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

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## 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.<sup>1</sup> This definition was confirmed by the Court of Justice of the European Union (CJEU) in its *Arblade* judgment<sup>2</sup> 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,<sup>3</sup> it was the Rome I Regulation that first gave a legislative definition at EU level.<sup>4</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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,<sup>5</sup> as well as the regulations on matrimonial property regimes<sup>6</sup> and on the property consequences of registered partnerships<sup>7</sup> 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*,<sup>8</sup> and interpreted Article 9 of the Rome I Regulation (and its predecessor from the Rome Convention) in the *Unamar*<sup>9</sup> and *Nikiforidis*<sup>10</sup> judgments, while Article 16 of the Rome II Regulation was interpreted in the *da Silva Martins* case.<sup>11</sup> 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

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

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

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

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

<sup>11</sup> 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.<sup>12</sup>

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

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<sup>12</sup> 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 Zgrabljčić 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<sup>13</sup> and Spain,<sup>14</sup> 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.<sup>15</sup> These rules also acknowledge that domestic public law is only applicable in the national territory of the issuing state.<sup>16</sup>

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,<sup>17</sup> or that it is not even possible to provide a definition of overriding mandatory rules.<sup>18</sup> 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.<sup>19</sup>

<sup>13</sup> Luxembourg Civil Code, art 3 (1).

<sup>14</sup> Spanish Civil Code, art 8.

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

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

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

<sup>18</sup> Germany: Klaus Schurig, 'Zwingendes Recht, «Eingriffsnormen» und neues IPR' (1990) 54 *Rabels Zeitschrift*, 217–250, 247.

<sup>19</sup> 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.<sup>20</sup> 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;<sup>21</sup>
- norms applicable irrespective of the governing law;<sup>22</sup>
- norms applicable irrespective of the operation of conflicts of laws, i.e. they switch off the operation of conflict of laws;<sup>23</sup>
- norms that cannot be avoided by choice of law;<sup>24</sup>
- 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).<sup>25</sup> The characteristic of these norms that they claim

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

<sup>21</sup> 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.

<sup>22</sup> Bulgaria: Nikolay Natov, *Komentar na Kodeksa na mejdunarodnoto chastno pravo, kniga purva*, chlen 1–47 (Siela 2006, Sofia) 390; Todor Todorov, *Mejdunarodno chastno pravo. Evropejskiat 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.

<sup>23</sup> 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](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.

<sup>24</sup> Slovenia: Repas and others (n 23) 40.

<sup>25</sup> Belgium: Johan Meeusen, 'Onrechtmatige daad, wetten van politie en voorrangregels 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;<sup>26</sup>

- norms having extraterritorial application;<sup>27</sup>
- norms having a pivotal importance for the enacting state;<sup>28</sup>
- norms intruding on private relationships to serve public interests or the interests of the enacting state.<sup>29</sup>

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,<sup>30</sup> as well as provisions stipulating the ‘uniqueness of the status of the child’<sup>31</sup> 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

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

<sup>26</sup> 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.

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

<sup>28</sup> Italy: Sperduti, ‘Norme di applicazione necessaria e ordine pubblico’ (1976) *Rivista di diritto internazionale privato e processuale* 469ff.

<sup>29</sup> 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.

<sup>30</sup> Italy: Private International Law Act, art 32-ter.

<sup>31</sup> 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.<sup>32</sup>

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<sup>33</sup> are examined. The context and the systemic relationship with other provisions of the legal system are also factors that may be taken into consideration.<sup>34</sup> 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*).<sup>35</sup> It may be also stated that substantive law norms with a specific content are more likely to qualify as overriding mandatory norms<sup>36</sup> 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.<sup>37</sup> 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 overriding 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.<sup>38</sup> The Luxembourgish Court of Appeal found a prescription deadline to be non-mandatory and pointed out that if it is not

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

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

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> Italy: Milan Court of Appeal, judgment of 6.2.1998 (1998) *Rivista di diritto internazionale privato e processuale* 582.

<sup>37</sup> 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.

<sup>38</sup> Croatia: Dora Zgrabljic 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.<sup>39</sup> 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.<sup>40</sup>

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,<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

<sup>39</sup> Luxembourg: Cour d'appel (commercial), 13 October 2010, *Pasicrisie luxembourgeoise*, vol 35, 2011–2012, 270f.

<sup>40</sup> See Hungary: Explanatory memorandum of the Hungarian Private International Law Act to Section 13.

<sup>41</sup> Hungary: 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code).

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> 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.<sup>46</sup> 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).<sup>47</sup> In this sense, it may be required that the provision concerned must safeguard a public interest going beyond the accommodation of private interests.<sup>48</sup> 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

<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> 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.<sup>49</sup> In that sense, the latter could be called half-mandatory provisions.<sup>50</sup>

### **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.<sup>51</sup> 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.<sup>52</sup> Certain impediments to marriage are also considered as overriding

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

<sup>50</sup> France: Bureau and Muir Watt (n 49) 556.

<sup>51</sup> Hungary: Mádl and Vékás (n 44) 300.

<sup>52</sup> Hungary: Nagy Csongor István: *Nemzetközi magánjog* (HVG-ORAC 2017, Budapest) 50.



mandatory norms under Italian law.<sup>53</sup> In a recent judgment of the Milan Court of Appeal,<sup>54</sup> 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.<sup>55</sup> 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<sup>56</sup> 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.<sup>57</sup>

– 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.<sup>58</sup> 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;<sup>59</sup>

<sup>53</sup> Italian Civil Code, arts 85, 86, 87 paras 1, 2 and 4, 88 and 89.

<sup>54</sup> Italy: Milan Court of Appeal, Minors Division, judgment of 24.4.2019 – *T.J.F. c. S.M. and S.M.*

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

<sup>56</sup> Germany: BGB § 1306.

<sup>57</sup> 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 Rießmann, 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.

<sup>58</sup> 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.

<sup>59</sup> Germany: Bundesgerichtshof [Federal Court of Justice], decision of 14 November 2018 – XII ZB 292/16, *NZ Fam* 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*),<sup>60</sup> including their mutual assistance obligation or their duty of fidelity, as overriding mandatory provisions;<sup>61</sup>
- certain rules on names (Belgium);<sup>62</sup>
- 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.<sup>63</sup>
- 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;<sup>64</sup>
- 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.<sup>65</sup> 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;<sup>66</sup>
- 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.<sup>67</sup>

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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<sup>60</sup> French Civil Code, arts 212 and 215.

<sup>61</sup> France: Cass. Civ. 1<sup>re</sup>, 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.

<sup>62</sup> 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.

<sup>63</sup> Italy: Milan Tribunal, 9th Division, judgment of 16.4.2009.

<sup>64</sup> Italian Private International Law Act, art 36-bis.

<sup>65</sup> 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).

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

<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup>

## 2 Property Law

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

## 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,<sup>72</sup> 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;<sup>73</sup>
- requirements concerning the establishment of a branch. The formalities of establishing branches by foreign companies in Belgium were seen as overriding mandatory norms;<sup>74</sup>

<sup>68</sup> 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.

<sup>69</sup> 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.

<sup>70</sup> 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.

<sup>71</sup> Wendehorst (n 70), para 18.

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> 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;<sup>75</sup>
- 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;<sup>76</sup>
- 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,<sup>77</sup> 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;<sup>78</sup>
- 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.<sup>79</sup>

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<sup>80</sup> to companies incorporated abroad, but having their central administration in Germany,<sup>81</sup> 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.<sup>82</sup> 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<sup>83</sup> and on the liability of directors of a company vis-à-vis third parties<sup>84</sup> may qualify as overriding mandatory norms.

<sup>75</sup> Belgium: CA Liège 27 March 2001, *Tijdschrift voor Belgisch Handelsrecht/Revue de Droit Commercial belge* 2003, 144 (annotated by V Marquette).

<sup>76</sup> Luxembourg: Loi modifiée du 10 août 1915 concernant les sociétés commerciales, *Mémorial A* 1066/2017, art 160.

<sup>77</sup> Bertrand Ancel and Yves Lequette, *Les grands arrêts du droit international privé* (5th edn, Dalloz 2006, Paris), para 43.

<sup>78</sup> France: Conseil d'État, 29 June 1973, n°77982.

<sup>79</sup> Luxembourg: Cour d'appel (commercial), 13 October 2010, *Pasicrisie luxembourgeoise*, Volume XXXV, 2011–2012, 270f.

<sup>80</sup> 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.

<sup>81</sup> 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.

<sup>82</sup> See Weller (n 48), paras 469–472.

<sup>83</sup> 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.

<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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*.<sup>88</sup> Similarly, in Germany, it was argued that German law prohibits surrogacy agreements and this prohibition invalidates such agreements, irrespective of the otherwise applicable law.<sup>89</sup>

### 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.

<sup>85</sup> Rome I Regulation art 1 (2) a).

<sup>86</sup> Hungary: Explanatory memorandum to Section 13 of the Hungarian Private International Law Act.

<sup>87</sup> 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.

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

<sup>89</sup> Germany: Chris Thomale, *Mietmuttertschaft: Eine international-privatrechtliche Kritik* (Mohr Siebeck 2015, Tübingen) 39f.; Konrad Duden, *Leihmuttertschaft 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:<sup>90</sup> Public law provisions do not have any effect beyond the borders of the enacting state.<sup>91</sup>

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.<sup>92</sup> In Germany, the principle also evolved in court practice.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> However, this exception has never been invoked by courts. Finally, there may be treaty obligations to apply foreign public law.<sup>96</sup> 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,<sup>97</sup> and some authors have called into question the reason for the existence of such a principle.<sup>98</sup>

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

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

<sup>91</sup> Ibid.

<sup>92</sup> England: see *Government of India v Taylor* [1955] AC 491.

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

<sup>94</sup> Ibid.

<sup>95</sup> 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.

<sup>96</sup> 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 Nebengesetzen BGB, Internationales Privatrecht* (Sellier 2019, Berlin), para 33; Busse (n 95) 393.

<sup>97</sup> See Looschelders (n 96), paras 32ff.

<sup>98</sup> 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.<sup>99</sup> On the contrary, the lack of regulation may equally be 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.<sup>100</sup>

## 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.<sup>101</sup>

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<sup>102</sup> presupposes a certain connection between the case and the forum (*Inlandsbeziehung*).<sup>103</sup>

<sup>99</sup> 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.

<sup>100</sup> 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.

<sup>101</sup> Bulgaria: Natov (n 22) 395.

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

<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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*.<sup>107</sup> 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*.<sup>108</sup> 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,<sup>109</sup> 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.<sup>110</sup> Foreign overriding

<sup>104</sup> See Polish Report.

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

<sup>106</sup> Croatia: Sikirić (n 55) 87.

<sup>107</sup> 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.

<sup>108</sup> 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.

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

<sup>110</sup> 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.<sup>111</sup>

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.

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<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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).<sup>114</sup> 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.<sup>115</sup>

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

<sup>112</sup> Croatian Private International Law Act, art 25 (2).

<sup>113</sup> 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).

<sup>114</sup> 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.

<sup>115</sup> 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.<sup>116</sup> Such an interest worthy of protection may even include the objective of international decisional harmony.<sup>117</sup> 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.<sup>118</sup> 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<sup>119</sup> 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).<sup>120</sup> In the former case, a coincidence between the interests or values behind the overriding mandatory rule concerned and German interests or values is required.<sup>121</sup> 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.<sup>122</sup> In German private law, Article 313 BGB (change of circumstances),<sup>123</sup> and Article 242 BGB

<sup>116</sup> Poland: Tomaszewski (n 115) 243–244.

<sup>117</sup> Ibid.

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

<sup>119</sup> 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.

<sup>120</sup> 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.

<sup>121</sup> 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.

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

<sup>123</sup> 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)<sup>124</sup> may provide further legal bases to take foreign overriding mandatory norms at the level of substantive law into consideration.<sup>125</sup> In other jurisdictions, rules on *force majeure* are typically used to consider foreign overriding mandatory norms.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup>

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*.<sup>129</sup>

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.<sup>130</sup> 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.<sup>131</sup>

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

<sup>125</sup> 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.

<sup>126</sup> Belgium: Meeusen, *Nationalisme* (n 62) para 759.

<sup>127</sup> 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.

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

<sup>129</sup> Germany: Busse (n 95) 411; von Hoffmann and Thorn (n 29) para 100; Kegel and Schurig (n 57) 1098.

<sup>130</sup> Germany: Fetsch (n 108) 20f; Adrian Hemler, *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht* (Mohr Siebeck 2019, Tübingen) 67.

<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>

Moreover, the functions of overriding mandatory norms and the *ordre public* clause have sometimes been confused in judicial practice.<sup>136</sup> 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.<sup>137</sup>

## 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

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

<sup>133</sup> See Ornella Feraci, *Ordine pubblico nel diritto dell'Unione europea* (Giuffrè 2012, Milano) 60ff; Kegel and Schurig (n 57) 516ff.

<sup>134</sup> 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.

<sup>135</sup> Hungary: Szász István, *Nemzetközi Magánjog* (Sylvester 1938, Budapest) 108; Burián László, *Nemzetközi magánjog* (n 134) 193; Burián, Raffai and Szabó (n 134) 236.

<sup>136</sup> Belgium: Cass. 25 June 1975, Arr. Cass. 1975, 1146; Meeusen, *Nationalisme* (n 62), para 723.

<sup>137</sup> See the Slovenian report.

over any foreign law.<sup>138</sup> 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.<sup>139</sup>

## 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.<sup>140</sup> The same approach was followed in other cases as well,<sup>141</sup> and was similarly applied in the context of arbitration.<sup>142</sup>

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.<sup>143</sup>

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

<sup>139</sup> Germany: Busse (n 95), 412.

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

<sup>141</sup> France: Cass. Civ. 1<sup>re</sup>, 30 janvier 2013, n° 11-10.588.

<sup>142</sup> France: Cass. Civ. 1<sup>re</sup>, 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.

<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> This was deduced from the principle

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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.

<sup>144</sup> 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.

<sup>145</sup> 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.

<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> 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.*

<sup>149</sup> 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<sup>150</sup> 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.<sup>151</sup> 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

<sup>150</sup> 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.*

<sup>151</sup> 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 identity 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.

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