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Modern Changes in the Conflict-of-Laws Methodology: The Blending of the Savignian Multilateralism, the American Unilateralism, and the Recognition of Legal Relationships[1]

Abstract: Over the centuries, the preference for a conflict-of-laws methodology was subject to twists and turns. A number of methods coexisted and continue to compete today. First, the unilateralism involves determining the spatial scope of application of either the forum's own law or foreign law. This is achieved through the use of one-sided choice-of-law rules or through the functional interpretation of specific substantive provisions. Second, the multilateralism assumes a neutral and territorial localization of the legal situation in question. It seeks to identify the legal system most closely connected to the matter, based on objective connecting factors. The third approach, which is sufficiently distinct from the first two to warrant separate analysis, boils down to recognition of legal events crystallized under foreign law.

The article reviews some of the most important trends and developments in the conflict-of-laws, occurring during the second half of the XX century and the first decades of the XXI century, on both sides of the Atlantic Ocean. At the outset, it briefly introduces

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characteristics of the multilateral method as understood in Europe and the unilateralism, focusing on its American version. An attempt is made to show how the unilateral and multilateral methods are intertwined in the US conflicts of laws, with a particular attention devoted to the draft of the Restatement (Third) of the Conflict of Laws. The attention is then transferred back to Europe, putting an emphasis on the expressions of unilateralism, not only in their classic forms of the public policy exceptions and overriding mandatory rules, but also hybrid instruments which essentially constitute a mixture of the multilateral technique and a substantive-result-orientation. The article deals also with recognition as a conflicts method, focusing on the recent case law of the Court of Justice of the European Union, which effectively ignores the conflict-of-laws analysis, because it is guided by a different imperative, namely to safeguard the free movement within the Union. The article concludes with a suggestion that — although the methodological starting points and accents undoubtedly differ on either side of the Atlantic — a common feature of contemporary developments in conflict-of-laws theory, both in Europe and the United States, is the blend of unilateral and multilateral approaches to solving the conflict-of-law problems.

A fundamental distinction between European and American approaches, however, lies in the European reluctance to replace the multilateral method with a unilateral one. The prevailing view in Europe remains that unilateral methodologies may be employed only in exceptional cases, serving as supplementary or corrective mechanisms within the broader framework of traditional conflict-of-laws system, and only in relation to specific institutions or techniques designed to address particular deficiencies. The article posits, nevertheless, that the role of these mechanisms has gained increasing prominence within the traditional framework of private international law. Moreover, it is essential to recognize that they reflect a unilateral methodology grounded in a conceptual premise fundamentally distinct from that of traditional conflict-of-law rules based on neutral connecting factors. Specifically, this alternative approach centers on delineating the spatial scope of application of a substantive rule — whether domestic or foreign — that asserts its relevance, without resorting to a multilateral determination of the applicable law governing the legal relationship in question.

The article also attempts to show how the American Restatement (Second) and the current Draft of the Restatement (Third) represent hybrid constructs that blend the "revolutionary" doctrines of interest analysis with elements that remain rooted in traditional, multilateral choice-of-law rules. The authors argue in this context, that while there is no inherent contradiction in combining unilateral and multilateral methodologies within a single conflict-of-laws framework, this can satisfactory be done only if the distinct methodologies are kept separate and understood as having very different premises, with a clear defined role and hierarchy within the system. Both the existing and planned Restatements fail to achieve clarity in that regard, as often reminded by the American conflict scholars themselves.

Keywords: methodology in private international law — conflict of laws — unilateralism — multilateralism — recognition of legal relationships

1. Introduction

For decades, four distinct methods for resolving conflict-of-laws issues have coexisted.[2] The first, commonly referred to as unilateralism, involves determining the spatial scope of application of either the forum's own law or foreign law. This is achieved through the use of one-sided choice-of-law rules or through the functional interpretation of specific substantive provisions. The second method, known as multilateralism, assumes a neutral and territorial localization of the legal situation in question. It seeks to identify the legal system most closely connected to the matter, based on objective connecting factors. The third approach, which is sufficiently distinct from the first two to warrant separate analysis, boils down to recognition (or non-recognition) of legal events crystallized under foreign law (the method of recognition of legal relationship and the vested rights theory). The fourth method, while not strictly a conflict-of-laws technique, aims to eliminate the conflict altogether. This is pursued through the development of uniform substantive rules — or at least through significant harmonization — at the international or supranational level.

Over the centuries, it was only the relative weight and prevalence of these methods that was changing. Since von Savigny laid the intellectual foundations for multilateralism, the prevailing method in Europe has focused on identifying the neutral, territorial localization — or "seat" — of the legal relationship or situation at issue. The formal, substance-blind nature of this approach has, to varying degrees, been qualified or mitigated by mechanisms characteristic of unilateralism, such as public policy exception or the overriding mandatory provisions. From a different perspective, this rigidity has also been softened by the acceptance of foreign legal relationships and their effects under the method of recognition. Ultimately, all three traditional methods — unilateralism, multilateralism, and recognition — may be superseded by the unification or harmonization of substantive law, to the extent that such unification successfully occurs at the international level.

Globalization, increased migration, and the rapid development of new modes of communication have led to an exponential rise in cross-border private legal relationships. These transformations pose significant challenges, prompting both the exploration of new methodologies and the revival of traditional approaches to ensure the harmonious coexistence

[2] Cf. F. Juenger, *American and European Conflicts Law*, "Am. J. Comp. L." 1982, vol. 30, No. 1, p. 120.

of legal systems in the realm of private international law. Increasingly, scholarly discourse emphasizes the need to mitigate harm to the legitimate interests of individuals and states involved in transnational disputes. In particular, methods of resolving conflict-of-laws issues must avoid outcomes that result in discrimination or violations of fundamental human rights. A notable shift in the focus of conflict-of-laws scholarship can be observed — from the determination of the applicable law to the manner of its application. There is growing recognition of the necessity for a "restrained" or "self-limiting" application of the applicable law, especially in circumstances where the imposition of domestic legal rules would be ill-suited to the complex and nuanced nature of international relationships. This is particularly pertinent when applying legal norms that were clearly designed with domestic, rather than cross-border, situations in mind.

In this context, the process of applying the chosen law is increasingly accompanied by a reflection that a balancing exercise is necessary: the legal certainty offered by rigid application of rules must be tested against the potential harm to values such as international courtesy and tolerance, which underlie peaceful and respectful coexistence among nations. Consequently, greater emphasis is being placed on corrective mechanisms aimed at moderating the potentially inappropriate results of applying the law that is formally applicable but substantively unsuitable.

Parallel to this development is the growing importance of techniques aimed at recognizing legal relationships or situations established under foreign legal systems, particularly where denying recognition would unfairly undermine legitimate expectations formed under the law of the country of origin. In this evolving framework, the understanding of the traditional concept of public policy (*ordre public*) is also undergoing transformation. While originally designed to protect the fundamental principles of the forum state, it is increasingly acknowledged that public policy must also reflect shared values of the international community, particularly as expressed in sources of international law such as fundamental human rights instruments. This has led to the emergence and growing acceptance of the concept of "international public policy," grounded not merely in domestic constitutional values but in universally recognized legal and ethical norms.

In this article, we review some of the most important trends and developments in the conflict-of-laws, occurring during the second half of the XX century and the first decades of the XXI century, on both sides of the Atlantic Ocean. In doing so, we focus on the approach taken with respect to various rules, solutions, instruments or techniques — in how they express one of the three major conflict-of-laws methodologies:

unilateralism, multilateralism, or recognition. The article unfolds as follows. After briefly introducing the basic characteristics of the multilateral method as understood in Europe (chapter 2), we take on the unilateralism, focusing on its American version, and how the unilateral and multilateral methods are really intertwined in the US conflicts of laws (chapter 3). Here we devote room in particular to the Restatement (Third) of the Conflict of Laws project, which is currently being drafted by the American Law Institute (chapter 3(e)). We then transfer attention back to Europe, putting an emphasis on the expressions of unilateralism, not only in their classic forms of the public policy exceptions and overriding mandatory rules, but also hybrid instruments which essentially constitute a mixture of the multilateral technique and a substantive-result-orientation (chapter 4). In chapter 5, on the other hand, we deal with recognition as a conflicts method, focusing on the recent case law of the Court of Justice of the European Union, which effectively ignores the conflict-of-laws analysis, because it is guided by a different imperative, namely to safeguard the free movement within the Union. We finish with an attempt of a conclusion, were we suggest that the most important — albeit general — development in the field of the conflict of laws, on both sides of the Atlantic Ocean, is the blend of unilateral and multilateral approaches to solving the conflict-of-law problems.

2. The multilateral methodology in the conflict-of-laws

The multilateral methodology[3] in the conflict-of-laws is premised on the notion that the determination of the applicable law in an international situation must begin with the choice-of-law of the forum, which treats all laws — domestic and foreign — as equal in principle. Multilateralism presupposes that determination of the applicable law should be made through use of geographical criteria.[4] This neutral approach predominates European conflict-of-laws since F.C. von Savigny laid foundations for multilateralism in the mid XIX century.[5] Central to von Savigny's

[3] A term "method of pointers" is also used to denote the same methodology. See M. Pazdan, in: *System Prawa Prywatnego. Vol. 20A. Prawo prywatne międzynarodowe*, ed. M. Pazdan, C.H. Beck, Warszawa 2014, p. 18.

[4] G. Cuniberti, *Conflict of Laws: A Comparative Approach: Text and Cases*, Edward Elgar Publishing 2022, p. 2.

[5] F. C. von Savigny, *System des heutigen römischen Rechts, Band VIII*, 1849 (English translation by W. Guthrie published as: F. C. von Savigny, *A Treatise on the Conflict of*

Copernican revolution was the belief that the private law systems of different states reflect variations of common legal institutions (*Institutionen*), rooted in Roman law and shaped by the Christian legal tradition. Because these systems share foundational similarities, they are regarded as largely equivalent and thus functionally "interchangeable." This perspective enabled a shift in focus: rather than examining the substantive content of individual legal provisions, the emphasis moved toward identifying the legal system that constitutes the natural seat (*Sitz*) of the legal relationship. The new paradigm facilitated the development of neutral conflict-of-laws rules that operate independently of the substantive content of the legal systems they select. These rules impose an obligation to apply the law of a particular legal system, without regard to the substantive rights and obligations such law might create. In this sense, multilateralism is substance-blind. Its purpose is not to evaluate the fairness or justice of outcomes, but simply to designate the applicable legal framework. Any normative judgment about what constitutes a just solution is deferred to the substantive law of the selected legal system. This is because private international law has other goals: to ensure predictability in the determination of the applicable law, to maintain neutrality with respect to state interests, to uphold the principle of equality between parties from different jurisdictions, and to promote harmony in international decision-making.[6] Its overarching aim is to achieve what is commonly referred to as the "conflicts justice."[7]

It seems clear enough, however, that von Savigny's outlook was limited to European legal tradition. In the contemporary context, a broader and more inclusive global approach must take into account the diverse legal traditions that exist around the world. Some of them might be characterized by important differences, also on the level of the very basic principles of private law. Family law stands out in this regard, as it is often deeply rooted in moral and religious beliefs. Across various regions, family law reflects markedly different values and cultural attitudes. Islamic law serves as a clear example of such divergence.[8]

Laws: And the Limits of Their Operation in Respect of Place and Time, T. & T. Clark, 1869).

[6] M. Pazdan, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, p. 18.

[7] See e.g. P. Hay, *European Conflicts Law after the American Revolution-Comparative Notes*, "U. Ill. L. Rev." 2015, No. 5, p. 2055; P. Hay, *On the Road to a Third American Restatement of Conflicts Law*, "Praxis des internationalen Privat-und Verfahrensrechts" 2022, No. 3, p. 208; G. Cuniberti, *Conflict of Laws*…, p. 4—5.

[8] On interactions between Islamic family law and Western legal traditions see e.g. E. Giunchi (ed.), *Muslim Family Law in Western Courts*, Routledge, London 2014; I. Bantekas, *Transnational talaq (Divorce) in English Courts: Law Meets Culture*, "J. Islamic St. Prac. Int'l L." 2013, vol. 9, pp. 40 et seq.; Z. Meškić, A. Duraković,

Thus, what is important is not just that the private law rules of different countries are often equivalent in substance. Even more significant is that private laws do not, typically, express any dominating public interest. Private law largely focuses on protection of the interests of private parties and not on furthering interests of a state.[9] It sorts out conflicts between theses interests.[10] Private law remains distant from the state.[11] When a state enacts private law, it does not impose a dominant public interest but rather establishes neutral "rules of the game" — a legal framework intended to provide a stable and predictable environment within which individuals and businesses can operate. In the context of disputes between private parties, including those with cross-border elements, the interests at stake are inherently private, and the objective is to achieve justice between the individuals involved.[12] Accordingly, in the field of conflict of laws, the decisive reason for applying law of a particular country should be its closest, most natural, connection to a legal relationship in question. One applies the law "by which parties have lived." In that way, the parties expectations (even if largely unconscious and only typical) are honored.[13]

Von Savigny's paradigm has been fully embraced and continues to exert a dominant influence on the European approach to conflict of laws.[14] His ideas were, of course, developed in a number of ways. They have undergone various developments and refinements over time. One of the

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J. Alihodžić, S. Hassan, Š. Handalić, *Recognition of Talaq in European states — in Search of a Uniform Approach*, "Journal of Private International Law" 2023, vol. 19, pp. 420 et seq.; M. Enright, *The Beginning of the Sharpness: Loyalty, Citizenship and Muslim Divorce Practice*, "International Journal of Law in Context" 2013, vol. 9, pp. 1 et seq.; K. Krzysztofek-Strzała, *Dopuszczalność stosowania prawa szariatu w zakresie spraw rozwodowych i spadkowych w prawodawstwie Unii Europejskiej,* "Studia z Prawa Wyznaniowego" 2016, vol. 19, pp. 23 et seq.; M. Zachariasiewicz, *Odmowa uznania w Polsce rozwodu talaq na tle prawnoporównawczym,* "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 27, pp. 7 et seq.

[9] See e.g. G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann (eds.), *The Max Planck Encyclopedia of European Private Law, 2 Bände*, Oxford University Press, 2012 (available at https://max-eup2012.mpipriv.de).

[10] P. Machnikowski, in: *Zarys prawa cywilnego*, eds. P. Machnikowski, E. Gniewek, C.H. Beck, Warszawa 2018, p. 4.

[11] F. Bydlinski, *System und Prinzipien des Privatrechts*, Wien—New York 1996, pp. 79, 92 [as cited in: Z. Radwański, A. Olejniczak, *Prawo cywilne — część ogólna*, C.H. Beck, Warszawa 2023, p. 4].

[12] G. Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, "The American Journal of Comparative Law" 1979, vol. 27, p. 615; P. Hay, *On the Road*…, p. 208.

[13] G. Cuniberti, *Conflict of laws*…, p. 5.

[14] See e.g. G. Cuniberti, *Conflict of laws*…, p. 2.

most significant evolutions is the formulation of the theory of the most significant relationship (fr. *principe de proximité*), notably advanced by scholars such as Paul Lagarde.[15] The theory posits that a legal relationship should be governed by the law of the state with which it has the closest or most significant connection. This connection is understood primarily in terms of the objective territorial links between the relevant factual elements and the legal order of a particular state. Crucially, the substantive outcome produced by the application of that law is not a relevant consideration. In this respect, the theory reflects the principle of justice pluralism, which holds that in cross-border private law disputes, justice is not achieved by selecting the law that a decision-maker subjectively deems most appropriate. Rather, it is achieved by applying the legal rules of the jurisdiction that is most closely connected to the situation. This approach reinforces legal certainty, respects the autonomy of legal systems, and aligns with the core multilateral values of neutrality and predictability in private international law.[16]

The principle of most significant relationship (most close connection) has been incorporated into many contemporary systems of private international law, both at the national level and within international frameworks, particularly within the European Union. Across these various legal systems, the principle serves multiple functions.[17] First, it is used as supplementary connecting factor, where conflict rules of the forum fail to determine the applicable law. The relationship in question is then governed by the law most closely connected with that relationship. This function may be expressed in the form of a general residual clause that applies as a default mechanism to fill systemic gaps in the conflict-of-laws framework,[18]

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[15] P. Lagarde, *Le principe de proximité dans le droit international privé contemporain: cours général de droit international privé*, Martinus Nijhoff 1986. Lagarde's work has been repeatedly discussed and commented in the doctrine. See e.g. T. Ballarino, G. P. Romano, *Le principe de proximité chez Paul Lagarde*, in: *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Dalloz, Paris 2005, p. 40 (noting that Lagarde was the father to the principle); C. Kessedjian, *Le principe de proximité vingt ans après*, in: *Le droit international privé: esprit et méthodes…*, p. 508 (observing that Lagarde has discovered most significant relationship as a principle).

[16] See A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge University Press 2009, pp. 5—6.

[17] In the Polish doctrine see M. Pazdan, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A…*, pp. 20 et seq.

[18] See e.g. Art. 67 of the Polish Act on Private International Law dated 4 February 2011 (O.J. of 15.04.2011, No. 80, item 432) [as translated by M. Zachariasiewicz, published in "Yearbook of Private International Law" 2011, vol. 13, pp. 641—656 and in "Problemy Prawa Prywatnego Międzynarodowego" 2011, vol. 8, pp. 109—138], which states: "If this act, or the specific rules of law, or the ratified international conventions to

or it may appear as a more specific rule operating within narrowly de fined circumstances.[19]

Second, the principle of the most significant relationship frequently performs a corrective function within modern conflict-of-laws systems. This function is invoked where, based on the overall circumstances of the case, it becomes evident that the legal relationship is more closely connected with a country other than the one designated by the specific conflict rule and its connecting factors. Such escape clauses may be designed to operate broadly across the legal system, allowing for the displacement of a statutory choice of law in favor of the law more appropriately connected to the situation.[20] More commonly, however, the application of this corrective mechanism is confined to narrowly defined areas of law. That is how the principle is used by the EU legislator, who additionally requires, that in order to trigger the application of that other law, the connection must be "manifestly" more close.[21]

Third, the role of the principle of closest connection extends beyond the supplementary and corrective functions assigned to it by the conflict-of-laws rules. In its inherent flexibility and adaptability,[22] the principle represents a foundational element of multilateral private international law,[23] tempered only by the need to ensure legal certainty and predictability. The core assumption — that it is necessary to identify the state with which a given legal relationship has the closest spatial link — has

which the Republic of Poland is a party, or the European Union law, do not determine the applicable law for a relationship falling within the scope of this act, the law most closely connected with the relationship applies."

[19] Article 4(4) of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L 177, 4.7.2008, p. 6 ("**Rome I Regulation**").

[20] Article 15(1) of the Swiss Federal Act on Private International Law of 18.12.1987, AS 1988 1776 (available at: www.fedlex.admin.ch); Article 19 §1 of the Belgian Code of Private International Law of 2004 (available at www.ejustice.just.fgov.be).

[21] Article 4(3), 5(3), 7(2) of Rome I Regulation; Article 4(3), 5(2), 9(4), 10(4), 11(4), 12(2)(c) of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. L 199, 31.7.2007, p. 40 ("**Rome II Regulation**"); art. 21(2) of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 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 ("**Succession Regulation**"), O.J. L 201, 27.7.2012, p. 107.

[22] T. Ballarino, G. P. Romano, *Le principe…*, p. 42.

[23] A. Mills, *The dimensions of public policy in private international law*, "Journal of Private International Law" 2008, vol. 4, p. 210; G. Cuniberti, *Conflict of laws…*, p. 6. In Polish doctrine see e.g. M. Czepelak, *Zasada najściślejszego związku jako reguła kierunkowa prawa prywatnego międzynarodowego*, "Problemy Prawa Prywatnego Międzynarodowego" 2016, vol. 18, p. 96.

remained a constant feature of European conflict-of-laws doctrine since the work of von Savigny. Accordingly, even where the legislator articulates a specific conflict rule using a concrete connecting factor, without explicit reference to the principle of the closest connection, the idea of closest connection is omnipresent, in the sense that efforts to find the applicable law should be made in the direction of seeking the law most closely connected with the legal relationship in question.[24] The application of a specific conflict of laws rule obviously does not require recourse to the principle of closest connection in every case — just as the application of dispositive contract law provisions does not necessitate explicit invocation of the principle of freedom of contract in every instance. In the majority of cases, courts simply apply the legislator's designated connecting factors, thereby fulfilling the system's requirement for predictability and consistency in legal outcomes.[25] Nonetheless, the principle of the closest connection remains tacitly embedded in all conflict-of-laws rules. It permeates the whole system, providing a unifying rationale for the selection of applicable law.[26] While usually not stipulated *expressis verbis* in statutory provisions, some legislatures explicitly incorporate the principle as a guiding norm, thereby acknowledging its foundational role in maintaining coherence and adaptability within private international law.[27]

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[24] If, for example, it is determined that rights *in rem* in immovable and movable property are subject to the law of the place where they are located (*lex situs*), this is primarily because it is assumed that, in a typical situation, the place where the property is located shows the closest relationship to the right *in rem*.

[25] See M. Czepelak, *Zasada*…, p. 86, who underlines the necessity to strike a proper balance between the principle of the closest connection and the predictability of the conflict-of-law decision making. Arguably, some of the relatively recent legislative developments, provide a shift from flexibility of the closest connection principle towards more predictability offered by specific connecting factors, that cannot easily be displaced by the former. Article 4 of the Rome I Regulation is the prime example here, given how it reverses — in comparison to Article 4 of the 1980 Rome Convention on the law applicable to contractual obligations (O.J. L 266, 9.10.1980, p. 1) — the relationship between the closest connection test and the application of the law of the state, where the party affecting the characteristic performance has its habitual residence (Rome Convention only presumed that the contract is most closely connected with that law). See M. Czepelak, *Zasada*…, p. 91. On the relationship between presumptions set in Article 4(2)—4(4) of the Rome Convention and the principle of the closest connection (Article 4(1) and 4(5)) see the leading CJEU judgment of 6.10.2009 in case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV*, ECLI:EU:C:2009:617.

[26] P. Lagarde, *Le principe de proximité*…, p. 126; T. Ballarino, G. P. Romano, *Le principe*…, p. 40.

[27] E.g. Article 1 of the Austrian Act on private international law of 15.06.1978 (IPR-Gesetz); see also recital 37 of the Preamble to the Succession Regulation ("The main rule should ensure that the succession is governed by a predictable law with which it is closely connected").

3. The unilateral method in the conflict-of-laws

a) General remarks

The starting point for the unilateral method[28] is not a conflict rule, but rather a substantive law provision, whenever a need to apply it arises in the dispute at hand.[29] The rule in question determines its own scope of application. Indications as to its spatial scope of operation may be drawn either directly from the wording of the provision or, more commonly, inferred indirectly through interpretation based on the nature or underlying purpose of the rule. Thus, there exists a direct relationship between the regulatory aim of a particular substantive norm and the extent to which it is applicable in situations transcending national borders.

A key rationale underlying the distinct starting point for unilateralism is the perception as to the function of private law. As explained by G. Rühl: "[…] for unilateralism, private law — like public law — is an expression of state sovereignty. It effectuates state interests and fulfils social functions."[30] From this perspective, conflicts between the laws of different states are viewed as conflicts between competing sovereign interests. Accordingly, the first step in resolving such conflicts is to determine whether, and under what circumstances, the substantive rules at issue — given their nature and legislative purpose — are intended to apply to the situation in question.

The importance of the unilateral method is revealed primarily in relation to foreign laws, since domestic laws are applied in a natural manner.

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[28] More on the unilateral method in private international law see: G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia…*; S. Francq, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham 2017, pp. 1779 et seq.; S. Francq, *Public Policy and Overriding Mandatory Rules as Mirrors of the EU System of Thought and Integration: On the 'Europeanness' of Exceptions and Oddities*, in: *How European is European Private International Law*, eds. J. von Hein, E.-M. Kieninger, G. Rühl, Intersentia, Cambridge 2019; J. Basedow, *EU Private Law: Anatomy of a Growing Legal Order*, Intersentia, Cambridge 2021, pp. 659 et seq.; J.-J. Kuipers, *EU Law and Private International Law: The Interrelationship in Contractual Obligations*, Martinus Nijhoff Publishers 2011, pp. 178, 218 et seq., 318 et seq.

[29] Some speak here of the "rule selection techniques," as differentiated from multilateral method, which is referred to as the "jurisdiction-selecting method." See J. Fawcett, J. Carruthers, P. North, *Cheshire, North & Fawcett: Private International Law*, Oxford University Press (OUP) 2008, p. 25.

[30] G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia…*

The forum law governs the dispute unless a party invokes the potential relevance of the law of another state and provides evidence that this foreign law has an interest in governing the matter. No conflict-of-laws issue arises until it becomes apparent that the legal issue in question also falls within the scope of regulatory "interest" of a specific foreign legal system. A conflict-of-law problem materializes only when a foreign law asserts a legitimate claim to apply — namely, when it serves to protect different interests, reasons, or values that merit recognition and furtherance in the given context.[31]

The unilateral method has manifested in various forms over the centuries, often concealed beneath the façade of different theories and conceptual frameworks. These are commonly grouped under the collective designation of the "statutory school," which dominated the development of private international law from the 12th to the 19th century — up to the emergence of von Savigny's methodology.[32] As early as the 12th century, Aldricus argued that the conflict between competing laws should be decided by choosing a rule that warrants a better solution.[33] Since the specific conflict resolution depended exclusively on an analysis of the substantive content of the laws in question, the Statutists did not articulate defined conflict-of-laws rules. Instead, the content, nature, and purpose of the relevant substantive provisions determined their applicability to the case at hand.[34]

b) American unilateralism

In the modern era, the unilateral methodology gained widespread prominence primarily in the United States.[35] Since the mid-twentieth century,

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[31] M. A. Zachariasiewicz, *Metoda unilateralna w prawie prywatnym międzynarodowym. Uwagi na marginesie orzeczenia TSUE w sprawie C-135/15 Republika Grecji przeciwko Grigoriosowi Nikiforidisowi*, "Problemy Prawa Prywatnego Międzynarodowego" 2021, vol. 29, p. 128.

[32] M. Sośniak, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, pp. 38 et seq.; G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia*…

[33] P. Franzina, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia*…, p. 48 (recalling that Aldricus suggested application of the "more effective" and "more useful" law); M. Pazdan, *Prawo prywatne międzynarodowe*, Wolters Kluwer, Warszawa 2017, p. 35 (noting that Aldricus argued for application of the more appropriate law under the circumstances of the given case).

[34] See in more detail: M. A. Zachariasiewicz, *Metoda unilateralna*…, pp. 127 et seq.

[35] G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia*…

the conflict-of-laws in US has witnessed intellectual movement that came to be known as the American "choice-of-law revolution."[36] The foundations of private international were challenged and eventually demolished.[37] The system enshrined in the Restatement (First) of the Conflict of Laws (1934), based on the prior existing and operating, neutral choice-of-law rules, was rejected.[38] At the time, American scholars widely regarded this system as mechanical, arbitrary, and incapable of delivering just outcomes.[39] A number of different theories and concepts were proposed instead. Among the most influential was Brainerd Currie's theory

[36] L. Silberman, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia…*, p. 66 et seq.; S. Symeonides, *The American Choice-of-Law Revolution in the Courts: Past, Present and Future*, Martinus Nijhoff, 2016; S. C. Symeonides, *The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning,* "U. Ill. L. Rev." 2015, No. 2, pp. 1849 et seq; P. Hay, *On the Road*, p. 207. The American modern methodologies in the conflict of laws constituted also the object of interest to Polish doctrine: M. A. Zachariasiewicz, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, pp. 61 et seq.; M. A. Zachariasiewicz, *Nowe prądy w kolizjonistyce Stanów Zjednoczonych i ich wpływ na naukę eurpejską*, "Kwartalnik Prawa Prywatnego" 1995, No. 2; pp. 181 et seq.; M. A. Zachariasiewicz, *Nowe tendencje w prawie prywatnym międzynarodowym Stanów Zjednoczonych Ameryki: ze szczególnym uwzględnieniem stosunków umownych,* "Studia Prawnicze" 1980, No. 1—2, pp. 169 et seq.; M. Sokołowski, *Współczesne koncepcje amerykańskie w dziedzinie wyboru prawa właściwego na przykładzie zobowiązań deliktowych (przegląd doktryny i orzecznictwa)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1980, vol. 42, No. 3, pp. 83 et seq.; S. Sołtysiński, *Lex maximi in hac causa momenti: oczekiwana rewolucja czy niepożądany przyczynek w teorii prawa kolizyjnego?*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1974, No. 3, pp. 267 et seq.; T. Pajor, *Metoda analizy interesów w amerykańskim prawie kolizyjnym odpowiedzialności deliktowej*, "Studia Prawno-Ekonomiczne" 1987, vol. 39, pp. 91 et seq.; J. Boroń, M. Dąbroś, Z. Dziadek, *Metoda analizy funkcjonalnej — równoprawna metoda kolizyjna?*, "Problemy Prawa Prywatnego Międzynarodowego" 2014, vol. 15, pp. 71 et seq.

[37] L. Silberman, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia…*, p. 66; R. C. Bogue, C. M. Vazquez, *Choice of Law as Statutory Interpretation: The Rise and Decline of Governmental Interest Analysis*, 2024, https://www.ssrn.com [accessed: 1.01.2025], p. 3.

[38] As famously denounced by B. Currie "We would be better off without choice-of-law rules." See B. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, "Duke LJ" 1959, p. 177.

[39] Most harsh criticism came, of course, from B. Currie himself. See e.g. B. Currie, *The Disinterested Third State,* "Law and Contemporary Problems" 1963, vol. 28, p. 754 (noting that "no responsible scholar offers to defend it"). Other prominent critics of the Restatement (First) included W. W. Cook and D. Cavers. Cf. in modern scholarly writings e.g. S. C. Symeonides, *The Choice-of-Law…*, p. 1850; K. Roosevelt III, B. R. Jones, *The Draft Restatement (Third) of Conflict Laws: A Response to Brilmayer & Listwa,* "Yale LJF" 2018, vol. 128, p. 296; H. Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution,* "Stanford Law Review" 2007, vol. 60, p. 247 et seq.

of governmental interest analysis.[40] Currie argued that courts should determine the policy objectives underlying a specific substantive rule of domestic law in order to assess whether that law has an "interest" in being applied. In his view, all laws function as instruments of social, administrative, or economic regulation by the state.[41] For Currie, the differences between laws of states mean that there is a conflict between interests among states.[42] The "true goal of choice of law is [thus] implementation of a state's governmental interests."[43] According to Currie, where only one state's policy is implicated, the case involves a false conflict, and the *lex fori* should apply.[44] A true conflict arises only where multiple states have a legitimate interest in the matter — in which case, Currie proposed that the court should resolve the conflict in favor of the forum state.[45] Foreign law, under this theory, could only apply if the forum was disinterested.[46]

Currie's writings were extremely influential.[47] His views dominated American conflict-of-laws for decades.[48] Other scholars embraced his school of thought and developed different theories, which, nevertheless, have built on the same premise of unilateralism. This include in particular: W. W. Cook's "local law theory," D. Cavers' "principles of preference," R. Leflar's "choice-influencing considerations," A. von Mehren's and D. Trautman's "functional approach," A. Ehrenzweig's "*lex-fori* approach," and the "comparative impairment" developed by W. Baxter and Tobriner.[49] These theories each added a different angle. In particular, however, it came to be accepted that *lex fori* does not automatically apply in every true conflict situation. The interests of the forum and a competing

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[40] See B. Currie, *The Constitution and the the Choice of Law: Governmental Interests and the Judicial Function,* "U. Chi. L. Rev." 1958, vol. 26; B. Currie, *Notes on Methods*…; B. Currie, *The Disinterested*…, and other writings collected in B. Currie, *Essays on the Conflict of Laws* (1963). In the modern literature see e.g. S. C. Symeonides, *The Choice-of-Law*…, p. 1851.

[41] Cf. S. C. Symeonides, *The Choice-of-Law*…, p. 1851.

[42] B. Currie, *Notes on Methods*…, p. 173.

[43] L. Brilmayer, D. B. Listwa, *A Common Law of Choice of Law*, "Fordham L. Rev." 2020, vol. 89, p. 891.

[44] B. Currie, *Notes on Methods*…, p. 176.

[45] See e.g. L. Silberman, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia*…, pp. 66—67.

[46] B. Currie, *The Constitution*…, p. 10; B. Currie, *Notes on Methods*, p. 178; P. Hay, *On the Road*, p. 207.

[47] G. Cuniberti, *Conflict of laws*…, p. 31.

[48] S. C. Symeonides, *The Choice-of-Law*…, p. 1850.

[49] In the Polish literature see: M. A. Zachariasiewicz, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, p. 61.

foreign state must be weighted, and the question of their priority must be decided.

When conceptualizing modern interest analysis methodologies, it is often observed that they all proceed in two steps.[50] In the first, the study of the policies and interests of states behind the laws serves to determine which laws are interested in applying to the facts of the case and to eliminate "false conflicts." A conflict is considered false if only one state has an interest in applying its law, or if the laws of multiple states pursue the same underlying values or policy objectives. A "true conflict" arises when the laws of two or more jurisdictions, which promote different values, rationales, or goals, each assert a legitimate claim to govern the dispute. In the second step — which only takes place in cases of a true conflict — the aim is to resolve the conflict by finding an appropriate, better legal rule (a better solution). A third category may also be identified, namely the "negative conflict" or "no-interest" case. This occurs when the plaintiff's law (i.e., the legislation it invokes) favors the defendant, while the defendant's law — is more favorable to the plaintiff. In such cases, neither state has an interest in applying its law: the plaintiff's state has no interest in extending protection to the defendant, and the defendant's state has no interest in conferring greater rights on the plaintiff than it would under its own legal system.[51]

The many theories and concepts that were developed in the US in the second half of XX century usually go under the name of the "modern approaches."[52] They are sometimes also referred to as the "political school of private international law."[53] A defining characteristic of these approaches is their rejection of fixed, neutral choice-of-law rules in favor of a case-specific analysis of the interests, values, and policy objectives underlying the competing domestic legal provisions. The individualized inquiry enables the identification of the territorial scope of the relevant laws and their connection to the specific issue at hand. These methodologies emphasize the particular, rather than the typical, factual context of the dispute, and focus on the concrete legal issue requiring resolution,

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[50] See e.g. G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia…*; K. Roosevelt III, B. R. Jones, *The Draft Restatement*, p. 302. See also, albeit with a critical note: L. Brilmayer, D. B. Listwa, *A Theory-Less Restatement for Conflict of Laws*, Transnational Litigation Blog, https://tlblog.org/a-theory-less-restatement-for-conflict-of-laws [accessed: 1.01.2025]; M. A. Zachariasiewicz, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*..., p. 63.

[51] J. Fawcett, J. Carruthers, P. North, *Cheshire, North & Fawcett 2008*…, p. 29.

[52] K. Roosevelt III, B. R. Jones, *The Draft Restatement*…, p. 302.

[53] G. Rühl, *Unilateralism (PIL)*, in: J. Basedow, K. J. Hopt, R. Zimmermann, *The Max Planck Encyclopedia…*

rather than on the legal relationship as a whole.[54] What unites the various strands of modern approaches is a shared underlying rationale: the pursuit of substantive justice in individual cases, rather than the resolution of conflict-of-laws issues through a formal or neutral framework.[55] This variety of "modern" theories and approaches continues as a lasting legacy of the American choice-of-law revolution and influences judicial practice, particularly in the domains of contract and tort law.

c) Restatement (Second) of Conflict of Laws

The criticism of the Restatement (First) and the intellectual ferment that dominated the post-WWII era, heavily influenced the creation of the Restatement (Second) of Conflict of Laws (1971).[56] The work led by W. Reese (as the chief rapporteur) ended up with the set of rules and principles embodied in 3 volumes that clearly intended to break up with the vested rights methodology and rigidity of the Restatement (First). This is not to say that the Restatement (Second) surrendered entirely to the governmental interest and its progenies. Rather, Restatement (Second) is seen as constituting a "mix of things,"[57] a "conscious compromise and synthesis between the old and the new schools, as well as among the various branches of the new schools."[58] It does contain — although not for all issues — pre-formulated choice-of-law rules designed according to the multilateral methodology, either in the form of the black-letter rules or presumptive rules (rules instructing the courts to apply certain law, but allowing the presumptions to be overridden, if in a particular case, another law has a more significant relationship), or even weaker "pointers," which merely point to a direction of the likely applicable law.[59] At the same time the whole Restatement (Second) is permeated by the "most significant relationship" formula that came to

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[54] P. Hay, *On the Road*…, p. 209; M. A. Zachariasiewicz, *Metoda unilateralna*…, p. 128; M. A. Zachariasiewicz, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, p. 63.

[55] P. Hay, *European*…, p. 2055.

[56] The American Law Institute, Restatement (Second) of Conflict of Laws, St. Paul, ALI Publishers, 1971. See https://www.ali.org/publications/restatement-law-second/conflict-laws [accessed: 1.01.2025].

[57] P. Hay, *On the Road*…, p. 209.

[58] S. Symeonides, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia*…, p. 1549.

[59] Ibidem, p. 1550.

be understood and applied in very different ways.[60] It is thought that a court deciding the case, may — in virtually all situations — choose to apply the law of the state with which it has — with regard to the particular issue in question — the most significant relationship.[61] This is not, however — as a continental lawyer might think — understood merely as a process of weighting territorial links of the case at hand (and the specific issue in question) with a given state. The application of the most significant relationship formula is — same as any conflict-of-law decision under the Restatement (Second) — penetrated by the general choice-of-law principles expressed in the famous section 6. Under the Restatement (Second), determining the law most significantly related with the issue at hand, might well mean to apply the law that provides the best solution in terms of substantive justice.[62]

Section 6 constitutes, as often underlined, the cornerstone of the Restatement (Second), having both a guiding, as well as validating function in any choice-of-law analysis.[63] It provides a "home for virtually all of the approaches debated in the years prior to the Second Restatement."[64] Section 6(2) lists, in a non-exclusive fashion,[65] factors that courts should consider in making the choice-of-law decision. These are: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[66] Thus, while section 6 expresses some considerations familiar to Savignian multilateral methodology and universalism (letters

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[60] P. Hay, *On the Road*…, p. 209.

[61] S. Symeonides, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia*…, p. 1550.

[62] P. Hay, *European*…, p. 2060.

[63] S. Symeonides, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia*…, p. 1549—1550; G. Cuniberti, *Conflict of laws*…, p. 41. To a similar effect: K. Roosevelt III, B. R. Jones, *The Draft Restatement*, p. 299, contending that "Section 6 analysis controls essentially every judicial application of the Restatement (Second)".

[64] P. Hay, *On the Road*…, p. 209. See also P. Hay, *European*…, p. 2059.

[65] Restatement (Second) of Conflict of Laws (as published by ALI Publishers), Vol. I, comment c), p. 12.

[66] Although this last principle is downplayed by the drafters of the Restatement (Second) themselves, since the comment notes that: "it is obviously of greater importance [than the ease — M. Z. & M. A. Z.] that choice-of-law rules lead to desirable results". See Restatement (Second) of Conflict of Laws (as published by ALI Publishers), Vol. I, comment j), p. 16.

a, f and g in particular), it also clearly makes room for unilateral method in the form of interest analysis of the competing policies (letters b, c and e). More specifically and by way of example — when letter a) refers to the "needs of the interstate and international systems," it denounces a guiding value that "the most important function of choice-of-law rules is to make the interstate and international systems work well"[67] and that they "should seek to further harmonious relations between states and to facilitate commercial intercourse between them."[68] We have no doubt that the same overriding value underscores the multilateral method in the conflict-of-laws as practiced in Europe.

Letters (b), (c), and (e), by contrast, invite — and indeed oblige — the court to examine the policies underlying the relevant substantive laws of the forum and of other interested states, and to weigh those policies in making a choice-of-law determination. It is evident that this inquiry is grounded in a unilateral methodology; that is, the court considers the potentially applicable substantive laws and assesses whether, in light of their wording and purpose, they express an interest in governing the issue at hand. What remains uncertain, however, is the extent to which this unilateral approach can override the results produced by the multilateral methodology reflected in the specific provisions of the Restatement, as well as in other principles articulated in Section 6 — particularly those found in letters (a), (f), and (g). Consequently, the court retains considerable discretion in prioritizing various considerations, thereby shaping the outcome of the conflict-of-laws analysis. For this reason, Section 6 — and the Restatement (Second) more broadly — is often characterized not as a set of rules, but rather as a methodological "approach" to resolving choice-of-law questions.[69]

All that can be asserted in this regard is that the significance of the principles set forth in Section 6 depends on the particular area of law and the extent to which the specific provisions of the Restatement articulate a clear and determinate choice-of-law rule. Where such precise rules exist — as, for example, in the area of property law — Section 6 plays a more limited role, serving primarily to provide an underlying rationale for the prescribed solution and, potentially, as an escape mechanism.

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[67] This universalistic function proclaimed by Restatement (Second) is considered to stand in contrast to Currie's ethnocentric attitude. See P. Hay, P. Borches, S. Symeonides, *Conflict of Laws*, West 2010, p. 63.

[68] Restatement (Second) of Conflict of Laws (as published by ALI Publishers), vol. I, comment d), p. 13.

[69] K. Roosevelt III, B. R. Jones, *The Draft Restatement*, p. 296 (citing W. Reese, *Choice of Law: Rules or Approach*, Cornell L. Rev. 1972, vol. 57, p. 315); S. Symeonides, in: J. Basedow, G. Rühl, F. Ferrari, P. A. De Miguel Asensio, *Encyclopedia…*, p. 1549.

In other areas, such as tort and contract law, the relevant provisions of the Restatement are formulated in more general terms, relying to a considerable extent on the principle of the most significant relationship. In these contexts, Section 6 assumes a central role in the adjudicative process. As noted in the commentary, "courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them."[70] The extensive body of case law developed by American courts since the adoption of the Restatement (Second) has, of course, provided a wealth of concrete applications and interpretative guidance regarding the resolution of specific choice-of-law issues.[71]

The Restatement (Second) has been the subject of considerable, and at times intense, scholarly criticism.[72] Nevertheless, it remains the most widely followed approach to resolving conflict-of-laws issues in the United States, currently applied in nearly half of the states.[73]

d) Criticism of the American unilateralism

The American modern approaches to conflict-of-laws, including Currie's governmental interest analysis and its numerous conceptual offspring, have been the subject of substantial criticism, both in the United States itself,[74] as well as elsewhere.[75] Somewhat simplifying the matter, that criticism may be summarized as follows.

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[70] Restatement (Second) of Conflict of Laws (as published by ALI Publishers), Vol. I, comment c), p. 13.

[71] See especially the surveys of American jurisprudence prepared for more than 40 years by S. Symeonides, published annually in the American Journal of Comparative Law and available also at https://www.ssrn.com [accessed: 1.01.2025].

[72] See e.g. a somewhat famous quote from R. J. Weintraub, who referred to Restatement (Second) as "an odd mixture of territorial gibberish and functional analysis". R. J. Weintraub, *At Least, to Do No Harm: Does the Second Restatement of Conflicts Meet the Hippocratic Standard*, "Md. L. Rev." 1997, vol. 56, p. 1315.

[73] See comparative tables prepared by S. C. Symeonides, *The Choice-of-Law…*, pp. 1872 et seq. Cf. R. C. Bogue, C. M. Vazquez, *Choice of Law…*, pp. 1 et seq.; G. Cuniberti, *Conflict of laws…*, p. 40.

[74] F. K. Juenger, *A Third Conflicts Restatement*, "Indiana Law Journal" 2000, vol. 75, pp. 403 et seq.; H. Y. Levin, *What Do We…*, pp. 247 et seq.; L. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, "Michigan Law Review" 1980, vol. 78, p. 392; L. Brilmayer, *Governmental Interest Analysis: A House Without Foundations,* "Ohio St. LJ" 1985, vol. 46, pp. 459 et seq.; H. L. Korn, *The Choice-of-Law Revolution: A Critique*, "Colum. L. Rev." 1983, vol. 83, p. 772.

[75] See e.g. J. Fawcett, J. Carruthers, P. North, *Cheshire, North & Fawcett 2008…*, pp. 29 et seq.; D. Evrigenis, *Interest Analysis: A Continental Perspective*, "Ohio St. LJ" 1985, vol. 46, p. 525; G. Kegel, *Paternal…*, pp. 615 et seq.

First, particularly from a European perspective, where the multilateral methodology is still considered the core of the private international law, the American rejection of equal treatment of legal systems and the resulting departure from a neutral conflict-of-laws approach, is considered a major drawback. Unilateralism — as American proponents of the interest analysis themselves admit — leads to favoring the application of *lex fori*.[76] In fact, for Currie and many others, to apply *lex fori* has been a preferred solution in most instances of both false and true conflicts, with foreign law applying only exceptionally. A prominent critic of unilateral methodologies, F. K. Juenger, famously remarked that the choice-of-law revolution had effectively reduced the entire U.S. conflict-of-laws system to one principle: "Thou shalt not apply foreign law."[77] Consequently, the burden of litigation often shifts to questions of jurisdiction, encouraging forum shopping. The international harmony of decision making cannot be achieved if each state focuses on furthering its own polices, and only exceptionally takes into account interests of other states. Unilateralism, resulting in a consistent *lex fori* bias, is inherently parochial — both in its foundational philosophy and in the outcomes it produces.

Second, significant criticism has been directed at the unilateral methodology's inability to reliably identify the policies underlying domestic substantive laws and, consequently, to determine their intended territorial scope. As noted by L. Brilmayer and D. Listwa: "no amount of interpretation could find choice-of-law meaning in the typical empty statutory record."[78] In most cases, legislators remain entirely silent on the spatial reach of the laws they enact. This silence is not only due to the absence of explicit language addressing territorial application, but also because it is virtually impossible to discern any underlying legislative intent concerning the cross-border operation of a given law. Legislative drafters typically have purely domestic scenarios in view, and thus fail to contemplate the international implications of their enactments. As a result, any effort to infer territorial scope in such cases necessarily involves a highly speculative and creative exercise.

Third, it is frequently emphasized that the criteria used to evaluate conflicting policies and interests are articulated in vague and often

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[76] D. Evrigenis, *Interest Analysis: A Continental Perspective*…, p. 526.

[77] F. K. Juenger, *A Third*…, p. 411.

[78] L. Brilmayer, D. B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict Laws: One Step Forward and Two Steps Back?*, "Yale LJF" 2018, vol. 128, p. 278. See also L. Brilmayer, *Interest analysis and the myth of legislative intent*…, pp. 391 et seq.

contradictory terms.[79] As a result, they fail to yield effective — let alone predictable — conflict-of-laws solutions. This deficiency gives rise to arbitrary and inconsistent judicial decisions, making the resulting uncertainty a significant shortcoming of the so-called conflict-of-laws revolution.[80] Proponents of interest analysis, who argue that the evaluative criteria must remain general and flexible to allow for a conscientious assessment of the underlying rationales and interests in each factual scenario, are met with the counterargument that American case law has yet to demonstrate a consistent willingness or capacity to undertake such nuanced analyses.[81] Consequently, the unilateral methodology proves inadequate as a practical tool for resolving conflict-of-laws issues.[82]

Finally, the American unilateralism focuses primarily on the policies of states, while largely disregarding — at least on a methodological level — the interests and legitimate expectations of the parties with respect to the application of a particular law. This approach appears unjustified, particularly in disputes between private parties — whether individuals or corporations — where the primary role of the court is to resolve conflicts between competing private interests, rather than to advance state policy objectives. This is subject, of course, to the important caveat that in certain instances, a compelling public interest may indeed arise and justifiably influence the adjudication of a private law relationship.

The criticism — particularly from European scholars — of American unilateralism does not appear entirely accurate or fair. Much of the disapproval found in European doctrine stem from the fact that the two conflict-of-laws methods — interest analysis and Savigny's neutral localization — are considered against the same theoretical background, despite being grounded in fundamentally opposing conceptual premises. Evaluating one method through the analytical lens and assumptions of the other cannot yield intellectually satisfactory results. The critics of the interest analysis also tend to overlook the fact that U.S. courts use the method of valuing interests and policies predominantly with regard to legal regulations of an imperative (mandatory) nature that protect important interests in the field of private law,[83] or state policies operating

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[79] F. K. Juenger, *A Third…*, pp. 403 et seq.

[80] H. Y. Levin, *What Do We…*, p. 249.

[81] J. Fawcett, J. Carruthers, P. North, *Cheshire, North & Fawcett 2008…*, p. 30

[82] H. Y. Levin, *What Do We…*, p. 250, who observes that "Revolution is simply too removed from the practicalities of actual litigation and too theoretical to serve as a touchstone for the development of the law".

[83] Consider, e.g. the example of the so called "guest statutes," which were central to many conflict-of-law disputes in the 2nd half of XX century before U.S. courts. See e.g. a classic cases of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), or *Tooker v. Lopez*,

at the intersection of public and private law[84] (to put it in European categories[85]). Indeed, in such cases, legislators and courts in Europe are often also inclined to apply (or at least take into account) regulations of such mandatory nature, regardless of the otherwise law applicable to a given legal relationship (see below ch. 4(b)).

American unilateralism must be evaluated in light of the function it performs within the federal structure and common law foundations of the United States legal system. This function is shaped by several factors, including the interaction between federal and state law, the often indistinct boundary between private and public law, the reliance on only those legal rules that are invoked and sufficiently proven by the parties in litigation, the emphasis on the specific legal issue in dispute rather than the legal relationship in its entirety, and the conceptualization of conflict of laws primarily as a clash between mandatory legal provisions. The legal systems of the individual U.S. states, though formally distinct, originate from a shared core and have developed within a framework of mutual interdependence. When U.S. law is viewed as a broadly unified system, with divergence limited to select regulatory provisions, it becomes clear why conflict-of-laws analysis often concerns particular rules rather than entire legal systems, why domestic law — understood as a jurisdiction's own version of the common law — is typically favored, and why the methodological focus lies in determining how that law should be

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24 N.Y.2d 569 (1969). "Guest statutes" are laws that intend to protect the driver against claims raised by a guest passenger in case of harm caused to the latter in an accident. This is because guest statutes generally create stricter standards for a guest passenger to sue a driver for injuries caused by negligence. They require that either gross negligence, recklessness, or intentional misconduct is shown for the passenger to recover damages. See e.g. F. M. Dunbaugh III, *Negligence-Guest Statute-Right of Recovery,* "Miami LQ" 1956, vol. 11, p. 150. The purpose behind guest statutes was not only to protect the individual driver against suits by a guest passenger but — more generally and with a wider social goal in mind — also to prevent insurance fraud. See (in context of interspousal torts) e.g. E. Katz, *How Automobile Accidents Stalled the Development of Interspousal Liability,* "Virginia Law Review" 2008, vol. 94, pp. 1245 et seq.

[84] Cf. e.g. *Bernhard v. Harrah's Club*, Cal. Sup. Ct., 16 Cal. 3d 313, 546 P.2d 719 (1976). A road accident was caused in California by a California resident who intoxicated himself in a Nevada based club. The victim, who was also a California resident, sued for damages under California law, which provided for the liability of the owners of clubs in such situations. The court applied Californian law, deciding that its interest in guaranteeing safety on public roads prevails over Nevada's interest in protection of clubs owners.

[85] Both American jurisprudence, as well as doctrine, however, pay little attention to a distinction, which is considered important for European doctrinal categorizations, i.e. between private and public law. See e.g. G. A. Bermann, *Public Law in the Conflict of Laws*, "Am. J. Comp. L. Supp." 1986, vol. 34, p. 157.

applied, in a restrained manner, to situations involving foreign elements. For similar reasons, it is not uncommon to refer not to the "application" of foreign law, but rather to "taking it into account" or "tolerating" it, particularly in the context of recognizing acquired rights or legal relationships established under foreign legal systems.

e) Draft Restatement (Third) of Conflict of Laws

Nearly half a century after the publication of the Restatement (Second), the American Law Institute initiated a new project aimed at preparing a revised Restatement for the conflict of laws. The official ALI website states that the "project reexamines the increasingly important subject of conflict of laws in light of significant legal developments in the field since the influential Restatement Second was published in 1971."[86] As explained by the Chief Reporter, Kermit Roosevelt III, the principal objective is to "[…] bring greater predictability to choice of law by providing more determinate rules, rather than open-ended balancing."[87] The Third Restatement does not intend, however, to start from the scratch, nor to constitute yet another revolution in the American choice of law. Rather, it is conceived as a continuation of the Restatement (Second), which, particularly in the areas of contracts and torts, provided relatively imprecise rules and anticipated supplementation through the development of case law.[88] Thus, the drafters of the Restatement (Third) now hope to fulfill that vision by examining the existing case law and shaping detailed rules[89] in all major areas of the conflict of laws. Although the

[86] See: https://www.ali.org/project/conflict-laws [accessed: 1.01.2025]. The website contains basic information on the status of the project. The access to drafts of the rules and accompanying commentary is available for a fee at: https://www.ali.org/publications/restatement-law-third/conflict-laws-3d [accessed: 1.01.2025]. Recent development and news relating to the topic can also be traced at: https://www.thealiadviser.org/conflict-of-laws/ [accessed: 1.01.2025]. The various parts of the Draft Restatement are presently at different stages of development (with some drafts not yet available for public and others approved by ALI Council, albeit still as tentative drafts). The Restatement (Third) is still very much work in progress, and so the references made in the present article to the Draft's rules or commentary are made to different stages of work. To state the obvious — the finally adopted rules may differ from what we refer to in the present article.

[87] K. Roosevelt III, B. Jones, *What a Third Restatement of Conflict of Laws Can Do*, "American Journal of International Law Unbound" 2016, vol. 110, p. 141.

[88] See W. L. Reese, *Conflict of Laws and the Restatement Second*, "Law and Contemporary Problems" 1963, vol. 28, No. 4, p. 699.

[89] K. Roosevelt III, B. R. Jones, *The Draft Restatement…*, p. 298.

published drafts have prompted debate and some criticism,[90] particularly concerning their methodological foundations (as discussed below) — it is evident, as noted by Peter Hay, that the Draft Restatement is "great deal more specific [than the Restatement (Second)] in helping the courts choose an applicable law in many other areas, especially, for instance, in tort and contract."[91]

The Third Restatement is still a work in progress. It remains to be seen what eventually will come out of this immense endeavor. In the present article we do not intend to comprehensively discuss rules proposed in the new Draft Restatement. Rather, we aim to take on the methodology underlying the proposed solutions and assess how the project fits into a more wider panorama of changes in the modern conflict of laws.

While the project is, of course, much about specific rules to be applied by the courts, the drafters of the Restatement (Third) are not shy in explaining the methodology of the conflict of law analysis. The goal is, they explain, "to describe what courts are doing in resolving a choice-of-law question and to instruct courts on how to use this Restatement."[92] The Draft thus contains an express provision defining the nature of the choice of law process. Section 5.01 states:

> Choice-of-law analysis is a two-step process that: (i) identifies the laws that are relevant to the determination of the rights and liabilities of persons involved in matters having connection to more than one state; and, if relevant laws conflict, (ii) selects the most appropriate relevant law to govern particular issues in such matters.

The Draft, as explicitly acknowledged by its drafters[93] and noted by critics,[94] embraces the modern American approaches to the choice of law, as practiced by courts in the majority of the US states. It is evident that the Restatement (Third) — at least in its conceptual account of the

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[90] See: L. Brilmayer, D. B. Listwa, *Continuity*..., pp. 266 et seq.; L. Brilmayer, D. B. Listwa, *A Theory-Less Restatement for Conflict of Laws*...; L. Brilmayer, *What I Like Most About the Restatement (Second) of Conflicts, and Why It Should not Be Thrown out With the Bathwater*, "American Journal of International Law Unbound" 2016, vol. 110, pp. 144 et seq.

[91] P. Hay, *On the Road*..., p. 212.

[92] Reporters' Memorandum Restatement of the Law Third, Conflict Of Laws, Tentative Draft No. 3, p. xv.

[93] Ibidem, p. xvi; see also K. Roosevelt III, B. R. Jones, *The Draft Restatement*..., p. 302.

[94] L. Brilmayer, D. B. Listwa, *Continuity*..., p. 267 (speaking of a "major theoretical realignment in favor of a school of thought once generally known as governmental interest analysis" and the modern choice of law revolution to which the Draft "surrenders enthusiastically"); L. Brilmayer, D. B. Listwa, *A Common Law of Choice of Law*..., p. 891.

choice-of-law process — remains within the framework of unilateralism. Consistent with the unilateralist tradition in American conflict-of-laws doctrine, it formulates the choice-of-law process as a two-step procedure: first, determining whether a conflict exists; and second, if so, selecting the most appropriate law to govern the issue. Under the first step, a conflict is identified by "deciding whether the facts of the case bring an issue within the scope of more than one state's law."[95] Accordingly, the judge must examine the substantive provisions of the potentially relevant laws to determine whether they assert applicability to the issue at hand.[96] This is a matter of discovering the territorial scope of application of these internal laws[97] by interpreting the relevant rules in line with ordinary methods of interpreting statutes or precedents. In other words, the judge considers potentially relevant laws and — in the process of interpretation of these laws — confirms whether they are interested in applying to the facts at hand (whether they reach the facts), taking into account polices behind these laws in particular. If only one law asserts a legitimate claim to apply, no conflict arises, and the choice-of-law inquiry concludes at that point.[98]

According to the drafters of the Draft Restatement, the foregoing represents the central premise of all modern approaches grounded in interest analysis, as originally formulated by Currie[99] and subsequently advanced by numerous U.S. conflict-of-laws scholars. This is not merely a theoretical construct devised in abstraction, but rather a reflection of judicial practice as observed in case law. According to the drafters, the courts "consistently interpret statutes to decide whether they reach the facts of a particular multistate case, treating this as a threshold question before undertaking a choice-of-law analysis to select a particular

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[95] Reporters' Memorandum Restatement of the Law Third, Conflict Of Laws, Tentative Draft No. 3, p. xvi.

[96] As explained by L. Brilmayer, D. B. Listwa, *Continuity…*, p. 268: "The 'two-step' theory is rooted in the idea that every choice-of-law analysis must begin by determining the scope of the state statutes in question."

[97] The notion of "internal law" obviously includes both statutory and judge made law, provided one evaluates a law of a common law jurisdiction. See Preliminary Draft No. 7, §1.03, comment a. If the potentially relevant law would be that of a civil law jurisdiction than of course case law could only have an interpretative value.

[98] In the words of the authors of the Draft: "If a state law does not reach certain facts, it is not relevant and is not a candidate for selection through choice-of-law analysis. If only one law is relevant, there is no choice-of-law issue and no need to consult the law-selecting rules of this Restatement." Restatement (Third): Conflict of Laws Tentative Draft No. 3, Ch. 5: Choice of law, §5.02 Comment, p. 18.

[99] Reporters' Memorandum Restatement of the Law Third, Conflict Of Laws, Tentative Draft No. 3, p. xvi.

law."[100] The commentary to the Draft provides numerous case law examples to support this assessment.[101]

If more than one law is interested, the analysis proceeds to the second step: deciding which of the relevant laws is to be given priority. To give priority in this context means to select the most appropriate law from among the competing candidates and apply it to the case at hand. Given the non-binding nature of the Restatement, it is quite natural that the question of priority must first be decided in accordance with the conflict-of-law rules of the forum. To that effect, §5.02(b) clarifies that: "A court, subject to constitutional limitations, will follow a local statute that identifies the law to be given priority." The commentary to the Draft further explains that §5.02(b), in addressing priority, concerns statutes distinct from those considered at the first step of the analysis — the latter dealing with the scope of their own application. Interestingly, if there exist forum rules that "identify the law to be given priority," a "determination of priority directs the state's courts to skip the analysis [choice-of-law analysis] and select one state's law rather than another's."[102] Such statutes, explain the drafters*:* "could be called overriding rules because they override the normal choice-of-law analysis."[103]

In the American context, such overriding rules often take the form of narrowly tailored choice-of-law statutes enacted at the state level. However, the drafters also recognize that broader codifications of choice-of-law principles may serve a similar function, citing the examples of Oregon and Louisiana. To non-American lawyers — so is thought — this looks like giving precedence to multilateral choice-of-law rules of the forum. The regular unilateral methodology of investigating scope of application of the potentially relevant substantive laws is suspended and the conflict-of-law question is dealt with from the point of view of the forum. This is somewhat surprising, given the importance of the deference of the Draft Restatement (Third) paid to each state's own determination of the scope of its internal laws. Indeed, the drafters themselves emphasize that "states are authoritative with respect to the scope of their laws in domestic cases, and the modern understanding of choice of law suggests that they are likewise authoritative in the multistate context."[104] If, however, each state is regarded as having the final word on the reach

[100] Ibidem.

[101] Restatement (Third): Conflict of Laws Tentative Draft No. 3, Ch. 5: Choice of law, §5.01 Comment, p. 11.

[102] Restatement (Third): Conflict of Laws Tentative Draft No. 3, Ch. 5: Choice of law, §5.02 Comment, p. 19.

[103] Ibidem.

[104] K. Roosevelt III, B. R. Jones, *The Draft Restatement*…, p. 304.

of its own laws, one might reasonably question why the conflict-of-law rules of the forum should take precedence at all.

Where no local priority rules are available in the forum, §5.02(c) directs the court to "the rules of this Restatement to identify the law to be given priority." The commentary to the Draft explains that there are two sets of general considerations that are relevant to the determination of the priority.[105] First is what the authors call "right answer" considerations. The central idea here is that the determination of the applicable law should be based on "sensible, rather than arbitrary" answers. Thus, in deciding the priority the court should take in account "the policies underlying the relevant laws, the connections between the relevant states and the particular issue under consideration, and the reasonable expectations of the parties."[106]

The second type of considerations are called "systemic." They include, in particular, factors such as certainty, predictability, uniformity, and ease of application.[107]

The Draft Restatement does not, of course, confine the determination of priority to general principles alone. After all, a central aim of the project is to enhance the specificity and predictability of conflict-of-laws doctrine in the United States. Accordingly, the Draft sets forth a series of detailed provisions in §§6 et seq., addressing the question of priority across various substantive areas of private law — §6 for torts, §7 for property, §8 for contracts, and so forth. These specific rules are designed to promote "right answer" outcomes and support "systemic" considerations, thereby contributing to the development of a coherent and predictable body of conflict-of-laws rules.[108]

The foundation of unilateral conflict-of-laws methodologies — particularly interest analysis — is the notion that the task of a judge sitting in the forum is to determine which substantive laws (whether foreign or domestic) have an interest in applying to the case at hand, and, if multiple laws assert such an interest, to give priority to one. Under this approach, the forum's own conflict-of-law rules — whether statutory or derived from common law — should be relevant only at the second stage of the analysis, i.e., the determination of priority, and not at the first stage, which concerns the scope of potentially applicable substantive laws. In light of this, it is somewhat perplexing — as has already been

[105] Restatement (Third): Conflict of Laws Tentative Draft No. 3, Ch. 5: Choice of law, §5.01 Comment, p. 9.

[106] Ibidem.

[107] Ibidem.

[108] Ibidem, p. 10.

noted in existing critiques[109] — that the specific conflict-of-laws rules set forth in the Draft Restatement appear to address not only the second step of the analysis but also the first. This becomes evident upon closer examination of both the black-letter provisions and the accompanying commentary in the Draft Restatement.

A comment to §1.01 states: "The rules of this Restatement have been derived through the process of determining the likely scope of different kinds of state laws and resolving conflicts between them when necessary. The rules may generally be applied without any explicit consideration of scope or priority."[110] The above is also confirmed — in the domain of torts — by the very wording of §6.01, which states: "This Restatement sets out rules that identify the states with the dominant interest for particular torts and issues (§§ 6.11—6.12) and for broader categories of issues based on the distribution of connecting factors (§§ 6.06—6.09)." It is thus clear that the rules of the Draft Restatement are not only laid down to decide priority (which would make sense) but also to entirely avoid determination of whether the case falls within the scope of application of potentially interested laws. According to this framework, the "likely" scopes of such laws are to be inferred through the Restatement's own conflict-of-law rules. However, this raises a fundamental question: how can the Restatement ascertain which laws are genuinely "interested" in applying to a given issue without a direct and independent examination of the scope, objectives, and underlying policies of those laws? If the initial step of identifying the scope of application is effectively supplanted by the Restatement's own presumptions regarding applicable law, then genuine deference to the substantive laws' own claims to applicability is lost. The interest analysis is abrogated. The unilateral approach is pushed away by what essentially must be a multilateral methodology.

To be sure, the above is not a criticism of the Draft Restatement's attempt to formulate specific, relatively clear-cut conflict-of-law rules, which a judge might apply to readily determine the law applicable to a dispute case or issue. After all, this is what legislators, states making international treaties, judges and experts, attempt to do all around the world. What we find puzzling as continental lawyers, however — although at the same time somewhat fascinating — is how the unilateral and multilateral methodologies are really intertwined in the Draft Restatement. We tend to agree with a comment made also from within

[109] L. Brilmayer, D. B. Listwa, *Continuity*..., p. 266.

[110] Restatement (Third): Conflict of Laws Tentative Draft No. 2, Ch. 1: Introduction, §1.02 Comment B, p. 5.

US — by L. Brilmayer and D. Listwa — that the "two-step theory and a Restatement-based set of rules just don't go together."[111] At least not when it comes to creating a methodologically coherent environment for resolving conflict-of-laws questions.

While not attempting to undermine the complex and nuanced nature of the American conflict-of-law system, which should naturally also be reflected in the Restatement, it seems to us that the major reason behind the hybrid approach of the Draft Restatement is the following.

The fundamental premise of a unilateral approach is that the territorial scope of potentially relevant laws — that is, their intended applicability to a given set of facts — can be ascertained through proper legal analysis and interpretation. This is often possible, particularly where the law expressly defines its territorial reach. Similarly, a state's interest in the application of its own laws may be sufficiently compelling to justify inferring territorial scope through interpretive means. However, as previously noted, it is far more common for laws to provide no indication of their intended territorial application. Indeed, most legal provisions — especially those primarily concerned with regulating the relationships between private parties — are territorially neutral and remain silent on their spatial scope. Moreover, in such cases, there is frequently no overriding public interest that would justify extending the law's application to multistate scenarios. Attempting to discover the territorial scope of such laws by analyzing their underlying policy or legislative intent is, therefore, often a fool's errand.

In these instances, the unilateral method offers little practical assistance to a judge tasked with resolving a choice-of-law question. The specific conflict-of-laws rules contained in the Draft Restatement are designed, in large part, to address this gap. Because it is impossible or excessively difficult to discover the territorial scope of the substantive laws that come into orbit, the interest analysis is abrogated and one must necessarily fall back to the multilateral conflict-of law rules of the forum (or rules laid down in the Restatement).[112] This, in our view, has long been the purpose and justification for the hybrid character of the Restatement (Second), which combines both specific multilateral choice-of-law rules and more open-ended directives to evaluate the policies of interested states in a unilateral fashion. Although there is no inherent contradiction in combining unilateral and multilateral methodologies within a single

[111] L. Brilmayer, D. B. Listwa, *Continuity*…, p. 268.

[112] The other option would of course be to automatically apply the *lex fori*, without making any choice of law analysis. That, obviously, cannot be an intelligible solution to cross-border problems.

conflict-of-laws framework — a structure that also appears to a certain extent in European systems (as discussed below) — we find it conceptually problematic that rules which clearly function as multilateral choice-of-law indicators (see e.g. §6.07,[113] §6.09(a),[114] §6.11(a)(1),[115] §7.25[116] of the Draft), are said to be "derived through the process of determining the likely scope of different kinds of state laws," as the drafters of the Restatement (Third) assert.[117] The two distinct methodologies, which should be separated (even if included within the same system), are unnecessarily entangled.[118]

4. Unilateral orientation towards substantive results in the European conflict of laws

In Europe, the Savignian model of multilateralism continues to serve as the predominant method for resolving conflict-of-laws issues. However, in light of ongoing globalization and socio-economic transformations — coupled with the growing influence of American legal thought on European private international law — there is an increasing recognition of the need to adapt and qualify the principle of Savignian neutrality, given that it effectively constitutes a "leap into the unknown." This chapter examines the principal mechanisms through which decision-makers can adjust the outcomes of choice-of-law analysis by incorporating substantive policy considerations.

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[113] "When the relevant parties are domiciled in a single state, that state's law governs [...]" (Tentative Draft No 4).

[114] "When conduct in one state causes injury in another, the law of the state of conduct governs […]" (Tentative Draft No 4).

[115] "(a) Liability for injury caused by a product is determined by the law of: (1) the state where the product was delivered to the initial end user, if the product was available in that state through ordinary commercial channels and that state is also the plaintiff's domicile, the place of injury, the place of manufacture, or the defendant's domicile […]" (Tentative Draft No 4).

[116] "The law of the state of the testator's domicile at the time of death governs the formal validity of a will" (Tentative Draft No 7).

[117] See Restatement (Third): Conflict of Laws Tentative Draft No. 2, Ch. 1: Introduction, §1.02 Comment B, p. 5.

[118] Cf. L. Brilmayer, D. B. Listwa, *Continuity…*, p. 277, who observe that: "there is a deep incompatibility between the method of resolving conflicts of law advocated by the "two-step" theory and the very notion of a rules-based restatement."

a) Public policy exception

The traditional expression of the unilateralism is the public policy exception (*ordre public* clause).[119] The exception has long been a part of the conflict of law systems both in Europe, as well as across the Atlantic. Although the content of the public policy has evolved considerably over time — examples include the growing recognition of same-sex marriages or the categorical rejection of corruption — the underlying mechanism has remained relatively stable. The precise operation of the public policy exception may vary depending on its specific function, whether it is invoked to resist the application of foreign substantive law, the recognition of a foreign judgment, or the acknowledgment of a legal status or relationship that would otherwise merit recognition.[120] Its application is also shaped by the legal context, such as whether it occurs within a federal structure like the European Union or in relation to foreign or hostile states. Nevertheless, the core principle persists: the forum, while generally willing to apply foreign law or recognize foreign judgments, retains the right to refuse to do so where such application or recognition would produce results that are manifestly incompatible with the forum's fundamental legal principles. Given that the nature of the public policy exception has remained largely unchanged for over a century, an in-depth examination is unnecessary here. A few observations on its role in light of recent methodological developments in conflict of laws, however, are appropriate.

First, there is little doubt that the public policy exception represents not only a classic expression of unilateralism — being concerned primarily with the enforcement of domestic legal principles — but also the strongest manifestation of substantive orientation within private international law systems that are otherwise grounded in a multilateral, result-neutral methodology.[121] The essence of the public policy exception lies in its function: it serves to exclude certain outcomes that are fundamentally incompatible with the forum's legal and moral order. In this way, it operates as an escape mechanism within a system otherwise focused on achieving "conflicts justice" through neutral and formalistic

[119] Public policy has ample literature. For one of the most prolific studies in English see: P. Lagarde, *Public Policy*, in: *International Encyclopedia of Comparative Law: vol. III — Private International Law*, ed. K. Lipstein, Mohr Siebeck, Tübingen 1986. For a comprehensive study in the modern Polish doctrine see M. Zachariasiewicz, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*. C.H. Beck, Warszawa 2018.

[120] See below, chapter 5.

[121] See P. Hay, *European*…, p. 2061.

rules. Although the substantive orientation and the natural tendency to prefer the principles and values of the *fori* brings the public policy exception close to the overriding mandatory rules (common law lawyers speak of the two sides of the same coin[122]), there are some important differences between these instruments.[123] Most importantly, the public policy exception is triggered only after the result is determined under the foreign law and that result is then assessed as unacceptable to the forum. Thus, its function is essentially reactive, operating to negate an objectionable result, in contrast to overriding mandatory rules, which proactively assert the application of the forum's own policies to shape the outcome from the outset.

Second, while the role of the public policy might diminish within the framework of a federal structure of the EU as the European integration progresses, its role has not been completely abrogated. The CJEU, acting as a guardian of the mutual trust between the Member States, makes sure, however, that public policy is exceptionally narrowly understood, when it is applied as between the Member States.[124] Functionally, the Court has imposed outer limits for the application of the national public policy,[125] so that the exception is not overemployed by the Member States in a manner that would undermine the basic principles of the EU law. In this respect, the EU legal order imposes a form of constitutional constraint on the extent to which a Member State may assert its domestic values against the laws or legal acts of another Member State.

A form of constitutional limitation on the national application of public policy has, albeit to a limited extent thus far, also been reflected in EU conflict-of-laws legislation. Recital 58 of the Succession Regulation underlines that national courts should not be able to apply the public policy exception as against laws or decisions from other Member States,

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[122] R. Plender, M. Wilderspin, *The European private international law of obligations*, Sweet & Maxwell, London, 2009, p. 363.

[123] See e.g. J. Blom, *Public Policy in Private International Law and Its Evolution in Time*, "Netherlands International Law Review" 2003, vol. 50, pp. 379 et seq. In the Polish doctrine see e.g.: M. Wojewoda, *Zakres prawa właściwego dla zobowiązań umownych. Nowa regulacja kolizyjna w konwencji rzymskiej z 1980 r.*, Wolters Kluwer, 2007, pp. 191 et seq.; M. Zachariasiewicz, *Klauzula…*, pp. 59 et seq.

[124] See in particular: judgment of the CJEU of 28.3.2000 in case C-7/98 *Krombach v. Bamberski,* ECLI:EU:C:2000:164; judgment of the CJEU of 11.5.2000 in case C-38/98 *Régie Nationale des Usines Renault v. Maxicar*, ECLI:EU:C:2000:225; judgment of the CJEU of 16.7.2015 in case C681/13 *Diageo Brands v. Simiramida-04 EOOD*, ECLI:EU:C:2015:471; judgment of the CJEU of 4.10.2024 in case C-633/22 *Real Madrid Club de Fútbol, AE v. EE, Société Éditrice du Monde SA*, ECLI:EU:C:2024:843.

[125] *S. Francq*, in: *Brussels I Regulation*, eds. U. Magnus, P. Mankowski, Sellier 2007, pp. 565 et seq.

if doing so would be contrary to the Charter[126]. The competence of the Member States to invoke *ordre public* is thus expressly limited in the intra-EU relations. In our view, because of the primacy of EU law, the same holds true also in the context of other EU instruments on private international law (Brussels Ia, Rome I and II, etc.), even if they fail to make an explicit reference to the Charter.[127]

Third, it is interesting to note, that even in the system largely based on the unilateral methodology — which in itself is about enforcing certain substantive policies — there is still room for the public policy exception in its classic form. This is evidenced not only by the case law of American courts, which still invoke the exception, but even more visibly — by the Draft of the Restatement (Third), which — although methodologically immersed in the governmental interest analysis — preserves a classic public policy exception (§5.04).[128]

b) Overriding mandatory rules

The exemplary and most widely commented manifestation of the unilateral method, which supplements and penetrates the classic, multilateral conflict-of-law systems are the so called overriding mandatory rules (international mandatory rules, fr. *loi de police* or *loi d'application immédiate*, ger. *Eingriffsnormen*, pl. *przepisy wymuszające swoje zastosowanie*). Numerous authors have underlined that the overriding mandatory rules are based on a different paradigm that brings it closer to rationale underlying the unilateral method, as contemporarily embodied mostly in the American interest analysis.[129] Still, although based on the competing

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[126] Charter of Fundamental Rights of the European Union, O.J. C 326, 26.10.2012, p. 391.

[127] See M. Zachariasiewicz, *Klauzula…*, pp. 321—322.

[128] Restatement (Third): Conflict of Laws Tentative Draft No. 3, §5.04: "A court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy."

[129] B. Audit, *A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles,* "The American Journal of Comparative Law" 1979, vol. 27, p. 602; F. Vischer, *Revolutionary Ideas and the Swiss Statute on Private International Law*, in: *Convergence and Divergence in Private International Law — Liber Amicorum Kurt Siehr*, eds. K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides, Eleven-Schulthess, The Hague—Zürich 2010, pp. 107 et seq.; A. Bonomi, *Mandatory Rules in Private International Law. The quest for uniformity of decisions in a global environment,* "Yearbook of Private International Law" 1999, vol. 1, p. 219; P. Lagarde, *The European Convention on the Law Applicable to Contractual Obligations: An Apologia,* "Va. J. Int'l L." 1981, vol. 22, p. 103; J. Von Hein, *Something Old and Something Borrowed, but Nothing New? Rome II*

choice-of-law methodology, the overriding mandatory rules play a function of an exception within the traditional multilateral systems.[130] In the European Union legislation, the most comprehensive definition is provided in Article 9(1) of the Rome I Regulation.[131] Article 9(1) contains what by A.D. 2025 may be said to constitute a common understanding of the term "overriding mandatory rules." It builds not only upon the concept of mandatory rules included already in Article 7 of the Rome Convention,[132] but also on the formulation given by the EU Court of Justice in the *Arblade* judgment,[133] as well as on numerous doctrinal analyses of the topic,[134] including the seminal essay by Ph. Francescakis.[135] Article 9(1) states:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

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and the European Choice-of-Law Evolution, "Tul. L. Rev." 2007, vol. 82, pp. 1663 et seq.; R. Michaels, *The New European Choice-of-Law Revolution,* "Tul. L. Rev." 2007, vol. 82, pp. 1663 et seq.; J.-J. Kuipers, *EU Law*..., pp. 67 et seq., 79 et seq.; M. Renner, in: *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, ed. G.-P. Calliess, Alphen aan den Rijn 2011, p. 268; T. Szabados, *Economic Sanctions in EU private International Law*, Hart Publishing, Oxford 2020, p. 87; A. Mills, *Party Autonomy in Private International Law*, Cambridge University Press 2018, pp. 464, 477; 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*, "The American Journal of Comparative Law" 1991, vol. 39, pp. 661 et seq.; P. Hay, *European*..., p. 2060. In the Polish literature see M. Mataczyński, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Zakamycze, Kraków 2005, p. 113; M. A. Zachariasiewicz, *Nowe prądy w kolizjonistyce*..., p. 213.

[130] G. Cuniberti, *Conflict of laws*..., p. 17.

[131] Other EU Regulation regarding choice of law also refer to the concept but either fail to define it with precision included in Article 9 of the Rome I Regulation (see Article 16 of Rome II Regulation), or provide a somewhat specific formulation of the concept and its scope (see Article 30 of the Succession Regulation, which will be discussed below in chapter 4e).

[132] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, O.J. L 266, p. 1.

[133] The judgment of 23.11.1999 in joined cases C-369/96 *Jean-Claude Arblade and Arblade & Fils SARL* and C-376/96 *Bernard Leloup, Serge Leloup and Sofrage SARL*, ECLI:EU:C:1999:575, para 30.

[134] See, inter alia, literature cited above in fn. 128.

[135] P. Francescakis, *Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles de conflits de loi*, "Revue critique de droit international privé" 1966, vol. 55, pp. 1 et seq. Francescakis is considered to have rediscovered the concept as in fact a long existing phenomenon, when making an empirical analysis of the case law from French courts. See T. G. Guedj, *The Theory*..., p. 662.

In order to be classified as an "overriding mandatory rule," a rule of substantive law must meet several key criteria. First, the concept encompasses only such substantive law rules that seek to further an imperative public interest,[136] and — as highlighted in Article 9(1) — are crucial to safeguard that interest. This suggests that the public interest at stake must be sufficiently strong, so to permit their application via the mechanism contained in Article 9 and that such application should occur only exceptionally in the private law disputes.[137] Accordingly, not every rule promoting social or economic objectives qualifies as "crucial" for these purposes. In the Member States of the European Union, the mere fact that a rule derives from EU law — whether by virtue of a directly applicable regulation or as the result of the implementation of a directive — does not automatically confer upon it the status of an overriding mandatory rule.[138] However, the CJEU displayed in the past readiness to consider EU policies as overriding, at least in a situation, when *lex causae* was the law of the non-EU state.[139]

[136] Common examples include rules of competition law, restrictions of trade, embargoes, other economic policies of the state, such as monetary policies, provisions safeguarding the environmental protection, illegality of the contract for reasons of violation of fundamental principles of public policy (such as e.g. corruption, drug trafficking, prostitution or slavery).

[137] Judgment of CJEU 18.10.2016 in case C-135/15 *Greece v. Grigorios Nikiforidis*, ECLI:EU:C:2016:774; judgment of CJEU of 17 October 2013 in case C184/12 *Unamar v. NMB*, ECLI:EU:C:2013:663, para 49. However, in the context of international commercial arbitration, one author estimated that the question of potential application of overriding mandatory rules arises in as much as 50% of cases. See M. Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts. Swiss Commercial Law Series. Vol. 9*. Basel—Frankfurt am Main 1999, p. 5.

[138] See, par analogy, C681/13 *Diageo Brands*, para 49—52 (not every misapplication of EU law constitutes violation of public policy under Brussels I Regulation; this conclusion might readily be extrapolated to overriding mandatory rules).

[139] See judgment of the CJEU of 9.11. 2000 in case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, ECLI:EU:C:2000:605, where the Court justified intervention of the UK implementation of the Commercial Agents Directive (Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. 1986 L 382, p. 17) against the chosen Californian law, with a mandatory nature of the rules (in a ius cogens substantive sense of the term), and a need to eliminate restrictions on carrying-on of the activities of commercial agents, as well as necessity to protect the freedom of establishment and the operation of undistorted competition in the internal market for commercial agents. This reasoning, essentially focusing on protection of weaker parties, seems somewhat slim in justifying the overriding mandatory character of the rules. In any event, the decision in *Ingmar v. Eaton* is a visible expression of the Europe's "shift away from a purely spatial/territorial rule orientation," to borrow words from P. Hay, *European…*, p. 2054, or, possibly, even an instance of favoring the European *lex fori*. Interestingly, in an intra-EU situation, where the rules in question came from a Member State (Belgium), that Member

Second, the overriding mandatory rules apply "irrespective of the law otherwise applicable" to a given legal relationship, which means that a regular, multilateral determination of the law application is bypassed as with respect to these rules. They apply not because they are part of the legal system indicated as applicable under the conflict-of-law rules of the forum, but irrespective of the regular choice-of-law analysis. They apply because of their own intention to apply. They interfere from outside the *legis causae* (*legis contractus*, *legis delictionis*, *legis successionis*, etc.).

Third, the overriding mandatory rules apply if their intention to apply to a particular set of facts results from their own content and/or purpose. The basis for their inclusion is solely their "own intention to apply." They apply if the situation falls within their scope, both in terms of the subject matter (as any other rule of domestic law), as well as the territorial (spatial) sphere of application. In other words, overriding mandatory rules unilaterally define their own territorial scope of application. They are "interested in being applied" to a particular situation — to borrow the term from the American interest analysis. That "intention to apply" must be discovered by a court[140] or an arbitral tribunal in each case, on the basis of the analysis of interests, reasons or values, which the rule in question intends to safeguard.[141]

c) Discretion and limits in applying overriding mandatory rules

Even where a court determines that a particular provision meets the criteria of an overriding mandatory rule, the question remains as to the appropriate circumstances under which such a rule should be applied

State granting the commercial agent protection going beyond the Commercial Agents Directive, the Court was much less inclined to admit that such protection must necessarily override the law chosen by the parties (here, the Bulgarian law, which properly implemented the Directive). See C184/12 *Unamar v. NMB*, ECLI:EU:C:2013:663.

[140] Here, again, the *Ingmar v. Eaton* judgment is given as an example of the decision which "discovers" the territorial scope of application of the provisions (especially Articles 17 and 18) of the Commercial Agents Directive that rendered them applicable, even in the case, in which the contract was governed by Californian law. See M. Szpunar, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A*…, p. 181—182.

[141] Whether there are specific overriding mandatory rules that "need" to be applied in the case at hand is — from a practical perspective — a question of whether they are "discovered" in the court's/tribunal's examination of that case. This is done, obviously, foremost through parties' submissions, who plead applicability of certain overriding mandatory rules. However, the court must determine and apply its own overriding mandatory rules (rules of the fori) also *ex officio*, even if not pled by the parties.

in a given case. The issue is more straightforward in relation to the overriding mandatory provisions of the forum. Article 9(2) of the Rome I Regulation provides that: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[142] No further conditions or limitations are imposed. Accordingly, the court is obligated to apply domestic provisions that are regarded as essential for the protection of the forum state's fundamental public interests. Nonetheless, two important qualifications should be made.

First, it must be reiterated that a court may apply only those overriding mandatory provisions that are intended to govern the particular international situation at issue. In other words, a court will not apply its own overriding mandatory rules to a legal relationship involving foreign elements if the provision in question does not purport to extend its application to such relationships. This may occur, for instance, where the rule is intended to operate exclusively in domestic contexts. Consider the following example from the Polish anti-COVID-19 regulations. Article 15ze (later transformed to Article 15ze[1]) of the COVID-19 Act[143] offered certain exemptions in rents to the tenants of commercial premises in large shopping centres exceeding 2,000 square meters.[144] The law did not distinguish on whether tenants or landlords were to be local businesses or international companies. However, although not expressly provided for in the Act, it seemed clear enough given the intention of the law, that the exemptions from Articles 15ze / 15ze[1] consider only commercial centres located in Poland. In that sense, the exception operated domestically. If a Polish tenant leasing commercial premises in, for instance, a shopping center located in Brno, Czech Republic, were to seek rent relief under Articles 15ze or 15ze[1] before a Polish court, the claim would likely be dismissed, even though those provisions arguably enjoy an overriding mandatory character. This is because their spatial reach does not extend to shopping centers located outside Poland.

A second note refers to limitations that may be imposed by federal constraints, where the application of a given overriding mandatory rule of the forum would amount to a violation of a federal principle that must be observed by the forum. In the federal countries such as US, a state is not be permitted to further its own public policy via a governmental

[142] Very similar wording was adopted in Article 7(2) of the Rome Convention.

[143] The law of 2.3.2020 on specific solutions related to the prevention, counteraction and eradication of COVID-19, other communicable diseases and emergencies caused by them, O.J. 2020, item 374 (as later amended).

[144] More on this: M. Zachariasiewicz, *The Lease of Commercial Premises in Time of COVID-19: The Decision of the German Bundesgerichtshof of 12 January 2022 from a Polish Perspective*, "European Review of Private Law" 2023, vol. 31, pp. 627 et seq.

interest analysis, if it would be constitutionally prohibited to do so.[145] In federal structures such as the European Union, a Member State should not apply its own overriding mandatory rules in case it would run against requirements of the primary, or, sometimes even secondary EU law. As observed by R. Michaels almost two decades ago: "Functionally, the EC Treaty operates as a constitution and its impact on choice-of-law rules is structurally similar to that of other nations' constitutions on domestic choice-of-law rules."[146] The view holds even more true today, after in 2009 the Treaty in Lisbon transformed the EC Treaty to TFEU,[147] and gave a full legal effect to the Charter. Although this limiting role of the EU law is justified by the principle of the supremacy (primacy) of EU law, in specific situations of a conflict between the Member States' overriding mandatory rules and the EU law, a balancing exercise must be made.[148] After all, none of the EU Treaty freedoms applies without exception.[149]

An interesting example of a secondary EU law that sets the framework (and limits) for the application of the overriding mandatory rules (including those of the forum) is provided by the 1996 Posted Workers Directive[150] (as amended in 2018).[151] The Directive "designates at Community

[145] See e.g. B. Currie, *The Constitution*…, p. 9 et seq.

[146] R. Michaels, *The new European*…, p. 1625.

[147] Consolidated Version of the Treaty on the Functioning of the European Union, O.J. C 326, 26.10.2012, p. 47.

[148] Cf. G. Zarra, *Imperativeness in Private International Law*. Asser Press, Springer 2021, pp. 201 et seq.

[149] By way of example, with respect to free movement of persons, see: C. Muller, *European public policy and restriction of free movement of persons in EU law,* "European papers" 2024, vol. 9, pp. 1408 et seq.

[150] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services O.J. L 18, 21.1.1997, p. 1, as amended by Directive (EU) 2018/957 of 28 June 2018, O.J. L 173, 9.7.2018, p. 16.

[151] On the relationship between Posted Workers Directive and Article 9 of Rome I Regulation (or Article 7 of the Rome Convention) in the Polish literature see e.g. M. Zachariasiewicz, M. Szpunar, *Swoboda przedsiębiorczości i swoboda świadczenia usług a działania związków zawodowych — glosa do wyroku ETS z 18.12.2007 r. w sprawie C-341/05 Laval un Partneri Ltd przeciwko Svenska Byggnadsarbetareförbundet i inni oraz do wyroku z 11.12.2007 r.*, "Europejski Przegląd Sądowy" 2008, No. 7, pp. 40—41; M. Zachariasiewicz, in: *System Prawa Prywatnego. Vol. 20B. Prawo prywatne międzynarodowe*, ed. M. Pazdan, C.H. Beck, Warszawa, 2014, pp. 498 et seq.; J. Skoczyński, *Wpływ prawa wspólnotowego na polskie prawo prywatne międzynarodowe w dziedzinie stosunków pracy,* in: *Europeizacja polskiego prawa pracy,* ed. W. Sanetra, Warszawa 2004, p. 119; P. Wąż, *Delegowanie pracowników do innego państwa celem świadczenia usług*, Wydawnictwo CH Beck, Warszawa 2011, p. 23; A. Rogacka-Łukasik, *Czy przepisy regulujące warunki zatrudnienia pracowników delegowanych, jako przepisy wymuszające*

level mandatory rules within the meaning of Article 7 of the Rome Convention[152] in transnational posting situations."[153] Under Article 8(2) of the Rome I Regulation, the law applicable to the individual employment contract is that of the country in which, or from which, the employee habitually carries out his work in performance of the contract. A temporary posting to another state does not alter that. Thus a posted worker's employment contract is not governed by the law of the state to which he or she is posted (the host state) but normally by the law of the state of origin of the employer (service provider). Nevertheless, under Article 9(2) of the Rome I Regulation, the host state would have been generally free to impose its own rules concerning employee protection, aiming at safeguarding equal competition at the local market and combating social dumping. The purpose of the Directive is, as explained by the Commission, to refine the legal framework offered by Rome and to set "nucleus of minimum protection for posted workers, while respecting the principle of equality of treatment between national and non-national providers of service […]."[154] What is often overlooked, however, is that the Directive does not only oblige Member States to ensure that workers posted to their territory are guaranteed conditions of employment in areas specified in Article 3 of the Directive, but at the same, it also limits the extent to which Member states may impose its own rules regarding conditions of employment as overriding mandatory rules of the forum. The application of these rules — in intra-EU situations — is controlled by EU law and the freedom to provide services that it guarantees. This was confirmed by the CJEU even before the adoption of the Posted Workers Directive.[155]

The question of whether a court should apply foreign overriding mandatory rules in a particular case is much more complex and controversial. This issue has given rise to considerable scholarly debate, centering primarily on the extent of judicial discretion. Broadly speaking, the core point of contention concerns whether courts should be subject to any

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swoje zastosowanie, zapewniają ochronę pracownika?, "Roczniki Administracji i Prawa" 2021, pp. 545 et seq.

[152] Now Article 9 of the Rome I Regulation.

[153] The Communication of 25.7.2003 from the Commission to the Council, European Parliament, The Economic and Social Committee and the Committee of Regions — The Implementation of Directive 96/71 in the Member States, COM (2003) 458 *final*, para 2.3.1.1.

[154] Ibidem.

[155] C-369/96 *Arblade* and C-376/96 *Leloup*. Cf. C. Barnard, *The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law: Case c-319/06 Commission v Luxembourg, Judgment 19 June 2008*, "Industrial Law Journal" 2009, vol. 38, pp. 122 et seq.

constraints, preferences, or obligations when determining the applicability of such provisions — regardless of whether they originate from the *lex causae* or from a third state. Some commentators argue that no such restrictions should exist, and even question the conceptual utility of distinguishing between overriding mandatory rules of the *lex causae* and those of a third state.[156] By contrast, other scholars advocate for a clear and principled distinction. According to this view, overriding mandatory rules that form part of the *lex causae* should be applied as an integral component of the applicable legal framework, whereas the application of third-state overriding mandatory provisions should be limited and subject to carefully defined conditions. The Rome I Regulation aligns more closely with the latter approach.[157] The Rome I Regulation opted more towards the latter solution. According to Article 9(3):

> Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. 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 European Court was called to decide on the limits of discretion on applying the overriding mandatory rules of a third state in case C-135/15 *Nikiforidis*.[158] Mr Nikiforidis worked as a teacher in a Greek school in Germany. Because of the financial crisis and the obligations imposed on Greece by Commission, European Central Bank and International Monetary Fund, the Greek parliament adopted laws, which lowered the salaries of all public sector employees, including those working abroad. Mr Nikiforidis' employment contract was subject to German law. When he sued for the amounts' his salary was lowered, the question for the German court arose whether it should apply the mentioned Greek laws, since their overriding public interest was clear. Nevertheless, the CJEU,[159] adopted a restrictive interpretation of Article 9(3)

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[156] See M. A. Zachariasiewicz, *Metoda unilateralna…*, p. 137; A. Bonomi, in: *Rome I Regulation*, eds. U. Magnus, P. Mankowski, Sellier, Köln 2017, p. 632; S. Francq, *Public Policy…*, p. 316.

[157] See e.g. T. Szabados, *Economic…*, p. 98. In the Polish doctrine see e.g. W. Popiołek, *Styk prawa prywatnego i publicznego z kolizyjnoprawnego punktu widzenia*, "Problemy Prawa Prywatnego Międzynarodowego" 2016, vol. 18, pp. 53 et seq.

[158] Op.cit.

[159] A more flexible approach was proposed by the AG Szpunar in his Opinion of 20.04.2016 in case C-135/15 *Nikiforidis*, ECLI:EU:C:2016:281.

(while arguably in line with a presumed intent of the EU legislator[160]), concluding that it precludes application of the overriding mandatory rules "other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed."[161] In the case at hand this meant that Greek law will not be applied. The decision was criticized by those who believe that more discretion, as offered inter alia by Article 7(1) of the Rome Convention,[162] or Article 19 of the Swiss PIL Act,[163] is at place,[164] but welcomed by others, who complimented the Court for preserving predictability,[165] or focusing on close relationship with German law and the protection of workers.[166]

While it is true that the wording of Article 9(3) of the Rome I Regulation offers limited scope for interpretation — explicitly permitting consideration only of the overriding mandatory provisions of the state where the contractual obligations are to be performed — the exclusion of such provisions from other third states, even those with a similarly strong connection to the case, appears unnecessarily restrictive. There is no real risk that the courts would abuse the discretion in overapplying overriding mandatory rules of third states. Practice shows that application of foreign *lois de police* occurs extremely rare.[167] The greater risk lies, in fact, in the opposite direction: that courts may fail to give due regard to important public policies of a third state with a significant connection to the dispute, thereby undermining the substantive justice of the outcome.

In the specific circumstances of the Nikiforidis case, the decision to disregard Greek legislation — despite its clear public objectives (notably, the reduction of public expenditure) and its enactment in implementation of international obligations, including those arising from the European Union — appears difficult to justify, particularly in light of the substantial connections between the case and Greece. The Court's decision in *Nikiforidis*, with its formalistic approach, appears to be a missed

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[160] *Nikiforidis*, para 45.

[161] *Nikiforidis*, para 55—56.

[162] Article 7(1) of the Convention provided more generally that: "[…] effect may be given to the mandatory rules of the law of another country with which the situation has a close connection […]".

[163] Federal Act on Private International Law of 18 December 1987, AS 1988 1776.

[164] See e.g. S. Francq, *Public Policy*…, pp. 318 et seq.; M. A. Zachariasiewicz, *Metoda unilateralna*…, pp. 139 et seq.

[165] T. Szabados, *Economic*…, p. 96.

[166] T. Kadner Graziano, M. J. Reymond, *The Application of the Rome I and Rome II Regulations before the Court of Justice of the European Union*, in: *Rome I and Rome II in Practice*, eds. E. Guinchard, Intersentia, Cambridge 2020, pp. 16—18.

[167] Opinion of AG Szpunar, para 1.

opportunity of opening for an individual interest analysis of competing policies — analysis that essentially lays behind any application of overriding mandatory rules, and which is invited by Article 9 of the Rome I Regulation itself,[168] even if within constraints defined therein (only the law of place of performance).[169]

It must be emphasized, however, that in *Nikiforidis* the Court left open the possibility of "taking such other overriding mandatory provisions into account as matters of fact in so far as this is provided for by the national law that is applicable to the contract pursuant to the regulation,"[170] thereby invoking concept known as *datum* theory.[171] The "practical difference between the application of, and substantive regard to, an overriding mandatory rule" may be less significant than it initially appears.[172] Consequently, the scope of this exception may be broad enough to accommodate — albeit formally as matters of fact — the overriding mandatory rules of third states. Consider an example of an economic sanction imposed by state A on all undertakings from state A, amounting to a prohibition of trade with state B and businesses therefrom. Let us assume that the goods or services are provided from State C to State B, albeit by a company from state A ("company A"). The place where the "obligations arising out of the contract have to be or have been performed" in the meaning of Article 9(3) can hardly include State A, and so the operation of Article 9(3) is not triggered. However, if a court — applying the law of State C as the governing law of the contract — must assess Company A's contractual liability for non-performance, it would seem both relevant and appropriate to consider the prohibitions imposed by State A as factual circumstances influencing Company A's conduct. It seems sufficient, at least in this case, to take into account state's A prohibitions as a fact that might have influenced company's A choices and actions.

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[168] Article 9(1) defines overriding mandatory rules as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests," which implies that that public interest must be discovered. Article 9(3) in fine states that "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," which implies not only that their purpose must be analyzed, but also that it should be contrasted with the policies underlying other competing laws (*lex causae* and *lex fori*).

[169] See more M. A. Zachariasiewicz, *Metoda unilateralna*…, pp. 144 et seq.

[170] *Nikiforidis*, paras 55—56.

[171] See, recently, e.g. M. K. Kim, *Overriding Mandatory Rules in International Commercial Disputes: Korean and Comparative Law*, Bloomsbury Publishing 2025, p. 92.

[172] Opinion of AG Szpunar, para 101. Some authors point to differences, though, arguing that datum theory insufficiently "respond to the need to consider third-country laws." See M. K. Kim, *Overriding*…, pp. 92 et seq.

d) Substantive law rules that define their own territorial scope of application

Occasionally, legislators enacting substantive laws define the territorial scope of those laws (or of specific provisions therein) by expressly stating the factual circumstances under which they are to apply. In such cases, the spatial scope of application need not be inferred from the legislator's intent or the underlying function and purpose of the law, as it is explicitly established as part of the legislative framework. The legislature thereby unilaterally determines that a specific set of substantive rules shall apply, irrespective of the law otherwise governing the legal relationship in question. This approach represents a clear expression of the unilateral method in resolving conflict-of-law issues.

As the examples below will illustrate, this method is most commonly found in legislative instruments with a predominant public law orientation, where private law provisions play only a secondary or supportive role within the broader regulatory scheme. Through the adoption of a unilateral approach, the legislator ensures that its domestic public law rules apply in all relevant factual scenarios where it deems that certain substantive policies require enforcement. This practice is often referred to as the extraterritorial application of laws.

Notable examples of the unilateral methodology can be found in recent legislation adopted in the European Union law. Two key instruments in this regard are the Digital Services Act (DSA)[173] and the Digital Markets Act (DMA),[174] both adopted as part of the EU's broader "digital future" strategy. These instruments aim, respectively, to "create a safer digital space in which the fundamental rights of all users of digital services are protected" and to "establish a level playing field to foster innovation, growth, and competitiveness."[175] To that end, the DSA[176]

[173] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, O.J. L 265, 12.10.2022, p. 1 ("**DMA**").

[174] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, O.J. L 265, 12.10.2022, p. 1 ("**DMA**").

[175] See: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package [accessed: 1.07.2025].

[176] Unlike the name might suggest, the DSA does not regulate all digital services. It applies to intermediary services, i.e. services that involve the transmission and storage of user-generated content. See F. Wilman, *The Digital Services Act (DSA)-An Overview*, 2022, https://www.ssrn.com [accessed: 1.01.2025]. The DMA has an even more restrictive personal scope of application, since it only applies to the "gatekeepers," i.e. "digital platforms with a systemic role in the internal market that function as bottlenecks between

imposes regulatory obligations on intermediary digital service providers such as online platforms and search engines, while the DMA targets so-called "gatekeeper" online platforms. Both the DSA and DMA explicitly define their territorial scope of application by stipulating that their provisions apply to services offered to recipients who are either established in or located within the European Union, regardless of the service provider's place of establishment.[177] Essentially, they apply to all services offered to recipients located in the EU.[178] They thus impose certain substantive obligations on the online services providers established both in EU Member States, as well as (in practice mostly) in the third countries (e.g. USA or China). One commentator has observed that the provisions of DSA/DMA might also be applied as overriding mandatory provisions in the meaning of Article 9 of Rome I Regulation or Article 16 of Rome II Regulation.[179] In other words, even in the absence of an express territorial clause, the public interest objectives pursued by these Acts could justify their application as mandatory norms overriding the otherwise applicable law. The precise implications of this for the relationship between the law governing a contract or a tort and the provisions of the DSA/DMA will be addressed further below. Notably, the Acts themselves do not offer additional guidance on how they interact with private international law norms.

In the DSA,[180] the EU legislator, makes reservation that the: "Regulation should also be without prejudice to Union rules on private international law, in particular […] rules on the law applicable to contractual and non-contractual obligations."[181] This should not be read as giving priority to the law applicable determined under Rome I or Rome II Regulations. Rather, it is an expression of the limited substantive coverage of the DSA, so that a large number of questions regarding online services, must be decided by the applicable substantive national laws, as determined by proper conflict rules.[182] As noted above, DSA (or DMA) may then interfere with the application of that law. It follows that while a con-

businesses and consumers for important digital services." See https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package [accessed: 1.07.2025].

[177] See Article 2(1) of the Digital Servies Act and Article 1(2) of the Digital Markets Act.

[178] This is referred to as the "marketplace approach". See T. Lutzi, *The Scope of the Digital Services Act and Digital Markets Act: Thoughts on the Conflict of Laws,* 2023, https://www.ssrn.com [accessed: 1.07.2025].

[179] T. Lutzi, *The Scope*…, p. 2 (fn. 10).

[180] For reasons that are unclear to us, there is no comparable reservation in the Digital Markets Act.

[181] Recital 10 and Article 4(4)(h) DSA.

[182] See T. Lutzi, *The Scope*…, p. 2.

tract with a digital service provider from US might still be subject to, say, Californian law (at least in B2B contracts[183]), the provisions of DSA must be applied in any situation when the service is offered to a recipient located in the EU. The provisions of DSA might interfere with the *legis contractus* and must be applied in preference to the latter, whenever contradiction occurs.

There is a number of other EU acts that have adopted a similar unilateral approach in defining the territorial scope of application. The most well known example is probably the General Data Protection Regulation (GDPR),[184] which contains a comprehensive provision dealing with its territorial scope of application in Article 3. According to this provision, it applies both to the processing of personal data by the controller or a processor who is established in the Union (Article 3(1)), as well as, by controllers or processors from outside the EU, to the extent it concerns processing of personal data of data subjects who are in the Union (Article 3(2)), provided certain further conditions are satisfied (Article 3(2)(a) and (b)).[185]

As previously noted, the unilateral determination of the territorial scope of certain substantive laws is a technique frequently employed in legislation falling within the domain of public regulatory law — a field that has seen substantial expansion in recent years. As these public law provisions increasingly intersect with private legal relationships governed by the applicable *lex causae*, a central issue arises: how to coordinate the application of both legal regimes. It is submitted that this question ultimately turns on whether the relevant provision qualifies as an overriding mandatory rule, as discussed above. Accordingly, establishing the territorial scope of a given set of public law provisions — such as the Digital Services Act (DSA) under Article 2(1) — constitutes the first step in determining whether these rules are capable of interfering with a private law relationship governed by its own applicable law. In a Member State court, such provisions may be applied directly pursuant to Article 9(2) of the Rome I Regulation. However, for a court situated outside the European Union, the issue becomes whether the DSA

[183] If the recipient of a service is a consumer, Article 6 of Rome I Regulation may mandate application of the law of the place where the consumer has his or her habitual residence.

[184] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, O.J. L 119, 4.5.2016, p. 1.

[185] In the Polish literature, more on the scope of application of GDPR see: M. Świerczyński, *Prawo właściwe dla zobowiązań deliktowych wynikających z naruszenia zasad ochrony danych osobowych przyjętych w RODO,* "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 27, pp. 44 et seq.

provisions should be applied as foreign overriding mandatory rules. This may occur either as part of the *lex causae* (where the applicable law is that of a Member State) or as overriding mandatory rules of a third state (where the *lex causae* originates from a non-EU jurisdiction).

The proliferation of divergent legislative instruments that autonomously define their own territorial scope of application has drawn concern — and, in some cases, criticism — from scholars rooted in Savigny's classical multilateral methodology. These commentators highlight the resulting fragmentation and legal uncertainty caused by the multiplicity of scope provisions found across numerous Union law regulations, as well as the variety of criteria employed to delineate their spatial reach.[186] Some also complain about providing a "disappointingly limited answer to the many conflict-of-law problems."[187] We submit, however, that such criticism is not entirely warranted. Regulation that is fundamentally public in nature must, by its very character, articulate its territorial scope in a unilateral fashion. The issue is not the determination of the applicable law to a private legal relationship, but rather the delineation of the geographic application of specific substantive provisions of Union law. The criteria employed in these scope provisions should therefore not be conflated with the connecting factors used in classical multilateral conflict-of-laws rules.

Furthermore, while the current state of EU law may be less than ideal in terms of coherence, the inherently piecemeal development of the Union's legal framework necessitates the use of varying criteria across different instruments to define territorial applicability. What renders this field particularly significant in the twenty-first century is the extent to which public regulatory measures increasingly permeate private law relationships.

e) Hybrid choice of law rules with a priori built-in value judgments

Another notable development in European conflict-of-laws — one that places substantive outcomes at its core — is the increasing use of rules that effectively represent a hybrid form of choice-of-law methodology. While they are generally rooted in the traditional multilateral approach, they simultaneously incorporate explicit substantive preferences within the structure of the rule itself. Peter Hay has referred to these as

[186] See J.-J. Kuipers, *EU Law*..., pp. 22, 177 et seq.; J. Basedow, *EU Private Law: Anatomy of a Growing Legal Order*, p. 681.

[187] See T. Lutzi, *The Scope*..., p. 1 with reference to the DSA/DMA.

"a priori rules with built-in value judgments."[188] Under such rules, the applicable law governing a particular legal relationship is initially determined through a conventional conflict-of-laws rule employing standard connecting factors. However, the outcome derived from the application of that law may be modified by permitting the influence of specific substantive provisions from another legal system, provided that this adjustment produces a more desirable substantive result — what may be termed a "better legal norm." Crucially, the legal systems from which these supplementary provisions may be drawn are limited to those connected to the case through recognized conflict-of-law criteria. It is not permissible to incorporate substantive provisions from legal systems outside this predetermined circle, even if those systems bear a significant substantive connection to the facts of the case.[189]

The most important types of these hybrid mechanisms are the choice-of-law rules designed to protect weaker parties. This traditionally includes three groups: consumers (Article 6 of the Rome I Regulation), policy holders in insurance contracts (Article 7), and employees (Article 8). A consumer, for example, may generally benefit from the protection of the law of the country where he or she has habitual residence (provided that the professional pursues its activities in that country or directs them thereto; Article 6(1)). However, if the parties opt to choose the law applicable to the contract (which is permissible), the consumer will effectively be entitled to rely on either of these laws, whichever is more beneficial for the consumer. This is because the choice of law "may not […] have the result of depriving the consumer of the protection afforded to him" (Article 6(2)) by the substantive rules of the law of his or her habitual residence.

The substantive rules protecting the consumer determine their own spatial scope.[190] They deem themselves appropriate, by means of their own criteria, other than the classic connecting factors of the multilateral method. Their spatial scope derives from their content or purpose. Furthermore, the protective provisions of the law of the consumer's habitual residence can only be resorted to, if these provisions benefit the consumer as a consumer (rather than a weaker counterparty in general),[191] and protect the consumer better than the chosen *legis contractus*.

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[188] P. Hay, *European*…, pp. 2062—2063.

[189] The same is true for Article 9(3) of the Rome I Regulation, which was covered earlier. Article 9(3) also constitutes a "hybrid" mechanism, in a sense attributed to this term here.

[190] See M. Jagielska, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20B*…, p. 272.

[191] *Contra* M. Jagielska, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20B*…, p. 292.

Another example of a hybrid choice of law rule is offered by Article 10(2) of the Rome I Regulation. According to Article 10(1) of the Regulation, the existence and validity of a contract are governed by the law that would apply to the contract if it were valid — that is, the putative *lex contractus*. However, Article 10(2) introduces a form of negative intervention. Under this provision, a party may invoke the law of the country of their habitual residence in order to establish that they did not consent to the contract, provided it appears from the circumstances that it would not be reasonable to determine the effect of their conduct in accordance with the *legis contractus*. This mechanism effectively grants a form of veto power, allowing a party to contest the conclusion of a contract, even if it would be deemed valid under the putative governing law. Importantly, this does not amount to a blanket rule subjecting the formation of consent to the law of the party's habitual residence. Rather, it creates a subsidiary mechanism through which a specific substantive standard from that law may be invoked. The purpose of this provision is to safeguard the autonomy of the contracting parties and to respect their legitimate expectations regarding the legal effects of their conduct under their personal law.

A party invoking Article 10(2) of the Rome I Regulation — claiming that they did not consent to the contract — must identify a specific legal provision or established judicial practice in force in the country of their habitual residence that supports their position. In assessing whether to admit this defence, the court retains a degree of discretion. It must evaluate the circumstances surrounding the conclusion of the contract and consider principles of equity in determining whether the party should reasonably have anticipated that their declaration would be assessed under a different legal system — namely, the law applicable to the contract — and, if so, whether the party could have been aware of the content of that foreign law. The relevant circumstances — such as the nature of the contract, the parties' established practices, prevailing commercial usages (e.g., the legal effect of silence), and the commercial experience or bargaining power of the party — typically serve as substantive criteria for evaluating a party's conduct. Within the context of Article 10(2), however, these factors function differently: they serve as threshold criteria for activating a conflict-of-laws solution, determining whether recourse may be had to the law of the party's habitual residence.

Another manifestation of a hybrid solution can be found in Article 30 of the Succession Regulation. This provision allows for a departure from the general rules governing succession by permitting the influence of special rules — imposing restrictions on or affecting the succession of specific assets — that are in force in the state where those assets are located.

What is introduced here is not a form of *dépeçage*, but rather an exceptional adjustment to the outcomes of succession, justified by economic, family, or social considerations protected in the state of the asset's location. This mechanism operates in a manner analogous to the public policy (*ordre public*) exception. The special rules contemplated by Article 30 limit succession with respect to particular categories of assets — such as agricultural land, businesses, residential properties, or cultural heritage sites. The rationale and imperative nature of these rules must be ascertained through interpretation, much like the process applied when identifying overriding mandatory provisions.

Finally, elements characteristic of the unilateral method can also be identified in Article 17 of the Rome II Regulation. As a general rule, non-contractual obligations are governed by the law chosen by the parties, provided such choice is permitted under Article 14. In the absence of a valid choice of law, Article 4(2) stipulates that the law of the country in which both parties have their habitual residence shall apply. If no common habitual residence exists, the applicable law is that of the country where the damage occurs (Article 4(1)), which represents the most frequent scenario. Significantly, the place where the event giving rise to the damage occurred does not, as a rule, influence the determination of the applicable law to the delict. It may, however, be considered as one of the factors in assessing whether the tort is manifestly more closely connected with another country, in accordance with Article 4(3). Nonetheless, the need to protect the legitimate expectations of the parties — particularly concerning the standards of safety and conduct to which the alleged tortfeasor was subject — has necessitated a corrective mechanism. Article 17 thus allows for the evaluation of those standards under the law of the country in which the harmful act was committed. According to Article 17 of the Regulation:

> 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.

Again, this instrument does not constitute a *depeçage* of the law applicable to the delict. What occurs here is not a distinction between evaluation of the conduct of the alleged tortfeasor (to be governed by the place of event giving rise to damage) and the decision as to risk allocation (to be subject to the place of damage). There is no division known in the US between "conduct regulating" and "loss-allocation" rules. Thus, Article 17 does not require that a distinction between the law of the place

of the event and the law of the place of the damage is made. It is sufficient to identify certain rules of the law of the place of the event — on the basis of their nature and purpose — as 'rules of safety and conduct'. Taking them into account depends on the court's determination ("in so far as is appropriate") as to whether they are related to the facts of the case. It is pertinent whether the rules consider themselves to be relevant in light of their own criteria, and whether it will be just and reasonable to take them into account. Such criteria may, for example, include the possibility, or the duty of the alleged tortfeasor, to foresee that the damage might occur in another state. It might be reasonable to take them into account, if it was justified for the tortfeasor to expect a more favorable standards at the place of the event. Indeed, the overriding objective is to ensure a balance between the parties.

5. Recognition of legal relationships

Recent decades in Europe have also seen an increasing interest drawn to the method of recognition of legal relationships or their elements, either as a self-standing conflict-of-law methodology or, more importantly, as a supplementary technique, which, under certain conditions, corrects the results of the operation of the law applicable determined under the neutral conflict-of-law rules. The method of recognition is based on the idea that in certain cases when the factual situation has been sufficiently crystalized (came to a close) under foreign law, it should be recognized in a form in which it has been created.[192] The method is concerned with private law situations (relationships or rights) which, as a result of their long duration, have become "social facts" or have been formally documented

[192] See e.g. P. Lagarde, *La reconnaissance des situations en droit international privé: actes du colloque international de la Haye du 18 janvier 2013*, Pédone, Paris 2013; L. Hübner, *Die Integration der primärrechtlichen Anerkennungsmethode in das IPR*, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2021, vol. 85, pp. 106 et seq.; M. Pilich, *Die Anerkennung der quasi-ehelichen Verhältnisse in Polen aus der kollisions-und europarechtlichen Perspektive*, "Zeitschrift für Gemeinschaftsprivatrecht" 2011, vol. 8, pp. 200 et seq. In the Polish literature see: A. Dorabialska, *Uznanie stosunku prawnego powstałego za granicą*, "Państwo i Prawo" 2012, No. 4, pp. 54 et seq.; A. Dorabialska, *Między normą kolizyjną a instytucją uznania — nazwisko w orzecznictwie TS*, "EPS" 2011, No. 3, pp. 22 et seq.; M. A. Zachariasiewicz, *Nowa ustawa o prawie prywatnym międzynarodowym a małżeństwa i związki osób tej samej płci*, "Problemy Prawa Prywatnego Międzynarodowego" 2012, vol. 11, pp. 83 et seq.

by an entry in the relevant register.[193] The main consequence is that one should not revisit questions of the existence, validity or effectiveness of a relationship, by applying the law determined under the appropriate conflict-of-law rules of the forum. The legal relationship is accepted as it was created under the law of a foreign state. The recognition does not, however, mean that the law of the state of origin is applied in the state where recognition is claimed. Rather, the latter state accepts the effects produced as a result of application of law in the first state.[194] This acceptance — as in the case of the recognition of foreign judgments or authentic instruments — is not preceded by a re-examination of the existence or validity of a legal relationship, but it is based on the assumption that such an examination has already taken place in the country in which the situation arose. The recognition in question is not a formal act — its essence boils down to taking into account the legal effects of the situation in question as crystallized in the country of origin.

The growing interest in the concept of recognition of legal relationships as choice of law method is related to the CJEU case law, concerning free movement of companies and the free movement of persons within the EU. First, in a series of cases decided under Article 49 TFEU (freedom of establishment), the Court of Justice decided that the legal personality of companies established in an EU state must be recognized in other Member States, with the legal effects produced under the law of the state of registration.[195] Second, in a number of decisions under Article 21 of the Treaty (the right of every EU citizen to move and reside freely in all of the EU), the Court mandated that the name of a physical person created and registered in one Member State must be recognized as such in other Member States.[196] Third, Article 21 TFEU has also recently been

[193] Obviously, we are not concerned here with recognition of judgments or other public law acts, nor with acceptance of the evidentiary effects of public documents.

[194] A. Dorabialska, *Uznanie*…, p. 57 and the literature cited therein.

[195] Judgments of the CJEU: of 25.10.2017 in case C-106/*16 Polbud — Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804; of 12.7.2012 in case C-378/10 *VALE Építési kft*, ECLI:EU:C:2012:440; of 16.12.2008 in case C-210/06 *Cartesio Oktató és Szolgáltató* ECLI:EU:C:2008:723; of 30.9.2003 in case C-167/01 *Inspire Art. Ltd.*, ECLI:EU:C:2003:512; of 5.11.2002 in case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH*, ECLI:EU:C:2002:632; of 9.3.1999 in case C-212/97 *Centros Ltd. v. Erhvervsog Selskabsstyrelsen*, ECLI:EU:C:2002:632; of 27.9.1988 in case 81/87 *The Queen v. Treasury and Commissioners of Inland Revenue*, *ex parte Daily Mail and General Trust*, ECLI:EU:C:1988:456.

[196] Judgments of the CJEU: of 30.3.1993 in case C-168/91 *Christos Konstantinidis v. Stadt Allensteig and Landratsamt Calw-Ordnungsamt*, ECLI:EU:C:1993:115; of 2.10.2003 in case C-148/02 *Carlos García Avello v. Belgium*, ECLI:EU:C:2003:539; of 14.10.2008 in case C-353/06 *Stefan Grunkin and Dorothee Regina Paul*, ECLI:EU:C:2008:559; of 22.12.2010 in case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann*

employed to mandate — at least for purposes of creating certain specific legal effects — recognition of the same-sex marriages and parenthood.[197]

According to the CJEU, the application of the law of the state where a company or the EU citizen move (the host state), which would lead to a refusal of the existence and the legal effects (even partially) of a company formed in another Member State, or the name of a physical person registered therein, may constitute an obstacle to the exercise of EU freedoms. The Court of Justice of the EU interprets the Treaty freedoms (guaranteed by Article 49 and 21 of the Treaty, respectively) so that they prohibit any national law of Member States that could hinder or make less attractive the exercise of the freedoms guaranteed by the treaty. Moreover, obstacles arising from national law can also sometimes be seen as discriminatory. In fact, within the two mentioned areas, an obligation has been developed to recognize legal situation that occurred under the law of the country of origin to the extent that the application of the host state's own law would undermine the effective exercise of the freedoms guaranteed by the provisions of the TFEU. Consequently, in such cases, a Member State is precluded from applying its own law, even if its application is determined by the forum's conflict-of-law rules.[198] The obligation resulting from the EU law does not, however, entirely displace the conflict of laws analysis,[199] since the restriction on the application of the host state's law occurs only to the extent that such application would undermine the exercise of the Treaty freedoms. For the rest, the law indicated by the forum's private international law applies normally.[200]

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von Wien, ECLI:EU:C:2010:806; of 12.5.2011 in case C-391/09 *Runevič-Vardyn*, ECLI:EU:C:2011:291.

[197] See the case law discussed below.

[198] In principle, no difficulty arises, where the conflict rules of the forum (the host state) indicate the law of the state of origin as applicable. Mutual recognition under the Treaty then leads to the same results as the classic choice of law analysis. This is because in most situations the law of the state of origin does not seize to apply at the moment when a company, or an EU citizen, leaves their state of origin to exercise their freedoms to move across EU. An exception is, however, imaginable and an example of a kind is provided by the case C-210/06 *Cartesio*. In that case a Hungarian company moved its head office to Italy, which meant the transfer of the real seat to another state. Under the Hungarian law at the time this resulted in a loss of legal personality. The CJEU held that such an outcome is not incompatible with the EU law. Consequently, the mutual recognition under the Treaty did not save the company from being forced to dissolve under the law of the state of origin.

[199] J.-J. Kuipers, *Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law*, "Eur. J. Legal Stud." 2008, vol. 2, No. 2, p. 77.

[200] In the realm of the companies this means that the so called real seat doctrine (the law of the state where the company has its "real seat" governs — broadly understood —

The obligation to accept legal effects created in another EU Member State (the state of origin), in accordance with the law of that state — regardless of the applicability of the law of the host state's as determined by its conflict of law rules — relates to a well-established EU principle of mutual recognition.[201] The principle derives from the jurisprudence on the Treaty economic freedoms, as developed by the Court of Justice, first in the famous *Cassis de Dijon*[202] for free movement of goods and later extended to many other branches of EU law.[203] The principle of mutual recognition is not a novelty in the EU. What is relatively new, however, is its impact in the area of private law and the conflict of laws.

The relationship between the principle of mutual recognition steaming from the Treaty and the private international law was heavily discussed in the literature.[204] The controversies surrounded the question whether the CJEU interprets the EU law to formulate the conflict-of-laws rules per se, or whether it merely creates an outer — constitutional in sense — limitation on the extent to which Member States may apply the law determined under their conflict-of-laws rules. The latter view eventually prevailed.[205]

However, more detailed inquiries, focusing on specific areas, were made with respect to the exact scope to which the EU freedoms penetrate the operation of the regular conflict of law analysis. Thus, in the companies law, the doctrine investigated the scope of the obligation to recognize a company incorporated under the laws of another Member State and the extent to which the host Member State remains free to apply its own law, while not unjustifiably interfering with the Treaty freedoms.[206] With respect to recognition of names under Article 21 TFEU, on the other hand, an interesting question was raised as to whether the obligation

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status of the company) has not been abrogated, but merely the extent to which it can be applied versus companies registered in another Member States has severely been limited.

[201] M. Fallon, J. Meeusen, *Private international law in the European Union and the exception of mutual recognition*, "Yearbook of Private international law" 2002, vol. 4, pp. 37 et seq.; J.-J. Kuipers, *Cartesio…*, p. 77.

[202] Judgment of the CJEU of 20.02.1979 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

[203] M. Fallon, J. Meeusen, *Private*, pp. 37 et seq.; M. Szpunar, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A…*, p. 165.

[204] See e.g. R. Michaels, *The new European…*, p. 1629. In the Polish literature see especially M. Szpunar, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A…*, pp. 164 et seq.

[205] In the Polish literature this latter view is persuasively defended by: M. Szpunar, in: M. Pazdan (ed.), *System Prawa Prywatnego. Vol. 20A…*, pp. 171—174.

[206] In Polish literature see e.g. A. Wowerka, *Zakres zastosowania statutu personalnego spółki*. CH Beck, Warszawa 2019, pp. 63—66.

to recognize the name registered in another state may be limited by the public policy concerns of the host state. The correction to the conflict-of-law analysis here is twofold: first the host state is precluded from fully applying its own law because of the principle of the mutual recognition steaming from the Treaty, and then, second — in an opposite direction — the host state is permitted to rely back on its own law because of the need to protect its own public policy and thus to refuse recognition of a surname registered under the laws of the Member State of origin.[207]

Under Article 21 of the Treaty the state of art is somewhat less developed outside the area of the recognition of names. The matter became increasingly vital in relation to the question of whether the free movement of persons under Article 21 may mandate also recognition of same-sex marriages and partnerships, same-sex parenthood, surrogate parenthood, changes of gender, or other forms of non-traditional family relationships.[208] More and more it is argued, that to refuse recognition of a marriage or partnership contracted in another EU state in accordance with the law of that state, would constitute an obstacle to exercise of the freedom guaranteed by Article 21 TFEU.[209] That argument is construed with a support of an analogy to the recognition of names, as mandated by CJEU. The non-recognition of a homosexual marriage, partnership or family certainly exposes the family members to difficulties in the state to which they have decided to move — arguably much greater than the non-recognition of a name itself. As a consequence, it may discourage the exercise of the freedom of movement and establishment in

[207] See C-208/09 *Sayn-Wittgenstein* (Austria was permitted to refuse to recognize "all the elements of the surname" as determined in another Member State, on the basis that it sought to warrant equality by prohibiting titles of nobility, which it could justify on public policy grounds). More on this topic in the Polish literature: M. Zachariasiewicz, *Klauzula*…, pp. 145—146.

[208] M. Van Den Brink, *What's in a Name Case? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU*, "German Law Journal" 2016, vol. 17, pp. 425 et seq.; H. Fulchiron, *Le mariage entre personnes de même sexe en droit français: refus et/ou reconnaissance?*, "Revue internationale de droit comparé" 2010, vol. 62, pp. 1088 et seq.; A. Tryfonidou, *Awaiting the ECJ judgment in Coman: Towards the cross-border legal recognition of same-sex marriages in the EU,* EU Law Analysis, http://eulawanalysis.blogspot.com [accessed: 1.01.2025]; D. Martiny, *Private Rnternational Law Aspects of Same-Sex Couples under German Law*, in: *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-Border and European Perspectives*, eds. K. Boele-Woelki, A. Fuchs, Intersentia, Antwerp 2012, p. 231; M. Melcher, *(Mutual) Recognition of Registered Relationships via EU Private International Law*, "Journal of Private International Law" 2013, vol. 9, pp. 149 et seq.

[209] M. Van Den Brink, *What's in a Name*, pp. 425 et seq. In the Polish literature e.g. A. Bodnar, *Obywatelstwo Unii Europejskiej a ochrona praw podstawowych obywateli państw członkowskich*, "Zeszyty OIDE" 2008, No. 9, pp. 72—77.

another Member State. This obstacle arises both in the case of a short stay in another country (for work or study purposes), as well as in a situation of a permanent relocation of the center of the family's interests to a Member State which does not provide for the institution of same-sex marriage, partnership or parenthood. An argument thus is that in order to respect the EU freedom of movement, Member States must recognize marriages and families, even in the forms not known in the host state (including same-sex families), possibly counteracted only by the public policy exception.[210]

The Court of Justice has so far been rather cautious in furthering the obligation of recognition of same-sex marriages and families on the basis of Article 21 CJEU. First, in the C-673/16 *Coman*[211] case, the Court had to decide whether Romanian authorities were obliged under EU law to honor the derived right of residence of an American spouse of a Romanian national, who was of the same-sex. The marriage was contracted legally in Belgium but the couple wanted to move to Romania, where the same-sex marriage is not legally possible. The Grand Chamber of the Court found, on the one hand, that the term "spouse" under the Directive 2004/38/ EC[212] must be understood to include spouses of the same-sex. Even though the Directive itself could not have conferred a derived right of residence on an American citizen, the Court concluded he can be afforded such a right on the basis of Article 21(1) of the Treaty. CJEU underlined, on the other hand, that the obligation of a Member State to recognize a homosexual marriage concluded in another Member State is imposed only for the purpose of granting a derived right of residence (and not for other purposes). This limited effect of the recognition of the

[210] However, any obligation to recognize a relationship based on Article 21 of the Treaty can only apply where a person in question exercises the freedom of movement, i.e. when it undertakes a cross-border activity within the EU. The EU law does not impose any obligations on Member States outside this context, namely in the purely domestic situations. In other words, in no way does EU law oblige Member States to amend their substantive family law as governing purely local situations. This is different with obligations steaming from the ECHR, as interpreted in the recent case law of the ECtHR. See judgment of ECHR of 17.1.2023 in case *Fedotova v. Russia*, ECLI:CE:ECHR:2023:0117JUD004079210 and judgment of 12.12.2023 in case *Przybyszewska v. Polsce*, ECLI:CE:ECHR:2023:1212JUD001145417.

[211] Judgment of 5.06.2018 in case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385.

[212] Directive 2004/38/ EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34)

same-sex marriage allowed the Court to sharply reject Romanian public policy defense, since neither does the recognition imply that Member States must introduce same-sex marriages in their domestic law, nor it undermines the institution of marriage in Romania.

The next important case, again decided in the Court's Grand Chamber, was C-490/20 *Pancharevo*.[213] Here, the case concerned rights of a child born in Spain to the same-sex parents (a Bulgarian mother and a British mother). The Spanish authorities issued a birth certificate with the names of both mothers but the Pancharevo municipality refused to produce a Bulgarian birth certificate to the child (the certificate being necessary for the issue of a Bulgarian identity document). The reasons given was that the reference to two female parents was contrary to the Bulgarian public policy. The European Court was called to decide whether this constituted an unjustified obstacle to the exercise of the free movement under Article 21 TFEU and Directive 2004/38, and the violation of the fundamental rights of the child to have the relationship with each of his/her parents (Articles 7 and 24 of the Charter). In a somewhat compromising tone, the CJEU concluded that while EU law does not require Bulgarian authorities to draw up a local birth certificate with two mothers depicted as parents, it does oblige Member States to issue to that child an identity card or a passport. Moreover, EU law requires that Member States recognize a document from another Member State that permits the child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States. Here again the obligation to produce a local identity document or to recognize such a document from another Member States does not imply — at least expressly — recognition of the same-sex parenthood for other purposes. The Court did, however, stress that:

> it would be contrary to the fundamental rights which are guaranteed to the child under Articles 7 [respect for private and family life] and 24 [the rights of the child] of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex.[214]

[213] Judgment of 14.12.2021 in case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, ECLI:EU:C:2021:1008.

[214] C-490/20 *Pancharevo*, para 65. An identical decision was delivered shortly after Pancharevo in an analogous case, which originated from Poland: CJEU's order of 24.06.2022 in case C-2/21 *Rzecznik Praw Obywatelskich,* ECLI:EU:C:2022:502.

This opens an opportunity to argue that other types of effects of the child-parent relationship, such as e.g. obligations of the parents to support the child, the child's right to inherit after the parents, or to receive a tax free gift, might need to be recognized so that the child's relationship with a parent is not made illusory when moving to another Member State. The crux of the matter remains, however, in that the Court mandates recognition only for the rights "derived from EU law."[215] Rights such as e.g. the rights to succession are derived from national law. The question is thus whether by exercising free movement within the EU, such rights — as acquired under the law of the state of origin — may be said to transform into rights "derived from EU law." The next two cases provide some support for this line of argumentation.

The obligation to recognize elements of a personal status as created in a different Member State was addressed in yet another case of the CJEU. In C-4/23 *Mirin*, M.-A. A., a Romanian (who later obtained also British nationality) changed his first name and gender from female to male while living in the United Kingdom. For that purpose M.-A. A. used a procedure available under British law and obtained a gender identity certificate. However, when he requested Romanian civil status registry to amend his birth certificate, he was refused and ordered to undergone a new judicial procedure in Romania, which would approve his change of gender identity. The EU Court did not hesitate to conclude that this constituted a violation of Article 21 TFEU, even though it is clear that the procedures for gender change as such are subject to national law of the Member States. When the EU citizen changes his or her first name and acquires new gender identity lawfully in a Member State this must be recognized in other Member States, where he or she moved and resides in exercise of the right to free movement under the Treaty. That person cannot be required to undergo again the procedure to change the gender, since this would hinder exercise of the right enshrined in Article 21 TFEU. The Court reasoned that non-recognition of the changes to civil status would expose the person to real risk of practical disadvantages, given that he or she would possess two diverse first names and two diverse gender identities under documents from different Member States.[216] It is worth to note that in its judgment, the Court does not pay much attention to the form in which the change of gender and first name occurs in the state of origin. The only requirement is that they are "lawfully acquired" in another Member State, whatever the procedures laid down for

[215] C-490/20 *Pancharevo*, para 57.
[216] C-4/23 *Mirin*, para 56.

that purpose in that Member State.[217] Naturally, elements of civil status are established with some sort of formality being required in (probably) all legal systems. "Lawful acquisition" thus implies some registration formality which necessitates involvement of the authorities. It follows, that the recognition does not pertain solely to a "pure" substantive legal relationship that is not evidenced by an official document.

The last important case regarding Article 21 TFEU and the recognition of non-traditional families has not yet been decided by the CJEU as of the moment of publishing the present article. In C-713/23 *Trojan*, a Polish and German national married in Germany and later moved to Poland requesting that their marriage certificate is transcribed[218] into the Polish civil registry. The Polish authorities, in accordance with a settled case law of administrative courts,[219] denied the request on the

[217] C-4/23 *Mirin*, paras 55, 57, 61, 68, 70, 71.

[218] It must be explained that "transcription," as understood under Polish law, does not amount to recognition of the legal relationship confirmed by a civil registry document as such. Rather "transcription" is merely "[…] a faithful and literal transfer of the content of a foreign civil status document, both linguistically and formally […]" (Article 104(2) of the Law on civil status records of 28.11.2014). See also judgment of SN (Supreme Court) of 20.11.2012, III CZP 58/12. In the doctrine see especially M. Wojewoda, *Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą*, "Kwartalnik Prawa Prywatnego" 2017, vol. 26; M. Wojewoda, *Transkrypcja zagranicznego dokumentu stanu cywilnego — kilka uwag na temat ewolucji konstrukcji w prawie polskim*, "Metryka" 2016, No. 2. "Transcription" is thus about producing a Polish civil registry document. It does not have substantive law effects. Transcription does not imply, nor prejudice, recognition of a marriage (or parent-child relationship) for various purposes (such as e.g. succession, proprietary, tax, etc.). However, having a Polish document is important for number of practical reasons and does have, what might be called, "added value" of the transcription. See M. Zacharasiewicz, *Transkrypcja aktów urodzenia dzieci par jednopłciowych*, "Studia Prawno-Ekonomiczne" 2019, vol. 111, p. 147. First, without a Polish marriage or birth certificate, it was (and still is) more difficult to obtain Polish identity documents (ID and passport). This was harmful especially for children of the same-sex parents, who by birth to a Polish mother *ex lege* possess Polish nationality. Second, it is much more difficult in a daily life to use a foreign civil registry document and to overcome lack of confidence on the part of authorities and other actors.

[219] Judgment of NSA (Supreme Administrative Court) of 28.2.2018, II OSK 1112/16; judgment of WSA (Voivodship Administrative Court) of 8.1.2019, IV SA/Wa 2618/18. See also, regarding birth certificates of children of the same-sex parents: judgment of NSA of 2.12.2019, II OPS 1/19; judgment of NSA 17.12.2014, II OSK 1298/13. The denial to transcribe both marriage and birth certificates was subject to extensive scholarly debates in Poland. There is no room here to present all arguments and positions in that discussion. It is worth noting, however, that a view was also defended that the obligation to transcribe, both with respect to the same-sex marriage and birth certificates of the children of same-sex parents, exists already under Polish law, based on constitutional values, as well as under ECHR (in light of the case law of the ECtHR). See M. Zachariasiewicz, *Klauzula*…, p. 131 et seq.; M. Zacharasiewicz, *Transkrypcja*…, p. 143 et seq.

grounds that Polish law does not recognize same-sex marriages, invoking public policy and Article 18 of the Polish Constitution.[220] The case reached the Supreme Administrative Court, which this time decided to formulate a preliminary question to the CJEU. While a decision of the CJEU is not yet available, Advocate General de la Tour has already issued his opinion. In a nutshell, the AG concludes that:

> the Member State of origin of a Union citizen should recognise his or her marriage concluded in another Member State with a person of the same sex, even if the purpose is not to obtain from the first Member State a derived right of residence, or an identity card or even a passport. However, the obligation to enter a marriage certificate in the civil register should remain within the competence of each Member State.[221]

In other words, EU law does not, in principle, compel entry of the same-sex marriage to the civil register of the state, which does not know this type of union,[222] but it does require recognition of a marriage contracted in another Member State when spouses exercise their freedom of movement and residence across EU. That recognition, as made clear by the above cited paragraph from the Opinion of the AG, goes beyond what was found in *Coman*, i.e. the derived right of residence. While it is not immediately clear what exactly should such recognition entail, AG de la Tour contends that Member States should ensure "that official recognition of same-sex couples confers an existence and a legitimacy on them vis-à-vis the outside world."[223] To be clear, the AG has not suggested, same as the Court in the previous cases, that Member States should adopt same-sex marriages in their national legislation.

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[220] Article 18 of the Constitution of the Republic of Poland of 2 April 1997, O.J. 1997, No. 78, item 483, reads: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

[221] Opinion, para 4.

[222] Unless — as stressed by the AG de la Tour — "it is the only way a person can prove his or her status as a married person" in the given Member State (Opinion, para 60). This, at least on a theoretical level, is not the case in Poland. According to Article 1138 of the Code of Civil Procedure: "Foreign official documents have the same evidentiary value as Polish official documents." The practice, however, shows that this is not often respected by the authorities. This was noted by the AG in para 44 of his Opinion, who thus concludes that "in the absence of alternative solutions in Poland […] that Member State is, therefore, under an obligation to transcribe the foreign marriage certificate into a civil register" (para 45 and 54).

[223] Opinion, para 53. The AG deliberately emphasized that the expression was borrowed from the ECtHR's judgment of 12.12.2023 in *Przybyszewska and Others v. Poland*, CE:ECHR:2023:1212JUD001145417.

None of the cases discussed above deals with questions of the applicable law. The Court simply proceeds on the assumption that a marriage or parent-child relationship[224] created under the laws of one Member State must be recognized — at least for some purposes — in other Member States so that the right to move freely within the EU is not impeded. Even if so far the case law of the Court was somewhat cautious in attempt to reconcile the EU freedoms and the national competences and traditions regarding sensitive areas of family law, it is clear that the latter, "can no longer be seen as separate from the impact of EU law" (at least in cross border situations).[225] Moreover, it seems clear enough that the method of recognition used by the European Court does penetrate the regular choice of law analysis.

The Court had no opportunity yet to extend the obligation to recognize a marriage or parenthood to classic private law consequences, such as e.g. succession or other proprietary effects. Some have spoken about "recognition without full effect," which "permits a limited acknowledgment of foreign acts or documents, sufficient to enable the exercise of fundamental freedoms."[226] However, looking at the Court's jurisprudence from a broader perspective, with all its insistence on the fundamental rights and the free movement of persons within EU, it would seem profoundly disturbing — in the EU common legal space — not only to refuse a child of the same-sex parents, or a spouse in a same-sex marriage, the "existence and a legitimacy vis-à-vis the outside world", but also to refuse basic proprietary rights, such as those of succession and other similar rights. Denying proprietary rights to non-traditional families formed in another Member State, not only violates fundamental rights enshrined

[224] Consider, however, the EU legislative action to facilitate the recognition in a Member State of the parenthood established in another Member State, which adopts a classic conflict-of-laws methodology to deal with the problem. See Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final. See also European Group for Private International Law, *Observations on the Proposal for a Council Regulation in matters of Parenthood,* https://gedip-egpil.eu/wp-content/uploads/2023/06/Observations-on-the-Proposal-for-a-Council-Regulation-in-matters-of-Parenthood.pdf [accessed: 1.01.2025].

[225] J. Meeusen, *Functional Recognition of Same-Sex Parenthood for the Benefit of Mobile Union Citizens — Brief Comments on the CJEU's Pancharevo Judgment (J. Meeusen — ECJ, 14 December 2021, C-490/20),* https://gedip-egpil.eu/fr/2022/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/ [accessed: 1.01.2025].

[226] M. Pasqua, *AG De La Tour's Opinion in Wojewoda Mazowiecki on Poland's Refusal to Transcribe a Same-Sex Marriage Certificate,* The EAPIL blog, https://eapil.org/2025/04/22/ag-de-la-tours-opinion-in-wojewoda-mazowiecki-on-polands-refusal-to-transcribe-a-same-sex-marriage-certificate/comment-page-1 [accessed: 1.01.2025].

in the Charter but also hinders (or at least renders less attractive) the exercise of the free movement to states, which do not know same-sex families in their domestic law.

It is doubtful whether the method of recognition of legal relationships may be used in situations when there is no formal registration that initiates a legal relationship.[227] Although the "recognition" (as understood here) is about accepting substantive effects of a legal relationship, the method has so far been used in situations, when there exists a formal entry to some kind of registry (companies, marriages, parenthood, names), which is also evidenced by the recent CJEU's case law regarding Article 21 and non-traditional families. Thus, while recognition of legal relationships concerns substantive effects, and consequently operates on a different level than the recognition of judgments (which works on a procedural level and is about accepting the *res iudicata* effects), the common feature of both is that there must be some formal act of the state authorities in a Member State of origin as a starting point.

6. Conclusion

In Europe, the fundamental principles of private international law have largely remained unchanged. These principles continue to rest on the ideal of harmonious coexistence among nations, underpinned by the doctrine of comity. One of the primary objectives of private international law should remain the promotion of international consistency in judicial decision-making. The determination of applicable law in private legal disputes must, in principle, be approached with neutrality. Central to this is the commitment to the equal treatment of all legal systems — the belief that no legal order is inherently superior or inferior, more or less modern, better or worse suited to the circumstances at hand. This impartial stance should serve as the starting point for all conflict-of-laws analysis. The preferential application of a forum's own law ought to be the exception rather than the rule. In identifying the applicable legal system for a given situation, courts should aim to designate the law that corresponds most closely to the case's natural or territorial center of gravity (*der Sitz*, or the law most closely connected). Furthermore, the

[227] See A. Dorabialska, *Uznanie*…, p. 56 (stating that it is a common ground in the doctrine that the method of recognition may only apply with respect to relationships documented in a relevant registry).

principles of predictability and simplicity should continue to guide both the formulation and application of the conflict-of-laws rules. Adherence to the Savignian multilateral approach as the predominant methodological framework remains essential to preserving these foundational values.

In recent decades, however, it has become increasingly evident that the multilateral method of conflict-of-laws analysis is ill-equipped to address the growing influence of public law norms within private legal relationships. The limitations of a "blind indication" of the applicable law — whereby the connecting factor alone determines the governing legal system without regard to substantive content — have become more apparent, especially when contrasted with the perceived benefits of identifying a "better law" by taking into account the objectives and practical outcomes of the substantive rules of the competing legal systems.[228] There is a growing consensus that the pursuit of fairness is not confined to substantive law alone, but must also extend to the realm of private international law. Some scholars argue that justice — the overarching aim of all judicial activity — should not be compartmentalized into separate spheres of "conflict" and "substance," as has traditionally been the case in the continental private international law [229] Rather, there exists a single conception of justice, to be realized through the coherent application of appropriately aligned conflict-of-laws principles and substantive legal norms. A fundamental distinction between European and American approaches, however, lies in the European reluctance to replace the multilateral method with a unilateral one. The prevailing view in Europe remains that unilateral methodologies may be employed only in exceptional cases, serving as supplementary or corrective mechanisms within the broader framework of traditional conflict-of-laws system, and only in relation to specific institutions or techniques designed to address particular deficiencies. Accordingly, instruments such as public policy clause, the overriding mandatory rules, or rules with built-in value judgments remain exceptions from the principle-oriented, neutral localization of the

[228] See e.g. O. Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, "Common Market Law Review" 1987, vol. 24, p. 159; E. Vitta, *The Impact in Europe of the American "Conflict Revolution"*, "American Journal of Comparative Law" 1982, vol. 30, p. 7; P. Patocchi, *Characteristic Performance: A New Myth In the Conflict of Laws? Some Comments on a Recent Concept In the Swiss and European Private International Law of Contract*, in: Études de droit international en l'honneur de Pierre Lalive, eds. Ch. Dominicé, R. Patry, C. Reymond, Basel—Frankfurt am Men 1993, p. 129; J. von Hein, *Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution*, "Tulane L.R." 2008 (May), p. 1707.

[229] See F. Vischer, *"Revolutionary Ideas" and the Swiss Statute on Private Intranational Law*, in: *Convergence and Divergence in Private International Law — Liber Amicorum Kurt Siehr*, eds. K. Boele-Woelki et al., The Hague—Zürich 2010, p. 102.

territorial center of gravity of legal relationships. Likewise has the recognition of legal relationships penetrated the conflict-of-laws methodology to a limited extend and only with respect to intra-EU free movement.

Nevertheless, in the recent decades, the role of the aforementioned exceptions has gained increasing prominence within the traditional framework of private international law. This trend is notable enough so that it is justified to speak of the blending of the Savignian multilateralism, the American style unilateralism, and the recognition of legal relationships within the European system of the conflict of laws. Although these instruments continue to function as exceptions, it is essential to recognize that they reflect a unilateral methodology grounded in a conceptual premise fundamentally distinct from that of traditional conflict-of-law rules based on neutral connecting factors. Specifically, this alternative approach centers on delineating the spatial scope of application of a substantive rule — whether domestic or foreign — that asserts its relevance, without resorting to a multilateral determination of the applicable law governing the legal relationship in question. The interaction between these substance-oriented mechanisms and traditional multilateral rules represents one of the most significant contemporary developments in private international law. At the same time, it poses considerable challenges for both judicial practice and academic analysis. The effective operation of this blended system requires careful attention to the diverse range of legal instruments involved, and a nuanced understanding of the differing logics that underpin these distinct methodological approaches.

The Americans, on the other hand, endure their own struggles with conflict-of-laws methodology. Both the Restatement (Second) and the current Draft of the Restatement (Third) represent hybrid constructs,[230] a "mix of things," blending the "revolutionary" doctrines of interest analysis with elements that remain rooted in traditional, multilateral choice-of-law rules. In principle, there is no inherent contradiction in combining unilateral and multilateral methodologies within a single conflict-of-laws framework. This might satisfactory be done if the distinct methodologies are kept separate and understood as having very different premises, with a clear defined role and hierarchy within the system. However, the amalgamate of approaches and rules that characterize both the existing system of the Restatement (Second) and court practice in various states, as well as the planned Restatement (Third), is least satisfying for the US practice itself, as often reminded by the American

[230] To that effect, with respect to Restatement (Second): F. K. Juenger, *A Third*…, p. 415.

scholars[231] and practitioners. While the Draft Restatement's (Third) objective to "[…] bring greater predictability to choice of law by providing more determinate rules, rather than open-ended balancing"[232] must be complemented, this objective might be unattainable, unless and until the methodological premises that drive interest analysis, on one hand, and the more rigid, rule-based structure of multilateral conflict-of-laws rules, on the other, are adequately acknowledged and conceptually reconciled.

Accordingly, while methodological starting points and accents undoubtedly differ on either side of the Atlantic, a common feature of contemporary developments in conflict-of-laws theory — both in Europe and the United States — is, we submit, the blend of unilateral and multilateral approaches to solving the conflict-of-law problems.

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[231] F. K. Juenger, *A Third…*, p. 403 (underlying the widespread misunderstanding of the difference between unilateral and multilateral methods and the criteria they employ for resolving conflicts, i.e. the connecting factors as contrasted with state interests).

[232] K. Roosevelt III, B. Jones, *What a Third…*, p. 141.

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