impeded by a legal obstacle.

As a main rule, *the State of registration of the aircraft is competent to exercise jurisdiction* over offences and acts committed on board jeopardising flight safety [Article 3 (1)]. The law-maker demands that each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in that State [Article 3 (2)]. The purpose of the law-maker was to prevent the lack of jurisdiction as a consequence of the lack of state sovereignty while flying over high seas (as a territory to be freely used by all). Therefore, the Convention needs to be applied 'in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State while that aircraft is in flight or on the surface of the high seas or of any other area outside

[8] *United States v Cordova,* US District Court E.D. New York, 1950.89 F. Supp. 298.
[9] Brian F. Havel, Gabriel S. Sanchez, *Principles and Practice on International Aviation Law* (Cambridge 2014) 185.

the territory of any state'. [Article 1 (2)]. This also entails that *exclusive jurisdiction* is only applicable with respect to the registering state if the registered aircraft is flying over the high seas or Antarctica. In this way, the law-maker created a situation in which the people on board are subject to the jurisdiction of at least two states (the one securing its national airspace and the state of registration) at the same time.[10] Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft [Article 16 (1)].

However, it is not at all unlikely that not only 'the state of the flag' and the state of the national airspace, but other states also have jurisdiction *vis-à-vis* the perpetrator of the crime. The equitable interest of the states to avail themselves their rights is narrowly constructed and guaranteed as an exception by the Convention. As such, a specific State may have jurisdiction if:

a) the offence has effect on the territory of such State;

b) the offence has been committed by or against a national or permanent resident of such State;

c) the offence is against the security of such State;

d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement (Article 4).

The law-maker also grants jurisdiction to the 'state of the first landing', provided that the aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit an offence on board the aircraft (Article 8). At the same time,

> the aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.

About this fact the aircraft commander shall notify the authorities of such State of his intention to deliver such person and shall furnish the authorities to whom any suspected offender is delivered with evidence and information (which are lawfully in his possession) under the law of the State of registration of the aircraft (Article 9).

While establishing a broad scale on the fora of jurisdiction, the law-makers were attentive to the legal preferences represented by the major legal regimes:

– to the Anglo-Saxon (precedent) legal system, which favours the *territorial principle,* according to which the proceedings should be conducted in the country where the act was committed (over which the aircraft was flying), and

[10] Ernszt Ildikó, 'A nemzetközi légiközlekedés védelme' (2010) 15 Jog és Állam 35–36.

– to the Continental legal system, which favours the *personal principle* (the jurisdiction of the state of registration), according to which the close relation of citizenship between the state and its citizen requires that the person (in the present case the passenger) has to observe the law of their state, even in the territory of another state.

The resolution of the vast differences between the two basic systems of law under international treaties and in debates presented a major challenge and frequently was a great achievement. Beyond the reconciliation of differences, we need to consider the fact that international law cannot and does not intend to regulate everything, but it grants frameworks, and therefore national law has an indispensable role as expressly permitted by the law-maker. The Tokyo Convention formulates clearly that it does not exclude any criminal jurisdiction exercised in accordance with national law [Article 3 (3)].

Let's presume that, on board an Austrian Airlines aircraft registered in Austria in flight from Vienna (VIE) to Madrid (MAD), a Czech and a Dutch passenger commence to scuffle in Swiss airspace. The Dutch passenger is severely injured and, following the entry of the airplane into French airspace, the aggrieved party loses consciousness. The aircraft commander decides to interrupt the flight and lands on French territory. Related to the case, several rivalling jurisdictions emerge. According to the main rule, the registering state, Austria, may have jurisdiction on the basis of *the principle of the flag* (quasi territorial principle). Furthermore, a claim for jurisdiction may also be submitted on the basis of the *territorial principle (principium territoriale)* by Switzerland and France; the latter may invoke *the principle of the first landing*, but the intention of the Czech Republic and the Netherlands to lodge a criminal action may be recognised on the basis of the *personal principle (principium personale)* as well. Finally, Spain, as the *place of destination,* may also request the recognition of its jurisdiction with reference to its national flight safety rules.[11]

The example vividly demonstrates that a combined system of jurisdiction was introduced.[12] The objective is unambiguous: it is better that multiple jurisdictions need to be applied than none. At the same time, it is important to highlight that although the law-maker itemises taxatively the possibilities of the enforcement of jurisdiction (Articles 1, 3–4, 8–9), it omits guidance as to which of the rivalling jurisdictions has priority. If several rivalling claims for jurisdiction exist, it is essentially the circumstances that determine which of the authorised parties is recognised as the best and safest to adjudicate the case. The body proceeding in the case is obliged to accept the support and intervention of the other parties authorised for jurisdiction. In order to guarantee legal certainty, the proceeding authorities should be highly

[11] ICAO Doc 8111, Legal Committee 146-2. 164.

[12] Juan J. Lopez Gutierrez, 'Should the Tokyo Convention of 1963 Be Ratified?' (1965) 31 (1) Journal of Air Law and Commerce 3–4.

attentive to the non-commencement of parallel proceedings, because that would injure one of the most important basic principles of criminal law, the prohibition of dual proceedings *(ne bis in idem)*.[13]

2 The Competence of the Aircraft Commander

In the interest of the uniform safeguarding of flight safety beyond the issues of jurisdiction, the law-maker paid close attention to the rights and obligations of the aircraft commander. The aircraft commander (captain) is the member of the specialised staff with special authorisation appointed by the aircraft operator for the normal and safe attendance to the tasks of the flight and operation. The aircraft commander (even if the co-pilot navigates the plane) is authorised and simultaneously obliged to guarantee security on board the aircraft and make a final decision on all issues related to operation. While in flight, the commander is entitled to deviate from the rules, if that is unquestionably essential and reasonable in the interest of security.

The commander directs the (cockpit and cabin) crew of the aircraft in his person. The Convention is to be applied in the event of crime or acts committed on board the aircraft in flight.[14] The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, an offence or other act on board the aircraft, impose reasonable measures, including restraint, upon that person. The objective of such measures is to protect the safety of the aircraft, or of persons and property therein; to maintain good order and discipline on board; or to enable the aircraft commander to deliver that person to the competent authorities or to disembark him [Article 6 (1)].

In the interest of the earliest restoration of order and discipline on board, the resolute intervention of the crew, and depending on the evolved situation, of the passengers may be necessary *vis-à-vis* the acting unlawfully. The aircraft commander may *require* or authorise the assistance of other crew members and may *request* or authorise, but not require, the assistance of passengers to restrain any person he is entitled to restrain (by tying up, shackling or holding down). Any crew member or passenger may also take reasonable preventive measures without such authorisation when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property in it [Article 6 (2)].

The law-maker endeavours to encourage this frequently indispensable intervention by guaranteeing exemption (from liability under criminal, civil and administrative law) for all conduct aimed at the restitution of order that would qualify as unlawful conduct under normal circumstances.

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[13] No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. UN International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March, 1976 [Article 14 (7)].

[14] For the purposes of the Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. [Tokyo Convention, Article 1 (3)].

> For actions taken in accordance with the Convention, the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall not be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken (Article 10).

The aircraft commander is not only entitled to restrain personal freedom on board the airplane via the application of measures, but he may also disembark the person having committed or about to commit an unlawful act in the territory of any Contracting State. The aircraft commander shall notify the authorities in advance, may deliver the offender and shall provide evidence and information concerning the fact of and the reasons for the disruption of the flight and disembarkation to the competent authorities of the Contracting State (Articles 8–9). At the same time, any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person (Article 12). In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft, the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo (Article 17).

In practice, the commander has to fulfil numerous obligations related to security; he is thus not only obliged to take all necessary measures if the persons aboard or the aircraft is endangered, but also to help other endangered aircraft (or ocean-liner or ship) as necessary and practicable in the given situation.

The popularity of the convention is indicated by its ratification by 186 states. This high figure can be attributed to the fact that the Tokyo Convention only reformulated the already existing international practice under an international treaty. However, the Tokyo Convention after a while could not keep up with the changes surrounding air transport and previously unknown criminal methods, all of which required the law-maker to provide more developed and subtler international regulation.

II International Treaties Concerning Security: The Hague (1970), Montreal (1971), New York (1979) and Montreal (1991) Conventions and Montreal Protocol (1988)

Mainly due to the strained political ambience because of the Cold War, the number of hijacks rose dramatically from the late 60s onwards. According to statistics the pinnacle of hijacks was between 1968 and 1972 (with regard to hijacked aircraft registered in the US alone, more than 130 interventions were necessary). The most hijacks in the history of civil aviation occurred in 1969, on 86 occasions.[15] Although the objective of terrorists was not the

[15] In our days this occurs very rarely; in 2015 and 2017 such a crime did not occur at all. Hugh Morris, 'The strangest stories from the golden age of plane hijacking' Travel News Editor, <www.telegraph.co.uk/travel> accessed 5 July 2019.

annihilation of the aircraft, passengers or crew that jeopardised their escape, being granted political asylum or their liberation or that of others, these terrorist acts left behind many victims. By seizing the aircraft and becoming the focus of the attention of the international public, (normally) armed terrorists manifested their will and endeavoured to achieve their political objectives. These included requesting asylum in a country designated by the terrorists or demanding the release of prisoners convicted for political or other reasons, taking hostages and receiving financial or other benefits. Seizing or taking control of an in-flight aircraft is always distressing since it endangers the safety of persons and property, seriously disrupts air traffic and undermines the confidence of the public in the security of civil aviation. Therefore, with a view to driving back the criminal practice of using aircraft as an instrument for unlawful purposes, the international community held a diplomatic conference in The Hague in December 1970. The conference, organised by the ICAO, was concluded by the ratification of the *Convention for the Suppression of Unlawful Seizure of Aircraft*.[16]

Pursuant to The Hague Convention (1970) all contracting States assumed the obligation to impose severe penalties against any person who, on board an aircraft in flight[17] unlawfully, by force or threat thereof, or by any other form of intimidation seizes, or exercises control of that aircraft (Articles 1–2). The law-maker envisages severe penalties, while the lowest penalties are subject to national jurisdiction and facilitate the exercise of criminal jurisdiction in accordance with national law [Article 4 (3)].

The rules related to the exercise of jurisdiction basically complied with those of the Tokyo Convention, whereas the law-maker secured a further forum besides the existing ones. The Hague Convention extends jurisdiction to the state of the operator of the aircraft. Due to the features of the aviation industry, the state of registration is in many cases different from the state of the operator. The main reasons for this include the increasingly extensive use of leased airplanes, while the institution of forum shopping is popular with aircraft operators. Thus, with respect to any act of violence committed by the alleged offender *vis-à-vis* the passengers or the crew, when the offence is committed on board an aircraft leased without crew, that state in which the lessee has his principal place of business has jurisdiction or, if the lessee has no such place of business, his permanent residence [Article 4 (1) *c)*].

Apart from the introduction of the new forum of jurisdiction, the law-maker tightened the freedom of the state with jurisdiction to proceed: if the contracting State in the territory of which the alleged offender has been arrested does not extradite the alleged offender, it shall take such measures as may be necessary to establish its jurisdiction over the offence, whether or not the offence was committed in its territory, and to submit the case to its competent authorities for the purpose of prosecution (Article 7). Therefore, via the consistent observance of the *aut dedere, aut judicare* principle, the perpetrator either needs to be extradited to

[16] ICAO Doc 8920 *Convention for the Suppression of Unlawful Seizure of Aircraft.* The Hague, 6 December, 1970.

[17] For the purposes of the Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for the persons and property on board. [Article 3 (1)].

a state that shall conduct the criminal proceedings or needs to be punished in the state in which he is held; a third way is not applicable.[18] The objective of the law-makers is explicit: the states may not provide asylum to the perpetrators; their punishment, being the enemies of mankind *(hostis humani generis),* is inevitable.

Because of the alarming proliferation of unlawful acts, in parallel with and almost copying The Hague Convention, with the involvement of the ICAO, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* was framed as the Montreal Convention, adopted in 1971.[19] The Convention prescribes the punishment of acts jeopardising the soundness and safety of aircraft and the infrastructure of ground air navigation service providers. Considering that unlawful acts against the safety of civil aviation jeopardise the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation, the law-maker enumerates taxatively the broad scope of the methods of terrorist acts infringing the safety of air transport.

Pursuant to the Convention, any person commits an offence if he unlawfully and intentionally:

a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight. [Article 1 (1) *a)–e)*].

In comparison with The Hague Convention, the basic difference was the shift of the central element of the perpetrator's conduct from seizing the aircraft to rendering it incapable of flying.

The main provisions of the convention concerning civil airports were extended by the Montreal Protocol (1988).[20] The *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation,* in comparison with the Montreal Convention, extended the conducts to be criminalised by acts (probably) jeopardising the safety of airports

[18] Kardos Gábor, 'Miért nehéz a terrorizmus ellen jogi eszközökkel védekezni?' in Vadai Ágnes (ed), *Terrorizmus – A nemzeti és nemzetközi biztonságot érintő kihívás* (1999, Budapest) 77.

[19] ICAO Doc 8966 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.* Montreal, 23 September, 1971.

[20] ICAO Doc 9518 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Montreal, 23 September, 1971.

serving international civil aviation. The Protocol was drawn up following the simultaneous terrorist attacks against the airports of Rome and Vienna on 27 December 1985.[21] This Protocol supplements the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;* therefore, the Convention and the Protocol shall be read and interpreted together as one single instrument (Article 1). [Remark: As between the States Parties, the *Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (2010) shall prevail over the previous international contracts, such as Montreal Convention (1971) and its Protocol (1988), (Article 24)].

On 13 October 1977 the terrorists of the Popular Front for the Liberation of Palestine hijacked the Boeing 737-200 operated by of Lufthansa, the German airline, as flight LH181 between Palma de Mallorca (PMI) and Frankfurt (FRA). The flight was over Marseilles, in French airspace when two male and two female perpetrators armed with hand grenades and pistols seized control. The airplane first landed in Rome, then over the next 5 days, for the purpose of constant mobility, it touched down at several international airports such as Larnaca, Ankara, Bahrein, Dubai and Aden. The leader of the hijackers, named Zohair Youssif Akache, identified himself as 'Captain Martyr Mahmud' came to the fore with his demands: the release of 10 imprisoned leaders of the far-left Red Army Fraction (RAF) and their two other faithful comrades imprisoned in Turkey, furthermore, that they would be given 15 million dollars. During their stay in South Yemen, the terrorists executed the captain of the airplane.

Vis-à-vis the hijackers, the German government put its Bundesgrenzschutz GSG-9 commando unit into action, formed after the hostage drama terminated in bloodshed at the 1972 Olympics in Munich. The operation with the cover-name "Feuerzauber" (Fire Magic) took place in Mogadishu in Somalia. The country's President Sziad Barre, (1919-1995) consented to the mission being carried out, while the German Chancellor Helmut Schmidt (1918-2015) assumed complete responsibility for its outcome. While Somalian soldiers set fire to the runway in front of the pilot's cabin as a distraction, the German and British SAS (Special Air Services) commando units simultaneously blew open the doors and threw intoxicating and noise grenades into the passenger compartment, then after entering it they opened fire. The special tactical operation met with complete success after 5 minutes and all hostages were released physically unharmed.[22]

[21] At the Leonardo da Vinci airport in Rome (FCO) 4 armed terrorists fired at the passengers waiting at the counter of the Israeli airline (ELAL). At the Schwechat airport in Vienna (VIE) 3 armed terrorists fired shots also at the counter of the Israeli airline and flung a hand grenade into the waiting crowd. In the attacks 17 innocent people lost their lives and 117 people were injured. The Pittsburgh Press, 'Terrorist raid 2 Europe airports' Vol. 102, No. 184, 27 December, 1985. 1.

[22] Szabó Miklós, 'Leszállás Mogadishuban' (2000) 10 (4) Hadtudomány <http://mhtt.eu/hadtudomany/2000/4_13.html> accessed 5 July 2019.

The ink had not dried on the Montreal Convention pertaining to security when the trend in the seizure of aircraft became incidental to taking hostages from among the civil aviation passengers. Drawing on their experience, terrorists realised that it was simpler and less risky to seize a passenger airplane and threaten the governments with exterminating the hostages than kidnapping figures symbolising the given regime (for example a protected person or an important businessman). The perpetrators, in return for the hostages, demanded the release of convicts (frequently political prisoners) or, according to the citizenship of the hostages, demanded the states concerned to fulfil political demands or several times to grant financial or other benefits.

The international community, in the interest of the security of civil aviation, concluded a new international treaty: the *International Convention against the Taking of Hostages,* which was adopted by the contracting States in New York in 1979.[23] Anyone who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages [Article 1 (1)]. Any person who attempts to commit an act of hostage-taking, or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence [Article 1 (2)].

Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences committed:

– in its territory or on board a ship or aircraft registered in that State;
– by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
– in order to compel that State to do or abstain from doing any act; or
– with respect to a hostage who is a national of that State, if that State considers it appropriate. [Article 5 (1) *a)–d)*].

If the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts. The custody or other measures shall be notified without delay directly or through the Secretary General of the United Nations [Article 6 (1-2)].

As the 1980's wore on, it seemed that the Tokyo Convention (1963), The Hague Convention (1970), the Montreal (1971) and New York (1979) Conventions, joined by the Montreal Protocol (1988) had encompassed the complete area of civil aviation from the viewpoint of criminal law. Unfortunately, that was not the case. On 21 December 1988, above the Scottish town of Lockerbie, Pan Am Flight 103 suddenly disappeared from the radar screen due to the

[23] *International Convention against the Taking of Hostages,* 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force on 3 June, 1983; UN Doc A/Res/34/146.

explosion of 312 grammes of Semtex plastic explosive.[24] The plastic explosive annihilating the airplane had been placed by Libyan terrorists. Subsequently, the Libyan government assumed responsibility for the manoeuvre and paid 10 million USD as compensation for each victim.[25] In response to the situation, namely, the significant increase in the number of sabotage actions against airplanes during the 1980s,[26] the Legal Committee of the ICAO drafted a *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. The convention was adopted by ICAO member states on 1 March 1991 in Montreal.[27] The main objective of the law-makers was that the member states banned and prevented the production and distribution of unmarked explosives (without chemical fingerprints) so that unauthorised persons could not have access to them. The technical supplement to the convention contains a detailed description of plastic explosives, their marking material and molecular formulae as well as the minimum concentration of markings, thereby assisting unified and concerted state intervention for driving back the use of such explosives.[28]

III The Modernisation of the International Aviation Security Treaties

Following the adoption of the Explosives Convention, no convention was drawn up in the area of criminal law related to international air traffic for nearly 20 years. However, the 21st century offered new morals and shocks. Civil air transport had to face unprecedented acts of mass violence: the tragic events of 11 September 2001 with the loss of 2977 lives in the USA and the airplanes exploded by suicidal assassins on 24 August 2004 in Russia shattered the world and its assumptions and revised our view of the safety of aviation for good reason. The conventions adopted in the past became out-of-date since they were unable to rise to all the challenges affecting the security of air transport.

1 Convention on the Compensation of Unlawful Acts (2009)

A major challenge related to compensation for persons on the ground, especially if the aircraft in flight caused damage to third persons due to unlawful conduct on board. As a modernisation of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the

[24] Semtex is an extraordinarily dangerous and powerful explosive developed in Czechoslovakia in the 1960s. It is difficult to find, dogs cannot smell it, X-Ray does not detect it, the density of the material is low; finally, it is plastic and heat and water resistant. It can be used for 20 years. Frankel Glenn, 'Havel Details Sale of Explosive to Libya' Washington Post Foreign Service, London, 23 March 1990, A15.

[25] Gerard Seenan, 'Lockerbie Deal to End Libya's Isolation' The Guardian, 15 August 2003.

[26] In 1985, 13 sabotage actions caused the death of 473 people, while in 1989, 279 people fell victim to such offences. <www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_11.pdf> accessed 5 July 2019.

[27] ICAO Doc 9571 *Convention on the Marking of Plastic Explosives for the Purpose of Detection.* Montreal. 1 March, 1991.

[28] Consequently, the Czech manufacturer currently produces Semtex, the plastic explosive so that its detection should be easier and the duration of its usability should be shorter.

Surface (1952)[29] the member states of the ICAO adopted the Convention on Compensation for Damage Caused by Aircraft to Third Parties, the so-called *General Risk Convention* on 2 May 2009,[30] and, due to unlawful acts, the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, the so-called *Convention on the Compensation for Unlawful Acts.*[31] This latter convention establishes the International Civil Aviation Compensation Fund, the objective of which is the provision of a considerable amount by raising the liability limit of the aircraft operator with absolute responsibility in cases subject to the Convention. During an international flight, the operator is liable for the occurrence of death, physical injury, damage to property or the environment. The liability of the operator is restricted on the basis of the weight of the aircraft. The payment of compensation ensues via the Supplementary Compensation Mechanism. The absolute liability and the heightened liability limitation encumbering the aircraft operator, as it was determined under the Convention, guarantee that the aggrieved victims of terrorists are granted higher compensation and can enforce their compensation claims more efficiently in the future.

2 The Beijing Convention and Protocol (2010)

In 2010 at the Diplomatic Conference on Aviation Security organised in Beijing by the ICAO, two new international treaties were adopted following several years' legal and diplomatic background work, for the purpose of the reform and modernisation of the system of rules governing aviation security.

– The Beijing *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*,[32] which replaces the Montreal Convention (1971) and its supplementary Protocol (1988) with a much more detailed uniform regulation adjusted to the requirements of the age; and

– the Beijing *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft,*[33] which supplements The Hague Convention (1970) by guaranteeing that legal entities are called to account and that the accessory conduct of accomplices related to the preparatory and the main act is punished.

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[29] ICAO Doc 7364 *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* (1952). If the General Risk Convention takes effect, it will replace the Rome Convention.

[30] ICAO Doc 9919 *Convention on Compensation for Damage Caused by Aircraft to Third Parties,* done at Montreal, 2 May 2009; Two New Treaties Adopted by International Conference on Air Law. ICAO News Release – PIO, 12 May, 2009. www.icao.int.

[31] ICAO Doc 9920 *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft.* Montreal on 2 May, 2009.

[32] ICAO Doc 9960 *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.* Beijing. 10 September, 2010; The Beijing Convention took effect on 1 July, 2018.

[33] ICAO Doc 9959 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft. Beijing, 10 September, 2010; The Beijing Protocol took effect on 1 January, 2018.

Via these sources of law, the number of the international treaties regulating international criminal air law has risen to seven.[34]

The principal innovation of the Beijing Convention is the criminalisation of conducts of the modern age. Within the purview of the Beijing Convention, the acts to be punished include:

– the use of a civil aircraft as a weapon for the purpose of causing death, serious personal injury or considerable material damage;
– using a civil aircraft so that biological, chemical and nuclear (so-called BCN – Biological, Chemical, Nuclear) weapons reach their destinations with the purpose of the extermination of lives, causing injury or incurring damages;
– assault on civil aircraft using BCN weapons;
– unlawful delivery of BCN weapons using civil aircraft;
– unlawful delivery of explosives and fissionable materials by civil aircraft for terrorist purposes; and
– attack against the IT infrastructure of airports or air navigational services (Article 1).

As a further novelty, the law-maker renders attempt at acts of commission punishable and prescribes the punishment of conduct that hinders calling the perpetrator to account [Article 1 (4) *a)–d)*]. One of the most significant changes regarding the former Conventions consists in the increased efficiency of enforcement due to the demand to call perpetrators to account. Pursuant to the Convention, the State of a national not only may but is obliged to establish its jurisdiction and enforce its due process against the perpetrator. Furthermore, the jurisdiction of the State may also be established if the victim is a national (Article 8). The Convention shall not apply to aircraft used by military, customs or police services; it solely applies to aircraft used for international civil aviation (Article 5).

The Beijing Protocol was drafted with the intention of extending the system of community requirements *vis-à-vis* international terrorism. The terrorist attacks of September 11th, 2001 made it abundantly clear that a civil airliner with full fuel tanks is capable of causing destruction comparable to that brought about by armed military aircraft. The States started analysing the legal frame of the destruction of rogue civil aircraft under international law and constitutional law.[35]

To prevent the unlawful seizure of aircraft more effectively, the law-maker amended and supplemented The Hague Convention (1970). Its substantive scope of application was accordingly extended; it now ordains the punishment of other forms of hijack, hence commission with the use of modern technology:

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[34] (2011) 66 (1) ICAO Journal 8.

[35] Gábor Sulyok, 'An Assessment of the Destruction of Rogue Civil Aircraft under International Law and Constitutional Law' in Halmai, Gábor (ed), *Hungary: Human Rights in the Face of Terrorism* (Vandeplas Publishing 2006, Lake Mary) 5–30.

> any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by any technological means [Article 1 (1)].

Furthermore, it extends criminal liability to accomplice and preparatory activities [Article 1 (3) *c)–d)*]. It prescribes that each State Party, in accordance with national law, holds legal entities criminally liable for the crime they committed (2 bis): in accordance with its national legal principles, each State Party may take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence. Such liability may be criminal, civil or administrative.

The role of national law remains definitive further on in the Convention, so the law-maker, as in the international conventions previously established, does not exclude any criminal jurisdiction exercised in accordance with national law [Article 4 (4)].

3 The Montreal Protocol (2014)

The Montreal Protocol[36] was designed to amend the Tokyo Convention (1963) in order to offer a comprehensive response to the problems caused by the constantly growing number of unruly passengers. The Protocol was not expressly drafted with the intention of intervention against international terrorism, but basically with the objective of extending the possibilities of criminal intervention against violent passengers not motivated by terrorism but who defy the instructions of staff. Accordingly, the law-maker specified and supplemented the elements in a case of delinquency.

According to the main rule, the Tokyo Convention grants the opportunity of the exercise of jurisdiction for the state of registration over offences and acts committed on board. The state of landing had not always been authorised to conduct proceedings; therefore, unruly passengers had often gone unpunished. The Montreal Protocol was designed to end this defect in law, since it guaranteed jurisdiction to the authorities of the state of landing to conduct proceedings *vis-à-vis* the delivered passenger [Article 1 (1)]. The law-maker further extended the choice of fora of jurisdiction by granting jurisdiction to the state of the operator [Article 3 (2) bis *b)*].[37]

The Montreal Protocol extends the scope of application of the Tokyo Convention, so that the effect of its provisions concerns offences and acts jeopardising flight safety on board an aircraft in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation [Article 1 (3) *a)*]. That is not

[36] ICAO Doc 10034 Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Montreal, 4 April, 2014; The Montreal Protocol took effect on 1 January, 2020.

[37] The designation of articles follows the Consolidated text of the Tokyo Convention and Montreal Protocol. DCTC Doc No. 33., 4 April, 2014.

inadvertent, since the majority of unlawful acts are committed by unruly passengers during taxiing before the commencement of take-off.

In order to lighten the tasks of the aircraft commander, the Protocol factually enumerates instances of unruly behaviour, such as physical assault or a threat to commit such assault against a crew member and as refusal to follow a lawful instruction given by the crew for the purpose of protecting flight safety [Article 15 bis (1) *a)–b)*]. Each contracting State is encouraged to take such measures as may be necessary to institute appropriate criminal, administrative or any other forms of legal proceedings against any person who commits an offence on board an aircraft. With regard to financial aspects, the Protocol expressly emphasises the right of air to claim compensatuion from the offending passenger (Article 18 bis).

In the Montreal Protocol, the states extended the jurisdiction opportunities boldly, by which they supported as many unlawful acts as possible would actually be adjudicated in criminal proceedings. However, the law-maker took something of a risk[38] when it dealt with the other highlighted area of the Tokyo Convention and juxtaposed the scope for action of the in-flight security officer (IFSO), that is, the Air Marshal, beside the rights and obligations of the aircraft commander. The question immediately arises: if the aircraft commander is the ultimate decision-maker, may the IFSO take over the competence of the aircraft commander in preventing or handling unlawful activities ocurring on board the aircraft? To what extent may the IFSO make decisions in such situations, thereby lightening the burden on the commander pilot? Obviously, the highly trained specialist IFSO may take measures according to his or her obligations proceeding from his or her sphere of activity with reasonable grounds without special permission [Article 6 (3)], but may not surpass the competence of the aircraft commander. The law-maker also stipulated that the

> aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person whom he is entitled to restrain" [Article 6 (2)].[39]

Exemption is also granted to the IFSO from being held responsible for the consequences of his lawful acts (Article 10).

With respect to the fact that the aircraft itself is considered quasi state territory, the registering state thus has jurisdiction pertaining to the mobile terrritory,[40] therefore, the activity of the IFSO in the national system of rules can be construed as that of the protector of the quasi territory of the state. Upon the definition of their situation besides the national regulation

[38] Jennifer A. Urban, 'The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft: A Missed Opportunity or a Sufficient Modernization?' (2016) 49 (703) Indiana Law Review 739–740.

[39] Authority in Handling Offences and Certain Other Acts Committed on Board Aircraft. International Conference on Air Law (Montreal, 26 March to 4 April, 2014) – Presented by Indonesia, DCTC Doc No. 24. 21 March, 2014. 3.

[40] The right of the flag does not mean territorial sovereignty (since in reality it is not the territory of the state), but definite jurisdiction. Hargitai József, *Nemzetközi jog a gyakorlatban* (Libri 2008, Budapest) 295–296.

and programs,[41] the bilateral or multilateral agreements[42] concluded among the states concerned have significance due to the international character of aircraft [Article 6 (3)–(4)].

Conclusion

It is obvious that criminality will not be prevented by law in itself; unlawful acts will always be committed by people. We may question whether the new conventions pertaining to security drafted under the auspices of the ICAO and designed to renew the comprehensively prevalent international system of treaties concerning security will be able to forestall these transboundary crimes and impose legal consequences. To what extent will these rules prevail in practice? The question is justified, because the renewal of treaties pertaining to security ariseses not only because the world has changed considerably and new forms of commission have emerged, or an increasing number of unlawful acts (mostly committed by unruly passengers) occur, but simply because the content of basic conventions had not prevailed in international practice, despite numerous ratifications. National law has retained a great scope for action, which impeded unification,[43] implying that the authorities of the competent state did not always intend to exercise jurisdiction; they did not wish to become engaged in matters in which furnishing evidence was problematic (the crime was committed in foreign airspace, on board an aircraft registered in another state by a foreign citizen), the questions of liability were ambiguous, while they imposed a financial burden on the proceeding state.

In the interest of the observance of security rules and following the model of flight safety audits, the ICAO has established the Universal Security Audit Programme (USAP), which is prescribed for the states as mandator. This controlling programme has been carried out in the framework of the Continuous Monitoring Approach (CMA) since 2015.[44] The essence is that, during the audit, the ICAO examines the extent to which the member state is party to the international treaty, and whether the rights and obligations stipulated therein have been incorporated into and harmonised with national law; furthermore, to what extent these rules and procedures prevail in practice and in the course of operation. The examined state regularly reports on the implementation of the measure plan designed to rectify the revealed deficiencies, in which it presents the current circumstances. Via the implementation of the

[41] More than forty States have IFSO programs. International Conference on Air Law, Authority and Protections for In-Flight Security Officers, at 1, DCTC Doc. No. 7., 23 January, 2014. 2.3, 1.

[42] For example: Act XXXIX of 2011 on the proclamation of the Agreement on the employment of Air Marshals concluded between the Republic of Hungary and the United States of America.

[43] The Tokyo Convention does not exclude any criminal jurisdiction exercised in accordance with national law [Article 3 (3)]. The rule that criminal jurisdiction should be exercised in accordance with national law hindered the achievement of the objective of uniformity. Gutierrez (n 12) 13.

[44] ICAO Doc 9807 Universal Security Audit Programme Continuous Monitoring Manual. Second Edition, 2016.; ICAO Assebbly Resolution A37-17, Appendix E refers.; ICAO Doc 10010-C/1172 Council Decision, 197th Session. C.MIN 197/1, Subject No. 52.1. 2013. 11–12.

activity, all member states are under continuous surveillance, which supports the enforcement of the rules of international conventions and of the Standard and Recommended Practices (SARPs) adopted by the Council of the ICAO.

This much is certain: via the Beijing Convention and Protocol (2010) as well as via the Montreal Protocol (2014), the ICAO and its member states regulating international air transport convey an unequivocal message to the world: all acts related to or jeopardising aviation security, wherever committed, will have criminal legal consequences under all circumstances.

Gábor Polyák* – Gábor Pataki**

The Value of Personal Data from a Competition Law Perspective[1]

Introduction: The New Digital Services Act

In June 2020 the Commission launched a public consultation on the Digital Services Act. The consultation seeks to gather views, evidence and data from the general public, businesses, online platforms, academics, civil society and all stakeholders to draw on their help in shaping the future rulebook for digital services.[2] As the Digital Services Act webpage notes, the new Digital Services Act package aims to modernise the current legal framework for digital services based on two main pillars:

> First, the Commission would propose clear rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights. (…) Second, the Digital Services Act package would propose ex ante rules covering large online platforms acting as gatekeepers, which now set the rules of the game for their users and their competitors. The initiative should ensure that those platforms behave fairly and can be challenged by new entrants and existing competitors, so that consumers have the widest choice and the Single Market remains competitive and open to innovations.[3]

The consultation closed on 8 September 2020. On 16 September 2020, the European Commission announced in the letter of intent, which accompanied President von der Leyen's State of the Union speech, to publish an Action plan on how to better use synergies between civil, defence and space industries.[4]

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1 The present study was written as part of the Hungarian Scientific Research Fund (OTKA) research project No 116551 entitled 'Regulatory issues involving internet traffic control services' (*Az internetes forgalomirányító szolgáltatások szabályozási kérdései* in Hungarian), and it is based on the results of this project. Furthermore, the authors also dedicate this study to the commemoration of the 650th anniversary of the founding of the University of Pécs.

2 Commission launches consultation to seek views on Digital Services Act package – press release, Brussels, 2 June 2020.

3 See <https://ec.europa.eu/digital-single-market/en/digital-services-act-package> accessed 6 June 2020.

4 See <https://www.europarl.europa.eu/legislativetrain/theme-a-europe-fitfor-the-digital-age/file-synergies-between-civildefence-and-spaceindustries> accessed 26 October 2020.

Already in May 2016, the Commission had identified the key areas of interest in its Communication on Online Platforms; the fourth guiding policy principle[5] was to '[k]eep markets open and non-discriminatory to foster a data-driven economy'. Although the Commission did propose some valuable considerations (e.g., 'large parts of the public remain apprehensive about data collection and consider that more transparency is needed'),[6] the road ahead is likely to be long and difficult, and the objective will not be achieved overnight. In our opinion, the competition, data protection and consumer protection laws need to take centre stage in this plan. That is why the European Commission's approval of the Facebook/WhatsApp merger in 2014 and the EUR 110 million fine in 2017 deserve our attention as milestones in the history of competition law and the data-driven economy.

Facebook was subject to a huge fine – this news created a splash throughout the media in May 2017. The European Commission's decision to levy a EUR 110 million fine against the company for furnishing the European body with misleading information concerning its acquisition of WhatsApp in 2014 was big news. The story of this 'mega fine' reaches back to Commission Decision No M.7217, in which the European Commission had originally approved the aforementioned transaction (i.e. the merger). Looking at the acquisition with the hindsight of six years, it appears that the underlying violation of competition law did not stem solely from the misleading information provided by Facebook but may have also arisen from technical mistakes on the part of the Commission. We were at a 'crossroads', as Zingales puts it:[7] it was a case at the intersection of competition, data protection and consumer protection laws and, by looking at it exclusively from a competition law perspective, the Commission may have failed to consider vital issues involving the other areas of law that were implicated in this merger. What are the lessons to be learned from this case about competition law, data protection and data-driven companies?

I The Players: Facebook Inc. and WhatsApp Inc.

The notion that Facebook is the most important player in the area of online interpersonal communication is an axiom of sorts:[8] In the barely more than a decade that has gone by since the company was founded in 2004, Facebook has completely conquered and dominated online

[5] First: A level playing field for comparable digital services; Second: Ensure responsible behaviour of online platforms to protect core values; third: Foster trust, transparency and ensure fairness on online platforms.

[6] COM(2016) 288 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms And The Digital Single Market, Opportunities And Challenges For Europe {SWD(2016) 172 final}, 25.5.2016.

[7] Nicolo Zingales, 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law' (2017) 33 (4) Computer Law & Security Review 553–558.

[8] See Polyák Gábor, A frekvenciaszűkösségtől a szűrőbuborékig in Tóth András (ed), *Technológia jog. Új globális technológiák jogi kihívásai* (Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar 2016, Budapest) 116–141.

communication. In a public Facebook post[9] from 27 June 2017,[10] the company's founder and CEO Mark Zuckerberg announced that the Facebook community had surpassed 2bn users. Zuckerberg put it as follows:

> 'As of this morning the Facebook community is now officially 2 billion people!' Then he went on to add the company's new slogan which had been unveiled four days earlier: 'Bring[ing] the world closer together'.

Even if we keep the possibility in mind that the figure of 2 billion users still includes a fair number of fake profiles – despite the massive efforts launched in 2017 to identify and eliminate them – these cannot possibly be large enough in number to make up a significant slice of the 2 billion user profiles overall. And if we consider that, based on current estimates, there are roughly 7.5 billion people in the world today, we can assert that, statistically speaking, every fourth person on earth is part of the Facebook community. Moreover, if we narrow the statistic further and do not look at the population overall but only at the groups that are relevant from an advertising market perspective, as well as those people who live in geographical areas that are relevant especially for marketing, then we can also assert that any person within that group is very likely to be a Facebook user.[11] Broadly speaking, therefore, Facebook has a continuously updated database comprising 2 billion people. The data at the company's disposal stem in part from information voluntarily shared by users, and in another part from profiling their behaviour. Even the major secret services across the world cannot attain such figures (all the more so since no-one shares personal information with them voluntarily). What's more, unless some earthshattering crisis were to rock Facebook in the near future, no other company in the social media market can come even close to such figures. And in any case, if any competitor were to approximate the breadth of its data collection, Facebook would buy it, just as it did with WhatsApp.

The application called WhatsApp was created by two former Yahoo employees, Brian Acton and Jan Koum, in 2009. This application, which is designed as a forum for communication between consumers, quickly became popular with the public; from the very start, its operations were based on a 'no ads policy'[12]. The WhatsApp application was bought by Facebook Inc. in October 2014 for a price of USD 19 billion, thereby turning WhatsApp into a Facebook subsidiary. At the time, WhatsApp boasted 600 million active users and it was adding news users at a rate of 25 million a month. The first figure was announced by Jan Koum on Twitter,[13]

[9] See <https://www.facebook.com/zuck/posts/10103831654565331> accessed 6 July 2020.

[10] On precisely the same day when the Commission issued its ruling against Google.

[11] According to USA Today, Zuckerberg has set the goal of reaching 5 billion Facebook users by 2030. Source: <https://www.usatoday.com/story/tech/news/2016/02/04/facebook-2030-5-billion-users-says-zuck/79786688/> accessed 6 July 2020.

[12] See <https://blog.whatsapp.com/245/Why-we-dontsell-ads?> accessed 6 July 2020.

[13] See <https://twitter.com/jankoum/status/503725598414368768> accessed 6 July 2020.

stressing that 'active and registered are very different types of numbers...'[14] In mathematical terms, this means that 10% of the global population were active WhatsApp users at the time, but the share of registered users as a percentage of the earth's population was even higher.

II A Personal Data – Dominant Company

Today, however, this user database is also owned by Facebook – the company now disposes over an amount and quality of data that the human mind cannot fully fathom.[15] In a 2016 publication Orsolya Bánki, who is a partner at the Budapest office of the global law firm Taylor Wessing, referred to companies that are in a position of dominance in terms of data management as 'data dominant companies'[16]. For the purposes of the present study, however, this category is too broad in its focus; we need to narrow it down. There are several areas – and not only in the online realm – where certain companies wield sufficient data to give them a position of dominance. However, when it comes to the companies at issue in the present discussion, we are not talking about entities that are data-dominant or data-led in a general sense of the term;[17] instead, their dominance stems specifically from their control of personal data, so the right term to describe them is 'personal data-dominant company'. The data assets of such a company are a relevant factor that shapes its business activities, its market position and, ultimately, also the assessment of its position in terms of competition law. Still, the issue is whether the Facebook-WhatsApp merger qualifies as a competition law case, in which the data wealth is tangentially relevant as one aspect of a classical merger assessment, or whether the fusion of the two companies is in fact a clear-cut case of a data protection legal issue. Some critics of the Commission's decision have argued that the Commission had – erroneously – decided on a data protection issue in a competition law procedure.[18]

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[14] It is worth noting here that over 2 billion people registered indirectly for Google social media service, Google+. The number of active users, however, is only ca. 10% of the total number of registered users – owing to the fact that the majority of Google users relies on the company's mail and search services rather than its social media service.

[15] Ninety-seven percent of Facebook's revenues stem from online advertising, while for Google's parent company, Alphabet, the corresponding figure is 88%. Source: Evans, David S.: Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies, 2017, 16 (available on SSRN at https://ssrn.com/abstract=3009438).
We write in greater detail about the potential profits that can be attained by making advertising activity behaviour-based and by profiling individual users in our other Hungarian Scientific Research Fund (OTKA) study entitled 'Az internetes forgalomirányító szolgáltatások szabályozási kérdései.' See Szőke László Gergely, Pataki Gábor, 'Az online személyiségprofilok jelentősége – régi és új kihívások' (2017) (2) Infokommunikáció és Jog.

[16] See <https://www.vg.hu/velemeny/ne-legyen-jolly-joker-a-versenyjog-470216/> accessed 6 July 2020.

[17] Although the so-called DIKW pyramid (data, information, knowledge, wisdom) does not in and of itself allow for a legal interpretation of the concept because the data are just symbols that represent certain characteristics, the information does yield answers to 'who, what, when, why'-type of questions as well, and in that context we should be talking about 'information-dominant companies'. [For a more detailed discussion, see: Russell Ackoff, 'From data to wisdom' (1989) 16 Journal of Applied Systems Analysis 3–9.]

[18] Georg Clemens, Mutlu Özcan, 'Obfuscation and Shrouding with Network Effects – The Facebook/WhatsApp Case, 2017, 2.' (accessible on SSRN https://ssrn.com/abstract=3023467).

That there are certain instances when these two legal areas cannot be neatly separated was also manifest in two conferences organised by the OECD. The first, held in 2016, touched on the relationship between the Big Data phenomenon and competition law,[19] while the second conference, which was held in 2017, was about the relationship between algorithms and competition law.[20] Another factor that supports the idea that these issues are closely intertwined is that the Italian *competition* authority[21] issued a EUR 3 million fine against Facebook on 12 May 2017 because the latter had violated *consumer protection* rules when it obliged WhatsApp users to share their *personal data* with WhatsApp's California-based parent company.[22] In its decision No 2017/C 286/06 of 17 May 2017, the European Commission issued a fine of EUR 55 million for a violation of Article 14 (1) a) of the Merger Regulation,[23] along with another EUR 55 million fine for a violation of the same Regulation's Article 14 (1) b).[24] Thus, within the span of five days, Facebook was subject to two judgments that it had engaged in legal violations – one concerned consumer protection and the other competition law – with fines totalling EUR 113 million. In both cases, however, one of the crucial factors was data protection. The merger between Facebook and WhatsApp has become one of the most hotly debated merger cases in the case-laws of both the European Commission and the U.S. Federal Trade Commission (FTC),[25] ever since both organisations greenlit the transaction in 2014.[26] The merger definitely marked a milestone in terms of EU competition law, in the sense that it was the first case in which the Commission had to look at the linking of the databases[27] of social media networks as one of the factors in assessing the anticipated market impact of the merger.[28]

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[19] See <http://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm> accessed 6 July 2020.

[20] See <http://www.oecd.org/competition/algorithms-and-collusion.htm> accessed 6 July 2020.

[21] Autorità Garante della Concorrenza e del Mercato, AGCM.

[22] See <http://www.agcm.it/en/newsroom/press-releases/2380-whatsapp-fined-for-3-million-euro-for-having-forced-its-users-to-share-their-personal-data-with-facebook.html> accessed 6 July 2020.

[23] Council Regulation No 139/2004/EC (20 January 2004) on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29/1/2004, 1–22.

[24] Article 14(1) The Commission may by decision impose undertakings where, intentionally or negligently:
a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4 *[Prior notification of concentration]*
b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2) *[Requests for information – the Commission may require the persons to provide all necessary information].*

[25] The present study does not look at the implications of the merger in the United States. For more details on that subject see: <https://www.epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf> accessed 6 July 2020.

[26] Clemens, Özcan (n 18) 2.

[27] It is worth pointing out, however, that the linking and integration of online databases [or "datasets, to use the terminology proposed by Pál Belényesi] had been previously examined by the Commission, for example in the Microsoft/Yahoo! case in 2010. What makes the case at hand in this paper special is that those involved are social media service providers.

[28] Belényesi Pál, 'Digitális platformok és a Big Data' (2016) (1) Verseny és Szabályozás 147.

III The Relevant Markets

The story of this 'mega fine' reaches back to Commission Decision No M.7217, in which the European Commission had originally approved the aforementioned transaction. To analyse this case in depth and to better understand the Commission's logic in making its decision, we draw on the fundamental principles laid out in the Commission's 2014 approval of the merger[29] with respect to its definition of who the parties are and what services they provide:

– *Facebook:* social networking platform;
– *Facebook Messenger:* consumer communications app;
– *Instagram:* photo and video-sharing platform;
– *Operated by:* Facebook Inc., which operates in the framework of the subsidiary Facebook Ireland Limited, which is registered in the European Economic Area and is 100% owned by Facebook Inc.;
– *WhatsApp:* consumer communications services via mobile app;
– *Operated by:* WhatsApp Inc., which has been a subsidiary of Facebook Inc. since 6 October 2014.

The Commission identified three relevant markets: the market for consumer communications services, the market for social networking services and the market for online advertising services. In the following, we only present the Commission's own considerations with regard to these services; our own analysis will follow in a later chapter of the present study.

The Commission defined the market of consumer communications services by taking account of the following:

(A) WhatsApp is offered only for smartphones and it does not have any plan to expand its offering to other platforms.[30]

(B) Although the two types of services are used for the same general purpose (communication), the overall experience of the user is richer in terms of functionalities in consumer communications apps.[31]

(C) There is a competitive interaction between Facebook and WhatsApp, but it goes only one way (i.e. consumer communications apps constrain traditional electronic communications services but not the other way around).[32]

Conclusion: The Commission limited its assessment of the impact of the merger to the context of the narrowest relevant product market, namely the market for smartphone-based consumer communications apps.[33]

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[29] Regulation (EC) No 139/2004 Merger Procedure, Case No COMP/M.7217 – Facebook/WhatsApp, paragraphs (2)–(3) [hereinafter: M.7217].
[30] M.7217, Paragraph (21).
[31] M.7217, Paragraph (30).
[32] M.7217, Paragraph (32).
[33] M.7217, Paragraph (34).

Since competition concerns do not arise in this case, regardless of the alternative market definition used, the Commission left it open whether the market for social networking services should be segmented further on the basis of the following considerations:

(A) The Commission highlighted a number of important differences between social networking services and consumer communications services.[34]

(B) On a general level, social networking services tend to offer a richer social experience than consumer communications apps.[35]

(C) The Commission concludes that while consumer communications apps such as Facebook Messenger and WhatsApp offer certain services that are typical of social networking services, in particular the possibility of sharing messages and photos, there are important differences between WhatsApp and social networking services.[36]

The Commission's conclusions were based on a very narrow definition of the market for online advertising services, which left several issues open, while the analysis focused on the following considerations:

(A) The market investigation conducted for the purposes of reviewing the Transaction clearly confirmed the Commission's earlier findings, in which it distinguished between online and offline advertising services.[37]

(B) The majority of competitors that took part in the market investigation submitted that, from an advertiser's point of view, search and non-search ads are not substitutable services.[38]

(C) Under a narrower definition of the product market, the Transaction would not give rise to serious doubts as to its compatibility with the internal market.[39]

IV A Transaction without a 'Union dimension', even though It Was Deemed to Have One

The merger character of the transaction was established beyond doubt because it met the conditions set out in Article 3 (1) of the Regulation, according to which a merger of corporations was being performed with Facebook Inc. acquiring WhatsApp Inc. for a price of USD 19 billion.[40] The transaction qualified as a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.[41]

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[34] M.7217, Paragraph (53).
[35] M.7217, Paragraph (54).
[36] M.7217, Paragraph (61).
[37] M.7217, Paragraph (75).
[38] M.7217, Paragraph (76).
[39] M.7217, Paragraph (79).
[40] Facebook Inc. acquired WhatsApp Inc. for USD 19 billion, of which 12 billion were paid in the form of Facebook shares, a further 3 billion were paid in the form of restricted stock units in Facebook, and a final 4 billion of the purchase price were paid in cash.
[41] M.7217, Paragraph (5).

In the next step, the Commission had to assess whether the merger had a 'Union dimension'[42], as this qualification determines the scope of the merger procedure.[43] The definition includes two criteria that must be examined to assess whether they apply to the situation at hand. The respective turnovers of Facebook and WhatsApp were not revealed by the Commission;[44] this information is published by the companies. However, although in 2013 Facebook's worldwide turnover was in excess of EUR 5,000 million,[45] the transaction did not have a Union dimension within the meaning of Article 1(2)[46] or Article 1(3)[47] of the Merger Regulation, since the intra-EU turnover of WhatsApp amounted to only EUR 7.7 million[48] in 2013.

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[42] Article 1(2) While the Commission's decision referred to a 'Union dimension', the text of the underlying Regulation refers to a 'Community dimension'. For the sake of greater clarity and consistency, we decided to use the term which the Commission had used in its decision, since our study focuses on the latter. Nevertheless, the two are understood to be synonymous here.

[43] Concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
(3) A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

[44] While the Commission's decision referred to a 'Union dimension', the text of the underlying Regulation refers to a 'Community dimension'. For the sake of greater clarity and consistency, we decided to use the term which the Commission had used in its decision, since our study focuses on the latter. Nevertheless, the two are understood to be synonymous here: <https://www.statista.com/statistics/412794/euro-to-u-s-dollar-annual-average-exchange-rate/> accessed 6 July 2020.

[45] According to Facebook Reports, the revenue was 7872 million U.S. dollars, which means 5920 million converted to EUR (exchange rate: 1,33 USD = 1 EUR). Facebook Reports Fourth Quarteer and Full Year 2013 Result: <https://s21.q4cdn.com/399680738/files/doc_news/2014/FB_News_2014_1_29_Financial_Releases.pdf> (6 July 2020); Exchange Rate: See <https://www.statista.com/statistics/412794/euro-to-u-s-dollar-annual-average-exchange-rate/> accesed 6 July 2020.

[46] A concentration has a Community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million *and* the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

[47] A concentration also has a Community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million; in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

[48] USD 10.21 million according to Statista.com <https://www.statista.com/statistics/346269/whatsapp-annual-revenue/, 6 July 2020) and techcrunch.com> accessed 6 July 2020.

Even so, the transaction was deemed to have a Union dimension:

> ...the acquisition fulfilled the two conditions set out in Article 4(5) of the Merger Regulation since it was a concentration within the meaning of Article 3 of the Merger Regulation and it is capable of being reviewed under the national competition laws of three Member States.[49] On 19 May 2014, the Notifying Party informed the Commission by means of a reasoned submission that the Transaction should be examined by the Commission pursuant to Article 4(5) of the Merger Regulation. A copy of that submission was transmitted to the Member States on 19 May 2014. As none of the Member States competent to review the Transaction expressed its disagreement as regards the request to refer the case, the Transaction was deemed to have a Union dimension pursuant to Article 4(5) of the Merger Regulation.[50]

V The Notification of the Merger, the Review and its Results

The European Commission published the notification of the planned merger between Facebook Inc. and WhatsApp Inc. on 4 September 2014, as part of its procedure in Case No M.7217.[51] Its preliminary examination stated that the 'Commission finds that the notified transaction could fall within the scope of the Merger Regulation. However, the final decision on this point is reserved'[52].

The Commission began its review on the basis of Article 6, and as part of the procedure it asked Facebook Inc whether

> [p]ost-acquisition, [Facebook was] planning to link/match in any way customers' profiles on WhatsApp with these customers' profiles on Facebook (e.g. by linking customers' mobile numbers from WhatsApp to these customers' Facebook accounts)?[53]

In the meanwhile, another submission was filed by a complainant third party, which essentially reiterated the Commission's assumption above, namely that Facebook Inc. would be able to link user profiles even without any active behaviour expressing consent by the given user. In its response dated 23 September 2014, Facebook rebutted the complainant's claims and answered the Commission's pertinent question in the negative by asserting that, since there was no way of automatically 'matching' Facebook User IDs with the mobile phone numbers

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[49] The Commission didn't name the three Member States, see M.7217, Paragraph (10).

[50] M.7217, Paragraph (10)–(12).

[51] See <http://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:C2014/297/04&from=HU> accessed 6 July 2020.

[52] Prior notification of a concentration (Case M.7217 – Facebook / WhatsApp) Text with EEA relevance, OJ C 297, 4.9.2014, 13–13.

[53] Question 5 of the questions sent by the Commission on 25 August 2014. (see Regulation (EC) No 139/2004 Merger Procedure, Case No COMP/M.8228 – Facebook/WhatsApp, Paragraph (60) [hereinafter: M.8228]).

associated with each WhatsApp user, 'matching of WhatsApp profiles with Facebook profiles would most likely have to be done manually by users'[54].

The European Commission decided on 3 October 2014 not to oppose the Transaction and declared that it was in compliance with the internal market and with the EEA Agreement.[55] The decision signed by Commission Vice President Joaquín Almunia posits that the Transaction does not give rise to serious doubts as to its compatibility with the internal market with respect to the market for the provision of online advertising services, including its potential sub-segments.[56] The Commission arrived at this assessment based on the following:

(1) The Commission defined the market affected as the narrowest relevant product market for consumer communications services, that is the market for consumer communications apps for smartphones.[57]

(2) The fact that WhatsApp and Facebook are not close substitutes is further evidenced by Facebook's data showing that a considerable number of users of one service also use the other service. This suggests that the needs fulfilled by each service are different. Therefore, given the considerable differences between the functionalities and focus of WhatsApp and Facebook, the Commission concluded that these providers are not close competitors in the potential market for social networking services.[58]

(3) Since only Facebook, and not WhatsApp, is active in the provision of online advertising services, the Transaction does not give rise to any horizontal overlaps in the market for online advertising or in any sub-segment thereof.[59]

(4) Even if Facebook were to introduce advertising on WhatsApp, the Transaction would only raise competition concerns if post-Transaction there would not be a sufficient number of effective alternatives to Facebook for purchasing online advertising space.[60] Therefore, the Commission notes that regardless of whether the merged entity will introduce advertising on WhatsApp, there will continue to be a sufficient number of other actual and potential competitors who are equally well placed as Facebook to offer targeted advertising.[61]

(5) The Commission declared that it did not find it necessary to review the data protection implications of the merger, and that it had 'analysed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof'. The Commission assessed namely that any 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'[62].

[54] M.7217, Paragraph (138).
[55] M.7217, Paragraph (191).
[56] M.7217, Paragraph (190).
[57] M.7217, Paragraph (34).
[58] M.7217, Paragraph (157)–(158).
[59] M.7217, Paragraph (165).
[60] M.7217, Paragraph (170).
[61] M.7217, Paragraph (179).
[62] M.7217, Paragraph (164).

> (6) In any event, even if the merged entity were to start collecting and using data from WhatsApp users, the transaction would only raise competition concerns if the concentration of data within Facebook's control were to allow it to strengthen its position in advertising.[63]

However, as has since became apparent, these claims are open to dispute on several grounds. We will analyse these further below, but only after concluding our comprehensive review of the entire process.

VI The Sharing of WhatsApp Data with Facebook

WhatsApp informed users of the acquisition and the planned changes in a blogpost:

19 February 2014:

> Here's what will change for you, our users: nothing. (blogpost entitled *Facebook*).[64]

17 March 2014:

> If partnering with Facebook meant that we had to change our values, we wouldn't have done it. Instead, we are forming a partnership that would allow us to continue operating independently and autonomously. (…) Speculation to the contrary isn't just baseless and unfounded, it's irresponsible. It has the effect of scaring people into thinking we're suddenly collecting all kinds of new data. That's just not true, and it's important to us that you know that. (Blogpost entitled *Setting the record straight*)[65]

18 January 2016:

> That's why we're happy to announce that WhatsApp will no longer charge subscription fees. (Blogpost entitled *Making WhatsApp free and more useful*)[66]

25 August 2016:

> Today, we're updating WhatsApp's terms and privacy policy for the first time in four years (…) [B]y coordinating more with Facebook, we'll be able to do things like track basic metrics about how often people use our services and better fight spam on WhatsApp. And by connecting your phone number with Facebook's systems, Facebook can offer better friend suggestions and show you more

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[63] M.7217, Paragraph (187).

[64] See <https://blog.whatsapp.com/499/Facebook> accessed 6 July 2020.

[65] See <https://blog.whatsapp.com/529/A-f%C3%A9lre%C3%A9rt%C3%A9sek-elker%C3%BCl%C3%A9se-v%C3%A9gett> accessed 6 July 2020.

[66] See <https://blog.whatsapp.com/615/A-WhatsApp-ingyeness%C3%A9-%C3%A9s-m%C3%A9g-hasznosabb%C3%A1-v%C3%A1lik> accessed 6 July 2020.

> relevant ads if you have an account with them. For example, you might see an ad from a company you already work with, rather than one from someone you've never heard of. (Blogpost entitled *Looking ahead for WhatsApp*)[67]

It took Facebook Inc. and WhatsApp Inc. slightly over two years to get to the point when they transferred the user data of WhatsApp users into the database of 'Corporations that are part of the Facebook family'. The Terms of Service as well as the Privacy Policy were updated: WhatsApp Inc., which had become a Facebook subsidiary by this time, informed its users of this in a blogpost as well as in the form of a so-called FAQ (frequently asked questions) page, in which the company addressed typical issues that users tend to raise in such a context.[68] At the same time, WhatsApp Inc. shared user data not only with Facebook but also with other companies that are part of the Facebook corporate group[69] in order to 'coordinate more and improve experiences across our services and those of Facebook and the Facebook family'[70]. It needs to be stressed, however, that when the terms and policies in question were updated, WhatsApp users had the option of withholding their data from Facebook, but they had to make a distinct statement to this effect. In consenting to the updated terms, users were informed that '[i]f you do not want your account information shared with Facebook to improve your Facebook ads and products experiences, you can uncheck the box'[71]. In fact, users even had the option of changing their mind for a period of 30 days after their statement – this was the timeframe provided for retracting[72] the previously given consent.[73]

Thus, it was only as late as August 2016 that users had the chance to learn that, despite all previous information to this effect, Facebook did in fact have access to their personal data. In other words, despite previous assurances to the contrary, the user profiles created in the two apps could be linked. However, the European Commission had found out about this already a month before – it was informed by Facebook Inc. itself.

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[67] See <https://blog.whatsapp.com/10000627/El%C5%91retekint%C3%A9s-a-WhatsApp-n%C3%A1l> accessed 6 July 2020.

[68] The number of users had reached the one-billion mark on 1 February 2016. <https://blog.whatsapp.com/616/Egymilli%C3%A1rd> accessed 6 July 2020.

[69] The most widely known among European users is Instagram LLC, but there are also seven other companies in this group (The Facebook Companies) <https://www.facebook.com/help/111814505650678> accessed 6 July 2020.

[70] See <https://faq.whatsapp.com/general/28030012?lang=hu> accessed 6 July 2020.

[71] We do not wish to perform a legal analysis of the statement of consent in our competition law study, but it still needs to be stressed that the consent to share one's data was based on an opt-out rather than an opt-in basis, which was a violation of the European Union's effective regulations on the subject.

[72] This is also a data protection issue, but European data protection law (which was governed by Directive 95/46/EC at the time) does not feature the institution of imposing a deadline on the possibility of retracting consent. The individual has the right to withdraw his or her consent at any time, and any limitation of this right by imposing a deadline on its exercise constitutes a violation of EU regulations.

[73] See <https://faq.whatsapp.com/hu/general/26000016> accessed 6 July 2020.

VII Providing Incorrect or Misleading Information

On 30 June 2016 Facebook Inc. filed a submission with the Commission in which it referred to product improvements involving 'a form of user matching between Facebook and WhatsApp that was not widely available in 2014'[74]. Practically, therefore, Facebook reported itself to the Commission, thereby pre-empting the Commission from launching its own investigation, which would likely have occurred if the Commission had found out about the changes from the internet as users had done. It is worth emphasising, however, that although Facebook did cooperate with the Commission in this context, the actual data integration had been implemented already before the Commission had had the opportunity to arrive at its own assessment.

On 28 July, the Commission asked Facebook whether the method of identification that would be used to identify the mutual users of Facebook and WhatsApp, on which the planned product update was based, had already been available when the merger was approved and whether this development had already been planned by that time. Facebook Inc. submitted that the so-called telephone identification/matching solution ('Phone ID Matching Solution') had been available already in 2014, but its actual form varied depending on the operation system of the given smartphone (Android, iOS, Windows OS or other OS used by Blackberry, Nokia S40 and Nokia Symbian S60).[75] Facebook Inc. further explained that at the time of the merger it had not been clear whether the Phone ID Matching Solution would be sufficient to support such functions, because it had not been designed with the goal of sending cross-platform messages.[76]

In its Statement of Objection dated 20 December 2016, the Commission explained its preliminary view. It posited that, in the M.7217 Facebook/WhatsApp case, Facebook Inc. had 'intentionally, or negligently, submitted incorrect or misleading information' in the notification filed in compliance with Article 4 of the Merger Regulation, as well as in its response to the Commission's request for information (RFI) dated 18 September 2014, which Facebook was obliged to provide pursuant to the Merger Regulation's Article 11 (2).[77]

The preliminary view expressed in the Statement of Objection already foreshadowed that the case could mark a milestone in the history of European competition law. If the Commission were to make a binding decision that a violation had occurred then that would be a first since the adoption of the Merger Regulation in 2004.[78] Since 2004, the Commission had never before ruled against any company for a violation of having provided 'incorrect or misleading information' – as the Commission mentions in the press release.[79]

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[74] M.8228, Paragraph (30).
[75] M.8228, Paragraph (49)–(50).
[76] M.8228, Paragraph (51).
[77] M.8228, Paragraph (38).
[78] Past Commission decisions in this regard were adopted under the 1989 Merger Regulation in accordance with different fine-setting rules. See e.g.: from 1999 Sanofi/Synthélabo, KLM/Martinair, Deutsche Post, from 2002: BP/Erdölchemie (M.2624), from 2004 Tetra Laval/Sidel (M.3255).
[79] See <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369> accessed 6 July 2020.

Facebook Inc. also acknowledged the Commission's preliminary assessment and confirmed that it had provided incorrect or misleading information in the context of case M.7217 and had engaged in negligent behaviour. In its written comments, Facebook also indicated that it did not request that oral hearings be held and it did not request to review the Commission's files on the case.[80]

VIII The Commission's Decision, the Amount of the Monetary Fine

In determining the amount of the fine, the Commission assessed that Facebook Inc.'s cooperative attitude was a mitigating circumstance. According to Article 14 (1) of the Merger Regulation, the Commission is entitled to issue a fine up to the amount of 1% of the total turnover of the company. In its determination of the amount, the Commission considered whether a fine would be an appropriate penalty and whether it would also have sufficient deterrent effect.[81] These were the considerations that informed its decision to issue a fine of EUR 55 million for a violation of Article 14 (1) a) of the Merger Regulation, that is the provision of incorrect or misleading information by Facebook in its prior notification of the merger, and another EUR 55 million fine for the violation specified in Article 14 (1) b), that is for the incorrect or misleading information provided by Facebook in response to the Commission's request for information.

The Commission pointed out in its decision that it had determined the maximum amount of the fine that it could potentially levy based on Facebook's annual report,[82] which said that the company's total turnover in 2016 was EUR 24,968.83 million.[83] According to Article 5 of the Merger Regulation, the fine could have totalled EUR 249.7 million[84] per violation. Nevertheless, the Commission set the actual amount of the fine at only 22% of the maximum possible amount.[85]

In the Commission's press release on the subject, Competition Commissioner Margrethe Vestager said that the Commission had imposed a 'proportionate and deterrent'[86] fine on Facebook. The authors of the present study assess that it is difficult to take an unequivocal position on the amount of the fine because there is no precedent. This was the first case of its kind, which means there is no basis for comparison. Nevertheless, the amount does raise whether, in the case of a company with such an annual turnover as well as in light of the value of the underlying acquisition deal, the figure decided upon by the Commission will have an actual deterrent effect.

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[80] M.8228, Paragraph (41).

[81] M.8228, Paragraph (107).

[82] See <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/80a179c9-2dea-49a7-a710-2f3e0f45663a.pdf> p. 31. accessed 6 July 2020.

[83] USD 27,638 million.

[84] USD 276.38 million.

[85] The text of the regulation says that the maximum fine that can be assessed does not apply cumulatively for all violations but per violation found. Thus the amount was not a single fine of EUR 100 million but two concurrently levied fines of EUR 55 million each.

[86] See <http://europa.eu/rapid/press-release_IP-17-1369_en.htm> accessed 6 July 2020.

As we wrote above, Facebook Inc. acquired WhatsApp Inc. for USD 19 billion and the Commission had already been fully apprised of this when they approved the transaction.[87] Even the maximum amount of the fine that could have been levied per violation (USD 276.38 million) would have amounted to a mere 1.45% of the total acquisition price, but the fine that actually ended up being levied was just 0.32% of the total merger value. (True enough, it was issued twice, once for each of the violations, but it still amounted to less than 1% of the price Facebook had paid for WhatsApp).

It would have also made sense for the Commission to review how Facebook's business performance and market position were influenced by fusing the user databases in question.

Moreover, in addition to the monetary fine, the Commission had the additional option of retracting its previous decision based on the Merger Regulation's Article 6. According to the Regulation, this option is expressly available in cases when the approval was granted based on incorrect information and the responsibility for this information can be clearly attributed to one of the companies involved. Ultimately, in its decision No M.8228 the Commission decided to forgo this option, presumably on two grounds. First, three years after the implementation of the decision, restoring the status quo ante was a theoretical possibility at best. Second, in approving the merger the Commission itself had been responsible for what appear with hindsight to be very obvious mistakes.

IX Criticisms of the Commission's Decision

The Commission made its first mistake in the identification of the relevant market. For one, Facebook rolled out its own messaging service, Messenger, in 2011 for the iOS and Android platforms. Messenger provides for the possibility of direct communication between two users, which is why it clearly seems like a WhatsApp substitute product. The Commission saw this differently, however.

In its decision No M.7217, the Commission declared that it had examined the merger with respect to its impact on the "narrowest relevant product market for consumer communications services, that is the market for consumer communications apps for smartphones,[88] also noting that it had relied on the previously used definition in the Microsoft/ Skype case.[89] As Yasar points out,[90] several authors have criticised this approach.[91] In its decision-making process, the Commission essentially treated Facebook and its Messenger service as two distinct units. It viewed the first as a social media service, while it classified Messenger as a consumer

[87] M.7217, Footnote 2.

[88] M.7217, Paragraph (34).

[89] M.7217, Paragraph (20).

[90] Ayse Gizem Yasar, 'Achieving Symbiosis between Disruptive Innovation and Merger Control: Challenges and Remedies' 2017, 29. (accessible on SSRN: https://ssrn.com/abstract=3015007).

[91] Inge-Wahyuningtyas Graef, Peggy Sih Yuliana-Valcke, 'How Google and others upset competition analysis: disruptive innovation and European competition law' 25th European Regional Conference of the International

communications service.[92] Despite this, it even chose not to classify Facebook Messenger as a close competitor of WhatsApp.[93] It based this assessment on the observation that the parties' offerings differ from one another in numerous respects,[94] although, in our assessment, these differences are far less significant than they would seem based on the Commission's opinion. First of all, in the Commission's view, the most obvious difference is the user ID that is used to access the service, which is a username in the case of Messenger while for WhatsApp it is a phone number. Today we know this was not a real impediment to linking the distinct user accounts across the two services. At the same time, all the other distinctions they draw are also debatable. They posit,[95] for instance, that the source of the interaction between users is different: while in Messenger it is based on Facebook user accounts, WhatsApp relies on the address list in the user's mobile phone. At the same time, however, in situations when Facebook has the user's phone number there is once again an area where the contacts immediately overlap. Indeed, while the Commission could not have known this back in 2014, on 24 June 2015 Facebook announced that it was launching a new service: From that day on Messenger was also available without a Facebook account. For using the service without a Facebook account, all the user had to do was to provide a phone number.[96] This took place slightly more than eight months after the Commission submitted its decision No M.7217. In hindsight, this casts the Commission's interpretation in a different light – this is true regardless of whether Facebook was already aware at the time that it would soon launch such a service or whether it decided to do so subsequently, in the awareness of and as a result of the Commission's decision.

The third difference that the Commission saw was the user experience. It argued that it is richer in Messenger. However, the question that arises with respect to this assessment is whether any given relative levels of user experience can shift in the future by WhatsApp improving its services. The Commission also pointed to the two services' respective data protection policies: While Messenger allowed for the collection of user activity data on behalf of Facebook to support corporate advertising sales, that was not the case with WhatsApp. In light of the steps taken after the acquisition, it is readily apparent that data protection policies are not immutable.

The Commission further pointed out[97] that, in practice, WhatsApp and Messenger are complementary products, as is also evidenced by the fact that the majority of EEA users installed both services on their devices and used them in parallel. That is why in reality the two applications are more complementary than rival products in the narrowest sense – the

Telecommunications Society (ITS) 2014, 13.; Viktoria Robertson, 'Delineating Digital Markets under EU Competition Law: Challenging or Futile?' (2017) 12 (2) The Competition Law Review 14–15.

92 M.7217, Paragraphs (15), (56), (61), Paragraph (102).

93 M.7217, Paragraph (107).

94 M.7217, Paragraph (101).

95 (102) using the paragraph numbering in Decision No. M.7217.

96 See <https://newsroom.fb.com/news/2015/06/sign-up-for-messenger-without-a-facebook-account/> accessed 6 July 2020.

97 M.7217, Paragraph (105).

Commission's assessment was that, in a narrower sense, WhatsApp's competitor is Viber, while Messenger is in close competition with Google Hangouts or Twitter.[98] The Commission was definitely right in its assessment that the logic underlying Google Hangouts and Messenger is the same: they are services that allow for exchanging direct messages and keeping in touch with those persons in a user's network of contacts who use the given social media service (to whit, Google+ and Facebook). At the same time, it is a mystery why the Commission saw an intense competition between Messenger and Twitter, even though the latter provides a service that is completely different from the former.

The Commission's conclusions concerning the differences in the data protection regulations are very controversial. In their analysis of the case, Clemens and Özcan looked specifically at consumer habits with respect to messaging services. The researchers divided potential users into two groups: one group does not care that data is being collected about them while the other will forgo the connection if it involves data being collected about them. This is why they concluded that if the provider does not collect data about its users from the very outset, it can continuously increase the number of users who thus become committed – and then, if there is a change in the data collection policy, users may be outraged but only a small percentage will actually quit the community.[99] There is no information available as to whether Facebook had such research insights at its disposal at the time when it acquired WhatsApp, which would have informed its decision going forward; what is certain, however, is that a knowledge of these insights renders the Commission's observation in 2014, that there are major differences between the respective data protection policies of the two platforms, irrelevant.

Clemens and Özcan also conclude that the problem of data integration is not a competition law issue, and the authors are staunchly opposed to the notion of assessing data management issues in the framework of competition law.[100] On this point, however, we disagree with them – although data integration in and of itself is indeed a data protection rather than a competition law issue, the unification, augmentation and linking of databases can serve as a competitive advantage that benefits certain service providers, and they can affect the business activities of enterprises so massively that their impact must be considered in competition law procedures as well.[101] And although the Commission did weigh this aspect, ultimately it did not take it sufficiently into consideration.[102]

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[98] M.7217, Paragraph (106).

[99] Clemens, Özcan (n 18) 12.

[100] Clemens, Özcan, (n 18) 17.

[101] Several authors support this, see for example: Vicente Bagnoli, *The big data relevant market as a tool for a case by case analysis at the digital economy: Could the EU decision at Facebook/WhatsApp merger have been different?* Ascola Conference 2017. (accessible on SSRN: https://ssrn.com/abstract=3064795) or Samson Esayas, *Competition in dissimilarity: lessons in privacy from the Facebook/WhatsApp merger.* University of Oslo Faculty of Law Legal Studies, Research Paper Series, 2017/33.

[102] Giuseppe Colangelo, Mariateresa Maggiolino, 'Big Data as Misleading Facilities. European Competition Journal, Forthcoming' (2017) Bocconi Legal Studies Research Paper, 19. Ayse Gizem Yasar, 'Achieving Symbiosis between Disruptive Innovation and Merger Control: Challenges and Remedies' 1 June 2017, 29.

X The Competition Law Assessment of the Databases

As we already mentioned, at the end of 2013, WhatsApp had recorded an annual revenue of USD 10.2 million – along with a net loss of USD 138 million: ten times more loss than revenue. Is it a good investment to buy an unprofitable company? Or maybe we should ask why this was good investment. WhatsApp was Facebook's largest acquisition by far, 20 times larger than Facebook's acquisition of Instagram in 2012. Why did Facebook break the bank to buy WhatsApp?[103] As economic analyses have shown, the answer is user growth.[104] Overall, Facebook broke down the money it spent on WhatsApp as USD 2.026 billion for the user base.[105]

> In 2014, over 500 million people used WhatsApp monthly and the service added more than 1 million users per day. 70% of WhatsApp users were active daily, compared to Facebook's 62%. Additionally, WhatsApp users sent 500 million pictures back and forth per day, about 150 million more than Facebook users. The app launched in 2009 and as of 2020 it has 1.5 billion users. As of 2019, Facebook has 2.59 billion monthly active users. With a shared mission of enhancing global connectivity via internet services, the merging of forces will likely accelerate growth for both companies. For Facebook, user growth comes first and monetization later. WhatsApp has helped fuel Facebook's growth in developing markets where internet connectivity is sparse but where WhatsApp is widely used. Facebook then gains access to these mobile user bases.[106]

It is no exaggeration to say that once the two databases have been linked, the data in them become significantly more valuable than they would be if the same data were kept in separate databases with two distinct providers. If we divide the users that Facebook Inc. won by its acquisition of WhatsApp into two groups, then we find that Facebook could have generated a surplus value from both groups in the database. With respect to the WhatsApp users who are at the same time also Facebook users, the parent corporation received additional information concerning their user behaviour, which will allow it to sell its advertising spaces to advertisers by arguing that they offer even more accurate and individually customised user profiles. But the database of users who are only WhatsApp users or who declined to have their user data linked is by no means worthless for the company, either: their personal data can be used to yield a surplus either by using them as a control group or by using them to render the general user profiles more accurate.

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[103] The USD 19 billion paid by Facebook was well in excess of the last WhatsApp valuation, which had been made during the 2013 funding round. That appraisal had pegged WhatsApp's value at USD 1.5 billion. The 2011 funding round had resulted in a WhatsApp valuation of USD 80 million. <https://www.businessofapps.com/data/whatsapp-statistics/#1> accessed 6 July 2020.

[104] Alison Deutsch L., 'WhatsApp: The Best Facebook Purchase Ever?' (2020) <https://www.investopedia.com/articles/investing/032515/whatsapp-best-facebook-purchase-ever.asp> accessed 6 July 2020.

[105] John Constine, 'WhatsApp's First Half Of 2014 Revenue Was $15M, Net Loss Of $232.5M Was Mostly Issuing Stock' (2014) <https://techcrunch.com/2014/10/28/whatsapp-revenue/> accessed 6 July 2020.

[106] Deutsch L. (n 104).

Although the Commission tangentially touched on this aspect of the underlying issue, it still concluded that the size of the database would not be a cause for concern, even in the event that Facebook would ultimately find a way to match and link the WhatsApp and Facebook user accounts since 'the Transaction would only raise competition concerns if the concentration of data within Facebook's control were to allow it to strengthen its position in advertising'[107]. In the market identified by the Commission, however, this could not actually happen because it includes a 'sufficient number of alternative providers' other than Facebook that also collect personal data (e.g. Google, Yahoo, AOL, Microsoft, Yelp or even Adobe), which means that even after this transaction there would be a sufficient number of online advertising service providers left in the market.[108] At the same time several commentaries criticised[109] the Commission's failure to take into account that the databases at the disposal of these various corporations are not the same, and that they shield these from one another as confidential business information. For our part, we would like to add that, in our opinion – because the actual underlying market at issue in this case has been inadequately defined – Facebook's database should not have been compared to the those of Yahoo, AOL, Microsoft, Yelp or Adobe, since they are the fruits of services that operate completely differently from Facebook.

It is further worth noting that in 2014 the Commission – despite the fact that a third party also filed a complaint – only submitted a request for information to Facebook Inc. Based on the information at our disposal, it did not substantially – from an IT perspective – examine whether Facebook Inc. might have had the technology – or might have at least had the capacity to attain it – that it could use to match and link the users in the databases of the two platforms. It is of course a question whether the scope of its authority to review such transactions, as it is defined in Article 13 of the Merger Regulation, can be interpreted expansively enough to extend to an information technology issue that is impacted by the merger in question. Still, one may legitimately ask why the Commission failed to obtain an IT assessment by independent experts and instead chose to decide a technical IT issue with a crucial impact on the merger exclusively based on the relevant statement by the organisation that was the subject of the review.

This is also relevant with respect to the process whereby the sanctions applied in this case were determined. As we previously noted, pursuant to Article 6 (3) of the Merger Regulation, the Commission may retract is decision approving the merger if said decision was rendered based on incorrect information and the corporation in question is deemed to be responsible for providing misinformation. Terminating the merger and restoring the status quo ante would presumably have been impossible three years after the merger. Based on the publicly available documents, the Commission did not even seriously entertain the possibility. Moreover, this was the first time since the entry into effect of the Merger Regulation in 2004

[107] M.7217, Paragraph (187).

[108] M.7217, Paragraph (188).

[109] Allen P. Grunes, Maurice E. Stucke, 'No Mistake about It: The Important Role of Antitrust in the Era of Big Data' (2015) 14 The Antitrust Source 1; Inge Graef, *EU Competition Law, Data Protection and Online Platforms* (International Competition Law Series, Wolters Kluwer 2016, Alphen aan den Rijn) 249–279.

that the Commission had levied a fine in connection with the provision of incorrect or misleading information, which meant that this was the first time that Article 14 (1) a) of the Regulation had been applied in practice. An important element of that provision is that the corporation in question provided the incorrect information deliberately or negligently. That is why, in its decision concerning the fine, the Commission consistently referred to 'at least negligently' when writing about the provision of incorrect information by Facebook Inc.

From a competition law angle, the Commission found that it was sufficient to show, based on three criteria, that Facebook had acted 'at least negligently'[110]. In determining the fine, the Commission only investigated whether Facebook Inc. had cooperated during the 2017 investigation. The Merger Regulation does not in fact provide that the Commission has to ascertain in its investigation whether it was intentional or negligent behaviour on the part of the company that resulted in the dissemination of incorrect or misleading information. In its assessment of the underlying behaviour, the Commission ultimately chose a sanction that did not affect the approval of the merger and was thus milder than a withdrawal of its previously issued approval. Nor did the Commission discuss in its decision on the fine how it would have adjudicated the merger application in 2014 if Facebook had not listed, among its promises at the time, that it had no intention of linking the two databases either at then or at any time in the future.

The Commission noted that, 'albeit relevant, the incorrect or misleading information provided by Facebook, Inc. did not have any impact on the outcome of the Article 6(1)(b) Decision'.[111] In our opinion, this statement is a wrong decision: As we already noted, once the two databases have been linked, the data in them hold a significantly greater value than they would if the same data were kept in separate databases with two distinct providers. The formula works: more data, more information, more accuracy, greater impact on the users (or consumers or data subjects).

And as of 2020 we have learned – despite the difficulties in precisely estimating WhatsApp's revenues, since Facebook does not release separate financial revenue information for its various business segments and subsidiaries – that the WhatsApp business model has never yielded high returns.[112] However, Facebook's annual revenue was USD 70,697 million in 2019 – compared to USD 12,466 million in 2014 (the year of the acquisition).[113]

We do not claim that WhatsApp is the only reason behind the surge in Facebook's revenue, but let us take a look at the most recent statistics (updated June 23, 2020) about WhatsApp:

– 1.5 billion users in 180 countries make WhatsApp the most-popular messaging app in the world (0.2 billion more than its peer in the market, Facebook Messenger);
– 1 billion daily active WhatsApp users;
– 3 million users of WhatsApp Business;

[110] M.8228, Paragraphs (86)–(89).
[111] M.8228, Paragraphs (100).
[112] Mansoor Iqbal, 'WhatsApp Revenue and Usage Statistics (2020)' <> accessed 6 July 2020.
[113] Facebook's annual revenue from 2009 to 2019 <https://www.statista.com/statistics/268604/annual-revenue-of-facebook/> accessed 6 July 2020.

– 65 billion WhatsApp messages sent per day, or 29 million per minute;
– 3 million users of WhatsApp Business;
– 55 million WhatsApp video calls made per day, lasting 340 million minutes in total.[114]

In our opinion, the incorrect or misleading information provided by Facebook, Inc., had an impact on the outcome of the Article 6(1)(b) Decision.

In 2017, the EU Commissioner Margrethe Vestager, who is in charge of competition policy, announced that the European Commission has fined Facebook:

> Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. And it imposes a proportionate and deterrent fine on Facebook. The Commission must be able to take decisions about mergers' effects on competition in full knowledge of accurate facts.[115]

We should note again in this context that Facebook had acquired WhatsApp for USD 19 billion in 2014. The European Commission imposed a fine on Facebook in the amount of EUR 0.11 billion. The Commission declared that it did not find it necessary to review the data protection implications of the merger, and that it had 'analysed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof'. The Commission assessed specifically that any 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'[116].

Conclusion

The Facebook/WhatsApp case has demonstrated that, in the event that data protection and competition law intersect, it does not appear sufficient to look at the merger solely from the angle of competition. The reason is that if we look at a merger only and exclusively as a transaction aimed at reducing competitive pressure in the market by buying up a competitor, the Commission's decision can only be subject to potential criticism with respect to its definition of the market in question. However, if we also look at the competitive advantaged gained by linking the databases then the Commission's decision can be disputed on the merits, too. The reason is that although the Commission declared that, from a data protection perspective, it did not see grounds for reviewing the transaction, the controversial question at issue in the context of the merger does not concern data protection but data assets. And the Commission should definitely have incorporated the issue of data asset management among the competition law considerations reviewed in the decision, because the question of

[114] Iqbal (n 112).
[115] See <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369> accessed 6 July 2020.
[116] M.7217, Paragraph (164).

how Facebook handles the personal data it accumulates in the performance of its service is indeed a data protection law issue; nevertheless, the question of what type of competitive market advantage the linked databases generate – personal information as a data asset and a non-material good – could have been examined from a competition law angle.

The big question is whether the new Digital Services Act package will make the issue of data asset management subject to the scope of competition law.

Attila Pintér*

Drag Along Right in Hungarian Venture Capital Contracts

Introduction

The topic of this paper is the drag along right in Hungarian venture capital contracts. In this paper, I aim to answer whether it is possible to apply valid drag along clauses with their original purpose in venture capital contracts under Hungarian law.

This study seems to be timely, since there are more and more venture capital deals under Hungarian law, and at same time, many new legal vehicles have come from the United States, which we are expected to use in domestic venture capital contracts, and it is not clear if they are able to produce the desired legal effect in Hungary. One of these new legal vehicles is the drag along right.

What is the drag along right; what is its definition, how does it work and, in particular, how can we use it in Hungarian contracts? There is no doubt that the drag along right works under the US or UK common law excellently, but it is not clear whether we can use it in Hungary in the same way. By the end of this study, I will give my answer to all these questions.

First of all, I examine the definition of the drag along right, using the United States, German and Hungarian venture capital institutes' statements regarding the term. It is necessary to study the regulation and daily practice of other legal systems' drag along right, as it is a quite new legal vehicle in the Hungarian contractual practice; there are no specific legal regulations and no court decision is known in connection with the drag along right.

Later, I introduce nine different contractual terms and conditions in connection with the drag along right. In each examined legal system, i.e. the legal system of the United States, Germany and Hungary, I studied three venture capital deals concluded in the last two years, so we can get a relatively complete picture of the terms and conditions applied in this context.

Finally, I analyse in detail how the drag along right can work under Hungarian law. I introduce the different approaches taken by different legal experts in the examined contracts or stated in the daily practice. I then reveal my own opinion of how we should explain the drag along right according to Hungarian law, but I also give room for the reader to choose from the possible legal solutions.

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I Definition of the Drag Along Right

The drag along right serves the purpose in the venture capital transactions, the holder of the drag along right has the right to force all of the other investors and founders to do a sale of the company without the consent of the other shareholders of the company.[1] The drag along right secures that, in the event of a favourable bid for the shares of the company made by a third person but the minority of the shareholders being opposed to the bid and do not wishing to sell their shares, then the holder of the drag along right can force all other shareholders in the company to sell their shares to an (outside) buyer at the same price at which the right holder(s) sells their shares (a so-called hold-up problem).[2] As the buyer usually would like to buy the whole company, whereas the minority shareholders, who have shares in the company of only a couple of percent each, can prevent the transaction, the drag along right can ensure that the majority of the shareholders can sell their shares if the buyer would like to buy the whole company or more shares than the right-holder has. In reality, in venture capital deals, the drag along right belongs to the investor, and the investor usually has only a minority share in the company. As such, in venture capital deals, the drag along right transforms shareholders' majority rights into a minority right, in favour of the principle of venture capital deals, namely that the investor exits first from the company. From another aspect, the drag along right is an obligation for the founders and the other parties as shareholders, regarding venture capital transactions; if the investor gets a bid for the shares of the company that exceeds investor's shareholding in the company, the founders and other shareholders are obliged to sell their shares in in it according to the terms and conditions stated by the investor.[3] To balance the rights and obligations of the parties, the drag along right always works *pari passu,* i.e. the investor cannot sell the shares of the obligors of the drag along right under worse conditions than those under which the investor will sell his own shares.

Although I examined the legal systems of the United States, Germany and Hungary, I have not found any *expressis verbis* law that defines the drag along right. Moreover, I also did not find any legal vehicle that properly describes the mechanism I characterised above. I therefore studied the standpoints of the most significant national venture capital institutes in the examined legal systems.

The drag along right has been defined in the term sheet template of the American National Venture Capital Association (NVCA) as follows.

> Holders of Preferred Stock and the Founders [and all future holders of greater than [1]% of Common Stock (assuming conversion of Preferred Stock and whether then held or subject to the exercise of

[1] Dick Costolo, Brad Feld, Jason Mendelson, *Venture Deals, Be Smarter Than Your Lawyer and Venture Capitalist* (2nd edn, John Wiley&Sons Inc. 2012, NY, USA) 68–69.

[2] Carsten Bienz, Uwe Walz, 'Venture Capital Exit Rights, 2008' CFS Working Paper No. 2009/05, 1–2.

[3] Robert B. Little & Joseph A. Orien, Gibson, Issues and Best Practices in Drafting Drag-Along Provisions, 2016. <https://corpgov.law.harvard.edu/2016/12/14/issues-and-best-practices-in-drafting-drag-along-provisions/> accessed 1 August 2019.

> options)] shall be required to enter into an agreement with the Investors that provides that such stockholders will vote their shares in favor of a Deemed Liquidation Event or transaction in which 50% or more of the voting power of the Company is transferred and which is approved by [the Board of Directors] [and the holders of ____% of the outstanding shares of Preferred Stock, on an as-converted basis (the "Electing Holders")], so long as the liability of each stockholder in such transaction is several (and not joint) and does not exceed the stockholder's pro rata portion of any claim and the consideration to be paid to the stockholders in such transaction will be allocated as if the consideration were the proceeds to be distributed to the Company's stockholders in a liquidation under the Company's then-current Certificate of Incorporation.[4]

On the website of the German Private Equity and Venture Capital Association (GVCA), I did not find a definition of the drag along right.[5] In the German legal literature, Ernst and Häcker analysed management rights and obligations in venture capital deals, and described the drag along right as the obligation of the management when the investor would like to sell the whole company:

> In the event that the Investor intends to sell shares in the Company in an Exit Transaction ("Transaction"), the investor shall have the right to require the Manager to sell and transfer all Manager Shares or, at the Investor's discretion, the Pro-Rata-Share Portion either to the purchaser in the Transaction (the "Purchaser") or to the Investor or any other entity as determined by the Investor. (…) The sale of Manager Shares under the Drag-Along Right will be substantially under the same terms and conditions (in particular, but not limited to pro rata the purchase price, the representations and warranties, arrangements on payments and adjustments of the purchase price, payments into escrow) applicable to the sale of Investor Shares sold in the Transaction.[6]

According to Orrick's Guide, in the German practice, we also can describe the drag along right as follows.

> A drag-along (also called bring-along) is a contractual arrangement that gives one or more shareholders, who hold either alone or together a certain percentage of the entire share capital of the company (usually more than 50%) and who wish(es) to sell her (their) shares or a portion thereof to a third party, the right to request all other shareholders to sell a pro-rata portion of their shares to such third party. Sometimes, especially in early rounds, drag-along rights can only be enforced with the consent of an investor majority. The drag-along is appealing to acquirers as it allows a 100% exit, leaving behind no minority shareholders. Buyers will often want to acquire 100% in a company in order to gain more flexibility and freedom to run the company as they see fit without having to pay attention to minority shareholders with certain unalienable minority protection rights.[7]

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[4] Model term sheet 14–15. NVCA, August 2019. <https://nvca.org/resources/model-legal-documents/> accessed 1 August 2019.

[5] See <https://www.bvkap.de/> accessed 1 August 2019.

[6] Dietmar Ernst, Joachim Häcker, *Applied International Corporate Finance* (2nd edn, Verlag Franz Vahlen 2011, München) 98.

[7] Orrick, Herrington & Sutcliffe LLP (Markus Piontek, Vanessa Sousa Höhl, Johannes Rüberg, John Harrison Barbara Hasse, Lars Wöhning, Justine Koston), Orrick's Guide to Venture Capital Deals in Germany (Orrick, Herrington

Compared to the definitions above, the Hungarian Private Equity and Venture Capital Association (HVCA) uses a very simple definition:

> If the venture capitalist sells his shareholding, he can require other shareholders to sell their shares to the same purchaser.[8]

As we see from the above-mentioned descriptions, drag along does not have a universal definition and almost every quotation emphasised different elements of the drag along right. At the same time, we can highlight some constant attributes of the drag along right's definition, as follows

a) the drag along right is a right of the investors, and at the same time,
b) the drag along right is an obligation on the founders and other shareholders,
c) upon the drag along right, the dragging investor can force the dragged shareholders to sell that their shares in the company shall be sold to one or more third person(s) (buyer), because
d) the buyer wants to buy more shares than the investor has, and
e) the dragged shareholders' share shall be sold on the basis of *pari passu* and pro-rata compared to the investor's shares.

II Contractual Practice

I examined three law firms' daily practice from the US, Germany and Hungary. During my research, I studied more than one hundred venture capital contracts, but finally, I chose nine contracts, three from each examined legal system, and analysed them in detail. I found that each examined venture capital contract has a drag along clause. Although the drag along clauses in the examined contracts were similar in their main points, there were however many important differences in the detailed rules. Therefore, in the following, I will present the main elements of the drag along right separately and highlight the different provisions of the contracts.

1 Main Elements in Each Examined Contract

In each examined contract, the main elements listed in the previous chapter were very similar. The definition I gave in the previous chapter therefore corresponds not only to the legal literature but to the daily practice, too. I posit that this definition can be acceptable as the general definition of the drag along right.

I must note that, in each examined Hungarian contract, the company in which the investor performed the investment, was established as a Hungarian limited liability company

& Sutcliffe LLP 2018) 71. <https://s3.amazonaws.com/cdn.orrick.com/files/Insights/Germany-VC-FINAL-web.pdf> accessed 1 August 2019.

[8] See <https://www.hvca.hu/EN/glossary/drag-along-rights/> accessed 1 August 2019.

(*korlátolt felelősségű társaság,* hereinafter *Kft.*). For this reason, I will introduce only the law regarding Kfts and analyse the drag along right in the venture capital deals where the company is a Kft.

Now, let us see the different terms and conditions of the drag along right clauses.

2 Holders of the Drag Along Right

In the examined contracts, the parties of the contracts were the selling investors and the other shareholders. The selling investors had the drag along right ('dragging investors', or 'obligee of the drag along right') and the other shareholders were the obligors of the drag along right ('dragged shareholders' or 'obligor of the drag along right').

In each examined US contract, the investors had a significant majority in the company, so the drag along right was the right of the majority. In the German and Hungarian contracts, the dragging investors had only a minority share in the company, so the drag along right was the right of the minority.

3 Time Conditions

I did not find time conditions in the US contracts.

In the examined German contracts, the dragging investors could not use their drag along right within a certain period after the investment contract was signed. This period varied between 1 and 3 years.

Among the Hungarian contracts, I found only one contract in which the dragging investors could use their drag along right immediately after signing of the investment contract. In this contract, the investors' drag along right would be open if the purchase price in the bid was not less than a certain minimum price, which was defined in the investment contract, and it was also the investors' minimum expected return. The investors do not have a drag along right if the purchase price is less than the predetermined amount.

In other two Hungarian contracts, a three-stage timing system was established as follows:

– In the first period it was not allowed to exercise the drag along right. This period was 1 year in one contract and 2 years in the other contract.

– In the second period, the investors can exercise their drag along right, but they cannot sell the drag along obligors' business shares under a certain purchase price.

– In the last period, which started from the end of the 5th year after the signing of the investment contract, the investors can exercise their drag along right without any other restriction but with respect to *pari passu* and pro rata rules.

4 Trigger Events[9]

The events that trigger the investors' drag along right are called trigger events. It is a key question what conditions should be present to allow for the investors to have the right to exercise their drag along right. Drag along exists so that if an investor receives a bid for his or her shares then he or she will be able to sell them, even if he or she does not have enough shares to satisfy the bid. Usually, the buyer wants to buy the whole company (one hundred percent of the shares) or the majority of the shares (fifty percent of the shares and one more vote) and it is very rare that the investor has exactly enough shares to satisfy the bid, so in this case, the investor uses his drag along right and enforces that enough shares will be sold from the dragged shareholders' shares for the required transaction to take place. Moreover, there are other events that can trigger the drag along right not only the selling transactions. Moreover, the selling transactions can also be different. Trigger events were defined in different ways in the examined contracts. The different solutions of the contracts are presented as follows.

I. Trigger events in the US contracts

– a transaction or series of related transactions in which a person, or a group of related persons, acquires from stockholders of the company shares representing more than fifty percent (50%) of the outstanding voting power of the company (a 'Stock Sale'); or

– a transaction that qualifies as a 'Deemed Liquidation Event'. In the contract, the Deemed Liquidation Event means the following:

I) a merger or consolidation of the company or the subsidiary of the company, or

II) the sale, lease, transfer, exclusive license or other disposition, in a single transaction or series of related transactions, by the company or any subsidiary of the company of all or substantially all the assets of the company and its subsidiaries taken as a whole, or (2) the sale or disposition (whether by merger, consolidation or otherwise, and whether in a single transaction or a series of related transactions) of one or more subsidiaries of the company if substantially all of the assets of the company and its subsidiaries taken as a whole are held by such subsidiary or subsidiaries, except where such sale, lease, transfer, exclusive license or other disposition is to a wholly owned subsidiary of the company.

II. Trigger events in the German contracts

– any transaction in which any person or a group of persons acquires more than 50% of the outstanding shares of the company, or

– more than 50% of the moveable and immoveable property of the company is sold, regarding their real market value, and all and any transactions have to be counted together, regardless of whether the transaction is a stock, asset deal, merger or acquisition or it is fulfilled upon any other legal title.

[9] In connection with the trigger events, see Lorenzo Sasso, *Capital Structure and Corporate Governance: The Role of Hybrid Financial Instruments.* A thesis submitted to the Department of Law of the London School of Economics and Political Science for the degree of Doctor of Philosophy (Harvard Law School Library print version 2012) 189–192.

III. Trigger events in the Hungarian contracts

In two Hungarian contracts there was no special trigger event. As soon as the investor receives a bid that he cannot satisfy with his own business shares, he can force the other members of the company to sell, in whole or in part, their business shares.

In the third Hungarian contract

a) the drag along right was not exercised in the first 2 years after the investment,

b) between the end of the 2nd year after the investment and before the end of the 5th year after the investment, the investor could exercise its drag-along right if the company's net sales or EBITDA ('earnings before interest and taxes') for a given financial year are at least 50% below the net sales or EBITDA projected in the current or the subsequent year's business plan,

c) after the end of the 5th year after the investment, the investor could exercise his drag along right without any conditions.

The financial conditions in point *b)* are usually considered as bad news and we can conclude that, based on these financial data, the company is in a downside period. In these cases, it is unlikely that the investor will want to keep its shares since these companies usually do not provide a good return; moreover, it is more likely that it will end in a bankruptcy procedure. So, in these cases, the investor would prefer to get rid of the company at any price and not be involved in the forthcoming and very expensive liquidation process of the company. I assume that this drag along right term could be used as an escape opportunity for the investor in case of a financial difficulty of the company.

5 Minimum Purchase Price

I did not find a minimum purchase price either in the American or German contracts, however, in two of the Hungarian contracts there were purchase price conditions. In both contracts, the limitation only applied until the end of the first 5 years following the investment; thereafter the condition ceased, and the investor could exercise its drag-along right.

The minimum purchase price protects the founders against the investor's unrestricted drag-along right. Upon the terms and conditions of the minimum purchase price, the parties agree on a purchase price stated in the investment contract under which it is not possible to sell the company without the consent of each party. Since the drag along right is a selling transaction, the minimum purchase price must therefore be an objective obstacle to the exercise of the drag along right. I must note that, it is very difficult to find a correct future purchase price during the investment negotiation, because usually there is no reliable data regarding the future market value of the company and whilst the founders are interested in the highest purchase price possible, as the investor may not find a buyer at a higher purchase price, the investor is interested in the possibly lowest purchase price in order to exercise its drag along right as easily as it is possible.

6 Mandates, Power of Attorney

I have found explicit mandates and powers in each US contract and two Hungarian contracts.

These mandates and powers are for the case where the dragged shareholders fail to fulfil their obligations related to the drag along right; then someone else can act for and on their behalf to perform their obligations under the investment contracts.

In the US contracts, the mandates and powers were established for the investors' attorneys, who could act on behalf of the dragging shareholders in the event of exercising the drag along right. In the Hungarian contracts, the mandates and powers were directly delegated to the investors, who could act upon the drag along terms and conditions of the investment agreements.

7 Other Rights, Obligations and Warranties

In the US contracts, not only the purchase offer had to be complete and eligible, but those entitled to do so had to vote to perform the transaction. On the one hand, this meant the company's board, on the other hand, this meant the company's general meeting. In the board; the investors' delegated member of the board had a veto right, upon which the investors' delegate could block the board members' decision to restrict the drag along transaction. In the general meeting, the investors had the necessary majority to vote through the drag along right, even if the other shareholders wanted to reject the transaction.

Each contract contained detailed procedural and implementing rules with special regard to making legal statements, carrying out the necessary voting and signing other documents (e.g. outstanding process of shares in US law or the company registration process in Hungarian law).

Finally, the US contracts contained a very detailed list of applicable warranties and statements, which was so that each shareholder was only required to take responsibility for his own shares; however, those shares had to be free and clear of all liens, claims and encumbrances and be capable of fulfilling the drag along obligations at the time of the transfer.

III Drag Along Right under the Hungarian Law

In the chapters above, I have introduced the contractual practice and legal theory of the drag along right under the US, German and Hungarian law. No doubt, there are more and more venture capital contracts under the Hungarian law in which the parties agree on the drag along clause. In this chapter, I summarise the legal characteristics of the drag along right and analyse the different legal aspects of the examined legal vehicle. Throughout the analysis, I am looking for the answer to whether drag along right is a valid clause under the Hungarian law.

In my view, the drag along right is a legal vehicle for the protection of the investors, based on the contractual agreement of the parties, which restricts the property right and render it

possible to transfer the ownership. It is worth going through all the elements of this statement so that I can outline the legal problem.

The drag along right is a legal institution for the protection of the investors, since it protects the investor's interest in a way that if the investor would like to sell all the business shares in the company, it cannot be prevented or restricted by the other owners or founders. This is so, even if the investor does not want to sell all the business shares of the company, but wishes to transfer more than the amount of its own business shares (typically 50% + 1 vote) and also if the investor has a majority itself but the minority shareholders' business shares are forced to be transferred.

The drag along right is a contract-based legal institution, which is important from the aspect that it is not a corporate legal vehicle, so a 'cogens or dispositive' dispute cannot arise; the drag along clause is based on the contractual freedom of the parties. However, we cannot omit the consideration that the drag along right necessarily has consequences related to corporate law. It is beyond dispute that, in the event of exercising the drag along right, the contract has to allow for transferring the 'ownership'[10] of the business shares.

It is still debated whether drag along restricts ownership of the business shares. I have to make a very strong point in this question: is it better to restrict someone's ownership than to sell the thing at any time, regardless of the owner's contractual intention? This is such a limitation that there is no longer anything remaining to limit anymore.

It seems to be a similarly evident statement that drag along is a legal vehicle that makes the transfer the ownership. In terms of the economic substance of the transaction, we can hardly draw any other conclusion: the holder of the drag along right is entitled to sell the business shares of other members to a subsequent buyer. However, this statement cannot be easily overlooked in a legal study, so it is worth examining now from a legal point of view whether the drag along right can transfer the ownership of a business share, or the drag along right is able to trigger the legal effect, under which the shareholders will obliged to sell their business shares to third persons.

The Hungarian law requires a valid legal title to transfer the ownership of any things, so if we stated that the drag along right can transfer the ownership at all, by itself, then we should find a valid legal title in the drag along contract.[11] The invalidity of the title excludes the transfer of ownership under the Hungarian law.[12]

Let us look at the possible legal titles of the Hungarian law that are capable of producing the economic effects we discussed in detail above.

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[10] Let me overlook the question that is it even possible to have ownership of a share *(üzletrész)* of the Hungarian limited liability company.

[11] Kisfaludi András, 'Transfer of Property, Claims, Rights and Contracts in the New Hungarian Code Civil' (2014) (2) ELTE Law Journal 109–122, 111.

[12] Menyhárd Attila, 'A dologi jog szabályozásának sarokpontjai' in Vékás Lajos, Vörös Imre, *Tanulmányok az új Polgári Törvénykönyvhöz* (Complex 2014, Budapest 145–167) 161; and Vékás Lajos (ed), *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Complex 2008, Budapest) 622–625.

1 Sale and Purchase Contract

The first and very logical answer, given by the members of the conservative drag along school, is the sale and purchase contract[13], since the dragging investor would like to sell the shares of the other shareholders to a third person. This third person should be the purchaser; the dragged shareholders could be the seller party and the share could be the subject of the contract.

However, we have a significant legal problem because we do not know the purchaser party at the time of signing the drag along contract. The purchaser party will be known later when the dragging investor named it. So, we have to put the question: will it be a valid sale and purchase contract with the parties' agreement if the purchaser person is not known at the time of signing the sale and purchase contract?

In my view, we have to refer the *ingatlan-átruházási szerződés érvényességéről szóló XXV. számú Polgári Elvi Döntés* (Civil Principle Decision by the Supreme Court of Hungary, No. XXV., on the validity of the contract for the transfer of real estate, hereinafter referred to as PED). We are interested in point number I. of the PED, and its statement of reasons, as follows:

> For the purposes of the existence of a valid real property sale and purchase agreement, it is necessary and sufficient that the deed, made from the contract of the intent of the parties, contains the parties' persons, their will to transfer the ownership of the real property, and also the deed has data about the real property and consideration, or if the transfer is free then it is stated from the content of the deed. (…)
>
> It follows from these statutory provisions that it is essential for the validity of a sale and purchase contract for a real property that the written contract contains (a) the parties, (b) the subject matter of the purchase, (c) the purchase price, and (d) the statement that the contract is a sale and purchase contract.
>
> Neither the law nor the implication thereof requires the contracting parties to be designated in the text of the contract. It is sufficient, therefore, that the identity of the contracting parties and the quality of their seller or purchaser (contractual status) can be clearly established from the signatures or other contents of the deed.

First of all, I have to explain why the analogy is not too remote, e.g. why I refer to PED in connection with the transfer of the real property, although a business share of a Kft is not a real property, but it is also not a thing, since it means the whole of rights and obligations arising in connection with the core deposit.[14]

First, it must be sufficient explanation as an a *contrario* argument that it would be a very brave statement that the referred part of the PED is not valid in the case of sale and purchase contracts that have subjects other than real property. Perhaps we can accept, as a sort of axiom, that a sale and purchase contract is not validly able to be concluded for a movable thing unless it specifies the subject of the purchase, the person of the parties and the purchase price.

[13] In this study, it is not examined what the legally correct title is to transfer a Hungarian Kft's business share, although we note that it is allowed to transfer rights and obligations, such as a business share is, under Hungarian law.

[14] Ptk. 3:164. § (1).

The corporate aspects of our examination pose a more difficult question.

Nowadays, it is widely accepted that the business share of a Kft is not a thing; as a result, the rules regulating sale and purchase contracts do not apply to it.[15] If the business share is not a thing, then why would the referred PED be relevant in our case?

The Hungarian Code Civil (Ptk.) uses the expression 'transfer of business share for consideration in money' in two sections when providing for the transfer of business share for consideration.[16]

No more details of the regulation are revealed by the lawmaker about this legal instrument leaving hereby those applying the law alone and forcing them to draw conclusions.

The law provides assistance by associating the 'transfer of business share for consideration in money' with 'acquisition of business share in priority' to which *analogia legis* the underlying provisions of the pre-emption right shall be applied.[17]

As the pre-emption right is a legal instrument closely connected with sale and purchase contracts,[18] those applying the law may be right when they conclude that if the pre-emption right can govern the 'acquisition of business share in priority', the provisions on sale and purchase contracts can govern the 'transfer of business share for consideration in money', too. This view is supported by the Expert Proposal, which the lawmaker did not ascend to the level of statute.[19]

However, it must be noted that I am of the opinion that it would have been expressly written in the law if the lawmaker had wanted to apply the rules of the sale and purchase contract to the transfer of business shares in exchange for money. It did not happen; moreover, a new legal title was created and there is no cross-reference to the application of the rules governing sale and purchase contracts; hence I tend to share the opinion that the legal principles do not allow us to conclude that we have to apply the rules governing sale and purchase contracts for the transfer of business shares in exchange for money.

From a practical point of view, the previous statement appears to be nonsense. If it did operate like this, several legal affairs would be unmanageable, for example lien rights (a business share can hardly be defined as a thing, a right or a claim[20]), although company law does not exclude the possibility of registering a lien right, [21] and it would also be impossible to exercise call option, put option or repurchase rights regarding the business share if it is taken into consideration that, *per definitionem,* all of them are entitlements to things.[22]

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[15] Pintér Attila, 'Az üzletrész-átruházási szerződésről' (2016) (5) Gazdaság és Jog.

[16] Ptk. 3:166. § (2) and 3:167. § (2).

[17] Sárközy Tamás, 'A jogi személy II/VI.' in Sárközy Tamás, (főszerkesztő), A *Ptk. magyarázata* (HVG-ORAC 2018, Budapest) 226–227.

[18] Ptk., Chapter XXXIII. 'az adásvétel különös nemei', and Pk. 9. VII., és BH 1995.10.589., és BH 1995.12.666.

[19] Vékás (n 12) 290–291.

[20] According to the Section 8:1. § (1) point 1 of the Ptk., asset *(vagyontárgy)* means: thing, right and claim, whilst in Section 5:101. § (1) of the Ptk., the subject of a lien can be any asset.

[21] *2006. évi V. törvény a cégnyilvánosságról, a bírósági cégeljárásról és a* végelszámolásról, 27. § (3) *c)* pont.

[22] Ptk. 6:225. § (1) and (2).

This situation is not made easier even if we accept the view of the Commentary, according to which

> the transfer of business share covers the transfer of all the membership, membership rights and membership obligations of a Kft; the legal title of that transfer is not to be regarded as a designated transfer of title ownership, as its statutory scope does not extend to business membership;, rather, it is a contract for transfer of business share governed by a special company law regulation.[23]

All in all, I take the standpoint that the legal title of a transfer of business share poses a legal problem without a solution, the root of which is the dogmatic diffidence of legally determining a business share. In this sense, this legal instrument is not congruent with the basically well-structured and precisely established system of the Hungarian Civil Code. Depriving the business share of its in rem nature and separating its transfer in exchange for money from the traditional principles of the law of obligations have led to the emergence of an unmanageable legal problem, which can only be settled by using generous interpretation of the law.

I understand and accept the view that, based on the Hungarian legal history, we cannot regard a business share as a thing; however, our daily practice would be made significantly easier if the lawmaker considered the sale and purchase contract as an underlying regulation for the transfer of a business share in exchange for money, rather than forcing the use of the pre-emption right as a collateral means for the right of acquisition of a business share in priority. In this way, the right of acquisition of a business share in priority could become intrinsically manageable, too.

Let me set aside this problem and regard share as a thing to allow for the application of the general Hungarian Civil Code regulating sale and purchase contracts and options and turn our attention to the statements of the conservative drag along school.

After finding the answers to these questions, we can accept now that the above-cited PED regulations govern drag along law; that is, the buyer must be identified in drag along contracts.

However, the identification of the buyer is not possible at the time of signing the drag along contract. As a result, we seem to have ended up in a dead-end street and we cannot argue that the drag along is basically a sale and purchase contract capable of transferring the legal title of the business share per se.

I do not even accept the view that the obligee of a drag along right is a representative or an agent who enters into a contract in the name of the future buyer, as we do not know upon concluding the contract whose representative or agent this person is; as such, the identity of the buyer is not disclosed, resulting in the invalidity of the contract even if the buyer can be identified at the time of the hypothetical perfection of the legal relationship. In my view, the subjects of the legal relationship must be clearly identified at the time of entering into the contract, rather than at the time of performing it.[24]

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[23] Vékás Lajos, Gárdos Péter, *Kommentár a Polgári Törvénykönyvhöz.* I. kötet (Közigazgatási és Jogi Kiadványok, Wolters Kluwer 2018, Budapest) 405–406.

[24] See more: Kisfaludi András, *Az adásvételi szerződés* (KJK-KERSZÖV Jogi és Üzleti Kiadó Kft. 2003, Budapest) 63–64.

In my opinion, based on the above argument, the supporters of the conservative perception seem to be under a misapprehension and, under the Hungarian regulations relating to sale and purchase contracts, drag along cannot be regarded as a simple sale and purchase contract.

2 Call Option

In practice, several lawyers try to settle this problem by treating drag along as a call option, taking into consideration that it cannot be a sale and purchase agreement. They can also be grouped into two schools as follows

i. some of them state that the obligee of the drag along right has the right to exercise a call option to acquire the business share that is encumbered with the drag along and he can acquire the obligor's business shares by his unilateral declaration in accordance with the other rules of the drag along,

ii. the members of the radical call option school however think that the obligee of the drag along has a call option right, but he also has the right to transfer this call option right to a third person. Finally, the third person, using the call option right to the drag along obligor's business share, will be the owner of the business share.

As for the standpoint of the simple call option school's approach, it is necessary to note that it is another legal transaction; the obligee of the drag along right has no intention of acquiring the drag along obligor's business share: he would like to get rid of his own share instead.

It can be seen that the drag along right is far from being a linear series of transactions, by which the obligee of the drag along right first acquires the drag along obligor's business share and subsequently transfers it to the future buyer. It is important to note that such a transaction could not be disputed as two legal documents, that can legally be drafted perfectly, transfer the title of the ownership; however, the title is not the drag along. Furthermore, it is essential to pay attention to the fact that the obligee of the drag along does not aspire to exercise membership rights or fulfil obligations concerning newly-acquired business shares, and, in particular, the obligee does not wish to pay tax on acquiring or transferring a business share, etc.

The legal solution, when the drag along obligee shall be entitled to transfer his call option right to a third person, should be handled as a different legal question to a simple business share sale and purchase agreement. We will discuss this problem in the next chapter.

3 Drag Along Right as a Call Option Involving the Right to the Designation of a Buyer *(vevőkijelölés)*

In this view, the drag along right always involves a call option, upon which the obligee of the drag along right is able to acquire the business shares that are encumbered with the drag along right. The radical call option school goes further and states that this call option right is transferable, and the obligee of the drag along right has the right to transfer the call option

right to any third person that will be able to acquire the drag along obligor's business shares by his unilateral declaration based on his call option right. Hence, they state that, during the enforcement of the drag along right, the obligee of the drag along right transfers a call option to the buyer; the buyer purchases the drag along obligor's business shares and pays money to the obligor. The purchase price and other purchase conditions have been determined by the sales and purchase agreement's terms and conditions concluded to the drag along obligee's own business shares by and between the obligee of the drag along right and the buyer (*pari passu* and *pro rata*). The transfer of the call option between the drag along obligee and the buyer is free from any fee or charge.

It looks like the real contractual intention of the parties, but we have to examine whether the legal framework is given by the mandatory law.

On the first hand, according to the Hungarian Civil Code, the sale and purchase contracts are defined as follows:

> Sales contract means any contract under which the seller undertakes to transfer the ownership of a thing to the buyer, and the buyer undertakes to pay the price thereof, and to take possession of the thing.[25]

Although we cannot handle the call option right as a thing, since ownership is possible only on tangible things,[26] so that a right is not transferable via a sale or purchase contract, but we can use the rules of the sale and purchase contract to the transfer of the rights, based on the subsidiary rule of the sale and purchase contract.[27]

On the other hand, the Hungarian Civil Code expressly allows the transfer of the rights:

> The entitled person may transfer his right to another person, provided that the right is declared non-transferable by law, or unless non-transferability follows unambiguously from the nature of the right.[28]

Analysing the text of the law, we must state the follows:

i. First of all, the law allows generally the transferability of rights. It comes from the general rule of the Hungarian Code Civil:[29]

> This Act governs the property and personal relations of persons under the principle of interdependence and the principle of equality.[30]

[25] Ptk. 6:215. § (1).
[26] Ptk. 5:14. § (1).
[27] Ptk. 6:215. § (3).
[28] Ptk. 6:202. § (1).
[29] Osztovits András (ed), A *Polgári Törvénykönyvről szóló 2013. évi V. Törvény és a Kapcsolódó Jogszabályok Nagykommentárja*. Book no. III., (Opten Kft. 2014, Budapest) 482.
[30] Ptk. 1:1. §.

The law does not make a difference between subjective rights such as pre-emption right, call and put options) or the rights with an absolute structure.[31] Rights with an absolute structure are transferable by the mandatory law, like the IP rights based on the Hungarian IP Law,[32] or the call option right on the capital market, based on the Hungarian Capital Market Law.[33]

ii. The rights are also transferable if

– the right based on the contract is transferable by law, or

– the transferability of the right based on the contract comes unambiguously from the nature of the right.

A right is transferable unless the transferability is forbidden by law. Generally, the transferability of the call option right is not forbidden by the Hungarian Civil Code; moreover, the transferability of the call option right on the capital markets has us conclude that the 'general' call option right should also be transferable.

We also have to review the transferability of a call option on a business share, as the nature (or real content) of the right. No doubt, the business share is transferable, since it is declared by the law; even so, the members of the company, the company and the person designated by the company have a pre-emption right in cases of the transfer of a business share to the 'outsider person.'[34]

Summarising the above analysis, we have to conclude that the transfer of a call option right on a business share is legally possible under Hungarian law. Factually, the contractual intention of the parties, based on the terms and conditions of the drag along agreement, is that the obligee of the drag along right should have the right to transfer his call option right on the obligor's business shares, which is part of the drag along agreement. Hence, we have finally found that the radical call option school's solution can be one of the legitimate interpretations of drag along right transactions.

4 Drag Along Right as a Transfer of Contract *(szerződésátruházás)*

Supporters of the neoliberal wing of the radical perception intend to solve this problem by referring to the legal instrument of transfer of contract[35] in the Hungarian Civil Code and regard drag along as something incorporating the call option of the drag along obligee to acquire the business share of the drag along obligor who, upon entering into the contract[36]

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[31] Petrik Ferenc (ed), *Polgári Jog I–IV. – Új Ptk. – Kommentár a Gyakorlat Számára.* Commentary for the Ptk. 6:215. §, online version, 2020.

[32] Act No. LXXVI of 1999 on Copyright, 42. §.

[33] Act No. CXX of 2001 on the Capital Market, 323. §.

[34] Ptk. 3:166. § (1) and 3:167. § (1)–(2).

[35] Ptk. 6:208. § – 6:211. §.

[36] In my view, there is no legal basis for the remaining party to the contract (in this case the drag along obligor) to give its prior consent to the assignment only if the person entering the contract is already known at the time of the conclusion of the contract. Thus, in my opinion, the drag along obligor is validly making a contractual statement in which the drag along rightholder is entitled to transfer his contractual position to an unknown buyer at the time of the conclusion of the contract. Cf. Fazekas Judit, Menyhárt Ádám, Kőhidi Ákos, *Kötelmi Jog,*

consents to altering the person of the drag along obligee (meaning every right and obligation)[37] upon the unilateral statement of the drag along obligee. The new position will be taken over by the future buyer, who can buy the business share of the obligor of the drag along by exercising his or her newly acquired call option.

Well, it cannot be disputed that the future buyer has no intention of acquiring a contractual position in any drag along contract, taking into consideration that his or her single wish is to acquire the business share of the drag along obligor. At the same time, we have to accept that the transfer of contract can be a perfect theoretical legal option to model the legal content of the transaction, but I suppose this is not a position that is really wanted by the buyer. In the drag along contract, there are many obligations that are not based on the parties' (the later buyer and the obligor of the drag along) contractual will. I refer here only to the conditions, how it is possible to sell the drag along obligor's business share, although it would just be acquired by the buyer. The buyer's only will be to acquire the ownership of the business shares. He does not want to keep in the original position of the drag along obligee; he would like to be a simple owner of the business shares.

With that, I think the transfer of contract as the description of the legal content of the drag along right is just a theoretical and legally perfect solution but it is not able to present the real economic content of the parties.

5 Considering Drag Along as an Agency Contract Service

We also have to mention the approach of the ultra-liberal school. They argue that drag along should not be overthought and it is needless to crack drag along 'nuts' with sales contracts, or call option right 'sledgehammers', as drag along is not more than a simple transaction in which the obligor of the drag along mandates the obligee of the drag along to enter into a contract with the buyer for transferring business shares in his place and in his name. Moreover, it is supported with a power of attorney meeting the mandatory formal requirements; as a result, the obligor of the drag along does not have to take any action when the buyer emerges and the contract must be concluded.

However, there are two problems with this seemingly perfect solution.

If we regard the drag along as an agency contract, it is beyond any dispute that the obligor of the drag along is the principal. As such, the principal has the right to instruct, which makes it uncertain to whom and under what circumstances the obligee of the drag along (who is the obligor of the agency contract at the same time) is able to transfer the business share. The answer of the ultra-liberal school to this question is that there are no impediments to setting forth in the agency contract (which is also a drag along contract in this case) what kind of instructions

Általános rész (2. átdolgozott kiadás, Gondolat Kiadó 2018) 228; Benke József, Nochta Tibor, *Magyar Polgári Jog, Kötelmi Jog* I., (Dialóg Campus Kiadó 2017, Budapest–Pécs) 261.

[37] Wellman György (ed), *Polgári Jog, Első és Második Rész* (3. átdolgozott, bővített kiadás, Az új Ptk. magyarázata V/VI., (HVG-ORAC 2018, Budapest) 510.

the principal can give to the agent, and it is also possible to exclude some instructions concerning the subject, the merit and the purpose of the contract (i.e. transfer of business share).

On the other hand, the restriction or exclusion of the right to terminate with regard to contracts for services is rendered null and void.[38] However, the obligee of the drag along could hardly sleep well if he or she tried to sell the business share of the obligor of the drag along without the consent of this person, based on a contract which can be terminated at any time. Here comes the argument of the supporters of the ultra-liberal school; that the lawmakers give us assistance in this matter as, in the case of a long-term agency contract, the parties may agree on the restriction of the right to terminate; furthermore, they can also preclude the exercise of the right to terminate within a prescribed term.[39] Thus, we have nothing else to do but to exclude the right to terminate for the obligor of the drag along, or make it fall on the closest day, which will obviously be the day succeeding the day on which the obligee of the drag along acting in place and in the name of the obligor of the drag along transferred the business share of the obligor of the drag along to the buyer.

Naturally, this argument also has some weaknesses. On the one hand, the contracts can be terminated, not to mention whether the termination was lawful or not. Hence, upon delivery of the termination notice, the legal effects of the termination are produced, making it impossible for the obligee of the drag along to transfer the business shares. Of course, later there could be a suit for unlawful termination and a judgment could restore the effect of the agency contract, after which the obligee of the drag-along right can legally sell the business shares, but factually, the buyers usually do not want to wait for the end of legal proceedings that could last for years, and they withdraw their offer. On the other hand, an agency contract is a complex set of obligations and so it can easily happen that a contractual breach is committed, and although it does not affect the main contractual obligation it can give the legal basis for the termination of the contract.

Taking every factor into consideration, the solution provided by the ultra-liberal perception cannot be regarded as a bad one. Although the principal-agent perception is definitely far away from the drag along approach and is not capable of handling the issue perfectly, it does offer a way that is operable even under Hungarian law.

Summary

In this study I summarized my experience with US, German and Hungarian contractual practices related to the drag along provision of venture capital transactions. I have presented some of the relevant legal literature of the examined legal systems. After outlining the practical and theoretical background, I tried to give a general definition of drag along.

[38] Ptk. 6:278. § (4).
[39] Ptk. 6:278. § (4).

I did all this work to address whether drag along clauses are valid under Hungarian law. The first related hypothesis was the conservative perception that drag along is a simple sale and purchase contract. I demonstrated that drag along cannot be considered as a simple sale and purchase contract or a special type of sale and purchase contract.

I found that, one of the special types of call options or an unusual perception of an agency contract can be the legal solution to the required legal content of the drag along right.

Drag along is one of the American legal instruments that, under Hungarian law entails potential violations; it leaves several contractual gaps in the agreements of the parties and violate the contractual intention of the parties. However, I do not think that an urgent law-making procedure is needed, as the drag along rules may have not reached their final form; we cannot anticipate their future changes and it is also possible that the whole legal instrument *ab ovo* will cease to exist in order to provide room for more innovative, creative and contractually well-founded solutions.

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