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

I Introduction

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

The story does not end there. There are some recent developments that bring into question the wisdom of curtailing the ability of the courts to give effect to overriding mandatory rules of third countries. One development is the judgment of the Court of Justice of the EU ('CJEU') in *Greece v Nikiforidis*,[6] in which the court adopted an approach that appears more in line with Article 7(1) of the Rome Convention than Article 9(3) of the Rome I Regulation. Another development is the recent English judgments in *Lilly Icos LLC v 8PM Chemists Ltd*[7]

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

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

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

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

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

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

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

and *Les Laboratoires Servier v Apotex Inc*,[8] in which the courts seem to have expressed a willingness to take foreign illegality into account in a wider set of circumstances than the English common law would have traditionally allowed. These developments prompt us to consider whether the courts should have a wider discretion to give effect to third countries' overriding mandatory rules or whether the CJEU and English judgments rest on shaky foundations.

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

II English Common Law Conflict of Laws

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

The UK constitution is based on the principles of parliamentary sovereignty and legislative supremacy. This has two consequences for choice of law. The first is that English courts apply an English statute to all situations falling within its scope and do not apply an English statute to situations falling outside it.[10] Some statutes expressly define their territorial reach. Usually, however, statues are silent in this respect. If asked to apply such a statute to a private law relationship with an international element, an English court has to construe the statute in order to determine its territorial scope. In performing this task, the courts are guided by the general principle of construction that UK statutes are *prima facie* territorial.[11] Consequently, almost all UK statutes have either express or implied territorial limits. The second consequence is that the determination of the territorial scope of an English statute that contains rules of substantive law does not directly depend on the operation of choice-of-law rules. Parliamentary commands contained in a statute that contains rules of substantive law cannot be restrained by choice-of-law rules. Of course, an English statute can provide expressly or impliedly that it applies only to relationships governed by English law by virtue of the

[8] [2014] UKSC 55, [2015] AC 430.
[9] T. Hartley, 'Mandatory Rules in International Contracts: The Common Law Approach' (1997) 266 *Hague Recueil* 341.
[10] *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823, para 6, referring to *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 (HL), 152: the question of territorial scope 'requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?' (Lord Wilberforce). See also Hartley (n 9) 354-5; A. Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] *Singapore Journal of Legal Studies* 189; cf M. Keyes, 'Statutes, Choice of Law and the Role of Forum Choice' (2008) 4 *Journal of Private International Law* 1, 20-1.
[11] *Lawson*, para 6.

operation of choice-of-law rules, but this is because Parliament so wills, not because a choice-of-law rule so demands.

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

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

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

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[12] Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' (n 10) 190. See also A. Briggs, *Private International Law in English Courts* (OUP 2014) 13-5.

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

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

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

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

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

necessarily required by the terms of the contract.[18] The prevailing view is that this is a conflicts rule, not merely a rule of English contract law.[19]

III Pre-Rome Convention Continental Systems of Private International Law

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

The treatment of overriding mandatory rules of third countries was less uniform. Comparative analyses of the key Continental systems of private international law[21] reveal two facts; first, the cases in which Continental courts gave effect to third countries' overriding mandatory rules concerned international contracts; and second, the courts in Europe were willing to give effect to overriding mandatory rules of third countries, in certain circumstances, even before the adoption of the Rome Convention.

Around the middle of the 20th century, German courts and academics developed two theories that justified giving effect to overriding mandatory rules of third countries, namely the *Schuldstatuttheorie* and the *Sonderanknüpfungstheorie*.[22] According to the former, the violation of a law that is neither the *lex fori* nor the *lex causae* can lead to the invalidity of a contract by virtue of the application of a rule of the *lex causae*. In the famous *Kulturgüterfall*,[23] for example, the *Bundesgerichtshof* held an insurance contract governed by German law to be invalid for lack of an insurable interest, because it concerned the insurance of goods of cultural heritage illegally exported out of Nigeria, an immoral act under §138 of the German Civil Code. The court held that the parties violated justified and commonly respected interests of a foreign

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[18] *Foster v Driscoll* [1929] 1 KB 470 (CA); *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 (HL).
[19] *Dicey, Morris and Collins*, para 32-193.
[20] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infant (Netherlands v Sweden) (Advisory Opinion)* [1958] ICJ Rep 55.
[21] T.G. Guedj, 'The Theory of the Lois de Police: A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories' (1991) 39 AJCL 661; A. Bonomi, 'Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment' (1999) I YBPIL 215; P. Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 217-26; M. Wojewoda, 'Mandatory Rules in Private International Law with Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 *Maastricht Journal of European and Comparative Law* 183; A. Bonomi, 'Article 7(1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules' (2001) 114 *Harvard Law Review* 2462; A. Mills, *Party Autonomy in Private International Law* (CUP 2018) 484-6.
[22] F.A. Mann, 'Contracts: Effect of Mandatory Rules' in K. Lipstein (ed), *Harmonization of Private International Law by the EEC* (IALS 1978) 31, 31-2; F. Vischer, 'General Course on Private International Law' (1992) 232 *Hague Recueil* 21, 168 and 170; Wojewoda (n 21) 186; A. Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 *Journal of Private International Law* 27, 40-2; M. Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?' (2009) 5 *Journal of Private International Law* 447, 448-9; M. Renner, 'Article 9 Overriding Mandatory Provisions' in G.-P. Callies (ed), *Rome Regulations* (2nd edn, Wolters Kluwer 2015) 242, 259-61; M. Lehmann and J. Ungerer, 'Applying or Taking Account of Foreign Overriding Mandatory Provisions – Sophism under the Rome I Regulation' (2017/2018) 19 YBPIL 53, 71-5; R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (5th edn, Sweet and Maxwell 2019), paras 12-034-12-057.
[23] BGH, 22 June 1972, BGHZ 59, 82.

state and, therefore, did not deserve protection of the law. Vischer mentions that this was in line with other examples of the application of the *Schuldstatuttheorie*, which concerned cases of contraband and smuggling, in which German courts usually held that intentional offences against foreign import restrictions were immoral acts invalidating the contract: 'Immorality thus becomes the collecting vessel for State interests when foreign compulsory law outside the proper law is deliberately disregarded and when that interest of the foreign State is considered legitimate by German standards.'[24] The *Sonderanknüpfungstheorie* was developed by Wengler, Zweigert and Neumayer.[25] These authors called for a uniform treatment of domestic and foreign overriding mandatory rules and advocated the direct application of foreign public laws that interfered with private law relationships.

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

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

The *Sonderanknüpfungstheorie* was further developed in the Netherlands. The work of de Winter, who advocated the application of overriding mandatory rules of third countries sufficiently closely connected with the legal relationship in question,[27] is particularly important because it influenced the *Hoge Raad* in the famous *Alnati* case.[28] The question in this case was

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[24] Vischer (n 22) 170-1. See also Bonomi, 'Article 7(1) of the European Contracts Convention' (n 21) 2471.
[25] W. Wengler, 'Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht' (1941) 54 *Zeitschrift für Vergleichende Rechtswissenschaft* 168; K. Zweigert, 'Nichterfüllung auf Grund ausländischer Leistungsverbote' (1942) 14 *RabelsZ* 283; K.H. Neumayer, 'Autonomie de la volonté et dispositons impératives en droit international privé des obligations' (1957) 46 *Revue critique de droit international privé* 577; (1958) 47 *Revue critique de droit international privé* 53; W. Wengler, 'Les conflits de lois et le principe d'égalité' (1963) 52 *Revue critique de droit international privé* 203.
[26] Bonomi, 'Article 7(1) of the European Contracts Convention' (n 21) 2471-2 (footnotes omitted; all cases cited in these footnotes involved contracts governed by French law).
[27] L.I. de Winter, 'Dwingend recht bij internationale overeenkomsten' (1964) 11 *Nederlands Tijdschrift voor Internationaal Recht* 329. See J.C. Schultz, 'Dutch Antecedents and Parallels to Article 7 of the EEC Contracts Convention of 1980' (1983) 47 *RabelsZ* 267.
[28] *Van Nievelt, Goudriaan and Co's Stoomvaartmij NV v NV Hollandsche Assurantie Societeit*, HR 13 May 1966, [1967] *Nederlandse Juresprudentie* No 3 at p 21, annotated by H. van den Bergh; (1967) 56 *Revue*

whether the court should give effect to a Belgian overriding mandatory rule to invalidate a clause in a contract for the carriage of goods from Belgium to Brazil that limited the liability of the ship-owner and which the parties subjected to Dutch law. The court stated that:

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

The *Alnati* case was not an isolated decision. In *Compagnie Européene des Pétroles SA v Sensor Nederland BV*,[30] the District Court at the Hague was confronted with the question whether an embargo placed by the United States on the export by American companies and their foreign subsidiaries of equipment for the trans-Siberian pipeline provided a defence against the enforcement of a Dutch contract that did not involve performance in the US. The court held that:

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

Although the courts in the *Alnati* and *Sensor* cases did not apply overriding mandatory rules of third countries, their willingness to do so if the right case presented itself caught the imagination of private international lawyers on the Continent. What followed was a codification of the practice of giving effect to third countries' overriding mandatory rules in international treaties concerning choice of law in contract and trust[32] and in the Swiss statute

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critique de droit international privé 522, annotated by T.H.D. Struyken. The Advocate General in *Alnati* referred to de Winter's article cited in the preceding footnote.

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

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

[31] ibid 73-4.

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

on private international law, where it was codified as a provision of general application.[33] The culmination of this trend was Article 7(1) of the Rome Convention.

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

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

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

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

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

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

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close

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Principles on Choice of Law in International Commercial Contracts (The Hague, approved 19 March 2015), art 11. See further *Convention on the law applicable to traffic accidents*, signed 4 May 1971 (entered into force 3 June 1975), art 7; *Convention on the law applicable to product liability*, signed 2 October 1973 (entered into force 1 October 1977), art 9.

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

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

> connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

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

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

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

The inspiration for the drafting of Article 9(3) was the English common law rules on foreign illegality,[40] in particular *Ralli Bros*. However, Article 9(3) represents a significant improvement on the common law. As mentioned above, the common law has never clearly

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[35] Giuliano Lagarde Report (n 29) 26.
[36] Rome Convention, art 22(1)(a). The seven states were Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the UK.
[37] See the judgment of the French Cour de cassation No 330 of 16 March 2010 (*Moller v Maersk*). Plender and Wilderspin (n 22), para 12-038, fn 129 argue that this judgment is not particularly strong authority on the application of art 7(1) since the decision of the Court of Appeal was annulled not because the court had wrongly interpreted that provision but because it had failed even to consider its application.
[38] European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations ("Rome I")' (COM(2005) 650 final, 15 December 2005), art 8(3).
[39] (Consultation Paper CP05/08, 2 April 2008), para 77.
[40] ibid paras 79-80.

answered whether the rules on foreign illegality form part of English contract law only or of English private international law.[41] If the rules on foreign illegality form part of English contract law only, they can only apply if the contract is governed by English law. But if the rules on foreign illegality form part of English private international law, they can apply even if the contract is governed by foreign law and can lead to the invalidity or unenforceability of that contract, regardless of what the *lex causae* says. In contrast, Article 9(3) of the Rome I Regulation clearly provides that effect may be given to the overriding mandatory rules of a law that is neither the *lex fori* nor the *lex causae*.

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

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

V Recent Development I: *Nikiforidis*

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

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[41] Nn 16-19 above.

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

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

accordance with German employment law. Nikiforidis then commenced proceedings in Germany, seeking unpaid wages and payslips.

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

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

The CJEU followed the Opinion of Advocate General Spuznar regarding these two questions.[45] With respect to the first question, the CJEU adopted the following line of reasoning. Article 9 is an exception from the general principle of party autonomy.[46] That exception is designed to enable the courts to take into account considerations of public interest in exceptional circumstances.[47] Article 9 must be interpreted strictly.[48] More generally, Article 9 is a derogation from the normal operation of choice-of-law rules, which is all the more reason for its strict interpretation.[49] The application of the overriding mandatory rules of a third country that is not the place of performance of the contract would undermine the general objectives of legal certainty[50] and foreseeability[51] and the particular objective of the choice-of-law rules for individual employment contracts of protecting employees.[52] It followed that 'the

[44] There was a further question concerning the temporal application of the Rome I Regulation, which will not be examined here.
[45] ECLI:EU:C:2016:281, [2016] IL Pr 39.
[46] *Nikiforidis*, paras 42-43.
[47] ibid, para 43.
[48] ibid, para 44.
[49] ibid, para 45.
[50] ibid, para 46.
[51] ibid, para 47.
[52] ibid, para 48.

list, in Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive'.[53] Surprisingly, however, this was not the end of the CJEU's reasoning. Although Article 9 must be interpreted as preventing the court of the forum 'from applying, as legal rules,' overriding mandatory rules other than those of the *lex fori* or the law of the place of performance, with the consequence that the German courts could not 'apply, directly or indirectly,' the Greek provisions,[54] the CJEU held that:

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

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

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

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

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

It is possible that a similar, although much less obvious, development is taking place in the English common law conflict of laws. The traditional approach to foreign illegality has been brought into question by three cases, the High Court judgment in *Lilly* and, more importantly, the recent Supreme Court judgments in *Les Laboratoires* and *Patel v Mirza*.[59] The first two cases concerned enforcement of cross-undertakings in damages following the grant of injunctions ultimately held to have been wrongly granted. Claims for enforcement of cross-

[53] ibid, para 49.
[54] ibid, para 50.
[55] ibid, para 51.
[56] ibid, para 52.
[57] ibid, para 54.
[58] BAG, 26 April 2017, 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0.
[59] [2016] UKSC 42, [2017] AC 467.

undertakings in damages are not contractual claims, but are enforceable in equity. The third case restated the law on domestic illegality in English private law.

In *Lilly,* the claimants argued that the defendants were not entitled to recover profits for lost sales of pharmaceutical products to Canadian internet pharmacies because the drugs would have been imported into the US in breach of US law. Arnold J first confirmed the traditional approach to foreign illegality in the field of contract.[60] He then turned to the defence of illegality in tort. After reviewing some of the leading English cases on domestic illegality in the law of torts,[61] Arnold J stated that it was not clear whether the principles stated in these cases applied where the acts in question were unlawful because they were criminal offences under foreign law. But, he said, 'the principle of international comity suggests that they should'.[62] The claim in *Lilly* was neither a contractual nor a tortious one, but one in equity. Arnold J thus also dealt with the effect of foreign illegality on an English equitable claim for damages under a cross-undertaking. Arnold J rejected a submission made by the claimants that the contract and tort cases were merely instances of a broader principle, namely that the court would not order a defendant to compensate a claimant for loss, or a head of loss, that arose out of the claimant's own involvement in an illegal activity, whether under English law or foreign law.[63] Arnold J then concluded that:

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

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

Les Laboratoires also concerned a claim for damages on a cross-undertaking given by the claimant that it would comply with any order the court might make if it later found that an interim injunction the claimant had obtained against the defendant caused loss to the defendant. The claimant raised as a defence that the defendant's lost profits would have accrued from sales in England of a product, the manufacture of which in Canada would have infringed a Canadian

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[60] *Lilly*, paras 262-264.
[61] ibid, paras 267-270. The most important case reviewed by Arnold J is *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 where the House of Lords mentioned a principle that a person could not recover for damage that was the consequence of his own criminal act.
[62] *Lilly*, para 271.
[63] ibid, paras 273-281.
[64] ibid, paras 287.
[65] ibid, paras 289-290.

patent. The matter came before Arnold J at first instance, who applied his decision in *Lilly* and held that the defendant failed because its claim was founded on its own illegality.[66] It was conceded in the Court of Appeal that the illegality defence could apply where the source of the profits from sales in England was illegal under foreign law: 'In such a case, an important policy consideration, and possibly the principal one, is comity, that is to say respect for the law and courts of other countries'.[67] The Supreme Court did not discuss English cases on foreign illegality and apparently proceeded on the basis that violations of foreign laws were to be treated in the same way as violations of domestic laws for the purposes of applying substantive English law rules founded on the maxim *ex turpi causa non oritur actio*.[68] The Supreme Court held that the infringement of the Canadian patent did not constitute a relevant illegality ('turpitude') for the illegality defence to operate. Had the Supreme Court considered English cases on foreign illegality, it should have assessed whether the claim in *Les Laboratoires* should have been refused on the basis that Canadian law could simply not be taken into account because it was neither the proper law nor the law of the place of performance of the relevant obligation to pay under the cross-undertaking.

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

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

Since *Patel v Mirza* concerned domestic, not foreign illegality, the Supreme Court neither approved nor disapproved the aspect of *Les Laboratoires* concerning foreign illegality.

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[66] [2011] EWHC 730 (Pat), [2011] RPC 20.
[67] [2012] EWCA Civ 593, [2013] Bus LR 80, para 69.
[68] L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws: Fifth Supplement to the 15th edn* (Sweet and Maxwell 2018), para 32-102.
[69] ibid, para 120.

Nevertheless, it is important to note that, whilst the majority in *Patel v Mirza* disagreed and the minority agreed with the rule-based approach to domestic illegality adopted in *Les Laboratoires*, none of the judges in *Patel v Mirza* questioned the assumption in *Les Laboratoires* that the infringement of a Canadian patent would have been relevant for the illegality defence to operate had it constituted a relevant illegality ('turpitude'). It is impossible to draw any solid conclusions about the correctness of the omission of a conflicts analysis in *Les Laboratoires* from the mere fact that such an omission was not questioned in *Patel v Mirza*. But, as the editors of *Dicey, Morris and Collins* conclude, there may be scope to extend the flexible, policy-based approach to illegality of the majority in *Patel v Mirza* to foreign illegality and reconsider the rule-based approach to foreign illegality of the preceding English case law.[70] This could entail giving English courts a discretion to take into account illegality under the law of a foreign country, even if that law is not the proper law of the contract and if the place of performance of the contract is not in that country. This could further entail the extension of this flexible approach to other fields of law, whereby English courts would be given discretion to take into account illegality under the law of a foreign country closely connected with the situation. This would be a tectonic shift in the common law conflict of laws. On the one hand, foreign illegality would become the concern of conflict of laws in general and not just an awkward doctrine in the field of contract. On the other hand, this would harmonise the methodological approach to illegality in English substantive law and the common law conflicts of laws.

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

> There may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state […] may be such that it would be

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

contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that every breach of foreign law would come into this category.[75]

VII Lessons for the Future

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

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

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

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[75] *Ryder Industries*, para 57.
[76] *Ralli Bros*; *Foster v Driscoll*; *Regazzoni*; *Dicey, Morris and Collins*, paras 32-094, 32-096-32-103 and 32-193.
[77] Rome I, art 9(3); *Nikiforidis*; Rome II, art 17; European Commission, 'Explanatory Memorandum Accompanying the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")' 25.
[78] B. Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 67-71, 178. See also H.H. Kay, 'Conflict of Laws: Foreign Law as Datum' (1965) 53 *California Law Review* 47; A. Ehrenzweig, 'Local and Moral Data in the Conflict of Laws: Terra Incognita' (1966) 16 *Buffalo Law Review* 55;T.W. Dornis, 'Local Data in European Choice of Law: A Trojan Horse from across the Atlantic' (2016) 44 *Georgia Journal of International and Comparative Law* 305.
[79] See also Bonomi, 'Mandatory Rules in Private International Law' (n 21) 234-5; Chong (n 22) 42 (the application of a third country's mandatory rule as law is 'a more honest way forward'); W.A. Reppy Jr,

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

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

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

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Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union (2008) 82 *Tulane Law Review* 2053, 2086-7 (the distinction is 'bizarre'); Hellner (n 22) 469 ('Using rules of contract law also makes it possible to give effect to foreign mandatory rules as local data but it is a little bit like trying to get out a key from your left hand pocket with your right hand – it works but is quite awkward.'); J. von Hein, 'Article 17 Rules of Safety and Conduct' in Callies (ed) (n 22) 741, 743 ('From a methodological point of view, however, it is not always easy to draw a bright line between taking a foreign law into account and actually applying it'); Dornis (n 78) 319-20 (taking into account of a third country's mandatory rule as fact is a 'terminological masquerade' and a 'misnomer'); Lehman and Ungerer (n 22). See further the Opinion of Advocate General Spuznar in *Nikiforidis*, para 101: 'It is true that the practical difference between the *application* of, and *substantive regard* to, an overriding mandatory provision is almost imperceptible.'

> the particular statute was a part may well have been the law with which the claim was most closely connected. In short, there would be no rule or category of private international law for 'foreign statutory claims'.[80]

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

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

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

1. A Sword, not Just a Shield?

The answer to the question whether the rules of private international law should allow third countries' overriding mandatory rules to operate as a sword, and not just as a shield, depends

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[80] Briggs, *Private International Law in English Courts* (n 12) 14 (footnotes omitted).
[81] *Peer International Corp v Termidor Musical Publishers Ltd* [2003] EWCA Civ 1156, [2004] Ch 212; cf A. Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield' (2002) 6 *Singapore Journal of International and Comparative Law* 953, 973-8.
[82] N 21 above.

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

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

The first aspect of the courts' role focuses on the individual private dispute between the parties in question. The goal is to achieve private justice and fairness in individual cases. This accords with the traditional theory which finds justification for private international law in that it implements 'the reasonable and legitimate expectations of the parties',[85] in the need to avoid 'gross injustice and inconvenience' that would arise if the courts refused to apply foreign law in appropriate cases,[86] and in the 'desire to do justice' to the parties.[87] An alternative view of private international law perceives this field of law as primarily concerned with the collective, public, systemic interests involved in the allocation of regulatory authority among states over private law relationships.[88] The difference between the individualistic and systemic views of private international law is reflected in two influential articles on third countries' overriding mandatory rules. In an article published in the *Journal of Private International Law* in 2006, Chong put forward two principal reasons for giving effect to third countries' overriding mandatory rules: the interests of third countries in having their laws applied and comity; in her opinion, these reasons justify a provision like Article 7(1) of the Rome Convention.[89] In an article published in the same journal a year later, Dickinson argued that giving effect to third countries' overriding mandatory rules should be limited because a provision like Article 7(1) of the Rome Convention undermines party autonomy and legal certainty and increases economic costs and risks.[90] Dickinson proposed replacing this article with a provision that resembles what is now Article 9(3) of the Rome I Regulation.[91]

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[83] See A. Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts' (2008) 10 YBPIL 285 298-9.
[84] H. Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalisation' (2007) 18 *American Review of International Arbitration* 21, 22-3.
[85] *Dicey, Morris and Collins*, para 1-005.
[86] ibid, paras 1-006-1-007.
[87] P. Torremans (gen ed), *Cheshire, North and Fawcett: Private International Law* (15th edn, OUP 2017) 4.
[88] A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009).
[89] Chong (n 22) 35-40.
[90] A. Dickinson, 'Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?' (2007) 3 *Journal of Private International Law* 53, 56-73.
[91] ibid 86-8.

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

Article 7(1) of the Rome Convention is based on the idea that the appropriate role for courts in addressing international disputes is to support the important regulatory and policy goals of other nations. Advocate General Spuznar indicated in his Opinion in *Nikiforidis* that Article 9(3) of the Rome I Regulation is principally based on the same idea.[95] But the drafting history of this provision shows that its main concern is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance. The original proposal of the Rome I Regulation contained a provision in essentially identical terms to that of Article 7(1) of the Rome Convention. In order to encourage the UK to opt into the regulation, a compromise was reached and Article 9(3) of the Rome I Regulation was modelled on the rule laid down in *Ralli Bros.* Given that the main concern of this rule is to correct imbalances in the bargaining process that arise in situations where the performance of a party's contractual obligation has become impossible in the place of performance, it is logical to conclude that the main concern of Article 9(3) of the Rome I Regulation is the same. Important regulatory and policy goals of other nations can only be given effect within the narrow confines of Article 9(3). That is why, from the perspective of the individualistic view of private international law, *Nikiforidis* can be criticised for undermining legal certainty and predictability by not interpreting Article 9(3) as preventing the courts from taking third countries' overriding mandatory rules into account as a matter of substantive law under the *lex causae*.[96] On the other hand, authors who subscribe to the systemic view of private international law use *Nikiforidis* to support an argument for the

[92] N 17 above.
[93] N 19 above.
[94] *Lilly*, paras 271, 287; *Les Laboratoires* EWCA, para 69.
[95] *Nikiforidis*, paras 74, 80, 88, 90, 92.
[96] E. Avato and M.M. Winkler, 'Reinforcing the Public Law Taboo: A Note on *Hellenic Republic v Nikiforidis*' (2018) 43 ELR 569.

amendment of Article 9(3) of the Rome I Regulation along the lines of Article 7(1) of the Rome Convention.[97]

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

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

In the field of contract, our understanding of the interaction between the *lex fori*, the *lex causae* and third countries' overriding mandatory rules is relatively advanced because most of the relevant cases and academic literature discuss the problem of third countries' overriding mandatory rules in this context. If one adopts the individualistic view of private international law and rejects the possibility of third countries' overriding mandatory rules operating as a sword, one accepts that the role that third countries' overriding mandatory rules may play is negative, in the sense that they may deprive a contract of its validity or enforceability. A contract's validity or enforceability can be potentially affected not only by a rule that exists in the place of performance of the contract but also by a rule from another legal system closely connected to the contract, such as the law of the place of a party's habitual residence, domicile or nationality[98] or the law of the place of a party's parent company's habitual residence, domicile or nationality.[99] The law as it stands achieves a balance between the individual private interests of the parties concerned by allowing a court to give effect to the overriding mandatory rules in the place of performance, not those in another legal system closely connected to a contract.[100]

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

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[97] Lehman and Ungerer (n 22) 66. See also S. Rammeloo, '"From Rome to Rome" – Cross-Border Employment Contract. European Private International Law: Intertemporal Law and Foreign Overriding Mandatory Laws' (2017) 24 *Maastricht Journal of European and Comparative Law* 298, 322. Similarly, Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation' (n 83) 297-9.

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

[99] Cf *Sensor*.

[100] Rome I Regulation, art 9(3); see also the two cases cited in the two preceding footnotes.

[101] Ehrenzweig (n 78).

[102] *Lilly*; *Les Laboratoires*.

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

With respect to issues other than the standard of conduct that may arise in the context of a claim based on a non-contractual obligation, we do not yet have a good understanding of the role that overriding mandatory rules of third countries potentially play. *Lilly* and *Les Laboratoires* are rare examples of this phenomenon. They can be regarded as supporting the proposition that, in the context of an equitable claim, the claimant cannot recover damages 'for the loss sustained by an unlawful business' or where the claimant 'has to rely to a substantial extent upon his own illegality in order to establish the loss. […] it does not matter for this purpose whether the acts in question are unlawful under English law or under foreign law.'[106] *Lilly* can also be regarded as supporting the proposition that the defence of illegality in the English law of torts can be applied where the acts in question are unlawful because they are criminal offences under foreign law.[107]

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

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

Private international law rejects the possibility of third countries' overriding mandatory rules operating as a sword. In that sense, the rules of private international law exclusively determine

[103] Private International Law (Miscellaneous Provisions) Act 1995 (Commencement) Order 1996, SI 1996/995, art 2.
[104] See *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621; [2007] UKHL 58, [2008] 1 AC 332; *Belhaj v Straw* [2013] EWHC 4111 (QB); [2014] EWCA Civ 1394, [2015] 2 WLR 1105; [2017] UKSC 3, [2017] 1 AC 964.
[105] O. Kahn-Freund, 'Delictual Liability and the Conflict of Laws' (1968-II) 124 *Hague Recueil* 5, 93-4.
[106] *Lilly*, para 287.
[107] ibid.

and limit the effectiveness of foreign overriding mandatory rules that create causes of action. The question arises whether the rules of private international law should also exclusively determine and limit the effectiveness of foreign overriding mandatory rules that do not create causes of action but affect private law relationships in other ways.

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

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

VIII Conclusions

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

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

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

Whether the rules of private international law should allow the application of overriding mandatory rules of third countries that create cause of actions depends on the theory of private international law to which one subscribes. The individualistic view of private international law

prevents the rules of private international law from allowing third countries' overriding mandatory rules to operate as a sword, and not just as a shield. In that sense, the rules of private international law exclusively determine and limit the effectiveness of foreign overriding mandatory rules that create causes of action.

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

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

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

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