

## § 8 Private International Law between Objectivity and Power

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Opposite forces seem to be at work in private international law in the US and the European Union. While the US no longer acts as a human rights watchdog for the world, in Europe, the sense of responsibility seems to be increasing: Particularly with regard to global supply chains, legislators have earnestly considered extending the reach of their laws.

This contribution seeks to analyse the underlying developments in private international law specifically from the vantage point of the tension between objectivity and power, and with a particular focus on recent jurisprudence of the European Court of Justice (ECJ) and the US Supreme Court as well as the Draft Restatement (Third) of Conflict of Laws.

The first part will outline the underlying understanding of the role of objectivity and power in private international law (I.). With that in mind, the second part will sketch the specific approaches of European and US private international law to international cases (II.). The following parts will retrace how these approaches are in flux, first for European private international law (III.), then for US private international law, with a view to both federal law and state law (IV.). A final part will compare the findings (V.).

## *I. Introduction: Private International Law, Objectivity, and Power*

Broadly conceived, private international law is concerned with international disputes between persons and entities other than states as such.<sup>1</sup> It deals with what law applies to a case, what court has jurisdiction to entertain a lawsuit and whether a judgment will be recognized and enforced abroad. This contribution's main focus will be on the applicable law, while related questions will be discussed as needed.

By this definition of private international law, states as such are not involved as parties in the relevant disputes. If we consider power to be at play when a state tries to further its interests, the relevance of power in private international law is not immediately apparent. One could even understand private international law as an entirely objective system<sup>2</sup>, aiming for justice only on a meta-level. Such private international law justice could be understood to be attained when the 'right' applicable law and the 'right' forum are designated, irrespective of state interests. However, as the following parts will explore, power has its place even on the level of private international law, and its influence is becoming more explicit.

## *II. A Sketch of the European and US Approaches to International Cases*

To have a backdrop for current developments in the later parts, this part will outline European (1.) and US approaches to international cases (2.).

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1 cf Peter Hay, Patrick J Borchers, Symeon C Symeonides, *Conflict of Laws* (6th edn, West 2018) § 1.1, 1. Thus understood, the term private international law would be equivalent to the US term 'conflict of laws'. 'Choice of law', by contrast, is mostly understood as only referring to questions of applicable law, cf *ibid* § 1.2, 3.

2 For 'objectivity', see Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1), text to n 1–3.

## 1. European private international law

a. European Union private international law<sup>3</sup> in the tradition of *Savigny*<sup>4</sup> follows a multilateral approach and seeks to assign a legal relationship to the state where it has its seat – or in whose legislative jurisdiction it belongs. This approach starts its analysis from the relationship between individuals, not from state interests. This concept seems to be a particularly good fit in the European Union: Regulating private law remains mostly within the competences of the Member States – unlike private international law, which in large part is set by the European legislator.<sup>5</sup> Somewhat relatedly, the supranational European private international law legislator cannot refer to a specific (national) *lex fori*, unlike national legislators.<sup>6</sup> Hence, if we equate the absence of state interests with objectivity, European Union private international law would seem relatively objective. Specifically, the pertinent regulations aim for predictability and legal certainty,<sup>7</sup> which arguably can best be achieved in an objective framework that does not take into consideration aspects of power, as these might require intricate balancing exercises, eg between the interests of two different states whose laws might apply. Moreover, one could also refer to the concept of mutual trust between the legal orders of the Member States,

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3 European Union private international law currently governs the areas of contract (Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6), non-contractual obligations (Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40), divorce (Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10, Rome III) and succession (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107, Succession Regulation).

4 See Friedrich Carl von Savigny, *System des heutigen Römischen Rechts vol VIII* (Veit 1849).

5 Sophia Schwemmer, *Anknüpfungsprinzipien im Europäischen Kollisionsrecht* (Mohr Siebeck 2018) 187; Jürgen Basedow, 'Der Raum des Rechts und das Internationale Privatrecht' (2012) 62 *Zbornik PFZ* 23, 27 (= *Liber Amicorum Krešimir Sajko*).

6 Schwemmer (n 5) 187, but also note the qualification at 206.

7 Recitals 6, 16 Rome I Regulation; recitals 6, 14 Rome II Regulation; recitals 9, 15 Rome III Regulation; recitals 37, 48 Succession Regulation.

which, in principle, would seem to require neutral – and in that sense, objective – connecting factors.<sup>8</sup>

b. Some qualifications are in order, however. Considerations of power are woven into the European private international law framework.<sup>9</sup> These may be the implicit explanation for some specific connecting factors, too. This article focuses on another aspect, that is how specific provisions allow for explicit considerations of power. As prime examples, the public policy exception and overriding mandatory provisions deserve attention.<sup>10</sup>

aa. The public policy exception (as in arts 21 Rome I Regulation, 26 Rome II Regulation, 12 Rome III Regulation, 35 European Succession Regulation; cf recitals 37 Rome I Regulation, 32 Rome II Regulation, 25 Rome III Regulation, 58 European Succession Regulation) allows a court to refuse the application of the law as specified by the general framework of the regulations if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. This exception marks a departure from an objective system: If the interests of the forum state are manifestly at odds with the result of the application of the law objectively determined and there is a sufficient nexus between the case and the forum state, this state's courts may *not* apply that law. Hence, this public policy exception gives power a negative function, as it blocks a specific law's application.<sup>11</sup>

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- 8 See Matthias Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11 J Priv Int'l L 64, in particular at 71–73; see also Koen Lenaerts, 'Der Grundsatz des gegenseitigen Vertrauens im internationalen Privatrecht: Über den Dialog der Gerichte' in Burkhard Hess, Erik Jayme and Heinz-Peter Mansel (eds), *Liber Amicorum Christian Kohler* (Gieseking 2018) 287.
- 9 See, extensively and in depth, Schwemmer (n 5) 187–217; Wulf-Henning Roth, 'Öffentliche Interessen im internationalen Privatrechtsverkehr' (2020) 220 AcP 458.
- 10 See, primarily on mandatory provisions, Jan von Hein, 'Eingriffsnormen und ordre public als Instrumente zur Durchsetzung von öffentlichem Wirtschaftsrecht im internationalen Verhältnis' in Peter Jung (ed), *Die private Durchsetzung von öffentlichem Wirtschaftsrecht* (Mohr Siebeck 2018) 23; Michał Wojewoda, 'Mandatory Rules In Private International Law' (2000) 7 Maastricht Journal of European and Comparative Law 183.
- 11 The public policy provision can be used to highlight that one could also adopt an understanding of objectivity and power different from the one of this contribution. While here, *ordre public* is associated with power, it could also be associated with objectivity: The public policy provision limits the leeway states have in legislating, or, put differently, in exercising their power. For a discussion of *private* power in private international law as yet another approach, see Giesela Rühl, 'Private Macht im Internationalen Privatrecht' in Florian Möslin (ed), *Private Macht* (Mohr Siebeck 2015) 475 and Giesela Rühl, 'The

bb. The provisions on overriding mandatory provisions in contract law, tort law and succession law go further.<sup>12</sup> Arts 9 Rome I Regulation, 16 Rome II Regulation and 30 European Succession Regulation (cf recitals 34, 37 Rome I Regulation, 32 Rome II Regulation, 54 European Succession Regulation) allow for power to be exerted by applying specific provisions (of the forum state or, in the case of contracts, of a state that has a specific nexus to the contract, or, in the case of succession, of a state where specific assets or enterprises are located) – irrespective of the law applicable to the case in general, as identified by the (more or less) objective connecting factors.<sup>13</sup>

To qualify as an overriding mandatory provision, a law needs to be sufficiently important to the legal order to which it belongs. Art 9 Rome I Regulation thus defines overriding mandatory provisions as ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.’ The specific interests need to be ascertained by the court handling the case.<sup>14</sup>

Para 2 of that provision states that overriding mandatory provisions of the law of the forum can be applied. At the same time, according to

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Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy’ (2014) 10 J Priv Int’l L 335.

12 See, generally, Jan D Lüttringhaus, ‘Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar’ [2014] IPRax 146.

13 Art 10 para 3 Rome III Regulation could be understood as a provision that adopts the same technique for a specific case to implement the principle of non-discrimination in international divorce proceedings. It also differs from the general provision in that it does not allow for a balancing of competing interests. See Marc-Philippe Weller, ‘Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit’, *RabelsZ* 81 (2018) 747, 768 and Marc-Philippe Weller, Irene Hauber, and Alix Schulz, ‘Gleichstellung im Internationalen Scheidungsrecht – talaq und get im Licht des Art. 10 Rom III-VO’ [2016] IPRax 123; cf also Susann Gössl, ‘Art. 10 Rom III-VO’ (1 February 2021) in Beate Gsell and others (eds), BeckOGK, para 3 <<https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm>> accessed 31 December 2021 and Michael Stürner, ‘Politische Interessen und Internationales Privatrecht’ in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Giesekeing 2020) 557, 565–567.

14 ECJ, Opinion of AG Szpunar, Case C-315/15 *Nikiforidis* ECLI:EU:C:2016:281, para 88. Von Hein (n 10) 34–36 discusses the distinction between public and private interests in this context.

art 9 para 3 Rome I Regulation, 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. So in cases of art 9 para 3 Rome I Regulation, a balancing of powers is required.

This provision allows taking into consideration ‘the legitimate interests of the other state’.<sup>15</sup> It may, under certain conditions, further the international harmony of decisions,<sup>16</sup> and it may promote international cooperation and solidarity.<sup>17</sup> However, yielding to a specific state’s interests conflicts with the objective of other provisions of the Rome I Regulation, which designate a state whose provisions have to be obeyed.<sup>18</sup> In particular, the application of overriding mandatory provisions is in conflict with legal certainty and foreseeability<sup>19</sup> and thus has been described by the ECJ as a ‘disturbance to the system of conflict of laws’.<sup>20</sup> That may be a reason why, during the drafting of the regulation, the scope of art 9 Rome I Regulation was curtailed. A Commission Proposal considered giving effect even to overriding mandatory provisions of a state ‘with which the situation has a close connection’,<sup>21</sup> but the EU legislature removed that option.<sup>22</sup>

## 2. US approaches to international cases

In the US, federal law (a.) and state law (b.) adopt different approaches to international cases.

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15 *Nikiforidis*, Opinion of AG Szpunar (n 14) para 80.

16 *Nikiforidis*, Opinion of AG Szpunar (n 14) para 80.

17 *Nikiforidis*, Opinion of AG Szpunar (n 14) paras 80 and also 88.

18 ECJ, Case C-135/15 *Nikiforidis* ECLI:EU:C:2016:774, para 48.

19 *Nikiforidis* (n 18) paras 46–47.

20 *Nikiforidis* (n 18) para 45.

21 COM(2005) 650, art 8 para 3; see also art 7 para 1 of the Convention on the Law Applicable to Contractual Obligations 1980.

22 See *Nikiforidis* (n 18) para 45; for more details on the legislative history of the provision see Felix Maultzsch, ‘Art. 9 Rom I-VO’ (1 December 2021) in Beate Gsell and others (eds), BeckOGK, paras 94–100 <<https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm>> accessed 31 December 2021.

a. Federal law

US courts engage with international cases from quite a different vantage point, as far as areas of US federal jurisdiction are concerned. Federal courts address questions of power at a far earlier stage of their analysis.<sup>23</sup> In that context, questions of jurisdiction and applicable law are intertwined. What is important here is that US courts adopt a unilateral approach when faced with an international case. Rather than ascertaining in a multilateral fashion what law applies to a case, US federal courts will inquire whether they have subject matter jurisdiction and whether US law extends to a particular set of facts. (If it does not, US courts will regularly dismiss the case rather than apply foreign law.<sup>24</sup>)

That analysis openly addresses questions of power. The question of US law's reach is connected with the question of the US interest in the case, and may also be answered with a view to another state's interest to control the case.<sup>25</sup>

b. State law

Regarding private international law on a state level, a general characterization is far more difficult to make. The approaches taken by US states differ vastly.<sup>26</sup> Still, a few overarching remarks are in order before turning to current developments later. Conflicts questions in state courts more frequently arise from interstate cases within the US than from international cases. As US states are all under the roof of the US constitution, policy differences tend to be larger internationally than between US states,<sup>27</sup> so some caution needs to be taken when juxtaposing interstate and international cases. Still, US states also have an authority to regulate extraterritori-

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23 These issues are touched upon in the Restatements on Foreign Relations Law, see most recently Restatement (Fourth) of Foreign Relations Law.

24 See generally, Andreas Engel, *Internationales Kapitalmarktdeliktsrecht* (Mohr Siebeck 2019) 57–68.

25 Kermit Roosevelt III and Bethan R Jones, 'The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa' (2018) 128 YLJ Forum 293, 306 <<https://www.yalelawjournal.org/forum/a-response-to-brilmayer-listwa>> accessed 31 December 2021.

26 For an overview of the approaches currently followed in different US states, see Hay, Borchers, and Symeonides (n 1) § 2.15, 65ff.

27 Ralf Michaels and Christopher A Whytock, 'Internationalizing the New Conflict of Laws Restatement' (2017) 27 Duke J Comp & Int'l L 349, 352.

ally and internationally – an authority analogous to that of the federation<sup>28</sup> – and state legislatures use that authority. However, unlike federal law, the states' approach generally is not unilateral when dealing with conflict cases. Rather, they try to find the law that applies to a specific case in a multi-lateral fashion. Thus, US states are more welcoming towards the application of foreign law. In this regard, the approach is similar to the one adopted by European private international law.

### III. *Developments in Europe*

With that background in mind, the analysis now turns to specific developments in private international law that have shaped the relationship between objectivity and power. For the European Union, the ECJ's jurisdiction on the public policy exception (1.) and overriding mandatory provisions (2.) will be scrutinized. It will turn out that so far, the ECJ may have given more leeway to exercise power with the latter than the former.<sup>29</sup>

#### 1. *Public policy exception*

ECJ jurisprudence on *ordre public* so far has not concerned the question of applicable law but has been set in the context of recognition of judgments.<sup>30</sup> The court's reasoning still is of interest, as it may be transferable from one context to the other. In short, the court interprets this gateway for the consideration of state interests restrictively.

Notably, the ECJ does not define or ascertain the content of the public policy of Member States. Rather, it sets out the limits within which the

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28 *Skiriotes v Florida*, 313 US 69, 78–79 (1941); Hannah L Buxbaum, 'Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy' (2017) 27 *Duke J Comp & Int'l L* 381, 389.

29 See also Juliane Kokott and Wolfgang Rosch, 'Eingriffsnormen und ordre public im Lichte der Rom I-VO, der Rom II-VO, der EuGVVO und der EU-InsVO' in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Gieseking 2020) 265, 273.

30 For general remarks on *ordre public* and an extensive discussion of the pertinent case law, see Kokott and Rosch (n 29).



courts of a Member State may have recourse to public policy at all.<sup>31</sup> In doing so, the court has held that recourse to the public-policy clause regarding recognition of judgments can be had ‘only in exceptional cases’.<sup>32</sup> Specifically, the infringement of public policy would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.<sup>33</sup> Hence, the forum state can only wield its power in particular cases.

To illustrate, in *Krombach* the right to fair legal process was at issue, but public policy could not be invoked merely for jurisdictional issues.<sup>34</sup> However, the ECJ qualified that statement and noted that public policy may be considered if, in an action for damages based on an offence, the court of the state of origin refused to hear the defence of the accused person, solely on the ground that that person was not present at the hearing.<sup>35</sup> The German court to which the lawsuit then returned went on to deny recognition based on the public policy exception.<sup>36</sup>

The ECJ reiterated its restrictive line with regard to the right to be notified of procedural documents and, more generally, the right to be heard in *Eurofood*<sup>37</sup> and with regard to the right to a fair trial in the context of a judgment given in default of appearance.<sup>38</sup>

Similarly, the ECJ held that the mere fact that a judgment given in a Member State was contrary to EU law did not in itself justify invoking the public policy exception.<sup>39</sup> Rather, the decision in question would need to be at variance at ‘an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental

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31 ECJ, Case C-7/98 *Krombach* ECLI:EU:C:2000:164, paras 22–23; ECJ, Case C-38/98 *Renault* ECLI:EU:C:2000:225, para 33; ECJ, Case C-302/13 *flyLAL-Lithuanian Airlines*, ECLI:EU:C:2014:2319, para 47; ECJ, Case C-681/13 *Diageo Brands* ECLI:EU:C:2015:471 para 42. For examples from Germany see eg Dietmar Baetge, Art. 6 EGBGB in Markus Würdinger (ed), *juris PraxisKommentar BGB vol 6*, paras 94ff (juris 2020) <www.juris.de> accessed 31 December 2021.

32 *Krombach* (n 31) para 21.

33 *Krombach* (n 31) para 37, confirmed in ECJ, Case C-341/04 *Eurofood* ECLI:EU:C:2006:281, para 63.

34 *Krombach* (n 31) para 34.

35 *Krombach* (n 31) para 44.

36 BGH IX ZB 23/97, BGHZ 144, 390.

37 *Eurofood* (n 33) paras 60–68.

38 ECJ, Case C-619/10 *Trade Agency* ECLI:EU:C:2012:531, paras 47–62.

39 *Renault* (n 31) para 33; *Diageo Brands* (n 31) para 68.

principle'.<sup>40</sup> Most recently, the ECJ held that a breach of the rules of *lis pendens*<sup>41</sup> in itself did not amount to an infringement of public policy.<sup>42</sup>

To sum it up, so far there has only been one instance where the ECJ has acknowledged an infringement of public policy in a private international law case – hence this tool to bring to bear considerations of power has only been of limited importance.

## 2. Overriding mandatory provisions

As regards overriding mandatory provisions, they have the potential to allow for open consideration of competing power. This potential has been unlocked to a certain extent.

*Ingmar*<sup>43</sup>, the first case regarding overriding mandatory provisions, related to the payment of compensation to agents on termination of their agreements with their principals, as determined in an EC directive. The court arrived at the conclusion that the norms in question were indeed overriding mandatory provisions. For the court, it was decisive that the legislator had a strong interest in what the provisions aimed at: they were designed to protect the commercial agent,<sup>44</sup> which protection was particularly evident as the parties were not allowed to derogate (to the detriment of the commercial agent) from the provisions.<sup>45</sup> Thus, the provisions aimed to safeguard a key goal of the European Community: to protect the freedom of establishment and the operation of undistorted competition in the internal market. As the ECJ stated, this goal would be undermined if a third-state principal could escape that provision when he used a commercial agent in a Member State.<sup>46</sup>

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40 *Krombach* (n 31) para 37; *Renault* (n 31) para 30; ECJ, Case C-420/07 *Apostolides* ECLI:EU:C:2009:271, para 59; *flyLAL-Lithuanian Airlines* (n 31) para 49; *Diageo Brands* (n 31) para 44.

41 On current European rules on *lis pendens*, see eg Christian Heinze and Björn Steinrötter, 'The Revised *Lis Pendens* Rules in the Brussels Ibis Regulation' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation* (TMC Asser Press 2017) 1.

42 ECJ, Case C-386/17 *Liberato* ECLI:EU:C:2019:24, paras 47–56.

43 ECJ, Case C-381/98 *Ingmar GB* ECLI:EU:C:2000:605.

44 *Ingmar GB* (n 43) para 21.

45 *Ingmar GB* (n 43) para 22.

46 *Ingmar GB* (n 43) para 25.

In a follow-up case, *Unamar*<sup>47</sup>, the court had to deal with a national (Belgian) law adopting the same solutions regarding the payment of commercial agents in another field as a potential mandatory rule of the forum. The court held that all means necessary could be taken to ascertain the intentions and characterization of the provision. The mandatory nature of a provision was to be determined taking ‘account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted.’<sup>48</sup> The ECJ left it to the national court to decide ‘on the basis of a detailed assessment’<sup>49</sup> whether that threshold was met, but not without noting that there was a specific twist to this case: The law to be rejected for the *lex fori* was the law of another member state.<sup>50</sup> While the court did not spell out the consequences, it stands to reason that an *overriding* mandatory provision would only be found if a specific national interest could be distinguished.

In *Da Silva Martins*<sup>51</sup>, a case concerning the period of limitation after a traffic accident, the ECJ confirmed that the definition for overriding mandatory provisions established for contracts in the context of the Rome I Regulation could be transposed to the Rome II Regulation for non-contractual claims.<sup>52</sup> The court held that also in the context of the Rome II Regulation, a mandatory overriding provision can be found ‘on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted’.<sup>53</sup> On that base, the ECJ did not find a national provision regulating a period of limitation to be sufficiently ‘important’ in a national legal order to be considered an overriding mandatory provision.<sup>54</sup>

In its most recent decision, *Nikiforidis*<sup>55</sup>, the ECJ provided further clarification and a methodological twist. First, the court held that art 9 Rome I Regulation must be interpreted strictly<sup>56</sup> and thus does not allow for

47 ECJ, Case C-184/12 *Unamar* ECLI:EU:C:2013:663.

48 *Unamar* (n 47) para 50.

49 *Unamar* (n 47) para 52.

50 *Unamar* (n 47) para 51.

51 ECJ, Case C-149/18 *Da Silva Martins* ECLI:EU:C:2019:84.

52 *Da Silva Martins* (n 51) paras 27–28.

53 *Da Silva Martins* (n 51) para 31.

54 *Da Silva Martins* (n 51) para 35.

55 n 18.

56 *Nikiforidis* (n 18) para 44; *Unamar* (n 47) para 49; cf von Hein (n 10) 51–56; Matthias Lehmann and Johannes Ungerer, ‘Applying or Taking Into Account of Foreign Overriding Mandatory Provisions – Sophism Under the Rome I Regulation’ (2017/2018) 19 YbPIL 53.

the application of overriding mandatory provisions from a third country (ie not the forum state or a state linked to the contract as provided for in art 9 para 3 Rome I Regulation). At the same time, the court held that mandatory provisions of such a third state, even if not applicable via art 9 Rome I Regulation, may be taken into account as matters of fact while applying the substantive law of another state. The can is being kicked down the road, so to say. The decision of how to deal with another state's claim to regulate a specific matter is left to the applicable substantive law. What is lamentable about this is that the criteria for this decision are not predictable.

An illustration for this new approach can be found in a somewhat infamous German case that concerned a lawsuit an Israeli citizen brought against an airline. It was based upon a claim out of a contract for transportation that hinged upon a Kuwaiti law that prohibited the airline from fulfilling a contract with an Israeli citizen. Balancing interests, as demanded by art 9 para 3 Rome I Regulation, the German court did not bring that law in as an overriding mandatory provision. However, when it applied the German provisions on contract law, it gave the Kuwaiti norm factual consideration.<sup>57</sup>

As a final remark, it is noteworthy that an unofficial draft of a German supply chain law expressly stated that it was designed as an overriding mandatory provision.<sup>58</sup> The German legislator cannot change the harmonized rules on private international law of contracts (ie the Rome I Regulation) and cannot change the definition of overriding mandatory provisions. What a Member State can do, however, is to create a provision that fits the definition.<sup>59</sup> The draft provision was meant to make this intention explicit, thus highlighting the role of power.

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57 OLG Frankfurt am Main NJW 2018, 3591; see also Felix Maultzsch, 'Forumsfremde Eingriffsnormen im Schuldvertragsrecht zwischen Macht- und Wertedenken' in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Giesecking 2020) 363, 371–72; von Hein (n 10) 47–49, 56–57.

58 Giesela Rühl, 'Towards a German Supply Chain Act' [2021] *European Yearbook of International Economic Law* (forthcoming), 9 <<https://ssrn.com/abstract=3708196>> accessed 31 December 2021; in the same vein, see the modifications to the bill proposed by the Green Party Bundestag document (BT-Drs.) 19/30505, 26–27. The law ultimately adopted by the German Parliament on 11 June 2021 (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*) does not contain a similar provision.

59 cf the points discussed between Wulf-Henning Roth and Marc-Philippe Weller per Hannes Wais, 'Diskussionsbericht zum Referat von Wulf-Henning Roth' (2020) 220 AcP 538, 539.

#### IV. Developments in the US

US private international law, on a federal level, has seen the exercise of power being limited (1.) and, on a state level, the relevance of power being explicitly discussed and analysed in the context of the Draft Restatement (Third) of Conflict of Laws (2.).

##### 1. Federal law

As stated before, in international cases, US federal law follows a unilateral approach, which can easily accommodate considerations of power. However, the actual exercise of power by courts has been curtailed by recent US Supreme Court decisions.

These decisions concern ‘complex and distinctively American statutory regimes’.<sup>60</sup> In dealing with these, the Supreme Court returned to a tool of statutory interpretation that can be traced back two hundred years.<sup>61</sup> The Court referred to the presumption against extraterritoriality, which ‘serves to protect against unintended clashes between [US] laws and those of other nations which could result in international discord.’<sup>62</sup> According to the presumption, Congress ordinarily legislates with respect to domestic, not foreign matters,<sup>63</sup> which, according to the Supreme Court, only states a commonsense notion.<sup>64</sup> Hence, absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.<sup>65</sup>

Federal courts therefore deal with international cases that raise questions of extraterritoriality in a two-step approach.<sup>66</sup> In a first step, they enquire whether the presumption against extraterritoriality has been rebutted – which is the case if there is a clear, affirmative indication that a

60 Patrick J Borchers, ‘How “International” Should a Third Conflicts Restatement be in Tort and Contract’, (2017) 27 Duke J Comp & Int’l L 461, 461.

61 See also Engel (n 24) 63–68.

62 *EEOC v Arabian American Oil Co*, 499 US 244, 248; for an overview see William S Dodge, ‘The New Presumption Against Extraterritoriality’, (2019) 133 Harv L Rev 1581, 1589–614.

63 *Morrison v National Australia Bank*, 561 US 247, 255 (2010).

64 *RJR Nabisco, Inc v European Community*, 579 US \_ (2016) 8 (slip opinion).

65 *Morrison v National Australia Bank* (n 63) 255; *RJR Nabisco, Inc v European Community* (n 64) 7.

66 See *WesternGECO v ION Geophysical Corp*, 585 US \_ (2018) 5 (slip opinion); *RJR Nabisco, Inc v European Community* (n 64) 9.

statute is to apply extraterritorially. Questions of a US interest can openly be addressed at this stage. If the statute is not extraterritorial, then in the second step, the court will ascertain whether the case has a sufficient nexus to the US to be covered by a domestic application of the statute, or, as the Supreme Court puts it, whether the case is within the statute's focus. This second step again allows taking into account considerations of power, as the focus of a norm depends on the interests informing it.

The first of the relevant decisions, *Morrison* (delivered by the late Justice *Scalia*), concerned provisions about securities fraud in the Securities Exchange Act. The Court only saw a national public interest (referred to in 15 USC § 78b) that did not pertain to the case before it, as it was based upon transactions conducted upon foreign exchanges and markets by foreign parties.<sup>67</sup> Before this landmark decision, such a case would have been entertained before US courts, which now lost their position as a 'Shangri-La of [securities] class action litigation'<sup>68</sup>.

A second decision, *Kiobel* (delivered by Chief Justice *Roberts*), concerned the Alien Tort Statute, which creates a cause of action<sup>69</sup> and provides jurisdiction for violations of international law. The ATS, too, was held to be subject to the presumption against extraterritoriality.<sup>70</sup> Citizens of Nigeria had brought a claim against certain Dutch, British, and Nigerian corporations alleging violations of international law in Nigeria. Claimants could only litigate before US courts if the Alien Tort Statute allowed that. However, the Court saw a 'danger of unwarranted judicial interference'.<sup>71</sup> Specifically, the Supreme Court mentioned that the will of the US might be imposed upon another sovereign,<sup>72</sup> which would lead to international discord.<sup>73</sup> Hence, the Court saw 'no indication the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms'.<sup>74</sup> Turning to the facts before it, the court found that no relevant conduct had taken place in the United States and that the claims did not 'touch and concern the territory of the United States (...)

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67 *Morrison v National Australia Bank* (n 63) 262.

68 *Morrison v National Australia Bank* (n 63) 270.

69 See *Sosa v Alvarez-Machain*, 542 US 692 (2004); Hay, Borchers, and Symeonides (n 1) § 3.74, 255.

70 *Kiobel v Royal Dutch Petroleum Co*, 569 US 108, 116 (2013).

71 *Kiobel v Royal Dutch Petroleum Co* (n 71) 116.

72 cf *Kiobel v Royal Dutch Petroleum Co* (n 71) 121.

73 *EEOC v Arabian American Oil Co* (n 62) 248; *Kiobel v Royal Dutch Petroleum Co* (n 71) 115.

74 *Kiobel v Royal Dutch Petroleum Co* (n 71) 123.

with sufficient force'.<sup>75</sup> Hence, the Court did not see room for the ATS to apply.

Subsequent lawsuits forced lower courts to consider whether a case 'touched and concerned' the United States. These were mostly unsuccessful.<sup>76</sup> However, some cases stand out as instances where there was a sufficient nexus with the US. In *Mastafa v Chevron Corp*<sup>77</sup>, the Court of Appeals for the Second Circuit held that US law applied when a company was headquartered in the US (and thus relevant decisions were made there) and relevant transactions took place and agreements were made in the US; in *Balintulo v Ford Motor Co*<sup>78</sup>, the United States was considered touched and concerned because the defendant had developed hardware and software in the US that was later used for human rights violations in South Africa.<sup>79</sup>

In a third decision, *RJR Nabisco*<sup>80</sup> (delivered by *Alito*), the US Supreme Court had to ascertain the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), which prohibits certain activities of organized crime groups in relation to an enterprise. The European Community and 26 Member States brought an action against RJR Nabisco and related entities, alleging they participated in a global money-laundering scheme. Again, the Court saw the extraterritorial scope as a question of the content and the meaning of the law and only saw an extraterritorial application of some of the relevant provisions. Civil claims were ruled out, according to the court, as allowing recovery would create a danger of international friction.<sup>81</sup> It is somewhat puzzling, however, that this argument was invoked when the European Community and Member States had initiated the lawsuit.

By contrast, in *WesternGECO v ION Geophysical Corp*<sup>82</sup> the US Supreme Court sidestepped the presumption against extraterritoriality and resolved the case by finding that relevant conduct had occurred in the United

75 *Kiobel v Royal Dutch Petroleum Co* (n 71) 125.

76 Presumption not rebutted in *Baloco v Drummond Co, Inc*, 767 F 3d 1229 (11th Cir 2014), cert denied 136 S Ct 410 (2015); *Doe v Drummond Co*, 782 F 3d 576 (11th Cir 2015), cert denied 136 S Ct 1168 (2016); *Mujica v AirScan Inc*, 771 F 3d 580 (9th Cir 2014), cert denied 136 S Ct 690 (2015). For an overview, see Hay, Borchers, and Symeonides (n 1) § 3.76, 258ff.

77 770 F 3d 170 (2d Cir 2014).

78 796 F 3d 160 (2d Cir 2015), cert denied *Ntsebeza v Ford Motor Co*, 36 S Ct 2485.

79 See also *Al-Shimari v CACI Premier Technology, Inc*, 758 F 3d 516 (4th Cir 2014).

80 n 64.

81 *RJR Nabisco, Inc v European Community* (n 64) 19.

82 n 66.

States. To reach this conclusion, the court also analysed what interests the relevant (patent law) statute<sup>83</sup> sought to protect.<sup>84</sup>

One important qualification is indicated. The jurisprudence of the Supreme Court just discussed mainly concerns private actions. As regards public enforcement of securities laws (*Morrison*), US Congress has explicitly reinstated the extraterritorial reach of US laws.<sup>85</sup> At the same time, in *RJR Nabisco*, the Supreme Court also noted that public enforcement is subject to ‘the check imposed by prosecutorial discretion’,<sup>86</sup> and thus less prone to causing international discord.

## 2. State law: Draft Restatement (Third) of Conflict of Laws

While – due to the variety of approaches adopted by different US states<sup>87</sup> – it is difficult to make general remarks about state conflicts law,<sup>88</sup> it bears mentioning that a new Restatement (Third) of Conflict of Laws is currently being drafted. While no full draft is yet available to the public, some general tendencies have already been discussed.<sup>89</sup>

The Draft Restatement (Third) of Conflict of Laws does not operate unilaterally and tries to ascertain first which laws aim to regulate a specific case. While the Restatement (First) had taken a strictly territorial approach, assigning legal relationships to specific jurisdictions by territorial connecting factors, the Restatement (Second) aimed to apply the law of the state with the most significant relationship to the case.<sup>90</sup> The most

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83 Sec 271(f) Patent Act.

84 *WesternGECO v ION Geophysical Corp* (n 66) 6–7.

85 Sec 929P Dodd-Frank-Act.

86 *RJR Nabisco, Inc v European Community* (n 64) 19.

87 See n 26.

88 For an in-depth discussion of the politicization of US state conflicts law in the realm of tort law, see Christian Uhlmann, ‘Politisierung des IPR links und rechts des Atlantiks’ in Konrad Duden et al (eds), *IPR für eine bessere Welt* (Mohr Siebeck 2022) 51, 53ff.

89 For the current status, see <[www.ali.org/projects/show/conflict-laws/](http://www.ali.org/projects/show/conflict-laws/)> accessed 31 December 2021; on the role of the (Draft) Restatement in the legal system and the methodology adopted by the Reporters in drafting it see Roosevelt III and Jones (n 25) 298.

90 Lea Brilmayer and Daniel B Listwa, ‘Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?’ (2018) 128 YLJ Forum 266, 271 <<https://www.yalelawjournal.org/forum/continuity-and-change-in-the-draft-restatement-third-of-conflict-of-laws>> accessed 31 December 2021; Roosevelt III and Jones (n 24) 299.



significant relationship was found in a less strict manner than by the Restatement (First) due to its open-ended, multifactor approach.

The Draft Restatement (Third) could be understood to make multilateral the approach taken by US federal law. It uses a two-step approach that is comparable to the Supreme Court's approach to questions of extraterritoriality.<sup>91</sup> The first step would be to determine which states have authority to regulate a case<sup>92</sup> and whether they have used that authority (which, again, is a matter of statutory construction) and thus expressed their interest in regulating that case<sup>93</sup> and exercising power. Any arising conflicts would then be resolved via priority rules.<sup>94</sup> The precise design of these priority rules is yet to be awaited. What is important here is that the first step, which can trace back its methodological roots to governmental interest analysis,<sup>95</sup> allows for an open discussion of what interests are at stake. While the priority rules may still resemble an objective system, the role of power is more openly recognized.

As *Michaels* points out, it remains to be seen how reinvigorating interest analysis will play out in that context.<sup>96</sup> Put neutrally, US states have a longer history of ascribing governmental interests to private law norms than legal systems outside the US.<sup>97</sup> It may prove harder to identify (or guess) the interests enshrined in non-US legal provisions. Moreover, it is

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91 See Roosevelt III and Jones (n 25) 305; Brilmayer and Listwa (n 90) 267.

92 Michaels and Whytock (n 27) 353; see also Christopher A Whytock, 'Toward a New Dialogue Between Conflict of Laws and International Law' (2016) 110 AJIL Unbound (online) 150, 151 <[www.cambridge.org/core/journals/american-journal-of-international-law/article/toward-a-new-dialogue-between-conflict-of-law-s-and-international-law/2246B32D629EEE4C5D5D6359ABD41A01](http://www.cambridge.org/core/journals/american-journal-of-international-law/article/toward-a-new-dialogue-between-conflict-of-law-s-and-international-law/2246B32D629EEE4C5D5D6359ABD41A01)> accessed 31 December 2021.

93 Ralf Michaels, 'The Conflicts Restatement and The World' (2016) 110 AJIL Unbound (online) 155, 158 <[www.cambridge.org/core/journals/american-journal-of-international-law/article/conflicts-restatement-and-the-world/495B4F01DD376CDEF3E0630D86DDD0D0](http://www.cambridge.org/core/journals/american-journal-of-international-law/article/conflicts-restatement-and-the-world/495B4F01DD376CDEF3E0630D86DDD0D0)> accessed 31 December 2021.

94 Brilmayer and Listwa (n 90) 270.

95 Lea Brilmayer, 'What I Like Most About the Restatement (Second) of Conflicts and Why It Should Not Be Thrown Out with the Bathwater' (2016) 110 AJIL Unbound (online) 144 <[www.cambridge.org/core/journals/american-journal-of-international-law/article/what-i-like-most-about-the-restatement-second-of-conflicts-and-why-it-should-not-be-thrown-out-with-the-bathwater/440FB6ED6E969083889607D54E2CA2D6](http://www.cambridge.org/core/journals/american-journal-of-international-law/article/what-i-like-most-about-the-restatement-second-of-conflicts-and-why-it-should-not-be-thrown-out-with-the-bathwater/440FB6ED6E969083889607D54E2CA2D6)> accessed 31 December 2021; Michaels (n 93) 158.

96 Michaels (n 93) 158.

97 Michaels (n 93) 158. For the growing role of state interests in German private law cf eg Roth (n 9) 465–70.

not yet clear how excessive assertions of power are to be moderated. The doctrine of comity might be of help, but is notoriously vague.<sup>98</sup>

## V. Conclusion: Comparative Remarks

Where does that leave us? Two intertwined results emerge. First, the examples attest to a significant role of power in both US and European private international law. Second, the influence of power has been addressed openly in recent decisions.

We have seen that European private international law is not a merely objective system. The Savignyan tradition allows for elements of power to be acknowledged even on the meta-level of private international law. The rules on *ordre public* (arts 21 Rome I Regulation, 26 Rome II Regulation, 12 Rome III Regulation, 35 European Succession Regulation) allow preventing the application of foreign law and the rules on overriding mandatory provisions (arts 9 Rome I Regulation, 16 Rome II Regulation, 30 European Succession Regulation) allow forcing the application of a specific law. The ECJ's jurisprudence regarding art 9 Rome I Regulation enables national courts to engage in a balancing exercise and take state interests into consideration. Moreover, in some cases national legislators try to find ways to use private international law to yield a specific result, one that is considered desirable by that very legislator. For instance, the draft of a supply chain law shows that the German legislator considered making its interests known and implement a law with broad reach. Both tendencies might reflect a (further) departure from a merely objective system towards one where power *also* plays a role.

Recent developments in US federal conflicts law seem to lead to a similar role for power, even if from a different starting point. Over the last few years, the US Supreme Court has decided and affirmed that three relevant statutes that allow private actions do not apply extraterritorially. This jurisprudence may be interpreted as an acknowledgement that the US legislator's power is limited and as a sign of increased deference to other sovereigns and their respective decisions. This same deference to the

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98 Michaels (n 93) 158. *Somportex Ltd. v Philadelphia Chewing Gum Corp*, 453 F 3d 435 (2d Cir 1971) calls comity 'a rule of "practice, convenience, and expediency" rather than of law'. See also Tim W Dornis, 'Comity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Elgar 2017) vol 1, 382, and Engel (n 24) 73–76.

interests of different sovereigns also shows up in the Draft Restatement (Third) of Conflict of Laws.

To get an idea about the systems' relative positions, one could muse how European courts would have handled the Supreme Court cases. These courts would have applied the rules of European private international law. In *Morrison*, the Supreme Court concluded that US law did not apply to a case where Australian shareowners sued an Australian company over shares listed on an Australian exchange. With all of these facts pointing towards Australia, it seems very likely that European courts would not have applied US law, either. Rather, the rules of private international law might have pointed them to the laws of Australia.<sup>99</sup>

As regards *Kiobel* and a claim for violations of customary international law, a hypothetical comparison is more difficult. There is no direct counterpart to the Alien Tort Statute. What can safely be said is that in a lawsuit between citizens of Nigeria and companies from a third country, European private international law would not leave leeway for the forum state to apply its own laws – yet. And turning to a specific connecting factor, it might still be easier to bring a claim under US law before US courts than for European private international law to lead to the application of the law of the state where the headquarters of a company is based<sup>100</sup> – particularly as the German legislator abandoned the idea of designating a draft supply chain law as an overriding mandatory provision.

Finally turning to *RJR Nabisco*, one might take a hypothetical European provision analogous to RICO. It would seem plausible that European courts might consider a provision aimed against organized crime an overriding mandatory provision – and thus apply it even in cases where the general rules of private international law lead to the application of a different state's laws.

Hence, as aspects of power have a limited, but relevant role in European private international law and the reach of US law is being curtailed, it could be said that the two systems are moving closer together.

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99 The relevant ECJ jurisprudence (albeit with regard to jurisdiction) attaches particular importance to the location of the claimant's bank account see ECJ, Case C-375/13 *Kolassa* ECLI:EU:C:2015:37; ECJ, Case C-304/17 *Löber* ECLI:EU:C:2016:774; ECJ, Case C-709/19 *Vereniging van Effectenbezitters* ECLI:EU:C:2020:1056 and also ECJ, Case C-12/15 *Universal Music International Holding* ECLI:EU:C:2016:449 and Engel (n 24) 159–212.

100 According to art 4 para 1 Rome II Regulation, the provision generally pertinent, the law of the place of injury governs claims arising out of a tort. See Rühl (n 58) 6.

At the same time, the relevance of power also becomes more apparent. The growing importance of overriding mandatory provisions makes the ways in which Member State interests influence a specific case more explicit. Similarly, recent Supreme Court decisions have grappled with the question of how far US interests extend. The Restatement (Third) is likely to make use of interest analysis. While the actual conflict rules, which aim to balance interests, are still being finalized, at least a methodological debate is taking place.

Whether the increasing role of power disrupts the system of private international law and how well private international law could adapt to such disturbance still remains subject to debate. At the very least, the examples discussed have shown that the relevance of power is made explicit – which will hopefully facilitate future discussion about its adequate role.