APPLYING OR TAKING ACCOUNT OF FOREIGN OVERRIDING MANDATORY PROVISIONS – SOPHISM UNDER THE ROME I REGULATION

Comments on the ECJ Case C-135/15 – *Nikiforidis*

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I. Introduction

The Grand Chamber of the European Court of Justice (ECJ) held in *Nikiforidis*[1] that Member State courts may "take into account" foreign overriding mandatory provisions (public policy provisions) as a matter of fact. This shall be possible even if the conditions of Art. 9(3) Rome I Regulation[2] for the "application" of foreign law are not fulfilled, namely when neither the contract is to be performed

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[1] ECJ, 18 October 2016, *Republik Griechenland v Grigorios Nikiforidis*, ECLI:EU:C:2016:774.

[2] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008.

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in the country that has enacted the public policy provisions nor when these provisions render the performance of the contract unlawful.

This paper will subject this decision as well as other findings of the ECJ judgment to a critical analysis. It will show that the ruling has the potential to undermine the European unification of the conflict-of-laws regime for contracts. In the end, the paper suggests a proposal for legislative reform.

II. Facts of the Case

The preliminary ruling by the ECJ under Art. 267 TFEU dates back to a request by the highest German labour law court, the Federal Labour Court (*Bundesarbeitsgericht*).[3] In the underlying case, Mr Nikiforidis, a teacher at a Greek school in Nuremberg (Germany), claimed his full salary from his employer, the Greek State (the "Hellenic Republic").[4] Mr Nikiforidis had been employed by the school since 1996. From October 2010 to December 2012, he had received only a reduced salary. His colleagues in Nuremberg were treated likewise,[5] and teachers at other Greek schools in Germany, such as in Düsseldorf,[6] were also affected. The teachers were told that the pay cuts were based on a Greek law of 2010,[7] which had been adopted in the Greek government debt and economic crisis. The act was instigated by the so-called "Troika", which consisted of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF); they obliged the Greek government to diminish public expenses in return for financial support. The Greek government argued in the German court that it was left with no other choice than to lower the salaries of its employees, that the

[3] German Federal Labour Court (*Bundesarbeitsgericht*), 25 February 2015, file No. 5 AZR 962/13 (A), ECLI:DE:BAG:2015:250215.B.5AZR962.13A.0.

[4] The case was initially brought before the Labour Court at the school's location in Nuremberg (*Arbeitsgericht Nürnberg*), which ruled in favour of the Hellenic Republic (decision of 30 March 2012, file No. 10 Ca 59/11). However, this decision was reversed on appeal in favour of Mr Nikiforidis by the Higher Labour Court at Nuremberg (*Landesarbeitsgericht Nürnberg*, judgment of 25 September 2013, file No. 2 Sa 253/12, ECLI:DE:LAGNUER:2013:0925.2SA253.12.0A). The Hellenic Republic appealed that judgment to the Federal Labour Court.

[5] Their claims were similarly handled by the German courts in parallel proceedings, cf. the final judgments by the Federal Labour Court, file Nos 5 AZR 739/16 through till 758/16.

[6] See, for instance, Labour Court (*Arbeitsgericht*) Düsseldorf judgment of 26 May 2011 (file No. 5 Ca 7637/10); Higher Labour Court (*Landesarbeitsgericht*) Düsseldorf judgments of 17 November 2011 (file No. 15 Sa 864/11) and of 31 July 2014 (file No. 15 Sa 1133/13); Federal Labour Court (*Bundesarbeitsgericht*), judgment of 25 April 2013 (file No. 2 AZR 960/11).

[7] Art. 1 of the Greek Law No. 3833/2010 (Official Gazette A 40 of 15 March 2010) imposes a reduction of 12 % and Art. 3 of the Greek Law No. 3845/2010 (Official Gazette A 65 of 6 May 2010) another 3 %.

general salary cut was part of its austerity legislation, and that it was applicable *ipso iure* to the contract of the teacher without any further steps.[8]

The Greek government's submission that it would enjoy state immunity and could therefore not be sued abroad for full payment was accepted by the court of first instance, which subsequently dismissed the claim.[9] The higher instances, however, followed Mr Nikiforidis's counterargument that his claim was admissible and did not interfere with the defendant's sovereignty.[10]

The employment contract of Mr Nikiforidis expressly provided that his salary is determined in accordance with the German collective wage agreement for the public sector.[11] There was, however, no explicit choice of law governing the contract. Since Mr Nikiforidis carried out his work as schoolteacher in Nuremberg, German law was applicable according to Art. 8(2) Rome I Regulation.[12] Under German labour law, the salary of Mr Nikiforidis could not have been reduced unless he had been given a formal notice of dismissal in combination with an offer of a new contract with different terms to be accepted by him.[13] A Greek school in Düsseldorf complied with these requirements.[14] However, in the cases of the teachers in Nuremberg such as Mr Nikiforidis, the German Federal Labour Court neither found nor considered that a notice of dismissal had been given. This gave rise to the question of whether the salary was reduced directly by the operation of Greek law.

The German Federal Labour Court assumed that the Greek austerity legislation would qualify as an overriding mandatory provision in the sense of Art. 9 Rome I Regulation.[15] The ECJ did not subsequently question this characterisation.[16] The point was therefore not whether the Greek law fulfilled the conditions of the definition in Art. 9(1) Rome I Regulation, but to what extent it could affect an employment contract governed by German law. The main issue of the referral by the German Federal Labour Court can be phrased as follows: is it

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[8] Cf. Federal Labour Court (note 3) para. 2.

[9] Cf. Higher Labour Court Nuremberg (note 4) para 21, based on sec. 20 of the German Judiciary Act (*Gerichtsverfassungsgesetz*); Opinion of Advocate General SZPUNAR, 20 April 2016, ECLI:EU:C:2016:281, para. 17.

[10] Cf. Higher Labour Court Nuremberg (note 4) paras 24 and 77–80, and Federal Labour Court (note 3) para. 10; Opinion of AG SZPUNAR (note 9) paras 17–18.

[11] Cf. Higher Labour Court Nuremberg (note 4) paras 3–11.

[12] The result would have been the same under the previous rule of Art. 6(2)(a) Rome Convention (Convention on the law applicable to contractual obligations 1980, OJ L 266/1, 9.10.1980).

[13] The conditions for a notice of dismissal pending a change of contract are set out by relevant decisions of the Federal Labour Court, judgment of 23 June 2005 (file No. 2 AZR 642/04, published in the case reporter BAGE 115, 149); judgment of 12 January 2006 (file No. 2 AZR 126/05, published in the journal NZA 2006, 587); judgment of 1 March 2007 (file No. 2 AZR 580/05, published in BAGE 121, 347); judgment of 26 March 2009 (file No. 2 AZR 879/07, published in NZA 2009, p. 679).

[14] Federal Labour Court (note 6) para. 5.

[15] Federal Labour Court (note 3) paras 10 and 15.

[16] Cf. ECJ (note 1) paras 40 *et seq*.

permissible under Art. 9 Rome I Regulation to apply or take into account foreign overriding mandatory provisions, which neither originate from the law of the forum nor the law of the place of contractual performance and which do not render the performance unlawful?

III. Rome I Regulation *versus* Rome Convention: Temporal Scope

Before it could address this main question, the ECJ had to clarify whether the Rome I Regulation governs the case in the first place. The Regulation sets out in Art. 28 that it "shall apply to contracts concluded after 17 December 2009." For previously concluded contracts, the 1980 Rome Convention, which both Germany and Greece had ratified, continues to apply.[17]

At first glance, given that the employment of Mr Nikiforidis dated back to before the Millennium,[18] it seems clear that the Rome I Regulation does not govern the case. However, employment relations are typically long-term contracts. If these contracts were indefinitely governed by the conflicts rules in force at the time they were entered, they would be shielded from any law reform. The same is true of rent, supply, service and similar contracts, which represent a major share of turnover recorded in the national economies across the Single Market. The German Federal Labour Court therefore sought clarification as to the applicability *ratione temporis* of the Rome I Regulation and posed this as the first question of its reference for a preliminary ruling.

Whether the Rome I Regulation or the Rome Convention applies is not merely a technicality but of particular importance because the two conflict-of-laws instruments differ with regard to giving effect to provisions that are foreign to the actually applicable substantive law. The relevant Art. 9(3) of the Rome I Regulation is stricter than its respective predecessor in Art. 7(1) Rome Convention, which allowed the application of overriding mandatory provisions from States other than that in which the contractual obligations have to be performed.[19] It must be noted, however, that some Member States had made use of the possibility to declare a reservation against the application of Art. 7(1) Rome Convention.[20] Germany was among these Member States. If the Rome I Regulation was not applicable, German courts would have to follow their domestic conflict-of-laws regime. Art. 34 of the Introductory Act to the German Civil Code (EGBGB), predating the Rome I Regulation, unilaterally stated that overriding mandatory rules of *German* law would apply regardless of the law governing the contract.[21]

[17] Art. 24 Rome I Regulation; for the Rome Convention see above note 12.

[18] Cf. Higher Labour Court Nuremberg (note 4) para. 3.

[19] See *infra* part 4.

[20] Art. 22(1)(a) Rome Convention.

[21] This domestic provision simply copies Art. 7(2) Rome Convention ("Nothing in this Convention shall restrict the application of the rules of the law of the forum in a

The situation with regard to *foreign* overriding mandatory provisions remained unclear.[22] If one accepts that Art. 9(3) Rome I Regulation is subject to the same intertemporal regime as the rest of the Regulation, then the applicability of the provision – over Art. 7(1) Rome Convention and respective domestic conflict-of-laws rules – depends on Art. 28 Rome I Regulation, *i.e.* the question of when the contract was concluded.[23]

Difficulties in temporal delineation arise from the fact that the Rome I Regulation itself does not specify when a contract is to be regarded as concluded for the purpose of its Art. 28. The ECJ held in *Nikiforidis*, based on its previous judgments in *Kozłowski*[24] and in *Dworzecki*[25] (on very different areas of EU law), that a European autonomous interpretation of the Rome I Regulation would apply in this respect.[26] This would be necessary for the uniform and equal application of the EU law across all Member States.

In contrast, Advocate General SZPUNAR had suggested that the term "conclusion of a contract" would not have to be regarded as a European autonomous concept because the European unification efforts resulting in the Rome I Regulation concerned conflict-of-laws for contracts and did not touch on the substantive laws of contracts in the Member States on issues such as contract formation.[27] This view, which is in line with Art. 10 of the Rome I Regulation and

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situation where they are mandatory irrespective of the law otherwise applicable to the contract.").

[22] See for the different approaches that had been developed, *infra* part 6.

[23] For a different view, see K. SIEHR, Deutsche Arbeitsverträge mit der Republik Griechenland und Gehaltskürzungen nach griechischem Recht, *Recht der Arbeit (RdA)* 2014, p. 206 *et seq.*, at 208-209, who argues that it is always the current public policy rule that applies. While it is correct that the content of public policy is constantly updated, it is not beyond doubt that the conflicts rule permitting the application of overriding mandatory provisions would also have to apply to events before its entry into force. This would undermine legal certainty because the parties to a contract could never be sure about the legal rules with which they must comply. Furthermore, the legislator of the Rome I Regulation treats Art. 9 and the rest of the Regulation indifferently with regard to their intertemporal application: see Art. 28 Rome I. It follows that specific provisions cannot be applied retroactively to contracts entered into before 18 December 2009.

[24] ECJ, 17 July 2008, *Kozłowski*, EU:C:2008:437, para. 42.

[25] ECJ, 24 May 2016, *Dworzecki*, PPU, EU:C:2016:346, para. 28.

[26] ECJ (note 1) paras 28-29. This view had little support from scholars, see *e.g.* K. THORN, in P. BASSENGE *et al.* (eds), *Palandt: Bürgeliches Gesestzbuch (BGB)*, 75th ed., CH Beck 2016, Art. 28 Rom I para. 2. Appreciation of the decision showed K. DUDEN, Anwendung griechischer Spargesetze auf Arbeitsvertrag in Deutschland, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, p. 940 *et seq.*, at 943; F. MAULTZSCH, Griechische Spargesetze und Internationales Privatrecht der Rom I-Verordnung, *Europäische Zeitschrift für Arbeitsrecht (EuZA)* 2017, p. 241 *et seq.*, at 246. For criticism expressed, see S. LEMAIRE/ L. PERREAU-SAUSSINE, Applicabilité du règlement "Rome I" et prise en considération des lois de police étrangères: la CJUE met en danger la sécurité contractuelle, *La Semaine Juridique* 2017, p. 124.

[27] Opinion of AG SZPUNAR (note 9), paras 36-45. The ECJ itself had highlighted this point in *Nikiforidis*, see ECJ (note 1) para. 52, first sentence: "[t]he Rome I Regulation

has been supported by the majority of scholars before the ECJ judgment in *Nikiforidis*,[28] is still convincing. It follows that the time and other circumstances of the conclusion of a contract have to be determined in accordance with the *lex causae, i.e.* in the case of Mr Nikiforidis the German *lex contractus*.[29]

In the end, it was not decisive which side one takes in this doctrinal dispute. In the absence of EU substantive rules on the issue of contract formation, the ECJ could not establish any conditions for the conclusion of a contract and merely highlighted that it matters when the "mutual agreement of the contracting parties [is] manifested".[30] It therefore assumed that the employment contract of Mr Nikiforidis was concluded prior to the cut-off date, 17 December 2009. The result would of course have been the same under German contract law. Regardless of whether one follows a European autonomous approach or the applicable substantive law in this respect, it is clear that the Rome I Regulation does not apply to the *original* employment contract in the case at hand.

However, both the Advocate General and the ECJ envisaged the possibility that the contract could have been renewed and could therefore be considered as being concluded at a time after 17 December 2009.[31] According to the ECJ, this would be conceivable when the parties make a variation to the contract.[32] A slight modification by simple updating or amending will, of course, be insufficient, as this would endanger the principles of legal certainty and the predictability of the outcome of litigation. Yet, if the contracting parties significantly alter their contract so as to create in fact "a new legal relationship", the ECJ is ready to apply the Rome I Regulation to this newly concluded contract.[33] This test is based on a European autonomous interpretation of the Regulation, yet it is left to the national courts to apply it.[34] Though the national courts are familiar with novation of contracts under domestic law, since it is a legal concept known across the EU,[35]

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harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract."

[28] S. OMLOR, in F. FERRARI (ed), *Rome I Regulation*, Munich 2015, Art. 28; P. MANKOWSKI, in U. MAGNUS/ P. MANKOWSKI (eds), *Rome I Regulation*, Otto Schmidt 2017, Art. 28 para. 5; U. MAGNUS, in U. MAGNUS/ R. HAUSMANN *et al.* (eds), *Staudinger, BGB, Internationales Vertragsrecht 2*, Sellier/de Gruyter 2016, Art. 28 Rom I-VO para. 8; G.J. SCHULZE, in F. FERRARI/ E.-M. KIENINGER/ P. MANKOWSKI *et al.* (eds), *Internationales Vertragsrecht*, 2nd ed., CH Beck 2011, Art. 28 VO (EG) 593/2008 para. 2; D. MARTINY, in R. RIXECKER/ F.J. SÄCKER/ H. OETKER (eds) *Münchener Kommentar zum BGB*, vol. 10, 6th ed., CH Beck 2015, Art. 28 Rom I-VO para. 3, and maintained after *Nikiforidis* in vol. 12 (7th ed., München 2017), Art. 28 Rom I-VO para. 4; T. PFEIFFER, Neues Internationales Vertragsrecht – Zur Rom I-Verordnung, *Europäische Zeitschrift für Wirtschaftsrecht* 2008, p. 622 *et seq*.

[29] See text to note 12.

[30] ECJ (note 1) para. 31.

[31] Opinion of AG SZPUNAR (note 9), paras 49–50; ECJ (note 1) paras 32-37.

[32] ECJ (note 1) para. 32.

[33] ECJ (note 1) para. 37.

[34] ECJ (note 1) para. 38.

they are prevented from applying their national standards when assessing the conclusion and variation of contracts for the purpose of determining the applicability of the Rome I Regulation.

Unfortunately for legal practice and certainty, the ECJ has not provided any criteria as to when a variation of the employment contract is to be regarded as a matter of such magnitude that it would give rise to a new contract falling under the Rome I Regulation. It is particularly regrettable that the ECJ created the requirement for European autonomous criteria in the first place but has not provided further assistance on how to identify them. Since standards of national law cannot be applied, Member State courts will need to request clarification in a preliminary ruling procedure from the ECJ. One can think of criteria such as assignment to different tasks or as modifications of salary or working hours.[36] What seems indispensable is that the job role has changed, *i.e.* that a new job is contracted. Admittedly, this can only be used as a rule of thumb and does not establish the threshold of necessary variation for permanent contracts in other areas of law.

In the decision subsequent to the ECJ's judgment in *Nikiforidis*, the German Federal Labour Court held that there had been no significant variation of the contract between Mr Nikiforidis and his employer.[37] Therefore, the court did not apply the Rome I Regulation to the case. It is somewhat curious that the rest of the preliminary ruling concerned precisely this Regulation, but that is far from being the only peculiarity of the case.[38]

IV. Exhaustive Nature of Art. 9 Rome I Regulation

The ECJ then tackled the main issue of the case. It held that Art. 9 Rome I Regulation lists exhaustively the scenarios in which foreign overriding mandatory provisions can be applied.[39] This is a major ruling. In practice, it means that a national court cannot give effect to public policy rules of other States where the conditions set out in Art. 9(3) Rome I Regulation are not met.[40] In other words, the Regulation is authorising, and at the same time, limiting, the application of foreign mandatory laws.

This interpretation of Art. 9 Rome I Regulation is in line with the classic canon of statutory construction. Already the Preamble of the Regulation highlights the exceptional nature of applying public policy provisions.[41] In this sense, the ECJ

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[35] O. LANDO/ H. BEALE/ E. CLIVE *et al.* (eds), *Principles of European Contract Law*, vol. 3, Kluwer 2003, p. 126.

[36] F. MAULTZSCH (note 26) at 248.

[37] Bundesarbeitsgericht, judgment of 26 April 2017 (file No. 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0, forthcoming in BAGE), para. 32.

[38] See on the peculiar aftermath of the case before the German courts, *infra* part 7.

[39] ECJ (note 1) para. 49.

[40] But see on the taking into account as a matter of fact, *infra* part 6.

[41] Recital 37 Rome I Regulation.

has a point when it states, as a "derogating measure", Art. 9 Rome I Regulation is to be interpreted strictly.[42] Though this statement about exceptions, which is often used, begs the question as to what to "interpret strictly" generally means, it is clear what it means here: not to extend the provision beyond its wording.

The limiting purpose of Art. 9 Rome I Regulation as a whole is already evident from its first paragraph which, for the first time, makes an attempt at a legislative definition of overriding mandatory provisions.[43] On this basis, the third paragraph of Art. 9 Rome I Regulation submits the application of foreign overriding mandatory provisions to very specific conditions, namely that they have been adopted by the country where the obligations arising out of the contract have to be or have been performed and that they render the performance of the contract unlawful. These conditions would hardly make any sense if national courts were allowed to follow foreign public policy provisions from other sources as well.

The intention behind the introduction of Art. 9(3) Rome I Regulation was to allow, and at the same time to contain, the application of foreign public policy rules. This can be evidenced by the history of the provision, to which the ECJ refers.[44] The rather liberal proposal by the Commission was gradually hardened in the legislative process.[45] The goal was to curtail judicial freedom in applying foreign public policy provisions and thereby discard the otherwise governing law. Whatever one may think about this restriction, it can be said that it is at least in line with the general ambition of the Regulation to "improve the predictability of the outcome of litigation" and "certainty as to the law applicable".[46]

Even more important than these hermeneutic arguments is a conceptual consideration. The application of public policy is like a black hole in the universe of private international law. It allows the provisions of a certain state, whose law is otherwise inapplicable, to supersede the law that governs the contract.[47] If national courts were allowed to extend this black hole further to draw in situations that are not expressly covered by Art. 9(3) Rome I Regulation, then the universe of private international law could collapse. Savigny's conception of legal relationships having their "seat" in a certain country would give way to a new kind of statutist

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[42] ECJ (note 1) para. 49, referring "by analogy" to the decision in Case C-184/12, *Unamar*. This case concerned the interpretation of Art. 7(2) of the Rome Convention.

[43] The definition given in Art. 9(3) Rome I Regulation is influenced by the writings of Franceskakis, see *e.g.* P. FRANCESKAKIS, Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles sur les conflits de lois, *Rev. crit. dr. int. priv.* 1966, p. 1 *et seq*. His conception had later been taken up by the ECJ in Case C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453, para. 31.

[44] ECJ (note 1) para. 45.

[45] Draft Report of the European Parliament on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 2005/0261(COD), p. 15, as cited by the ECJ.

[46] Recital 6 Rome I Regulation.

[47] This has been rightly called an "inherently negative process" by J. HARRIS, Mandatory Rules and Public Policy in the Rome I Regulation, in F. FERRARI/ S. LEIBLE (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publisher 2009, p. 269 *et seq*., at 297.

theory in which public policy rules determine the cases that fall within their scope, without any checks and limits. Courts could then, for instance, thwart a choice of law made expressly by the parties – simply by following a provision of another law that purports to be applicable even if the enacting State has no legitimate reason for regulating this contract. This situation has to be avoided at all cost because it threatens the achievements of private international law. Parties could neither effectively exercise their party autonomy nor trust in the objective connecting factors in the absence of a choice of law. While it is important to respect foreign rules in the public interest, their role must not be overemphasised at the expense of private justice and the general principles of conflict-of-laws.

One therefore has to applaud the ECJ's characterisation of Art. 9 Rome I Regulation as exhaustive. The vast majority of the literature before the judgment had arrived at the same conclusion.[48] But the ruling was by no means unnecessary. There has been a proposal in the literature to consider Art. 9 Rome I Regulation as the "unfinished part" of European private international law and to supplement it with other, unwritten rules, thereby effectively allowing and even requiring the application of overriding mandatory provisions to situations not provided for in the Regulation.[49] After *Nikiforidis*, this option is off the table.

Yet the fact that the Court has correctly interpreted the provision does not exclude that Art. 9(3) Rome I Regulation is misconceived. The defects of this provision have been long described.[50] Essentially, there are two.

First, the limitation to the law of the country in which the contractual obligations have been or are to be performed seems too restrictive. Other States may have a legitimate interest in their laws being applied too. One can imagine a provision of State A prohibiting the sale of its cultural goods. Why should it apply only if a contract, which the parties have submitted to the law of State B, is to be performed in State A? Of course, in many instances the law of State B or the law of the forum will have a rule against the sales of cultural goods as well, but whether this law covers the sale of a foreign cultural object is often not entirely certain. There may be good reasons to apply the law of State A from the viewpoint of international cooperation. Other examples include prohibitions of the sale of weapons, the financing of terrorism or agreements to manipulate the stock prices in

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[48] See *e.g.* L. GÜNTHER, *Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I- und Rom II-Verordnungen*, Alma Mater 2011, p. 173 *et seq*.; J. HARRIS (note 47) at 310 *et seq*.; P. HAUSER, *Eingriffsnormen in der Rom I-Verordnung*, Mohr Siebeck 2012, p. 105 *et seq*.; W.-H. ROTH, Savigny, Eingriffsnormen und die Rom I-Verordnung, in G. KÜHNE/ J.F. BAUR (eds) *Festschrift für Gunther Kühne zum 70. Geburtstag*, Recht und Wirtschaft 2009, p. 859 *et seq.*, at 873 *et seq.*

[49] A. KÖHLER, *Eingriffsnormen – Der unfertige Teil des europäischen IPR*, Mohr Siebeck 2013.

[50] See *e.g.* A. BONOMI, in U. MAGNUS/ P. MANKOWSKI (eds), *The Rome I Regulation*, Otto Schmidt 2017, Art. 9 para. 135 *et seq*. ("a step backwards"); L. D'AVOUT, Le sort des règles impératives dans le règlement Rome I, Dalloz 2008, p. 2167 ("suscite les plus vives réserves"); S. FRANCQ, Lois de police étrangère, in *Répertoire Dalloz de droit international* 2013 (actualisation 2016), para. 208 ("la clarté a perdu son chemin"); P. MANKOWSKI, Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge, *Internationales Handelsrecht (IHR)* 2008, p. 133 *et seq.*, at 148 ("Rückschritt in die Steinzeit des IPR").

a certain country. In each of these cases, solidarity amongst nations commands the application of the foreign law, yet Art. 9(3) Rome I Regulation does not allow it.

The second defect of Art. 9(3) Rome I Regulation is that it allows courts to follow only those overriding mandatory provisions that render the performance of the contract *unlawful*. It thereby excludes those provisions that determine the way in which a contract shall be performed without rendering it a nullity. Examples are standards of conduct and safety (*e.g.* the respect for environmental and labour standards), information duties (*e.g.* with regard to the goods sold) or provisions designed to avoid contractual imbalances (*e.g.* the requirement of an indemnity for a commercial agent in case of termination). Though none of these provisions render the performance of the contract unlawful, they try to steer the performance in a way that is compatible with public interests. Nevertheless, they cannot be applied under Art. 9(3) Rome I Regulation.

The two restrictions that the Rome I Regulation imposes on the application of foreign public policy provisions can hardly be explained by the goal of international cooperation or public justice. They only make sense from the point-of-view of private justice: Art. 9(3) Rome I Regulation saves individual debtors from a situation of conflicting duties under the law applicable to the contract and under the law of the place of performance. The provision is designed mainly to cater to obstacles of performance and not for co-operation in the enforcement of other laws. Its purpose is clearly at odds with Art. 9(2) Rome I Regulation, which is a pure rule for the protection of public interests (in this case, of the forum). The difference between the two paragraphs of Art. 9 Rome I Regulation can also be seen from their wording: while Art. 9(2) speaks of the "application" of the law of the forum, Art. 9(3) is only "to give effect" to foreign overriding mandatory provisions. What the latter provision does, then, is to allow the court to take account of foreign law, but not to apply it. Also, Art. 9(3) Rome I Regulation seems somewhat superfluous because already Art. 12(2) Rome I Regulation allows national courts to have regard to the law of the place of performance with regard to the manner of performance. The legislator could have easily extended this clause to the illegality of performance instead of establishing a separate rule in Art. 9 Rome I Regulation. Finally, by ignoring overriding mandatory provisions of States other than that of the place of performance, Art. 9(3) Rome I Regulation fosters international disharmony and invites forum shopping.[51]

It is well-known that these shortcomings of Art. 9(3) Rome I Regulation are due to the fact that the provision had been restricted in comparison to its predecessor, Art. 7(1) Rome Convention, during the legislative process in Brussels.[52] It is equally public knowledge that these restrictions were favoured by the British government which threatened, during the negotiations, to use its right to opt out if the application of foreign overriding mandatory rules was not restricted.[53]

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[51] A. BONOMI (note 50), para. 136.

[52] See the references *supra* note 50.

[53] See, for the position of the British government, A. DICKINSON, Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf

The UK's intention was to avoid legal uncertainty over the application of foreign public policy rules in the courts of other Member States, in particular concerning financial contracts governed by English law.[54] It was only satisfied after it had been reassured that the Regulation was in line with two English precedents, *Foster v Driscoll*[55] and *Ralli Bros. v Cia Naviera Sota y Aznar*.[56]

In the first case, the Court of Appeal for England & Wales declared a partnership, which aimed at financing of a shipment of whisky to the United States, illegal because of the prohibition of alcohol that was in force on the other side of the Atlantic. The application of US law in *Foster v Driscoll* can indeed be considered as a showcase of solidarity with a friendly nation (or as the court called it: "international comity"). There is no doubt that the partnership contravened US law because the whisky was destined for America. Yet the place of performance of the financing partnership was not in America, given that the parties only agreed to deliver whisky on board in London and not to ship it themselves to the US; furthermore, all payments had to be made in Europe. The place of performance did not play any role in the reasoning of the Court of Appeal. Instead, the driving motive was to avoid a complaint by the US government as a friendly nation to the UK. So the rationale of the judgment is not fully in line with the logic underlying today's Art. 9(3) Rome I Regulation.

In the second case, the English company *Ralli Bros* had chartered a ship from Spanish owners to ship jute from Calcutta to Barcelona. Part of the payment was to be made in Spain by the Spanish receivers of the jute directly to the shipowners. In the meantime, a Spanish decree had been adopted that limited the freight of jute to a certain rate, which was exceeded by the freight rate agreed in the charterparty. The recipients of the goods in Barcelona paid the amount up to the maximum rate set by the Spanish decree, but refused to pay the remainder to the shipowners. The latter then started proceedings in the English courts against *Ralli Bros.* The Court of Appeal dismissed the claim.

English authors have described the status of this judgment and its continuing relevance under English law as "controversial".[57] It is in particular unclear whether the decision relates to conflicts-of-laws or to the substantive-law

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Wiedersehen, Adieu?, *Journal of Private international Law (JPIL)* 2007, p. 53 *et seq*., at 71 *et seq*.; J. HARRIS (note 47) at 305–306.

[54] See Council Document 22 September 2006, 13035/06, Interinstitutional File: ADD 4, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) - Observations by the United Kingdom delegation.

[55] [1929] 1 KB 470.

[56] [1920] 2 KB 287.

[57] R. FENTIMAN, *Foreign Law in English Courts: Pleading, Proof, and Choice of Law*, Oxford University Press 1998, p. 109. See also F.A. MANN, Proper Law and Illegality in Private International Law, *British Yearbook of International Law (BYIL)* 1937, p. 107 *et seq.,* at 110-111 (highlighting that the case only concerned the English doctrine of impossibility and not any question of private international law); F.M.B. REYNOLDS, *Illegality by* Lex Loci Solutionis, *Law Quarterly Review (LQR)* 1992, p. 553 (stating that there is no need to take the case as deciding more than an issue under English domestic law).

doctrine of implied terms, which two of the three judges have mentioned.[58] From a reading of their opinions, it appears that the judgment is grounded less in international solidarity but in accommodating the parties' worry of obstacles to performance.[59] One could argue that the Court of Appeal was not applying the Spanish decree as such, but rather took cognisance of it as a fact. In this sense, it allows and prescribes the consideration of foreign law if (1) the provision has been adopted by the State of contractual performance and (2) it renders the performance illegal.

There seems to be agreement that these peculiarities of the *Ralli Bros* case have informed the two restrictive conditions in Art. 9(3) Rome I Regulation.[60] In *Nikiforidis,* the ECJ however makes an attempt to escape these rigidities by allowing national courts to take into account foreign overriding mandatory rules "as matters of fact" where the conditions of Art. 9(3) Rome I Regulation have *not* been met.[61] It thereby implicitly admits that it views the conditions set out by the Regulation as overly strict. But its ruling directly contradicts the rationale of the decision in *Ralli Bros*, which is supposedly the basis of the provision, and excluded the national courts' ability to take into account foreign law other than that of the place of performance, which renders the fulfilment of the contractual obligation illegal. It will be shown below that this leniency of the ECJ risks undermining the uniformity of European private international law.[62]

Instead of permitting a new and unshackled application of foreign public policy provisions at the national level, it would be recommendable to introduce a proper rule in the Rome I Regulation that provides for international cooperation that is not restricted to invalidating rules at the place of performance. A source of inspiration could be the Swiss Private International Law Act, which authorises

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[58] See the opinions of WARRINGTON L.J. [1920] 2 KB, p. 287 *et seq.*, at 296 ("I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country") and SCRUTTON L.J., [1920] 2 KB, p. 287 *et seq.*, at 304 ("I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstance, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country").

[59] The only allusion to the policy of other countries is to be found in SCRUTTON L.J., [1920] 2 KB 287, 304 - "This country should not in my opinion assist or sanction the breach of the laws of other independent States." - but this statement follows right after he has grounded his decision in an implied term (see preceding footnote). No such term could exist, and no co-operation could be exercised if the parties specifically agreed to circumvent the law of another country.

[60] It is generally recognised that this case served as a model for Art. 9(3) Rome I Regulation, see *e.g.* A. BONOMI, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts, this *Yearbook* 2008, p. 285 *et seq.*, at 296; BONOMI 2017 (note 50), Art. 9 para. 129; S. FRANCQ, Lois de police étrangères, in *Répertoire Dalloz de droit international*, 2013 (actualisation 2016), para. 205; M. RENNER, in G.-P. CALLIES (ed.), *The Rome Regulations*, 2nd ed., Kluwer 2015, Art. 9 Rome I, para. 32.

[61] ECJ (note 1) para. 51 *et seq*.

[62] See *infra* part 6.

Swiss judges to follow a foreign mandatory provision where legitimate and clearly preponderant interests so require and where the enacting State has a close connection to the case.[63] Another option would be to return to the pre-2008 approach by copying Art. 7(1) Rome Convention into the Rome I Regulation, of course without the possibility of making any reservations.

Either of these solutions would be better than the current state of the law.[64] This is well illustrated by the *Nikiforidis* case. The Swiss model would have allowed focussing on the question of whether there are clear and preponderant interests of the Greek State that require its provisions to be taken into account.[65] The Rome Convention's rule would have given centre-stage to the nature and purpose of Greece's austerity legislation and the consequence of its application and non-application.[66] Under both approaches, the labour court in Nuremberg could have considered the reliance of Mr Nikiforidis in the continued application of German law and weighed it against the necessities of the Greek government to reduce its expenses and treat all of its employees equally. In this discussion, the motives behind the Greek austerity legislation would have had to be balanced against interests that are at the heart of the Rome I Regulation such as certainty over the applicable law and the predictability of the outcome of litigation.[67] It is neither guaranteed nor excluded that the Greek law could have been applied in such a legal context.[68] Whatever the result, the Greek government would have at least had its day in court: it could have presented the reasons for its intervention in the German tribunal and justified the necessity to extend the pay cut to contracts governed by another law. The debate about the policy underlying the Greek law was, however, foreclosed by the mechanics of Art. 9(3) Rome I Regulation, which

[63] Art. 19 Swiss Private International Law Act of December 20th 1987 (PILA). Note that the provision makes the assessment of the interests protected subject to the "Swiss conception of law".

[64] See also S. FRANCQ, Public Policy, Overriding Mandatory Rules and EU Conflict of Laws – On the Europeanness of Exceptions and Oddities, presentation at the conference "How European is European PIL?" in Berlin on March 3, 2018 (arguing that "the wording of Art. 9(3) Rome I Regulation is not the result of a true European spirit").

[65] See Art. 19(1) Swiss PILA.

[66] See the second sentence of Art. 7(1) Rome Convention. The criteria reappear in the second sentence of Art. 9(3) Rome I Regulation, yet they are subject to the conditions set out in the first sentence of the provision, namely that the overriding mandatory provisions are in force in the country of contractual performance and that they render the performance illegal.

[67] See Recital 6 Rome I Regulation.

[68] One author has argued that the application of the wage cutting provisions of the Greek law would be "self-serving" and therefore not be in the public interest: C. THOMALE, Griechische Spargesetze vor deutschen Arbeitsgerichten – Verwirrung um Art. 9 Abs. 3 Rom I-Verordnung, *Europäische Zeitschrift für Arbeitsrecht* (*EuZA*) 2016, p. 116 *et seq.*, at 118-120. However, according to the Greek government, the savings were necessary to balance the budget and to maintain essential State services. In this sense, austerity laws can be in the public interest and accordingly qualify as overriding mandatory provisions. In the same vein, see A. JUNKER, Schuldenkrise und Arbeitsvertragsstatut – Der Fall der griechischen Schule, *EuZA* 2016, p. 1 *et seq.*, at 2; F. MAULTZSCH (note 26), at 249.

precludes the application of any foreign overriding mandatory provisions other than those in force at the place of contractual performance.

To resolve cases such as *Nikiforidis* in a manner that is consistent with both logic and the necessity for EU solidarity,[69] it is urgent to reform the Rome I Regulation. For certain, it is highly unlikely that the EU will return to the drawing board and revise Art. 9(3) Rome I Regulation. The Regulation has overall been such a success and has an almost sacrosanct status in Brussels. In the current political climate, nobody will want to re-open the debates about politically contentious issues such as the application of foreign mandatory rules. But perhaps the UK's departure from the Union will allow it to overcome a provision that is too restrictive to fulfil its function of permitting international co-operation. As the Brexiteers continue to emphasise, Brexit is full of opportunities. Why only for the UK, and not for the EU?

V. EU Solidarity and Conflict of Laws

Another problem raised by the referral was whether the principle of sincere cooperation, as enshrined in Art. 4(3) of the Treaty on European Union (TEU), would be relevant "for legal purposes" for the decision to apply the overriding mandatory provisions of another Member State directly or indirectly.[70] This innocuous looking question was of fundamental importance for the referral. Indeed, it formed the basis of a seeming contradiction and major embarrassment: on the one hand, the EU together with other creditors requires Greece to lower its expenditures. On the other hand, Art. 9(3) Rome I Regulation may not allow the courts of other Member States to apply a Greek public policy provision by cutting down the salary of its employees. Art. 4(3) TEU could have paved the way out of this conundrum. As a provision of primary law, it is supreme to the rules of secondary law, including the Rome I Regulation. But does it also entail an obligation to apply the public policy provisions of another Member State?

A number of German authors have answered this question in the affirmative.[71] Their argument runs as follows: the duty of sincere cooperation under

[69] See, on this problem, the discussion under the next heading.

[70] Art. 4(3) TEU reads: "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

[71] See K. KREUZER, *Ausländisches Wirtschaftsrecht vor deutschen Gerichten – Zum Einfluss fremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte*, CF Müller 1986, p. 94 *et seq.*, at 100; E.J. MESTMÄCKER, Staatliche Souveränität und offene Märkte – Konflikte bei der extraterritorialen Rechtsanwendung von Wirtschaftsrecht, *RabelsZ* 52 (1988), p. 205, 236-237; W.-H. ROTH, Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht, *RabelsZ* 1991, p. 623 *et seq.*, at 662-663; W.-H. ROTH, Der Grundsatz der loyalen Zusammenarbeit in der Europäischen Union und das Internationale Privatrecht, in D. HEID/ R. STOTZ/ A. VERNY (eds), *Festschrift für Manfred A. Dauses zum 70. Geburtstag*, CH Beck 2014, p. 315 *et seq.*; M. KUCKEIN, *Die "Berücksichtigung" von Eingriffsnormen im deutschen und englischen Privatrecht*, Mohr

Art. 4(3) TEU obliges national courts to respect the rules and public interests of other Member States. The effect can be clearly seen with regard to the country-of-origin principle, which forces the importing Member State to accept goods produced in accordance with the rules of the exporting Member State.[72] The proponents argue this duty would also apply with regard to private international law, which would be endowed in the federalist structure of the EU with the crucial function of coordinating the public interests of the Member States.[73] Art. 9(3) Rome I Regulation would not fulfil this coordinating function exhaustively, as it would for instance not address the application of public policy provisions *of the Union*.[74] It is also stressed that the fundamental freedoms require the recognition of certain legal situations created in other Member States independently of the conditions set by national or EU secondary law.[75]

Taking this idea further, it is argued that the principle of sincere cooperation would not be restricted to the relation between the Union and the Member States, but it also would cover the relation among the Member States *inter partes*. These States would have to act in the spirit of coordination and co-operation and be attentive to the impact of their decisions on the interests of other Member States and their citizens.[76] Since overriding mandatory rules are by definition crucial for the protection of political, social or economic interests of another Member State in the sense of Art. 9(1) Rome I Regulation, they could not be ignored by the courts. If Art. 9(3) Rome I Regulation was to exclude the application of such provisions by the national courts, it would violate the duty of sincere cooperation under primary law, from which Member States cannot be dispensed by secondary law.[77]

The ECJ however gave these arguments short shrift and answered with a simple "no". Its counterargument is embarrassingly simplistic: the principle of sincere cooperation in Art. 4(3) TEU would not authorise a Member State to circumvent the obligations that are imposed on it by EU law.[78] Yet this "argument" fails to address the question of *which* obligations EU law imposes. If the German

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Siebeck 2008; I. PÖTTING, *Die Beachtung forumsfremder Eingriffsnormen bei vertraglichen Schuldverhältnissen nach europäischem und Schweizer IPR*, Peter Lang 2012; A. KÖHLER (note 49). The Austrian Supreme Court (*Oberster Gerichtshof* OGH) has *obiter dictum* mentioned the duty of Member States to apply overriding mandatory provisions of another Member State provided that they are in conformity with EU law: see OGH, 8 March 2012 [2013] *Juristische Blätter* (JBl) p. 362 *et seq.*, at 364.

[72] See ECJ, Case 120/78, REWE-Zentral AG ("Cassis de Dijon"), [1979] ECR 649.

[73] W.-H. ROTH, Der Grundsatz (note 71), at 326-327 (citing A. MILLS, *The Confluence of Public and Private International Law*, Cambridge University Press 2009, p. 180 *et seq*.).

[74] W.-H. ROTH, Der Grundsatz (note 71), at 329.

[75] W.-H. ROTH, Der Grundsatz (note 71) at 330.

[76] W.-H. ROTH, Der Grundsatz (note 71), at 333 (citing the conclusions of Advocate General *Poiares Maduro* in Case C-343/04 – Land Oberösterreich v. CEZ I, 11.1.2006, [2006] ECR I-4459, para. 93, and in Case C-115/08 – Land Oberösterreich v. CEZ II, 22.4.2009, [2009] ECR I-10265, para. 1).

[77] W.-H. ROTH, Der Grundsatz (note 71), at 334.

[78] ECJ (note 1) para. 54.

authors are right, then primary law would precisely require national courts to apply the public policy rules of another Member State. Equally unconvincing is the ECJ's reference to its earlier decision in *Manzi and Compagnia Naviera Orchestra*, where it had already stated that the principle of sincere cooperation in Art. 4(3) TEU would not authorise a Member State to circumvent the obligations imposed by EU law.[79] The *Manzi* case did not involve private international law; rather, it involved relations between the EU and the Member State, and was therefore rendered in a completely different legal context, with the result that the statement had a completely different meaning. The ECJ thus has not given a satisfactory answer as to the role of the principle of sincere cooperation for private international law.[80]

Though its response is overly simplistic, this does not suggest that the result achieved by the ECJ would be wrong. Indeed, one may entertain a number of doubts with regard to the effect of Art. 4(3) TEU in private international law. To start, the principle of sincere cooperation is characterised by its high level of abstraction and therefore hardly lends itself to the direct application to private law cases. For practical purposes, it must be rendered more concrete, which is done through the operation of secondary law. The interplay between primary and secondary law is well-known from other areas.[81] While it is certain that the validity of secondary law is subject to its compatibility with primary law, one must be wary of drawing too many unwritten conclusions from the abstract principles of the Treaties that supposedly contradict secondary law.

Particularly with regard to the role of foreign overriding mandatory provisions during the negotiations of the Rome I Regulation, it must not be forgotten that the Member States themselves were forging a consensus. They have decided that this rule shall be the same regardless of whether the provision in question is that of a Member State or of a Third State. In this sense, Art. 9(3) Rome I Regulation is *lex specialis* to the more general principle of sincere cooperation.

Certainly, in case of conflict, Art. 4(3) TEU would have the upper hand as it is primary law. However, the principle of sincere cooperation only covers the scope of the European Treaties (TEU and TFEU), and not areas that fall outside of them.[82] It thus does not mandate applying every public policy provision that has

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[79] ECJ, 23 January 2014, *Manzi and Compagnia Naviera Orchestra*, EU:C:2014:19, para. 40.

[80] In the same vein, see W.-H. ROTH, Drittstaatliche Eingriffsnormen und Rom I-Verordnung, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2018, p. 177 *et seq.*, at 185 (calling the rationale of the court "strangely formalistic and short").

[81] See *e.g.* the fundamental freedom to provide services under Art. 56 TFEU and the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, 27.12.2006).

[82] See W.-H. ROTH, Der Grundsatz (note 71), at 331, who nevertheless wants to extend this principle to the entire area of judicial cooperation in civil and commercial matters. Even though it is correct that judicial cooperation is part of the EU's agenda, one cannot deduce that a Member State court would have to follow the overriding mandatory provision of another Member State that do not fall within the Treaties' scope. Judicial co-

been adopted by a Member State, at a national level. A mere look at the scope of Art. 4(3) TEU demonstrates that the principle does not require applying or taking into account the national law of other Member States.

Moreover, deducing such an obligation from Art. 4(3) TEU would mean ignoring the particular situation of private international law, in which public interests have to be balanced against private interests. Sincere cooperation does not demand the blind enforcement of other Member States' laws that interfere with private agreement. Even though these laws might protect important public interest, there are other values that have to be balanced against them, *e.g.* the principle of party autonomy and legal certainty, which also belong to the fundamental values of most national laws. The Member States placed a higher value on these principles than on the unconditional enforcement of restrictive policies. They therefore have opted for a stable and reliable framework for private relationships, which is in the common interest of all Member States for the sake of a functioning Single Market. They also voted for a universal private international law and against one that is different for intra-EU and extra-EU cases, which would be inevitable if Art. 4(3) TEU were interpreted to require the application of public policy provisions of other Member States, but not those of non-Member States. And by opting against a general obligation to enforce the public policy provisions of other States, the Member States avoided the need for national courts to resolve tricky questions such as a conflict between different public policy provisions of several States. These choices should be respected and not circumvented by an appeal to unspecific and abstract higher principles.

No different result is demanded by the supposed federalist structure of the EU. One may already have doubts as to whether the description of a federation fits the EU after the rejection of the EU constitution. But even if the EU were a federation and not merely a union, this would not *per se* lead to the applicability of the public policy rules of fellow Member States. Particularly enlightening is a look across the Atlantic. In the US, which is a federation, the laws of other federal states are applied, not as a matter of right, but only where they do not conflict with policies of the forum.[83] Moreover, conflict-of-laws theories are applied in the same manner to sister states as to foreign States. There is no split in US conflicts law for interstate and international affairs.[84] And federal obligations are not superimposed on conflict-of-laws.

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operation and co-operation in the enforcement of extraterritorial provisions are two different matters.

[83] See B. CURRIE, Notes on Methods and Objectives in the Conflict of Laws, *Duke Law Journal (Duke L.J.)* 1959, p. 171 *et seq*., at 178. Though numerous other approaches have been developed in the US, it is fair to say that Currie's thought "still controls the academic conflicts agenda." F.K. JUENGER, Conflict of Laws: A Critique of Interest Analysis, *American Journal of Comparative Law (Am. J. Comp. L.)* (1984), p. 1 *et seq*., at 4. See also D.E. CHILDRESS III, Comity as Conflict: Resituating International Comity as Conflict of Laws, *University of California Davis Law Review (UC Davis L. Rev.)* 2010,

p. 11 et seq., at 43, footnote 180.

[84] The proposal to treat interstate and international conflicts differently made by A.A. EHRENZWEIG, Interstate and International Conflicts Law: A Plea for Segregation, *Minnesota Law Review (Minn. L. Rev.)* 1957, p. 717 has not been retained. See

After all, one might ask in what way the Greek State could have fulfilled the obligations imposed by the "Troika" under the existing framework of primary and secondary EU law. The answer must be: not by interfering with contracts that are to be performed abroad and are governed by foreign law. In particular, the current version of Art. 9(3) Rome I Regulation does not allow one party to unilaterally diminish its obligations to the detriment of the other party. For instance, the Greek State could not have introduced a legislative haircut to bonds to be paid in London and submitted to English law.[85] Under the current, restrictive approach of the Rome I Regulation, the Greek State also cannot interfere with an employment contract that is governed by German law. So the final answer is: the salary can be reduced only in conformity with German law as the governing law of contract.

If one finds fault with this result, the way to go is not to apply EU primary law directly. The principle of sincere cooperation between the Member States is too blunt an instrument to determine the law that applies to private relationships. Moreover, it is not at all clear why European States should only give effect to the laws of other EU Member States but not to those of other countries with whom they have friendly relations. The cooperation inside the EU is certainly special, but there is no reason not to lend a helping hand to governments of Third States. Therefore, one must reform European private international law, namely Art. 9(3) Rome I Regulation in the way that was suggested above.[86]

VI. Taking Foreign Overriding Mandatory Provisions into Account as Matters of Fact

The ECJ did not end its verdict on Art. 9 Rome I Regulation in *Nikiforidis* with the result that foreign overriding mandatory provisions could not be applied as legal rules, directly or indirectly. Rather, the Court went on to state – and this is the astonishing news – that the restrictions of Art. 9 Rome I Regulation do not prevent foreign overriding mandatory provisions from being "taken into account as a matter of fact".[87] Whether this is possible would solely depend on the substantive

M. REIMANN, A New Restatement-For the International Age, *Indiana Law Journal (Ind. L.J.)* 2000, p. 575, at 578, footnote 20 (underlining that Ehrenzweig's work today is all but forgotten).

[85] This limitation has been implicitly recognised by Greece in the Bondholder Act 2012 through which it sought to restructure the country's debt and which only applied retroactively to debt governed by Greek law. New sovereign Greek bonds issued under English law contained a contractual provision (collective action clause CAC) that allows restructuring in the future. See M. XAFA, Sovereign Crisis Debt Management: Lessons from the 2012 Greek Debt Restructuring, *Centre for International Governance Innovation (CIGI)* 2014, CIGI paper No. 33, p. 9-10 <https://www.cigionline.org/sites/default/files/cigi_paper_33.pdf>.

[86] See *supra* 4.

[87] ECJ (note 1) para. 51.

law that is applicable according to the Regulation. For the case of Mr Nikiforidis, this means that it was up to the German substantive law governing the employment contract to decide whether public policy provisions such as the Greek pay-cutting law could be factually taken into account.

It seems that the Court's reasoning allows circumventing of not only the Rome I Regulation, but also its own interpretation. First, the ECJ has ruled that the Regulation does not allow the *application* of foreign overriding mandatory provisions in situations other than those envisaged in Art. 9(3) Rome I Regulation. Now it adds that such provisions can nevertheless come into play by being "taken into account" as matters of fact. This raises a difficult question: what is the difference between "applying" and "factually taking into account" foreign provisions? Advocate General SZPUNAR, who had considered this issue in his conclusions in *Nikiforidis*, noted that "the practical difference between the *application* of, and *substantive regard* to, an overriding mandatory provision is almost imperceptible."[88] The distinction goes back to German case law and literature, which therefore have to be more closely examined.

A. German Jurisprudence and Precedents

The basis of the dichotomy between applying foreign law and taking it into account is rooted in the pioneering works of WENGLER[89] and ZWEIGERT[90] during the 1940s. Whilst WENGLER favoured the direct application of foreign public policy rules provided that the adopting State had a close connection to the situation and that they did not violate the public policy of the forum, ZWEIGERT on the contrary opined that they should be taken into account on the level of substantive law. The view of WENGLER had influenced Art. 7(1) Rome Convention, while ZWEIGERT's opinion is experiencing a renaissance through the ECJ judgment in *Nikiforidis*.

Many German scholars agree with ZWEIGERT in that it would be permissible to take account of factual results of foreign public policy on the level of substantive law.[91] Two lines of cases have been of particular importance for

[88] Opinion of AG SZPUNAR (note 9) para. 101, emphasis as in the original.

[89] W WENGLER, Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht, *Zeitschrift für vergleichende Rechtswissenschaft* 1941, p. 168 *et seq.*, at 181 *et seq*.

[90] K. ZWEIGERT, Nichterfüllung auf Grund ausländischer Leistungsverbote, *RabelsZ* 1942, p. 283 *et seq*.

[91] See, *inter alia*, K. ANDEREGG, *Ausländische Eingriffsnormen im internationalen Vertragsrecht*, Mohr 1989, p. 101 *et seq*.; K. KREUZER (note 71); M. KUCKEIN (note 71), p. 72 *et seq.*; R. LEHMANN, *Zwingendes Recht dritter Staaten im internationalen Vertragsrecht*, Peter Lang 1986, p. 17 *et seq*. and p. 154 *et seq*.; F.A. MANN, Sonderanknüpfung und zwingendes Recht im internationalen Privatrecht, in O. SANDROCK (ed.), Festschrift für Günther Beitzke zum 70. Geburtstag am 26. April 1979, De Gruyter 1979, p. 608 *et seq*.; D. MARTINY, in H.J. SONNENBERGER *et al.* (eds), *Münchener Kommentar zum BGB*, vol. 10, 4th ed, CH Beck 2006, Art. 34 EGBGB para. 63; N.C. NEUMANN, *Internationale Handelsembargos und privatrechtliche Verträge*, Nomos 2001, p. 221

factual consideration of foreign law within the German law as the governing contract law.[92] In the first line, it was ruled that public policy provisions of another State could render the contract *contra bonos mores* and therefore void under sec 138(1) of the German Civil Code (BGB).[93] Whilst German courts stated that foreign provisions could not be used to establish the illegality of a contract, their violation could amount to a breach of morality. The highest court of the German Empire, the *Reichsgericht*, already considered a transaction for drug smuggling to be *contra bonos mores*.[94] The case involved a sale of cocaine to be shipped to India, where such imports were legally prohibited to protect public health. The *Reichsgericht* based immorality not on the commercial policy of a single country, India, but instead on the violation of foreign public policy provisions common to all "cultured countries".[95] After WWII, the German Federal Court of Justice found a breach of morality in a case in which two German merchants had agreed to import borax from the US to Germany but could not produce a statement required

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et seq.; K.H. NEUMAYER, Autonomie de la volonté et dispositions impératives en droit international privé des obligations, *Rev. crit. dr. int. pr.* 1957, p. 579 *et seq*. and *Rev. crit. dr. int. pr.* 1958, p. 53 *et seq*.; M. SCHÄFER, Eingriffsnormen im deutschen IPR – eine neverending story?, in E.C. STIEFEL *et al.* (eds), *Iusto Iure*: Festgabe für Otto Sandrock zum 65. Geburtstag, Recht und Wirtschaft 1995, p. 37 *et seq.*, at 50 *et seq*.; A.K. SCHNYDER, *Wirtschaftskollisionsrecht*, Schulthess 1990, p. 243 *et seq*.; K. SIEHR, Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht, *RabelsZ* 1988, p. 41 *et seq.*, at 78 *et seq*.; H.J. SONNENBERGER, in H.J. SONNENBERGER *et al.* (eds), *Münchener Kommentar zum BGB*, vol. 10, 4th ed., CH Beck 2006, Einleitung paras 85 *et seq*.; F. VISCHER, Kollisionsrechtliche Parteiautonomie und dirigistische Wirtschaftsgesetzgebung, in *Festgabe zum siebzigsten Geburtstag von Max Gerwig*, Helbing & Lichtenhahn 1960, p. 167 *et seq.*, at 183 *et seq*.; F. VISCHER, *Recueil des Cours* 142 1974-II, p. 21 *et seq*; M. ZEPPENFELD, *Die allseitige Anknüpfung von Eingriffsnormen im Internationalen Wirtschaftsrecht*, Duncker & Humblot 2001, p. 36 *et seq*.

[92] Matters of intense academic discussion have moreover been the *Schuldstatuttheorie* versus the *Sonderanknüpfungstheorie* in Germany and beyond, which have recently been dealt with in English, for instance, by A. CHONG, The public policy and mandatory rules of third countries in international contracts, *Journal of Private International Law (JPIL)* 2006, p. 27 *et seq.*, at 40 *et seq*.; M. HELLNER, Third country overriding mandatory rules in the Rome I Regulation: old wine in new bottles?, *JPIL* 2009, p. 447 *et seq.*, at 448 *et seq*. Also see F. VISCHER in his General Course on Private International Law, published in *Recueil des Cours* 232 (1992-I), p. 21 *et seq.*, at 168 *et seq.* For a critical discussion, see K. SCHURIG, Zwingendes Recht, "Eingriffsnormen" und neues IPR, *RabelsZ* 1990, p. 217 *et seq.*, at 234 *et seq*.; C. ARMBRÜSTER, Geltung ausländischen zwingenden Rechts für deutschem Recht unterliegende Versicherungsverträge, *Versicherungsrecht (VersR)* 2006, p. 1 *et seq*.

[93] Sec. 138(1) of the German Civil Code (BGB): "A legal transaction which is contrary to morality is void."

[94] Cf. Reichsgericht, decision of 24 June 1927 (file No. II 519/26, published in Juristische Wochenschrift 1927, 2288).

[95] See already Reichsgericht, judgment of 3 October 1923 (file No. V 886/22, published in RGZ 108, 241, at 243–244); confirmed in the judgment of 17 June 1939 file No. II 19/39, published in RGZ 161, 296, at 299–300 with Nazi-tainted reference to the "German healthy public opinion").

by US law that was designed to avoid a resale to the Eastern bloc.[96] The Court took account of the foreign law and held that the immoral contract would be null and void and that no damages could be claimed by either party.[97]

The best-known German precedent in this line of cases relates to an insurance claim for the loss of Nigerian masks during a shipment to Germany.[98] According to the law of Nigeria, the transaction over cultural goods required official permission, which had not been granted in this instance. The German Federal Court decided in 1972 that such a transaction would be *contra bonos mores* because it disregards established legal principles of the community of nations for the preservation of national cultural heritage.[99] The court reached this result by taking into account the outcome of Nigerian law as a matter of fact, which resembled the rules of the UNESCO Convention on Cultural Property.[100] Consequently, it was held that there was no insurable interest and the claim was rejected.

Yet there were cases decided to the contrary by the Federal Court during the time when Germany was divided. These cases involved contracts through which West Germans promised, for remuneration, to help East German citizens escape from the German Democratic Republic (GDR). The law of the GDR prohibited its citizens from escaping.[101] The (West German) Federal Court of Justice nevertheless held that the contracts were not immoral and consequently not void.[102] The Court argued that the GDR prohibition would contradict West German constitutional law and international conventions, which establish the right to leave one's country.[103] Therefore, it could not be given effect in West Germany.

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[96] German Federal Court of Justice, judgment of 21 December 1960 (file No. VIII ZR 1/60, published in BGHZ 34, 169, at 176–177).

[97] This kind of issue was exceptionally handled in a similar manner in the English case *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490 (CA), [1958] AC 301 (HL), where an Indian ban on exports to South Africa was taken into account, and the English sales contract was consequently disapproved. In the case *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171 (CA) a comparable issue arose but the judgment was based on different reasons.

[98] Federal Court of Justice, judgment of 22 June 1972 (file No. II ZR 113/70, published in BGHZ 59, 82 et seq.). Sometimes this case is in English referred to as "Kulturgüterfall", which simply means this was a case on cultural goods; it does not refer to the parties' names or any other aspects of the specific case.

[99] Federal Court of Justice (note 98) at 85-86.

[100] 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNTS No. 11806, vol. 823, p. 231).

[101] Sec. 213 of the Criminal Code of the German Democratic Republic made it punishable to "illegally cross the border".

[102] Federal Court of Justice, judgments of 29 September 1977 (file No. III ZR 164/75, published in BGHZ 69, 295, at 297–298; file No. III ZR 167/75, published in NJW 1977, 2358); file No. III ZR 118/76, publish in NJW 1977, 2359, at 2359–2360); judgment of 21 February 1980 (file No. III ZR 185/77, published in NJW 1980, 1574, at 1575).

[103] Art. 11 (freedom of movement) and 116 ("Germans" and citizenship) of the Constitution for the Federal Republic of Germany; Art. 2(2) Protocol No. 4 of 16 September

The second line of cases involves foreign public policy rules that had been taken into account as grounds for the "impossibility" of performing the contractual obligations.[104] These decisions have ruled that a foreign rule effectively prohibiting contractual performance can be considered as making it impossible to fulfil the contract under German substantive law. They are directly in line with the teachings of ZWEIGERT.[105] Foreign law is taken into account as a type of "local data". Precedents date back to the WWI era when the English act on banning trade with the enemy[106] was considered by the *Reichsgericht* to render the contractual performance of an English company towards its German creditor impossible.[107] After WWII, the Federal Court held on the contrary that the assignment of a claim from an East German creditor to a West German was valid despite the missing exchange authorization required by East German law.[108] Again, the court reasoned that the East German provision could not be enforced in West Germany.[109]

As a general test, the Federal Court of Justice established that foreign overriding mandatory provisions serving economic and governmental purposes of the enacting State could only be taken into account under the governing law as facts insofar as the enacting State would be capable of enforcing them with regard to objects, rights, or actions on its territory.[110] This test was recently applied by the Federal Court and by the Frankfurt Higher Regional Court in a series of decisions dealing with payment claims based on Argentinian bonds. According to the courts, the payment obligations arising from the bonds were not affected by the debt moratorium imposed by Argentinian law because the Argentinian government was unable to enforce it unilaterally without the assistance of foreign courts.[111]

1963 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Art. 12(2) International Covenant on Civil and Political Rights.

[104] See sec. 275(1) of the German Civil Code (BGB), which provides: "A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person."

[105] K. ZWEIGERT (note 90).

[106] An Act to make provision with respect to penalties for Trading with the Enemy, and other purposes connected therewith, 4 & 5 Geo 5 (1914) ch. 87; An Act to amend the Trading with the Enemy Act, 1914, and for purposes connected therewith, 5 & 6 Geo 5 (1914) ch. 12.

[107] *Reichsgericht*, judgment of 28 June 1918 (file No. II 69/18, publish in RGZ 93, 182, at 183-184). A similar outcome was reached in an earlier case, see *Reichsgericht* judgment of 13 November 1917 (file No. II 167/17, published in RGZ 91, 260, at 262).

[108] Sec. 8 of the Act of 15 December 1950 for the Soviet Occupation Zone of Germany on the Regulation of Intra-German Payments (Gesetz zur Regelung des innerdeutschen Zahlungsverkehrs).

[109] Federal Court of Justice, judgment of 17 December 1959 (file No. VII ZR 198/58, published in BGHZ 31, 367, at 371 *et seq.*). Similar outcome in a later case underlying the Federal Court of Justice's judgment of 16 April 1975 (file No. I ZR 4/73, published in BGHZ 64, 183, at 189 *et seq.*).

[110] Federal Court of Justice, judgment of 17 November 1994 (file No. III ZR 70/93, published in BGHZ 128, 41, at 52).

[111] Federal Court of Justice, judgment of 24 February 2015 (file No. XI ZR 193/14, published in NJW 2015, 2328, at 2333 *et seq.*); Higher Regional Court (*Oberlandesgericht*)

From the German jurisprudence and precedents discussed, it can be concluded that comprehensive provisions of substantive law may provide a basis for factually taking into account foreign overriding mandatory provisions. It is important to note that account is only taken of the result produced by foreign law. Clearly, foreign law is not, and cannot be, "applied within" substantive law. Contracts under German law can be null and void where the foreign law leads to a violation of *bonos mores* or to an impossibility of the performance of the contractual obligation. Impossibility is fairly easy to establish because it requires that the foreign law results in an almost physical obstacle for the fulfilment of the contract. By contrast, immorality due to foreign legal rules is a rather delicate issue. In order to avoid any biased evaluation of the foreign law in question, the assessment has at least to be based on established legal principles of the community of nations and international conventions. Even then the foreign law is not an undisputable fact that could be taken into account; the methodology comes rather close to an application of foreign or international law. Factual impossibility arises out of effective foreign prohibition, not out of moral debate. Hence, account can only be taken of a foreign law that effectively creates an obstacle to the performance of a contract, which then becomes a "matter of fact".

B. Consequences and Implications for European Law

The decision by the ECJ is very detrimental for the unity of European private international law. There are no established European principles for factually taking account of results of foreign public policy law within the applicable substantive law. In *Nikiforidis,* the ECJ pointed out that a seized court of a Member State has "the task to ascertain whether [foreign overriding mandatory provisions] are capable of being taken into account when assessing the facts of the case which are relevant in the light of the substantive law applicable to the […] contract at issue […]."[112] The implementation of this taking into account depends on the specifics of the *lex causae*, which determines whether and how it is acceptable to factually take into consideration an actually inapplicable law. In other words, the taking into account is contingent upon the autonomous characteristics of the domestic law governing the contract. Its substantive rules can open up the possibility of factually taking into account foreign public policy provisions, or not. Member States adopt different approaches when it comes to taking account of foreign public policy provisions as matters of fact: unlike the German courts, the French Court of Appeal in Paris refused to do so in a 2015 decision.[113] English courts have also

Frankfurt a.M. judgment of 12 June 2015 (file No. 8 U 93/12, ECLI:DE:OLGHE:2015:0612.8U93.12.0A, at paras 73–74); judgment of 11 December 2015 (file No. 8 U 279/12, ECLI:DE:OLGHE:2015:1211.8U279.12.0A, at paras 142–143); judgment of 26 August 2016 (file No. 8 U 83/14, ECLI:DE:OLGHE:2016:0826.8U83.14.0A, at paras 120–121).

[112] ECJ (note 1), para. 53.

[113] Cour d'appel de Paris, judgment of 25 February 2015 (file No. 12/23757, published in *Recueil Dalloz* 2015, p. 1260).

taken a different view than the German courts:[114] Brexit might "remedy" this friction by a definite UK/EU separation, but this could clearly not serve as a viable model.

In the absence of Europe-wide standards about the taking into account of foreign public policy provisions, the outcome of comparable cases could be vastly different. The path taken by the ECJ could have worked inside a domestic law, such as that of Germany. It is not very suitable for the EU, a multilevel system of governance that as such must strive to solve conflicts of laws by uniform private international law rules. After *Nikiforidis*, EU conflict-of-laws faces the risk that the very same case can have very different outcomes depending on whether and how national substantive law permits the taking into account of foreign law by the law that is actually applicable. One might think that some risk could be reduced because the Rome I Regulation forces national courts to determine the governing substantive law in a uniform manner and that the accordingly applicable substantive law should be similarly applied, including the taking account of foreign law. But realistically, it has to be feared that the effects of this "taking into account" under one and the same substantive law will be implemented differently by national courts. In this process, dangerous divergences will surely arise. The ECJ would not have jurisdiction to ensure achieving unity across Member States because, as the ECJ ruled itself in *Nikiforidis*, the "taking into account" is an issue within domestic law, as opposed to European law, and therefore out of its control.

C. Objections to the ECJ's Decision

The ECJ's ruling that the Rome I Regulation does not preclude considering the substantive law of another State by "factually taking it into account" raises a number of objections. First and foremost, the submission to the vagaries of the applicable law clashes with the explicitly declared objectives of the Rome I Regulation, which are "predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments" for the sake of the proper functioning of the Internal Market.[115] The ECJ's interpretation permits Member States to potentially undermine the harmonised conflict-of-laws regime wherever their substantive law provides for "factually taking into account" another law. In this sense, a second "stealth" system of conflicts rules at the national level would be created beyond the reach of the EU legislator and judiciary. This is all the more damaging as the intellectual process of "factually taking into account" can hardly be distinguished from the "application" of another law.[116]

The reason given by the ECJ for allowing the taking into account of foreign overriding mandatory provisions is that the Rome I Regulation merely intends to

[114] See *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678, [1939] 2 KB 394 (CA) (holding that a Hungarian company would not be unable to pay its England creditor according to their English contract even if restricted to do so under Hungarian law).

[115] Recital 6 Rome I Regulation.

[116] See *supra* part 6.

harmonise conflict-of-laws of contracts and does not cover substantive contract law of the Member States.[117] Although the argument sounds logically correct at first, it does not withstand closer analysis. Undoubtedly, both Rome Regulations focus on solving conflict-of-laws issues. That does not mean, however, that they would be silent with regard to the permissibility of factually taking into account. Art. 17 of the Rome II Regulation explicitly addresses this topic by mandating that "account shall be taken, as a matter of fact and insofar as appropriate", of the rules in force at the place and time of the event giving rise to the liability. A similar statement is missing in the Rome I Regulation. This does not necessarily mean that the taking into account of another law would be prohibited with regard to contracts, but it demonstrates that European private international law is not limited to conflicts rules in the classic sense of the term. Rather, it regulates the national court's engagement with foreign law in a comprehensive manner. In particular, it may also have a bearing on which and to what extent foreign rules can be taken into account as a matter of fact.

It is undisputed that Member States maintain the right to determine their substantive law. But this does not warrant the conclusion that the Regulation would be unable to prevent the applicable substantive law of a Member State from providing for "factually taking into account" foreign law. It has been well established since the ECJ landmark judgment in *Costa v ENEL*[118] that a Member State's substantive law and legislative sovereignty is limited insofar as supranational EU law prevails. The latter is particularly the case where a directly effective Regulation such as Rome I applies. Since the Rome I Regulation harmonises and exhaustively governs conflict-of-laws issues in the area of contracts for all Member States, the State whose substantive law is applicable should refrain from modifying the decision on the applicable law by taking into account results of foreign law. Otherwise, the superior conflict-of-laws regime would be disregarded or circumvented, and this would counteract the joint efforts for the European area of freedom, security and justice.

Moreover, the broad "factual taking into account" of other countries' laws resembles the methodology of *renvoi*. It forwards the case under domestic law to be "factually" governed by another law than that determined according to the conflict-of-laws rules of the forum, be it the substantive law of another Member State or that of a Third State. *Renvoi* is explicitly banned by the Rome I Regulation.[119] This is a logical necessity for a harmonised conflict-of-laws regime that does not tolerate deviation. Insofar as the taking into account comes close to an application of foreign law, it must therefore be excluded.

Finally, there can be no justification for giving legislators of EU Member States (or Third States[120]) the power to modify an explicit choice of law by "factually taking into account" another law. Equally, where foreign law modifies substantive law, whose applicability is determined by objective connecting factors, it would threaten legal certainty and predictability for the contractual parties and

[117] ECJ (note 1) para. 52.

[118] ECJ, 15 July 1964, *Costa v ENEL*, ECLI:EU:C:1964:66, at 593–594.

[119] Art. 20 Rome I Regulation.

[120] Art. 2 Rome I Regulation.

third parties relying on the applicable law. Ultimately, it must be borne in mind that private international law intends to create international decisional harmony (or "uniformity of decisions") across States, and this international harmony is endangered by modifications on the level of substantive law as much as by different rules of conflict of laws.[121]

D. In Favour of a Restricted Reading of *Nikiforidis*

It is undeniable that there are situations in which a judge can hardly avoid considering foreign law as a matter of fact. Take the example of a seller from State A that has contracted to ship certain goods to a buyer in State B. If State A adopts a prohibition for the export of these types of goods and enforces this prohibition via effective controls within its territory, it becomes – factually (!) – impossible for the seller to perform the obligations under the contract. Examples of such situations include the above-mentioned *Reichsgericht* case, in which it was held that a contractual performance of an English company towards its German creditor would be impossible due to the British ban on trading with the enemy,[122] or the situation in *Ralli Bros* of the Spanish debtors who were unable to pay the full freight rate in Spain (although not necessarily in Britain).[123] If the governing law provides for a general obligation of specific performance, like most civil law systems do,[124] then there is no point of 'sentencing' the seller to deliver the goods if he is unable to do so. Any other result would contradict the old adage *impossibilium nulla obligatio est*. The factual obstacle created by foreign law can become relevant within the applicable contract law under the doctrine of impossibility, *force majeure*, or a similar legal tool.[125]

In this very restricted sense, the taking into account of foreign law as a matter of fact is permissible and even unavoidable.[126] Indeed, it is a necessary feature of any reasonable substantive law. It is important to note the differences between this method and the direct *application* of foreign overriding mandatory provisions. The taking into account is only allowed where the prohibition is effectively enforced and factually hinders the debtor from performing its

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[121] This has already been considered by W. WENGLER (note 89), particularly at 188, and argued by A. BONOMI, Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment, this *Yearbook* 1999, p. 215 *et seq.*, at 239 *et seq*.

[122] *Reichsgericht*, judgment of 28 June 1918 (note 107).

[123] *Supra* note 56.

[124] The Draft Common Frame of Reference (DCFR), summarising the experience of both common law and civil law systems, provided for a "right to enforce performance" in Art. III.-3:302 DCFR. The United Nations Convention on Contracts for the International Sale of Goods, of April 11th 1980 (CISG), is more reserved and leaves the question to the *lex fori* of the deciding court: see Art. 28 CISG.

[125] The DCFR provides that specific performance cannot be enforced where "it would be unlawful or impossible", see III.-3:401 DCFR.

[126] See also W.-H. ROTH (note 80), p. 183-184.

obligation. Only then does it create "a fact" that the judge cannot ignore.[127] Also, such a factual obstacle does not exclude that the debtor may be liable for breach of contract and may have to pay damages.[128]

The situation in *Nikiforidis* was very different. It was entirely possible for the Greek State to perform its obligations under the contract, given that it was the State itself that had created the obstacle. What the Hellenic Republic actually demanded was that the German courts enforce its austerity laws by giving them effect beyond the Greek territory and contracts governed by Greek law. This is not a taking into account in the restricted sense described above. Instead, it amounts to an application of Greek law, which has no control over the situation without the German court's support. Seeing the case from this perspective highlights the extraterritorial and far-reaching nature of the demand made by the Greek State. It also makes clear that the case falls squarely into the scope of Art. 9(3) Rome I Regulation. There was quite simply no space for the doctrine of factual taking into account in the circumstances of the case in which Greece demanded the enforcement of its austerity laws outside of its territory and outside of its courts. This notion being introduced into the *Nikiforidis* case is due to the particularly large conception of "taking into account" adopted by the first line of German precedents, which allowed the consideration of foreign rules to preserve "good morals".[129] This large conception is much too broad. To say that the contravention of a foreign law is violating the *bonos mores* under domestic law blurs the lines between taking foreign law into account as a matter of fact and the actual application of foreign law as to make them indistinguishable. That does not mean that legal prohibitions of another State do not play a role. But their enforcement abroad is submitted to the conditions imposed by private international law, namely Art. 9(3) Rome I Regulation.[130]

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[127] This is in line with the theory according to which a third country's law could only be applied when this State had the power to enforce its laws. This "power theory" (*Machttheorie*) had been developed for the determination of the applicable law: see G. KEGEL, Die Rolle des öffentlichen Rechts im Internationalen Privatrecht, in K.-H. BÖCKSTIEGEL *et al.* (eds), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht Festschrift für Ignaz Seidl-Hohenveldern*, C. Heymann 1988, p. 243, at 250. It seems, however, that it is much more adapted for the question as to whether foreign law has to be taken into account as a fact. See also the most recent German case law on impossibility, *supra* note 111.

[128] An exception from liability may apply where the debtor proves that the failure was due to an impediment beyond his control that he could not reasonably be expected to have considered at the time of the conclusion of the contract or have tried to avoid it: see Art. 79(1) CISG. See also Art. III.-3:104(1) DCFR, according to which non-performance is "excused" under very similar conditions. Liability for factual obstacles to performance depends on the distribution of risks under the agreement and the law applicable to it.

[129] See *supra* notes 94 *et seq*.

[130] For a similarly differentiated view, see W.-H. ROTH (note 80), p. 184, who speaks of a "blocking effect" (Sperrwirkung) of Art. 9(3) Rome I Regulation with regard to the application of foreign overriding mandatory rules under sec. 138 BGB.

VII. The Aftermath before the German Courts

When the German Federal Labour Court took up the case after the ECJ ruling, it discovered that – contrary to its earlier suggestion – it had no possibility to take into account the Greek Act under German substantive law.[131] Specifically, it could not apply section 241(2) of the BGB, which requires both parties to a contract to show due consideration for each other's rights, assets and interests.[132] The Court had initially considered that this provision could serve as a basis for taking the Greek law into account,[133] but changed its view. It ruled that due consideration for the other party's interest does not entail an obligation of the employee to accept a permanent pay cut because of the financial woes of the employer.[134] Such a pay cut could only be implemented by a formal dismissal and the acceptance of a new contract by the employee.[135]

That late turn must be applauded. Otherwise, German contract law would have been stretched beyond any reasonable interpretation, allowing the taking into account of foreign public policy rules through almost any general clause. As a side note, however, this result could have been foreseen before the referral to the ECJ. A comparison between the Greek provisions and the lines of German case-law examined above demonstrates no basis for a unilateral pay cut because the case-law only allows for the invalidity of contract on grounds of immorality or impossibility of contractual performance.

Some authors have suggested that it would have been possible to give effect to the Greek law by (re-)interpreting the pay cut as a notice of dismissal combined with an offer of a new contract.[136] However, this would merely be a technical fix. It would neither have reflected the antagonistic laws in the present case, nor the limits that the private international law imposes on the application of foreign law. European private international law does not allow the application of foreign overriding mandatory provisions, except in cases set out in Artcile 9(3) Rome I Regulation. The Greek provisions do not meet the conditions of this provision as it currently stands. They do not intend to render the employment contract invalid and are not part of the law in force at the place of performance. Moreover, Greece cannot enforce its austerity legislation abroad since Mr Nikiforidis is not paid in Greece. As a result, the Rome I Regulation in its current form neither allows the application of the Greek provisions nor does German substantive law allow the taking account of such provisions.

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[131] Federal Labour Court, judgment of 26 April 2017 (file No. 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0), para. 34-37.

[132] Sec. 241(1) BGB reads: "An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party."

[133] See Federal Labour Court (note 3).

[134] See already the Higher Labour Court Nuremberg (note 4), para 36.

[135] See already *supra* part 2.

[136] F. MAULTZSCH (note 26), at 252; K. SIEHR (note 23), at 211 *et seq*. This was also the solution of the Higher Labour Court Nuremberg (note 4), 74 and 118 *et seq*.

VIII. Conclusions

Although the German courts ultimately ruled that they could not take the Greek legislative pay cut into account, the judgment in *Nikiforidis* does not amount to "Much Ado About Nothing". On the contrary, it is a seminal decision on the Rome I Regulation and on European private international law in general. It has brought some welcome clarifications with regard to the application of foreign public policy provisions. In particular, it is now beyond doubt that the list of circumstances under which foreign overriding mandatory rules can be given effect according to Artciel 9(3) Rome I Regulation is exhaustive and cannot be extended to situations not expressly covered.

The ECJ judgment has also pushed the question of sincere cooperation into the limelight of European discussion. This interaction between secondary EU law and Art. 4(3) TEU has not been sufficiently explored. While it is correct that primary law demands the cooperation between the Members of the Union, it would be going too far to impose a duty on national courts to apply or consider the public policy provisions of other Member States. This would ignore the particularities of private international law and the value it attaches to principles like party autonomy.

At the same time, the case illustrates a number of shortcomings of Art. 9(3) Rome I Regulation. The provision is too restricted to fulfil a function similar to that of Art. 7(1) Rome Convention or Art. 19 Swiss PILA. It is less of a tool for opening up the conflicts system to international cooperation than a response to the need to take factual impediments to contractual performance into account.

Against this background, it is no paradox that the ECJ allowed precisely this taking into account without respecting the limits imposed by Art. 9(3) Rome I Regulation. This ruling ignores the purpose behind the provision and risks undermining the unity of EU private international law. It gives the national courts broad permission to follow a foreign law that claims to govern the situation.

The adoption of a law by a foreign State is not enough to create a factual obstacle for performance. In addition, it is necessary that the adopting State has control over the situation and that it can and does effectively implement the law. Only under this condition are the courts of other countries not needed to support or be complicit in the foreign law's enforcement and may merely take account of a fact resulting from it. That was not the situation in *Nikiforidis*. Here, the Greek government required the assistance of the German courts in the enforcement of the law, which it could not achieve alone. The ECJ should therefore have rejected the possibility of applying the doctrine of factual taking account of a foreign law under the circumstances of this specific case.

In the future, one must hope that the limits of "taking into account" will be expounded in a more precise fashion. This, as a provisional solution, has to be done by the ECJ at the next occasion of a preliminary ruling request concerning the European autonomous interpretation of Art. 9 Rome I Regulation. Yet a sound solution requires legislative reform of the provision, which can only be done by the EU legislator and has to be proposed by the European Commission. The amended rule should allow national courts to apply overriding mandatory provisions of other

States that have a close connection to the situation, provided that they serve a legitimate and clearly preponderant interest.