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Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization

Hannah L. Buxbaum

I. Introduction

The role of mandatory rules in civil litigation is an issue that has excited much attention in the private international law academy. It presents the sort of taxonomical challenge that conflicts scholars enjoy – which rules, precisely, should be defined as mandatory? – and resulting efforts have yielded many competing definitions and systems of classification. In addition, theories about how to characterize the operation of mandatory rules, focusing on whether they work within usual choice-of-law processes or rather outside them, intersect with important debates about the nature and limits of private international law itself.

Yet for all that attention, it is not clear that a fully realized doctrine of mandatory rules has emerged. Work on mandatory rules begins with a somewhat mundane observation: forum courts considering contracts governed by foreign law

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2 Wengler fit them into multilateral private international law processes by using the notion of a “special connection,” which, at least formally, maintained the theory of using the factual characteristics of a transaction to point to the law of a particular jurisdiction. See Wilhelm Wengler, Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht, 54 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 168 (1941). This theory nevertheless departed from the Savignian approach in rejecting the unitary application of a single law to all aspects of a particular transaction or relationship.


4 See, e.g., Frank Vischer, General Course on Private International Law, 232 RECUEIL DES COURS 9, 150-51 (1992) (discussing these questions in connection with the more general question of whether foreign public norms may be applied outside the enacting jurisdiction, and, if so, what the consequences would be for the field of private international law).
will sometimes override that law, applying a rule of forum law in its place. Such action is the usual outcome, for instance, in cases presenting a conflict between foreign *lex contractus* and a forum law that protects an important public policy. A court is well positioned to determine whether its own country’s law demands application to the transaction in question, and, as an organ of the enacting state, clearly has the authority to apply that law. Indeed, the forum court may be *required* to apply it. Thus, the general proposition that party autonomy may yield to certain laws of the forum is uncontroversial, and the doctrine of mandatory rules, to the extent that it simply reflects and explicates this reality, unobjectionable.

This starting point, however, has been used as the foundation for the articulation of a more robust doctrine that would permit courts, in certain circumstances, to apply not only the mandatory law of the forum, but also the mandatory law of other countries connected with the transaction in question. The justification for such a doctrine lies in perceptions of the appropriate role for courts in addressing international disputes. In its fullest form, the doctrine supports two different aspects of that role. First, vesting courts with broad authority to apply foreign law recognizes their ability to correct for imbalances in the bargaining process. Ian Fletcher, for example, noted that

the increasingly common judicial practice of according effect to [mandatory] rules even in cases where they belong neither to the *lex fori* nor to the *lex contractus* is a remarkable example of the extent to which in recent times the previously sacrosanct principle of party autonomy in matters of contract has been eroded in response to a more activist view of the “appropriate” function of the Court, which may be summarised as being to ensure the prevalence of an idealised concept of “justice”, if necessary by *dirigiste* means rather than by adhering to the traditional role of “neutral umpire”. Recently-elaborated theories regarding the necessity for accommodating provisions of mandatory rules of law which, if more traditional conflicts approaches were adhered to, would play no part in regulating the parties’ relationship, may thus be seen as a logical counterpart of the increasing trend towards interventionism within the domestic legal sphere for the purpose of redressing social and economic imbalances by means of rules inhibiting freedom of contract.

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6 *See* Guedj, *supra* note 1, at 667; but see *infra* at Part III on the weakening of this principle.

7 Francescakis, in his seminal study, restricted his observations to the application of mandatory law of the forum itself. *See supra* note 3.

In this aspect, the doctrine supports the operation of a judicial function that had in some systems gained strength in the purely domestic context, recognizing its extension to cross-border transactions.

Second, recognizing the authority of courts to apply foreign law validates judicial participation in the processes of cross-border governance, in the sense of supporting the important regulatory and policy goals of other nations. This notion was voiced frequently in the discussions surrounding adoption of the Rome Convention, which addressed the particular needs of the European Community. Paul Lagarde, discussing Article 7 of the Rome Convention, stated that “[t]he basic idea stems from an awareness of the necessary solidarity existing between the legal policies of the various States.”

Beyond that specific regional context, this aspect of the doctrine speaks to the role of courts within the international community more broadly. As one commentator concluded, “the close social, economical and political interdependence among modern States commands a minimum of co-operation which in turn gives some credit to a claim that the judge, at least in some instances, should apply the mandatory rules of third states, too.” Here, the doctrine may be viewed as one instantiation of the more general doctrine of judicial comity.

There was a hope behind the doctrine of mandatory rules, then, of promoting certain kinds of judicial activity in the arena of international commerce – of encouraging a certain judicial role in the overall scheme of cross-border regulation. With respect to the first goal – enhancing the role of courts in addressing imbalances between contract parties – the doctrine’s evolution has been quite successful. Some cases show courts looking to foreign mandatory law in order to correct for inequalities in particular areas of law; for instance, by invalidating unfair termination clauses in distribution agreements.

More importantly, that role has to some degree been institutionalized. In the Rome Convention, for example, consumer contracts and individual employment contracts were simply carved out of the general rule providing for the enforcement

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10 Guedj, supra note 1, at 671.

11 See MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 30 (1995) (“When properly used, the doctrine of mandatory rules ... serves as a means to exercise comity and to strengthen the cooperation among nations through mutual assistance in the enforcement of especially vital policies.”).

of party-selected law, and subjected instead to special rules. These rules authorize forum courts to apply the law of the consumer’s home country and the law of the employee’s place of employment, respectively, if those laws are more protective than party-selected law.

Encouraging courts to protect the weaker party in contracts, however, is the narrower, perhaps the less ambitious, goal of the doctrine. (Some commentators in fact query whether rules correcting for bargaining imbalances may properly be considered mandatory rules at all.) With respect to the second goal, by contrast, the doctrine has not evolved substantially; while the quite ordinary application of forum mandatory law continues, no pattern of assistance of foreign interests has emerged. There is certainly no body of cases applying foreign mandatory law in this way – commentary depends largely on the same small handful of decisions,

13 Convention on the Law Applicable to Contractual Obligations, 80/934/EEC, 1980 O.J. (L266), at Art. 3(1) (“A contract shall be governed by the law chosen by the parties”).
14 Id. at Art. 5(2) (providing that in consumer contracts “a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence”).
15 Id. at Art. 6(1) (providing that “in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable ... in the absence of choice”).
16 It is generally easier to achieve legislative agreement on rules that guarantee a fair bargaining process than on rules protecting specific substantive policies. The former seek merely to establish a level playing field, and thus promote party autonomy as a public interest; that is itself a fairly common interest among states, and is also not ordinarily in conflict with other public norms.
17 See, e.g., Vischer, supra note 4, at 157-58 (“It is debatable whether protective private law rules whose objective is the safeguard of a party’s position in a contract or other relationship may enter into the category of norms which are to be applied irrespective of the bilateral conflict rules,” although concluding that in light partly of the “social orientation of the modern welfare State,” it would be unrealistic to limit the category of mandatory rules to those “either part of the State organization or [that] secure the State’s functioning.”); see also Nathalie Voser, Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration, 7 AM. REV. INT’L ARB. 319, 325 (1996) (stating that the characteristic goal of international mandatory rules is to pursue public interests, and concluding that “domestic mandatory rules for the protection of the ‘weaker’ party should not be viewed as international mandatory rules”); cf. Pierre Mayer, Mandatory rules of law in international arbitration, 2 ARB. INT’L 274, 275 (1986) (putting rules “protect[ing] parties presumed to be in an inferior bargaining position” into the category of mandatory norms); T.C. Hartley, Beyond the Proper Law: Mandatory Rules Under Draft Convention on the Law Applicable to Contractual Obligations, 4 EUR. L. REV. 236, 238 (identifying as two categories of mandatory rules those protecting the weaker party in a contractual relationship, and those promoting “social, economic or political” policies of the enacting state).
most of which recognize the possibility of such application but do not actually apply foreign law.\footnote{19 See, e.g., The Alnati, Hoge Raad der Nederlanden, 13 May 1966 (including dictum to the effect that Dutch courts might in some circumstances give effect to foreign mandatory law, but concluding that the foreign law at issue in the case was not of a mandatory nature); see also discussion in Guedj, supra note 1, at 672-73.} In this stagnation of the doctrine’s development, as well as in the earlier vision of more robust judicial cooperation, there may be something of interest to those thinking today about the role of mandatory rules in dispute resolution (including through arbitration), as well as those interested in the globalization of judicial processes more generally. Part II of this paper explores why the doctrine of mandatory rules has failed to materialize into a strong form of judicial support for foreign policies. It addresses this question from a functional perspective, examining barriers to judicial application of mandatory third-state norms in international contract litigation. Part III then inquires whether, in the era of globalization – both of commerce and, according to some, of the judiciary – any signs point to a resuscitation of this vision.

II. OBSTACLES TO THE DEVELOPMENT OF THE DOCTRINE OF MANDATORY RULES

This section examines some of the reasons that courts are deterred from applying foreign mandatory law in international contract disputes. The first (difficulties in ascertaining the mandatory nature of a particular norm) is implicated in every case involving a potentially applicable foreign rule; the others may be presented more sharply in particular systems or with respect to particular subject areas.

A. Difficulties in Determining the Mandatory Character of Foreign Rules

Courts considering the application of foreign mandatory law face certain obstacles that are present whenever any kind of foreign rule is considered – difficulties in properly ascertaining and interpreting the content of another country’s law.\footnote{20 See generally Friedrich K. Juenger, General Course on Private International Law, 193 RECUEIL DES COURS 119, 202-05 (1985).} Moreover, they face the additional difficulty of determining whether the rule in question is in fact mandatory. One traditional way of framing this question is to ask whether the rule “wishes” to apply regardless of the law otherwise applicable; that is, whether, from the perspective of the enacting state, the legislative interest underpinning the rule is such that it must apply to the relevant transaction or relationship. In some cases, the law in question may

been much talk about [the possibility of applying foreign ‘public rules’], it is unclear if there has been a case where this has occurred”).
contain an explicit provision on this point. In most, however, it will not, leaving
the forum court to ascertain from its content alone whether it demands
application. As many commentators have suggested, the difficulty of this task
goes a long way toward explaining the reluctance of courts to apply foreign
mandatory rules.

B. Limitations on the Applicability of Foreign Public Law

As noted above, the category of mandatory rules is generally seen to include
two groups, broadly defined, of norms: one dealing with protection of certain
contract parties, and another expressing the fundamental policies of the enacting
states. Many of the rules in the latter group embody the public regulatory and
economic policies of the enacting state, including, for instance, competition law
and securities regulation. The question whether these rules may be applied by the
court of another state intersects with another doctrine: the public law taboo. On
the traditional view – described by one commentator as “the most limiting view” –
the court of one state may not apply the public law of another. Courts adhering
to this view would therefore decline to apply many foreign mandatory rules on
this basis alone: even if they concluded that a foreign rule demanded application,
they would find themselves precluded from applying it if it fell within the scope of
the taboo.

21 See, e.g., the Trading With the Enemy Act of 1917 or the Carriage of Goods by Sea
Act of 1936, both of which expressly contemplate application to foreign transactions.
22 See, e.g., the Securities Exchange Act of 1934, whose scope of application is
notoriously unclear.
23 See Dimitrios Evrigenis, Interest Analysis: A Continental Perspective, 46 OHIO ST.
L.J. 525, 526 (1985) (in discussing the related technique of interest analysis, stating that
“inviting even the most learned judge to identify spatially operating interests actually or
purportedly underlying the substantive rules of foreign countries connected with the case
would not be only inhuman but illusory”).
24 For further differentiation, see MARC BLESSING, IMPACT OF THE
EXTRATERRITORIAL APPLICATION OF MANDATORY RULES ON INTERNATIONAL
CONTRACTS 14-15 (1999) (sketching out the following categories of mandatory rules: (1)
those protecting monetary interests of the enacting state (e.g., exchange control
regulations); (ii) those of a fiscal nature (e.g., customs regulations); (iii) those
safeguarding economic interests of the enacting state (e.g., import and export restrictions);
(iv) those protecting the welfare of certain individuals (e.g., rules protecting the weaker
contract party); (v) those serving political or military interests (e.g., embargoes); (vi) those
aimed at protecting environmental welfare; and (vii) those protecting open markets (e.g.,
competition laws).
25 David Jackson, Mandatory Rules and Rules of “Ordre Public,” in CONTRACT
CONFLICTS at 59, 60 (P.M. North ed., 1982); see generally William S. Dodge, Breaking
26 On this view, it would not matter whether the rule in question was part of the law
chosen by the parties or the law of some other interested jurisdiction. Even though the
mandatory rule might be part of the law chosen by the parties to govern the contract, and
C. *Lack of Judicial Authority to Apply Foreign Mandatory Law*

A court finding that a foreign rule demands application, and that such application is not barred by the public law taboo, still seeks a path to that application. In some narrow contexts, that path is clear. International accords covering certain substantive areas permit the courts of signatory states to apply foreign mandatory law. These include the Hague Conventions on Agency and Trusts, as well as Article VIII(2)(b) of the International Monetary Fund Agreement 1945, which effectively requires member states to honor the mandatory exchange control regulations of other members. Additionally, as noted above, special choice-of-law rules may be in place that dictate the application of foreign law in order to protect the weaker party in particular kinds of contractual relationships, such as employees or distributors.

More often, however, a forum court lacks such clear guidance, and must turn to general principles of private international law. Some national regimes specifically permit the application of foreign mandatory rules: Swiss private international law, for instance, explicitly authorizes Swiss courts to apply the mandatory law of another country in appropriate circumstances. Similarly, and most famously, the Rome Convention provides that even though its application in that sense would be “in invisible,” the forum would nevertheless lack the authority to apply it. But see Whincop & Keyes, supra note 3, at 521-22 (noting that courts are more likely to apply foreign mandatory law if it is part of the law chosen to govern the contract).

27 Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 ARB. INT’L 137, 138 (1995): “When confronted with the mandatory rules of a foreign state ... [the judge] must refer either to a specific provision from his own law, including case law, or to an international convention authorizing him to [apply that law].”

28 Convention of 14 March 1978 on the Law Applicable to Agency, Art. 16 (“In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules”).

29 Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, Art. 16. (“If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State [which must be applied even to international situations, irrespective of rules of conflict of laws]”).

30 Articles of Agreement of the International Monetary Fund, Art. VIII(2)(b) provides that “Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”

31 These include Rome Convention, Articles 5 and 6, discussed supra at notes 13-15 and accompanying text.

32 Swiss Private International Law Code, Art. 19(1); see also discussion in BLESSING, supra note 24, at 54-55.
When applying ... the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.\textsuperscript{33}

In legal systems lacking such legislation, a general comity jurisprudence might be in place that permits the application of foreign law.\textsuperscript{34} In addition, where the foreign mandatory rule in question is part of the \textit{lex contractus} – that is, where it is a rule of the state whose law was chosen by the parties to govern the contract\textsuperscript{35} – a court may turn to the general conflicts principle favoring party autonomy, and enforce the rule on that basis.\textsuperscript{36} Understandably, however, the further a forum court is from a clear directive covering a particular substantive area, the less likely it is to follow such a path and apply foreign mandatory rules.

\textsuperscript{33} Convention on the Law Applicable to Contractual Obligations, \textit{supra} note 13, at Art. 7(1). The Convention will be replaced by Regulation No. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. L 177/6, when that regulation enters into force in 2009. Article 9(3) of that Regulation provides:

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

For a similar approach, see also \textsc{Principles of European Contract Law Parts I and II}, Art. 1:103(2) (Ole Lando & Hugh Beale eds., 2000) (“Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract”).

\textsuperscript{34} See, \textit{e.g.}, \textsc{Restatement (Second) of Conflict of Laws} § 187(2)(b), suggesting a practice of such application under U.S. law; see also J.J. Fawcett, \textit{Evasion of Law and Mandatory Rules in Private International Law}, 44 \textsc{Cambridge L.J.} 44, 55 (“The only basis for a national interest [in upholding a foreign law] is that of considerations of comity of nations”).

\textsuperscript{35} Assuming that the parties did not explicitly exclude mandatory law in selecting the law to govern their contract.

\textsuperscript{36} The general question whether mandatory rules should be applied as part of the \textit{lex causae} is debated among commentators. \textit{Compare} Hans W. Baade, \textit{The Operation of Foreign Public Law}, 30 \textsc{Tex. Int’l L.J.} 429, 462 (1995) (citing the 1975 resolution of the \textit{Institut de Droit International} and describing “an emerging consensus in favor of the general application (to the extent compatible with forum public policy) of foreign public law as an incidental but determinative element of the \textit{lex causae}”) and Vischer, \textit{supra} note 4, at 166-68 (discussing the debate over the “integral application of the \textit{lex causae}, irrespective of the nature of the foreign rules in question”), \textit{with} Voser, \textit{supra} note 17, at 323 (supporting the counter-position: mandatory rules of the \textit{lex causae} should not automatically be applied, because that application would “ha[ve] the effect of granting the interests of the state which provides the \textit{lex causae} an unjustified primary position over other states’ interests”).
D. Absence of a Requirement to Apply Foreign Mandatory Law

Even in its most concretized form, as in the Rome Convention and the other legislative instruments discussed above, the “rule” regarding application of foreign mandatory law is still merely discretionary.\(^\text{37}\) Comity, even less concrete as a basis for applying foreign law, also operates as a discretionary principle. Thus, even when the path to application of a foreign norm is established, courts do not feel pressed to take it. The content of many foreign mandatory rules makes courts understandably reluctant to apply them absent an explicit requirement to do so. Such law often expresses political mandates in which courts in other countries wish to avoid entanglement, such as embargoes or boycotts targeting specific countries.\(^\text{38}\) In addition, forum courts may find the proposed application of a rule to be contrary to public international law\(^\text{39}\) or simply to constitute an over-aggressive act of the enacting state.\(^\text{40}\) Thus, while there may be some “easy” cases—involving contracts intended to violate foreign export restrictions,\(^\text{41}\) for instance, or to avoid currency controls\(^\text{42}\)—most present difficulties that forum courts wish simply to avoid.

Some commentators have suggested ways to evaluate a country’s demand for application of its law, attempting to clarify when the forum court should exercise its discretion in favor of that law. For example, one suggested approach is to focus on common values, reasoning that deference to foreign mandatory norms is appropriate when those norms “express[] values shared in common and which the

\(^{37}\) Despite this, several countries nevertheless reserved application of that section when adopting the Rome Convention.

\(^{38}\) See Vischer, supra note 4, at 175 (“[I]n the absence of clear directives from the forum’s executive authorities, I doubt whether it is the task of civil courts to evaluate the ultimate merits of foreign political enactments and assist foreign States in the extraterritorial enforcement of their political objectives”).

\(^{39}\) See Erauw, supra note 18, at 282 (noting the justifiability of a forum state’s refusal to apply a foreign state’s rule when the latter is viewed as incompatible with public international law).

\(^{40}\) Several commentators point to U.S. antitrust law as an example: if its wish to apply to extraterritorial conduct is viewed as an illegitimate assertion of authority on the part of the United States, they suggest that foreign courts would be justified in refusing such application. See, e.g., Lagarde, supra note 9, at 62.

\(^{41}\) See Trevor C. Hartley, Mandatory Rules in International Contracts: The Common Law Approach, 266 Recueil des Cours 337, 395 (1997) (discussing contracts in which “the direct purpose ... is to violate foreign law in the foreign country”); Fawcett, supra note 34, at 52 (framing the question in order to “concentrate on the content of the law that is being evaded and on the question whether the thwarting of this law is against the national interest”).

\(^{42}\) See Albert A. Ehrenzweig, A Treatise on the Conflict of Laws 489 (1962) (“Whether because of a certain international solidarity in financial matters, or because of special international agreements [on that topic], American courts seem to be willing to strike down contracts concluded in violation of the currency laws of foreign countries...”).
receiving country is itself willing to protect." Others attempt to distinguish between the “legitimate applicability of mandatory rules of law as deduced rationally from the purpose – itself legitimate – of the law in question, and ... a broader scope of application claimed in an imperialistic manner by the State having promulgated the law,” or to set aside “purely selfish or parochial interests” of the enacting state. However, these various axes proposed to separate appropriate cases for the application of mandatory rules from inappropriate cases fail to provide much concrete guidance to courts, and have therefore not encouraged greater application of the mandatory rules of third states.

For all of these reasons, there is simply no practice of free application by national courts of the mandatory rules of other states when it does not form part of the lex contractus. Despite considerable attention to the doctrine, and some degree of institutionalization in the Rome Convention and other instruments, the vision of generous judicial assistance in furthering the goals of other states has failed to materialize.

III. MANDATORY LAW AND GLOBALIZATION

As discussed above, the demands of transnational commerce, the growing interdependence of states, and the resulting need for greater international cooperation were in the past identified as a basis for extending the doctrine of mandatory rules to permit the application not only of forum law but also of the law of other states. One might therefore speculate that the international litigation climate today would be hospitable to further development of the doctrine. Students of globalization, and particularly of the role of courts within the globalized system, have identified a number of trends that are often grouped under the general rubric of “judicial globalization.” These include a variety of forms of increased cooperation – for instance, heightened communication across courts, willingness of domestic courts to review foreign decisions when interpreting domestic standards, and the development of negotiated solutions to cross-border cases in areas such as insolvency or group securities litigation. Within this climate, one might expect to see a resurgence of interest in the application of mandatory rules as another form of judicial cooperation in addressing cross-border transactions.


44 Mayer, supra note 17, at 289.

45 Voser, supra note 17, at 357.

46 This rubric encompasses a number of quite disparate issues, including the proliferation of tribunals, the use of foreign law in domestic decisionmaking, and the “globalization” of the judiciary itself, by means of judicial networks and otherwise.

Interestingly, however, what we see is not an expansion of the doctrine, but rather, arguably, a contraction. Far from applying foreign mandatory rules more frequently, some forum courts seem to be foregoing even application of *forum* mandatory rules, deferring instead to party-chosen law in international contract disputes. This trend manifests itself in the United States in a particular doctrinal development – increased enforcement of foreign forum-selection and governing-law clauses in cases implicating public regulatory policy – and also in an emerging theoretical framework that takes party autonomy as an appropriate foundation for a regulatory choice-of-law approach.

Many commentators have identified a weakening or dilution of U.S. mandatory law in the context of its application to cross-border contracts, a development generally identified as beginning with decisions to permit the arbitration of claims arising under federal regulatory law. U.S. courts are increasingly willing to forego the application of U.S. regulatory law to transactions that fall within the scope of that law. The cases dealing with the aftermath of Lloyd’s of London’s collapse have become the paradigmatic illustration of this trend. In those cases, U.S. investors who had signed investment contracts containing choice-of-law and forum selection clauses in favor of the United Kingdom nevertheless sued in U.S. courts, asserting that Lloyd’s had violated U.S. securities law by fraudulently inducing them to join certain insurance syndicates. Pointing to the strong public policies underlying the relevant regulatory law (and the explicit anti-waiver provisions it includes), they argued that the U.S. courts should reject enforcement of the choice-of-forum and choice-of-law clauses. They argued, in other words, that securities law is mandatory and thus demands application regardless of the law otherwise applicable to the contract.

The courts hearing the Lloyd’s cases all began with the principle that advance agreement regarding dispute resolution is critical in international commerce, and that freely negotiated choice-of-law and forum selection clauses are therefore presumptively valid. They then made an interesting move. Rather than addressing directly the question whether federal securities law was mandatory, and must automatically be applied in the U.S. litigation, they held that the clauses would be enforced, and the U.S. lawsuits dismissed, unless the result would be to undermine the public policy in question:

48 See Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* 212-23 (1996) (tracing the progression of this dilution).

49 See, e.g., Roby v. Corporation of Lloyd’s, 996 F.2d 1353 (2d Cir. 1993); Bonny v. Society of Lloyd’s, 3 F.3d 156 (7th Cir. 1993); Richards v. Lloyd’s of London, 135 F.3d 1289 (9th Cir. 1998). These lawsuits were initiated following Lloyd’s efforts, in U.K.-based litigation, to obtain payments of amounts assessed against the U.S. syndicate investors. See generally Hannah Buxbaum, *The Role of Public Policy in International Contracts: Reflections on the U.S. Litigation Concerning Lloyd’s of London*, 3/2002 *Praxis des Internationalen Privat- und Verfahrensrechts* [IPRAX] 232 (2002).

50 See, e.g., Roby v. Corporation of Lloyd’s, 996 F.2d at 1361-62.

51 See, e.g., id. at 1362-63; Richards v. Lloyd’s of London, 135 F.3d at 1294.
By including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws should not be thwarted. ... To allow Lloyd’s to avoid liability for putative violations of the 1933 Act would contravene important American policies unless remedies available in the selected forum do not subvert the public policy of that Act.52

Reviewing the substantive remedies provided under U.K. law, the courts concluded that the foreign law afforded a cause of action similar to that available under U.S. law.53 On this basis, they held that “[t]he specter of liability for breach of contract should act as an adequate deterrent to the exploitation of American investors,”54 and that the forum selection and choice-of-law clauses should be enforced. The decisions therefore rejected the application of U.S. regulatory law even after concluding that the transactions in question might indeed fall within its scope.55

To some extent, these decisions may be read simply as an expedient recognition of the fact that few cross-border transactions today are connected so closely with a single jurisdiction that only one state can fairly lay claim to exclusive application of its rule.56 Rather, a number of mandatory rules might be candidates for application. More importantly, though, these decisions to forego application of forum regulatory law suggest that the rules in question may no longer be mandatory at all. A classic definition of a mandatory rule defines it as “an imperative provision of law which must be applied to an international relationship irrespective of the law that [otherwise] governs that relationship.”57 Judicial recognition that an international transaction falls within the scope of a U.S. regulation, but that the regulation can be displaced by party-chosen law, implies that the regulation no longer operates as a mandatory rule of the forum.58

52 Bonny v. Society of Lloyd’s, 3 F.3d at 160-61.
54 Roby v. Corporation of Lloyd’s, 996 F.2d at 1366.
55 A related trend is seen in another area: courts have used the doctrine of forum non conveniens to dismiss claims falling within the scope of domestic regulatory law, accepting that the claims would then be subject to foreign law. See Hannah L. Buxbaum, Regulatory policy in transnational litigation: the influence of judicial globalization, in FESTSCHRIFT FÜR ERIK JAYME 73, 79-81 (Heinz-Peter Mansel et al. eds., 2004).
57 Mayer, supra note 17, at 274.
58 Horatia Muir Watt, Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy, 9 COLUM. J. EUR. L. 383, 407 (2003) (suggesting that some such rules are now “only ‘semi-mandatory,’ inasmuch as their presence is no longer an obstacle to the circulation of foreign judgments and awards which do not necessarily comply with their requirements”); Stephen J. Ware, Default Rules From Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. Rev. 703, 711 (1999) (arguing that the
This line of cases therefore suggests that the trend developing in today’s litigation climate is not toward increased application of foreign mandatory rules, but in the opposite direction — toward narrowing the scope of application of even forum mandatory rules. This in turn indicates that courts may view greater deference to party autonomy, rather than broader recognition and application of foreign mandatory law, as the better response to the complexities of global transactions.

In its most robust form, this doctrinal approach also supports a broader normative vision of a choice-of-law system that relies entirely — with respect to public law as well as private law — on party autonomy. In such a system, parties would be free to select the public regulatory regime governing their relationship just as they select the private law governing it. Commentators proposing such a regime proceed on the assumption that party choice is the optimal method of allocating resources, apart from the rare cases in which particular third-party effects require intervention (that is, in which public interests fail to coincide with private welfare as served by the chosen rules). They argue that opening such laws to choice by parties both within and outside the enacting state can improve global welfare, and that giving parties free choice from among competing regulatory regimes would foster a salutary level of regulatory competition. On this view, party autonomy can itself serve a regulatory function, in the sense that it can correct for overly intrusive, welfare-diminishing regulations. In semi-strong form, this theory would dramatically reduce the application of mandatory rules, as enforcement of arbitration agreements in disputes raising mandatory law “effectively converts [it] into default law”).

59 See Muir Watt, supra note 58, at 388 (describing “the increasing pressure to include public regulation within the scope of conflicts of laws”).


61 See Whincop & Keyes, supra note 4, at 542 (“Given that contracts generally produce few externalities, courts should uphold bargaining rather than attempt to stifle it”); cf. Joel R. Paul, Comity in International Law, 32 HARV. INT’L L.J. 1, 65 (1991) (stating that in such cases the courts have “narrowly construed systemic interests, protecting the power of multinationals to trade and invest with minimal interference from national regulations at the expense of the rights of third parties such as consumers and small investors”).

62 Muir Watt, supra note 58, at 387; Guzman, supra note 60, at 914.


64 See Guzman, supra note 60; Whincop & Keyes, supra note 3.

65 Muir Watt & di Brozolo, supra note 56, at 4-5.
norms of forum law would override party-chosen law only when clear detriment to third-party interests would follow from application of the latter. In its strongest form, this theory would essentially eliminate many categories of mandatory rules altogether, permitting parties to choose freely among competing regulatory norms.

Yet what we observe courts doing in the Lloyd’s cases and similar litigation indicates that certain boundaries remain both to the doctrinal development and also to the theoretical vision. The action the U.S. courts take is actually quite limited: they decide not to dishonor contractual choices of law and forum by insisting instead on application of their own national law. It is not clear from these cases that absent a contractual selection of a foreign forum, U.S. courts would similarly decline to apply federal regulatory law to claims falling within that law’s scope. Thus, while it is fair to conclude that these cases substantially elevate the interest of party autonomy, it would be overstating the point to conclude categorically that the norms in question are no longer mandatory.

Moreover, these cases reflect no real abandonment of the state interests behind the relevant regulatory law. The cases are clear that party-chosen law can displace U.S. regulatory law only if the foreign norm to which the transaction will be subjected is substantively similar to the U.S. law in question. This limitation signals the continued commitment of domestic courts to the particular policies underlying U.S. regulatory law, indicating the unlikelihood of a shift to a system

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66 See Whincop & Keyes, supra note 3, at 528 (discussing limitations on the parties’ freedom to choose applicable law in situations involving a third party effect, and noting that “[s]uch restrictions on choice of law appear to be (and in our opinion should be) limited to situations where the mandatory rule is that of the forum”).


68 See, e.g., Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) (enforcing party choice in a case involving antitrust law).

69 In addition, while it is true that all eight of the Circuit Courts of Appeals hearing these cases subscribed to the approach herein described, it is also true that the Lloyd’s cases presented a quite particularized set of facts (sophisticated parties, fully negotiated agreements, and – perhaps most importantly – the pressing need to rehabilitate the U.K. insurance market by funding the Equitas reorganization with reinsurance premiums) from which it may be difficult to extrapolate a general rule.


71 Cf. Swiss Private International Law Code, Art. 19(2) (stating that in deciding whether to apply the mandatory rule of another country, a court must consider whether the application of that rule would result in an adequate decision under Swiss legal concepts).
based on unfettered party autonomy. Thus, we circle back to the observation with which we began: courts considering contracts governed by foreign law will sometimes override that law, applying a rule of forum law in its place. That some courts may today choose to do so less frequently does not signal an abandonment of the mandatory rules doctrine.

IV. CONCLUSION

I will close with one brief historical observation, going back to the time when commentators and legislators were actively considering whether the doctrine supporting application of forum mandatory rules could or should be expanded to encourage the application of foreign mandatory rules. That project was focused largely around the adoption of the Rome Convention, and so was undertaken against the backdrop of regional harmonization. The notion of more flexible, multilateral assistance in the sense of honoring and upholding the laws of other states therefore served a political imperative; in addition, it took for granted the underlying similarity of legal regimes in the European states. Consider the following statement, made in 1982:

To a traditional conflicts approach [the suggestion of applying a mandatory rule of a third country] is anathema for there is simply no conflicts gate through which the rule can get at the issue. But, it may be argued, such an approach is too simplistic in an age of increasing state interest in arrangements made by individuals. Particularly is this so when (as with the Convention) states are creating a conflicts framework for a “community” – a community which must depend on reciprocal respect for the views of its members.

Even in the European Union, however, the context of the debate over mandatory rules has changed. Far from speaking to the expansive application of third-state foreign law, a current point of contention there is whether the application of forum mandatory law should be limited. Recent jurisprudence suggests that regulatory barriers between member states, having been removed by communitarization, cannot be “reconstituted” through the application by one state of its own more stringent standards to a transaction governed by the law of another state. Thus, a forum court is not free to apply its own mandatory law if

72 Thus, some commentators have suggested that a certain level of substantive harmonization must be a condition for any system based on recognition of party-chosen law. See, e.g., Muir Watt, supra note 58, at 397 (suggesting alternatively that “recognition of foreign regimes could be ... predicated on certain quality requirements”).


74 See generally Horatia Muir Watt, Experiences From Europe: Legal Diversity and the Internal Market, 39 TEX. INT’L L.J. 429 (2004) (discussing the European Commission’s work in the area of contract law), and id. at 440-43 (discussing recent European case law); and id. at 447 (“...minimum harmonization of national laws is to be combined with a principle of mutual recognition of equivalent domestic standards”).
the purpose behind that law is being served by the chosen law of another member state; rather, it must apply the latter.\footnote{See Milena Sterio, The Globalization Era and the Conflict of Laws: What Europe Could Learn From the United States and Vice Versa, 13 CARDOZO J. INT’L & COMP. L. 161, 169-70 (2005) (discussing the ruling of the European Court of Justice in the Arblade case, 1999 ECR I-8453 (1999)); see also id. at 171 (discussing the proposal of the European Group for Private International Law that effect be given to mandatory rules only to the extent that application does not constitute an unjustified restriction on freedom of movement within the Community).} This approach therefore mirrors to some extent the U.S. doctrine discussed above: it reduces the number of situations in which a forum court may override party-chosen law with its own mandatory rule. And it limits the development of the mandatory rules doctrine in a similar way: it neither eliminates mandatory rules altogether nor establishes a framework for broad application of foreign law. Moreover, in its explicit connection to EU standards, it suggests again that the mandatory rules doctrine may be tied inextricably to political imperatives,\footnote{One commentator spoke early to this point in discussing Article 16 of the Rome Convention: see FLETCHER, supra note 8, at 172 (“In the abstract, it may easily be envisaged that the court of the forum would inevitably be inclined to give priority of effect to its own domestic public policy in the event that any aspect of foreign public policy were found to be in irreconcilable conflict therewith. ... It is to be hoped ... that the courts of Member States ... will remain mindful of the fact that they now form part of a wider legal order, namely that of the Community itself, whose overall standards and objectives it is their solemn duty to uphold and to further.”).} and to a base level of similarity in the policies expressed by competing rules.\footnote{Or at least a political body vested with the authority to create minimum standards. See Muir Watt, supra note 74.