

The Public in Private International Law

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Abstract

This paper explores the interaction of public and private in a particular area of law: private international law, or the conflict of laws. It discusses the peculiarly public function of this area of law and demonstrates that it originally dealt with both private and public law. It examines how and why the area came to be associated predominantly with private law and identifies doctrinal tools that were specifically designed in order to keep public law and public considerations out. It then traces the effect on these tools, and on the area as a whole, of the collapse of the distinction between private and public law.

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This paper discusses the interaction between the public and private in the context of private international law, the area of law that determines how a foreign element in a case should affect the way we think about it. The story of this interaction suggests that private international law is essentially public law; that it is disguised as private law in order to maintain its legitimacy; and that, like private law, it is in a constant state of tension with “the public”, battling to keep politics out. After explaining why private international law is really public, and in what sense – and why – it became private, this paper will demonstrate the ambivalence towards public interests that characterises private international law.

1. Private international law: public or private?

Perhaps the most obvious sign that private international law is torn between the public and the private is the fact that the discipline has two names: private international (or sometimes international private) law and conflict of laws.¹ Each of these names represents a completely different perspective on the nature of the discipline.

1.1 The public nature of private international law

The term *conflict of laws* captures the public essence of the field that deals with jurisdiction (how far judicial jurisdiction extends), choice of law (how far substantive rules extend), and foreign judgments (what effect can be given to foreign judgments). Rather than determining individual rights and obligations directly, as in private law, this area of law determines who – or which system – should determine them.² Rather than regulating competing claims of individuals, it regulates competing claims of different legal systems to determine those individual claims. It delineates the borders of legal systems as a way to prevent or resolve conflict between systems. Like the delineation of physical, geographical borders, the delineation of the borders of law is a paradigmatically public function, and the term *conflict of laws* reflects this public nature of the discipline.

¹ In civil law jurisdictions, today, the general field is usually referred to as *private international law* or *international private law*. But historically, it was referred to as *conflict of laws* and even today, within the general area, choice of law is sometimes referred to as *conflict of laws* and the term *conflict of jurisdictions* is often used for the law of foreign judgments.

² It can also regulate them directly, just as the Roman *ius gentium* provided a set of substantive rules, parallel to those of the *ius civile*, for non-Romans. Today the few special substantive rules that are employed derive from international conventions. See *infra* note 53.

The public perception of private international law has a long and venerable tradition. One of the most influential works in the history of conflicts scholarship was written in the 17th century by Ulrich Huber in Holland.³ Huber explained traditional choice of law rules on the basis of the twin principles of territorial sovereignty and sovereign equality. Each sovereign was assigned exclusive authority over everything occurring in its territory. The rule that contracts were governed by the law of the place of contracting meant that each sovereign controlled contracts made in its territory – and only those contracts; the rule that wills were governed by the law of the place of testation meant that each sovereign controlled wills drawn up in its territory – and only those wills; the rule that procedure was governed by the law of the forum meant that each sovereign controlled the procedure of litigation in its courts – and only there. The legal world, like the physical world, was carved up into exclusive areas of authority – thus preventing overlap and preventing conflict.

A similarly public perception of private international law characterises some of the international conventions that have emerged in the modern period. For example, the Hague Convention on the Civil Aspects of International Child Abduction identifies one state that has exclusive jurisdiction to decide where and with whom children should live, and then, with few exceptions, it requires all other states – that by definition have no jurisdiction – to return any child wrongfully removed from that state. So, too, European conventions have produced regulations that carve up the European space into areas of legitimate control: the Brussels Regulations impose uniform rules of jurisdiction on all member states;⁴ the Rome Regulations impose uniform rules

³ Ulrich Huber, *De Conflictu Legum* (Leipzig, 1707). For an English translation of this work, see Ernest G. Lorenzen, “Huber’s *De Conflictu Legum*” (1919) 13 *Illinois L. Rev.* 375 at 401–418. It is not insignificant that Huber was a political philosopher (for a recent discussion and sources, see Gustaaf van Nifterik, “Ulrik Huber on Fundamental Laws: A European Perspective” (2016) 4:1 *Comparative Leg. History* 2), and that Story and Dicey were both constitutional law experts as well as experts on the conflict of laws (Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, 1833), published a year before his *Commentaries on the Conflicts of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments* (Boston: Hilliard, Gray, 1834) [Story, *Commentaries on the Conflicts of Laws*]; A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, U.K.: Macmillan and Co, 1885), published 11 years before *A Digest of the Law of England with Reference to the Conflict of Laws* (London, U.K.: Stevens & Sons, 1896) [Dicey, *Digest*].

⁴ Regulations EC, *Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast)* [2012] O.J., L 351/1 [Brussels I (recast) Regulation]; Regulations EC, *Council Regulation (EC) 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) 1347/2000*

of choice of law.⁵ These uniform rules perform a public function of allocating spheres of legal control.⁶

The public perception of the problématique of private international law is also prominent in choice of law methodology in the United States. There, since the middle of the 20th century, choice of law has been discussed as a problem of specific state interests. Traditional choice of law rules were challenged precisely because they allocated authority on a formal basis using general categories – and ignoring policies: contracts were always subject to the law of the place of contracting, and torts were always subject to the law of the place of conduct, regardless of who was involved and what the different laws sought to achieve. American conflicts scholarship rejected all this in favour of what is called “governmental interest analysis”.⁷ More familiar from public law, this analysis proceeds on the basis of the specific substantive policies and governmental interests at stake, that help both to identify and resolve conflicts in each individual case.⁸

[2003] , O.J., L 338/1. The uniform rules on jurisdiction translate into the free circulation of member state judgments throughout the Union.

⁵ Regulations EC, *Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] O.J., L 177/6 [Rome I Regulation]; Regulations EC, *Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] O.J., L 199/40.

⁶ Conventions such as these are public in the further sense that they give priority to state interests over private interests. They all promote international policies such as unification of law at the expense of local policies. The Hague Abduction Convention, for example, gives almost absolute priority to the uniform international rule that the country of origin controls. This often comes at the expense of local policies with respect to child welfare. The European Regulations impose “autonomous” or unified European interpretation of terms at the expense of domestic concepts. This preference for unification over domestic policies is clearly a matter of public, state concern. But, more importantly for the context under discussion here, it can be seen as preference for the public interest (i.e. state policies and relations in the international sphere), at the expense of private interests (i.e. local domestic policies that focus on individual rights and substantive justice).

⁷ The canonic work introducing governmental interest analysis was written by Currie. A representative selection of his work can be found in Brainerd Currie, *Selected Essays in the Conflict of Laws* (Durham, N.C.: Duke University Press, 1963).

⁸ The federal nature of the United States highlights yet more public aspects of modern private international law. In federal legal systems, the scope of application of laws, or the obligation to recognise laws or judgments of other member states, is frequently determined or affected by constitutional, allocational, considerations. So, too, in unitary systems with constitutions, foreign laws or judgments are sometimes held to local constitutional standards. Finally, constitutional values, such as fundamental human rights, derived in large part from international law, often affect decisions in conflict of laws cases. The field is thus increasingly influenced by constitutionalisation and this form of internationalisation.

This public allocational aspect of the discipline is so prominent that it is difficult to see in what sense, if any, the discipline is private, and why it was ever called private international law. Unlike private law, it is preoccupied with the essentially public problem of allocating control among different legal systems and setting limits to their control. Moreover, the problems it deals with are not unique to private law. Quite the contrary, the problems raised by cross-border relations and the need to delineate borders for jurisdiction, substantive law and judgments arise in all areas of law. Even if we confine ourselves to the problem of choice of law, it is obvious that choice of law questions can arise with respect to public law: does our criminal law apply to acts outside the state, and if so, only to local residents or local citizens, or to foreigners too? To whom does our tax law apply and does it apply to tax events taking place outside our territory? Who enjoys constitutional privileges, and do they apply overseas?

Until the late 19th century, this was openly acknowledged; the discipline called conflict of laws dealt with all areas of law. The classic texts – of Bartolus in 14th century Italy,⁹ of Huber in 17th century Holland,¹⁰ and of the 19th century scholars Story and Savigny, in the United States and Germany respectively¹¹ – all discussed the scope of criminal law just as they discussed the scope of private law, and they discussed it in exactly the same terms as they used for contract law, property law and marriage law.¹² Yet, today these questions are not considered part of the field. Indeed, what makes the field private is precisely this: that it deals only with private law relations. Criminal law was gradually dropped from the leading texts;¹³ public law was artificially excluded

⁹ Bartolus, *De Conflictu Legum Diversarum In Diversis Imperiis* [Bartolus, *De Conflictu Legum*]. For an English translation, see *Bartolus on the Conflict of Laws*, translated by Joseph Henry Beale (Cambridge, U.S.A.: Harvard University Press, 1914). The work was one part of Bartolus' commentaries on Justinian's Code, the title indicating the conflict of laws was given to the work later by others.

¹⁰ Huber, *supra* note 3.

¹¹ Story, *Commentaries on the Conflicts of Laws*, *supra* note 3; Friedrich Carl Von Savigny, *Private International Law: A Treatise on the Conflict of Law and the Limits of their Operation in respect of Place and Time*, translated by William Guthrie (Edinburgh: T.&T. Clark, 1869).

¹² Choice of law for tort emerged only later. Story did not deal with torts at all. Savigny did deal briefly with jurisdiction (*ibid.* at para. 371) and then with choice of law (*ibid.* at para. 374) with respect to delicts, subjecting them, with some reservation, to the law of the forum, likening them to penal laws.

¹³ Story still discussed the question (Story, *Commentaries on the Conflicts of Laws*, *supra* note 3 at 516–522: the extent of penal law was defined as local and territorial; the question whether it could be applied elsewhere was discussed, as was extradition). J. H. Beale also discussed the question, as late as 1916 (in his work whose very title is telling in this regard: *A Treatise on the Conflict of Laws or Private International Law*, vol. 1 (Cambridge, U.S.A.: Harvard University Press, 1916) at 7–8). He explicitly excluded a discussion of extradition but included the topic of jurisdiction over crimes. Savigny did not discuss penal laws as such although he did mention them in connection with his brief discussion of delicts, referring to

from the discipline as a whole, and it came to be called private international or international private law.¹⁴ How and why did this happen?

1.2 The private nature of private international law

The privatisation of the conflict of laws is related to its domestication. It was possible for the discipline to deal with both private and public law, and to divide up equal spheres of authority among states, only so long as it was regarded as a form of international law – a superior law binding upon all states.

Its rules *were*, in some sense, international. First, they were widely accepted: it was generally accepted that procedure is governed by the law of the forum, that contracts are governed by the law of the place of contracting, etc. Second, the classic texts presented these rules as universally valid because they derived from what were perceived to be universal, rational, first principles. In 14th century Italy every law could be assigned to a category - for example real laws or personal laws – and that category determined its scope of application.¹⁵ In 17th century Holland, the natural limits of territorial sovereignty determined who and what were subject to every sovereign's law.¹⁶ In 19th century Germany, every legal relationship had a natural seat. For example, the seat of a contract was in the place of contracting, and the law of that seat was the law governing that relationship.¹⁷ These were all scientific principles, valid for all systems.

For a long time, these rules were international also in the sense that they were regarded as binding on all states. Their binding nature derived partly from natural reason, but also from the

them as being public in nature and raising special problems (Savigny, *supra* note 11 at para. 374). Dicey no longer discussed this question although in the first edition of his work he added, in the Appendix, a note on the scope of tax law (Dicey, *Digest*, “Note XVII”, *supra* note 3, 781). The scope of the discipline was discussed in civil law systems too.

¹⁴ The term began to be used in the 19th century (see e.g. Story, *Commentaries on the Conflict of Laws*, *supra* note 3 at para. 9, where he pointed out that this is a branch of public law “rightly called” private international law – private in the sense that it deals with relations between private persons). In the civil law, too, the term became very fashionable in the 19th century as can be seen in the titles of the standard works of the period (e.g. M. Foelix, *Traité du droit international privé ou Du conflit des lois de différentes nations en matière de droit privé* (Paris: Joubert, 1843); Wilhelm Schaeffner, *Entwicklung des internationalen Privatrechts* (Frankfurt am Main, 1841)).

¹⁵ See e.g. Bartolus, *De Conflictu Legum*, *supra* note 9. Bartolus was a prominent representative of the statist school.

¹⁶ Huber, *supra* note 3.

¹⁷ Savigny, *supra* note 11 at para. 360.

notion of “comity”. Comity was understood at that time to mean the obligation to show courtesy to other sovereigns and treat them as equals. This obligation expressed the idea that all sovereigns derived their authority from a natural international order to which they were all subject – a universal public law.¹⁸ But this perception of comity and of international law changed. By the 19th century, states were regarded as truly sovereign; they were not subject to international law; rather, positive international law was created by state action. States respected and applied both international law and the law of other states only when they chose to and only because they chose to – as a voluntary courtesy.¹⁹ While the rules might be similar to those of other states, they were rules of domestic law, not international law; they were the product of the local sovereign.

Clearly, once domesticated, such rules could easily become a source of conflict. One sovereign delineating borders for domestic and foreign law might easily interfere with the interests of other sovereigns. But since only public law was identified with sovereign interests and policies, the danger of conflict could be neutralised by restricting the discipline to private law.²⁰ Private law was thought to have no particular local identity and no specific policy content; it was value free, and of no public concern.

The traditional form of choice of law rules reinforced their neutral image. These rules deal with general categories of situations – like contract, tort, and property – and subject them to a governing law on the basis of abstract, pre-determined links – like the place of contracting, the place of conduct and the **situs** of property. They do not proceed on the basis of the content of the competing laws or the state interests involved. Indeed, the judge is not allowed to look at their content. The use of neutral, universal categories of private law guaranteed that domestic and

¹⁸ Coined in Huber’s work *De iure civitatis* (1672) (see van Nifterik, *supra* note 3); comity as a limitation on state action can be traced back to international law as developed by Grotius.

¹⁹ As exemplified by the tone of Vattel’s work that had a major influence on Story in the United States.

²⁰ See Savigny *supra* note 11 at para. 349, where he discussed applying the law to which the legal relations pertain, excluding only laws of a public nature that cannot take part in such free exchange and foreign laws that are against local public policy. Significantly, Savigny, unlike Story and Dicey, was a private law scholar whose monumental work on the theoretical structure of private law relations in Roman law (*System des heutigen römischen Rechts* (1840–1849)) culminated in his eighth volume on the conflict of laws, *Herrschaft der Rechtsregeln über die Rechtsverhältnisse* (The Scope of Application of Legal Rules to Legal Relationships [my translation]) dealing with the spatial and temporal limits of legal rules. The words “private international law” that appear in the title of Guthrie’s translation (*supra* note 11) did not appear in the original.

foreign laws would be treated identically, that no preference would be given to forum law, and that individual public interests and policies – whether local or foreign – would never be considered.

The privatisation of conflict of laws was completed by reformulating its guiding theory. Rather than a tool of public law for determining legal borders, originating in international law and resting on comity, the discipline came to be seen as a tool of private law for the transnational enforcement of individual rights. The international obligation of comity was transformed into a domestic aspiration to respect vested rights.²¹ It is then no coincidence that the American conflicts revolution, which embraced the public aspect of private international law and rejected its traditional formalistic rules, relied on the insights of legal realism. One of the most prominent messages of legal realism was, after all, that the idea of vested rights was “transcendental nonsense”.²²

2. Keeping the public out of private international law

The conflict of laws thus took on a private identity in order to maintain the idea that the limits of legal control could be determined by uniform rules, and to facilitate a pluralistic approach to the application of foreign law, free of specific political considerations. Nonetheless, the “public” never ceased to plague private international law. Three related doctrines emerged to ensure that governmental interests would not interfere in the regulation of transnational individual relations and that all sovereigns would be treated equally: foreign sovereign immunity, exclusive jurisdiction, and public policy.

2.1 Foreign sovereign immunity

The first doctrine, foreign sovereign immunity, was located in the area of jurisdiction. It is a familiar doctrine: subjecting a foreign sovereign to domestic jurisdiction undermines the principle

²¹ Vested rights discourse appeared much earlier, for example, in Huber’s work. Nonetheless, it began to dominate conflicts thinking only in the 19th century. Interestingly, at around the same time, the doctrine of *obligatio* was adopted in the common law in the context of foreign judgments. Up until then, as in the civil law, the enforcement of foreign judgments had been perceived as a matter of public arrangement between states, on the basis of treaties. The judicial doctrine that no defence of mistake could be raised against a foreign judgment, and that the judgment was itself an obligation rather than merely evidence of an obligation (*Godard v. Gray* (1870), L.R. 6 Q.B. 139), made it possible to sue on foreign judgments as an independent cause of action – a vested right or *obligatio*, and introduced the common law action on the judgment as the dominant mode of enforcement for foreign judgments.

²² Felix S. Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35:6 Colum. L. Rev. 809.

of equality; in order to maintain equality, no sovereign can be subjected to the courts of another. Since sovereignty was perceived to be exclusive and absolute, this immunity had to be both broad and absolute.²³

2.2 Exclusive jurisdiction

The second doctrine was expressed in the areas of choice of law and the law of foreign judgments. In 1893 the Privy Council approved the rule that foreign penal laws and foreign penal judgments would never be enforced.²⁴ In 1955 the House of Lords confirmed that this exclusionary rule extended to foreign revenue laws too: foreign taxes could not be recovered in domestic courts.²⁵ Like foreign sovereign immunity, these rules were also required by the principle of sovereign equality. Applying foreign penal laws and foreign revenue laws would undermine both foreign and domestic sovereignty: the foreign sovereign whose laws were scrutinised in the domestic court would thereby be subjected to the domestic sovereign; at the same time, a domestic court would become subservient to a foreign sovereign by applying laws designed to benefit that foreign sovereign.

In the choice of law context, these rules meant that penal and revenue laws and judgments were regarded as “territorial”, in the sense that the natural scope of their application was limited to the territory of the sovereign that promulgated them. But they were also territorial in the sense that, unlike rules of contract law or tort law, they would never be applied by a court in another state, even in a case that was wholly territorial to the first state, but that for some reason was litigated elsewhere. So in effect, they also created a new jurisdictional category. The jurisdiction to apply these rules belonged only to the sovereign whose law was concerned.²⁶

²³ See for a typical presentation Malcolm N. Shaw, *International Law*, 7th ed. (Cambridge, U.K.: Cambridge University Press, 2014) at 509ff; Lord Collins of Mapesbury, ed., *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed., (London, U.K.: Sweet & Maxwell & Thomson Reuters, 2012) at para. 10–004.

²⁴ *Huntington v. Attrill*, [1893] A.C. 150 (P.C.) [*Huntington v. Attrill*].

²⁵ *Government of India v. Taylor*, [1955] A.C. 491 (H.L. (Eng.)) [*India v. Taylor*].

²⁶ In civil law countries these were all part of a more general category of “public” laws, traditionally presented as laws whose scope of application is established independently by the legislator, that are not subject to conflict and that are applied by other states only by treaty (see e.g. Bernard Audit & Louis d’Avout, *Droit international privé*, 7th ed. (Paris: Economica, 2013) at para. 174; Pierre Mayer & Vincent Heuzé, *Droit international privé*, 10th ed. (Paris: Montchrestien, 2010) at para. 315, where they point out that relations between a sovereign and its subjects should be handled only in that sovereign’s courts.

This category of “exclusive jurisdiction” is more familiar in the context of land. Matters connected with land can in general be adjudicated only in the courts of the state in which that land is situated; they cannot be adjudicated in foreign courts.²⁷ But this rule stems from exactly the same idea as the rule excluding application of foreign penal and revenue laws. Land cannot be subjected to the jurisdiction of a foreign court because it is a paradigmatic aspect of territorial sovereignty, and thus, adjudicating rights to foreign land is, *per se*, an intervention in foreign public and sovereign affairs. The category of exclusive jurisdiction thus prevented the possibility that foreign sovereign interests would be either promoted or interfered with by other sovereigns.²⁸

2.3 The public policy exception

While these first two doctrines kept out *foreign* public interests, the third doctrine – the public policy exception – was designed to keep out *domestic* public interests, and it functioned in both choice of law and the law of foreign judgments. This doctrine allowed courts to rely on local public considerations and reject the applicable foreign law if its content was sufficiently repugnant. Public policy was considered exceptional because it deviated from the principle that the content of the competing laws must not be considered. It was also exceptional because it admitted the precedence of local public interests. As a result, it was severely limited. It could not actively promote domestic policies as such. It could serve only as a check on the normal operation of choice of law rules, in a negative role, denying application once the applicable foreign law was shown to be repugnant. Furthermore, it was not enough simply to show that the foreign law was different from domestic law: choice of law rules are, after all, designed specifically to accommodate the application of substantive rules that differ from domestic rules. In order to minimise the influence of local public concerns, and the offense to foreign sovereigns of denying entry to one of their laws, the exception had to be narrowly confined; it could be invoked only if an essential domestic value was

²⁷ See e.g. *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602 (H.L. (Eng.)) [*Companhia de Moçambique*]; Yvon Loussouarn, Pierre Bourel & Pascal de Varreilles-Sommières, *Droit international privé*, 9th ed. (Paris: Dalloz, 2007) at para. 446; Italian Statute on Private International Law, No. 218, 31 May 1995, s. 5; Swiss Federal Private International Law Act, 1987, s. 97.

²⁸ All these are related to the act of state doctrine that prevents courts of one state from evaluating the public acts of a foreign sovereign. Indeed, in some sense they are part of the same doctrine. For example, Mayer & Heuzé (*supra* note 26) mention the act of state doctrine as a specific doctrine, but include in it penal and revenue laws. On this relationship, see e.g. Matthew Alderton, “The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib” (2011) 12 *Melbourne J. Intl. L.* 1.

immediately and seriously threatened by the application of the relevant foreign law.²⁹ Since the entire system was predicated on the assumption that private and public law were clearly distinct, and that private law was value free, the cases in which local public policy could intervene would, by definition, hardly ever arise.

3. The collapse of the distinction between public and private

All these doctrines – foreign sovereign immunity, exclusive jurisdiction and public policy – were designed to keep the public out of private international law. The public could be kept out only because public bodies, public laws and public interests were thought to be of no relevance in determining private rights. The consequent fate of these three doctrines can be regarded as a series of equivocal moves that responded to difficulties caused by the collapse of the distinction between the public and the private.

The breakdown of this distinction is a familiar phenomenon. First of all, sovereign activity is no longer exclusively public. States and state bodies often act as private individuals; they buy, sell and rent property; they enter into contractual relations; they cause damage by engaging in unlawful conduct. Second, public activity is not always performed by obviously public bodies. Non-state, or private, bodies and agencies are increasingly entrusted with a variety of public functions. Third, private law often serves as a tool in the pursuit of social and economic policies. As it does so, it loses some of its private nature and takes on some of the characteristics of public law. Traditional private law principles are often undermined by the methods employed in regulatory legislation or in laws seeking to protect special groups such as employees and consumers. For example, these laws tend to incorporate mandatory rules, and generalised requirements of good faith, both of which restrict and modify the traditional principle of freedom of contract; they often impose liability for damage even in the absence of fault; they sometimes offer tools designed to encourage private enforcement, such as class actions, that focus on imposing liability rather than on full compensation. Changes such as these inevitably challenged

²⁹ It is well recognised that civil law systems made more extensive use of the public policy exception than common law systems, where in matters of public concern, such as family law matters, jurisdiction was limited to local domiciliaries so that the *lex fori* would be the only applicable law. See e.g. Mayer & Heuzé, *supra* note 26 at para. 200. Nonetheless, as the discussion there shows, civil law systems also stress the relativity of public policy in private international law and the need to restrict its scope.

the three doctrines described, all of which were based on the assumption that the public and the private were quite distinct.

3.1 Equivocation over foreign sovereign immunity

The effect of the challenges produced by the breakdown of the distinction between public and private is most obvious with respect to the doctrine of foreign sovereign immunity. Just as most systems of law now permit domestic sovereigns to be sued in their own courts – for breach of contract, for tort, for infringement of property rights and so forth, so the immunity traditionally enjoyed by foreign sovereigns has also been restricted. In general, foreign sovereigns are now immune from suit principally when they are sued in a sovereign capacity. When they function in a commercial or private capacity, they can be held to account almost as if they were private individuals. Almost, but not completely. First because they cannot be held to account for *all* “private” activity.³⁰ Second, because even though not always immune from jurisdiction, foreign sovereigns are generally still immune from enforcement procedures. Respect for the foreign sovereign means that, even after civil judgment has been given against such a defendant, formal execution procedures will rarely be invoked. For example, in order to seize assets held by a foreign sovereign in a domestic bank account, it has to be shown that the account serves no sovereign function and is used exclusively for commercial purposes.³¹ So, too, while the immunity has been restricted in terms of subject matter, it has expanded *ratione personae*. As long as the litigation concerns sovereign activity, non-sovereign bodies performing that activity are now increasingly entitled to claim immunity too. The reassertion of private concerns is thus confused by the diffusion of public functions among “private” actors.

3.2 Equivocation over exclusive jurisdiction

The category of exclusive jurisdiction shows a good deal more equivocation. On the one hand, there are clear expressions of a desire to restrict all its rules. A general resolution was passed in

³⁰ In most countries they can be sued for any kind of commercial transaction, but to be able to sue them for personal and property damage or in connection with employment contracts, these causes of action must be connected with the forum. See e.g. Shaw, *supra* note 23, at 527ff.; Dicey, Morris & Collins, *supra* note 23 at paras.10E–027 to 10E–58; *State Immunity Act*, R.S.C. 1985, c. S–18, ss. 5–6; Mayer & Heuzé, *supra* note 26 at paras. 321ff.

³¹ See e.g. Shaw, *supra* note 23 at 542; Dicey, Morris & Collins, *supra* note 23 at paras. 10–014 to 10–015; *State Immunity Act*, *supra* note 30, s. 12(1).

1975 by the Institute of International Law, encouraging states not to refuse to apply foreign laws simply because they might be classified as public.³² This resolution reflected views that had been expressed in both civil and common law systems. For example, in the very case that confirmed the exclusion of foreign penal judgments, the court was confronted with the question what would be regarded as a penalty. A creditor tried to enforce a New York judgment against a debtor in Canada. The New York rule on which the judgment was based imposed personal liability for a company's debt on the director of the company, simply because he had signed an annual report that misrepresented the company's financial position. The debtor argued that this was a penal law, since it inflicted a penalty on the individual director, and should not be enforced. The court held that a foreign law would be regarded as penal only if it involved an offence against the state, only if the action in which the foreign law was applied was "in favour of the state". Since the relevant New York law provided a civil remedy for individual creditors, it was not penal and could be enforced outside New York. In other words, even if the foreign rule performed a public regulatory function and was designed to penalise careless directors, it would not be excluded, since it provided a private law remedy.³³

So, too, in the case that extended the exclusionary rule to foreign revenue laws, the court expressed unease with the breadth of the exclusionary doctrine. They accepted the argument that a foreign government could not participate as a creditor in local insolvency proceedings because the debt it was claiming was for unpaid tax. The court would not assist a foreign sovereign in recovering its taxes; that rule was "elementary", "well recognised" and had been applied for over 200 years. Nonetheless, they took care to stress that it was going too far to formulate this rule as saying that "no notice will be taken" of foreign revenue laws. While they would never be enforced, their consequences might be recognised.³⁴

A similar restriction occurred with respect to the exclusive jurisdiction over land. Originally, it had been held that English courts had no jurisdiction to hear any claims relating to foreign land, including actions for trespass.³⁵ In time, however, it came to be accepted that foreign

³² Institut de droit international, "L'application du droit public étranger" in (1975) 56 Ann. inst. dr. int. 550 at 550–553. This approach is generally accepted in civil law countries (see e.g. Audit & d'Avout, *supra* note 26 at paras. 346–347).

³³ *Huntington v. Attrill*, *supra* note 24.

³⁴ *India v. Taylor*, *supra* note 25.

³⁵ *Companhia de Moçambique*, *supra* note 27.

sovereign interests are not automatically affected by every private law dispute touching on its land. As a result, actions relating to contracts for the sale of foreign land and trespass to foreign land can often be heard. Even questions of title to foreign land can be determined, as long as they arise incidentally.³⁶

All these reflect changes that have taken place in the content of the public and private categories and in the relations between them. At the same time, they demonstrate the ongoing need, within private international law, to keep out whatever might still be thought of as public. But abandoning broad exclusionary principles and adopting more nuanced rules require courts to engage now in extensive discussion of equally confusing categories and their rationale. Not only is it not clear what is enforcement (and thus automatically excluded) and what is recognition (and thus permitted),³⁷ or whether a question concerning the validity of title to foreign land has arisen only incidentally, and can be decided, or is really the essence of the action, and cannot.³⁸ It is also

³⁶ Section 30 of the *Civil Jurisdiction and Judgments Act 1982* (U.K.), c. 27 provides that the limitation applies only if proceedings are “principally concerned with” a question of title to, or possession of, foreign land. Section 24 of the Brussels I (recast) Regulation (*supra* note 4) also stresses that exclusive jurisdiction is restricted to actions that have “as their object” rights “*in rem*” in local land.

³⁷ This distinction is, of course very difficult to draw (see Dicey, Morris & Collins, *supra* note 23, at para. 5–023). For example, as Dicey demonstrates, it is clear that foreign sovereigns cannot seek money, or property or other relief, relying directly on a foreign penal or revenue law since that is direct *enforcement*; nor can they be allowed to achieve indirectly what they cannot achieve directly, so indirect enforcement is also forbidden. Thus a foreign liquidator of a foreign company will not be permitted to recover assets from a director that would be used only to pay foreign tax debts of the company (*Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516 (S.C. (Ireland))). But such laws might be *recognised*. Thus no court will force a trustee to comply with foreign fiscal legislation (direct enforcement), but trustees who have complied with it will be entitled to reimbursement (recognition) (*Re Lord Cable (Deceased)*, [1977] 1 W.L.R. 7 at 24–25 (Ch.)), and foreign penal or fiscal legislation can further be recognised as a basis for invalidating a contract (*Foster v. Driscoll*, [1929] 1 K.B. 470; *Regazzoni v. KC Sethia (1944) Ltd.*, [1956] 2 Q.B. 490, *aff'd* [1958] A.C. 301 (H.L.(Engl.))). But while courts have relied on foreign laws to restrain counterfeiting of foreign banknotes (*Emperor of Austria v. Day* (1861), 3 De G.F. & J. 217 (Q.B.)) and the use of forged foreign export licenses (*Kingdom of Spain v. Christie, Manson & Woods Ltd*, [1986] 1 W.L.R. 1120 (Ch.)) – which looks very much like indirect enforcement, they did not permit a bank to claim delivery of property forfeited by a foreign state because of alleged treason (*Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140) or a debtor to rely on garnishment of a debt by foreign tax authorities (*Rossano v. Manufacturers' Life Insurance Co*, [1963] 2 Q.B. 352) or a shipowner to rely on a lien imposed by a foreign state because of unpaid tax as justification for not delivering goods to their owner (*Brokaw v. Seatrain UK Ltd*, [1971] 2 Q.B. 476) even though these look very much like recognition.

³⁸ For the action to be principally concerned with a question of title to land, so that the case *cannot* be decided, there must be a genuine dispute as to title or possession and the outcome of the case must depend on the way in which that question is decided. But this does not demonstrate when an issue is incidental and *can* be decided, since almost any incidental question that raises a question of title will be genuine and will be at least partially decisive of the case. Similar difficulties are encountered under the Brussels Regulation

not easy to *justify* the idea that recognition is really less problematic than direct or indirect enforcement, or that incidental questions are less problematic to decide than questions that arise directly. Thus, while on the one hand, the exclusionary rules have been narrowed, on the other, the struggle against public interests has simply shifted into different categorical distinctions whose content and justification are not clear.³⁹

More significantly, the trend has not been only to *limit* exclusive jurisdiction. For example, while the material scope of exclusive jurisdiction over land was limited, the category of exclusive jurisdiction has expanded to include areas such as public registries, corporations and intellectual property.⁴⁰ Much like land, both corporations and intellectual property are privileges granted by the state in which the state is presumed to have a special interest, and they are thus in the exclusive jurisdiction of the state involved. And yet, here too, as in the case of land, the scope of this exclusive jurisdiction is controversial. For example, until quite recently, in England, it was thought that, as had been the case with respect to trespass to foreign land, an action for infringement of a foreign intellectual property right was beyond the jurisdiction of the forum as much as the question of its validity. In 2008 the makers of the Star Wars film sued in England for infringement of their American intellectual property in the iconic storm-troopers helmet. The English defendant had originally produced these helmets for the film, on the basis of prototypes he had been given by the film-makers, but he later made copies of them which he offered for sale in the United States through the internet. When he was sued in England, he was initially held liable, but the Court of Appeal held that infringement of intellectual property was, like land – “a local matter involving local policies and local public interest [...] a matter for local judges”.⁴¹ As a result, the English courts had no subject-matter jurisdiction. This holding was ultimately overturned in the Supreme Court,⁴² but it indicates the longevity of intuitions about what is public, and the strength of judicial reluctance to interfere in public matters.

in deciding when an action has “as its object” rights *in rem*; see sources cited in Dicey, Morris & Collins, *supra* note 23 at paras. 23–010 to 23–013.

³⁹ Similar distinctions and difficulties appear in the civil law. See e.g. Audit & d’Avout, *supra* note 26 at paras. 349–351.

⁴⁰ See e.g. Brussels I (recast) Regulation, *supra* note 4, art. 24, which reflects the trend in many states.

⁴¹ *Lucasfilm Ltd. v. Ainsworth*, [2009] EWCA Civ 1328 at para. 175, [2010] Ch. 503.

⁴² *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2012] 1 A.C. 208.

A similar equivocation plagues the penal and revenue rules. Despite the attempts we have seen to limit the scope of these rules, Dicey, the leading text on private international law in Britain, has long listed the term *other public laws* together with foreign penal and revenue laws.⁴³ This view was given judicial weight in 1982 when New Zealand sued in England to recover some Maori artefacts that had been privately bought and were about to be sold through Sotheby's. Their claim rested on a New Zealand law that vested in the state title to any historic articles exported illegally. In the Court of Appeal, Lord Denning suggested that the law granting title to the government was a public law, and that the revenue and penal rule should be understood as excluding enforcement of all foreign public law rules.⁴⁴ The House of Lords decided the case on a different basis, holding that the New Zealand government had not actually acquired title over the artefacts, and they refused to express an opinion on the public law issue.⁴⁵ But attempts to expand the exclusionary rule did not go away.

In 1988, in the case popularly known as the Spycatcher⁴⁶ case, the British government sued a former employee in Australia, in an attempt to block distribution there of a book he had written. The book was about his work as a member of the British security services, and it obviously included the kind of secret information that states never want to reveal. The British government tried to persuade the court that the action was an ordinary action in private law – for breach of a contractual or equitable obligation of confidence requiring employees to keep secret any confidential knowledge acquired in the course of their employment. The Australian court rejected this argument, and dismissed the action, on the basis that it was really an attempt on the part of the British government to pursue its sovereign aims and protect its public interests. It accepted the principle that the court would not enforce foreign public laws, defining these as claims by foreign sovereigns outside their territory relating to governmental power, and allowed publication and distribution to go ahead. Subsequently it has been held that there is no rule excluding all public laws as such; only claims resting on sovereign rights or governmental interests will not be

⁴³ As early as the 4th ed. of 1927 “political laws” appeared together with penal and revenue laws, and in the 7th ed. this was replaced by “other public laws”: A.V. Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, 4th ed. by A. Berriedale Keith (London, U.K.: Stevens & Sons/Sweet & Maxwell, 1927); A.V. Dicey, *Dicey's Conflict of Laws*, 7th ed. by J.B. Moore (London, U.K.: Stevens & Sons/Sweet & Maxwell, 1958).

⁴⁴ *Attorney-General of New Zealand v. Ortiz*, [1982] 3 W.L.R. 570 (C.A.).

⁴⁵ *Attorney-General of New Zealand v. Ortiz*, [1984] A.C. 1 (H.L.).

⁴⁶ *Attorney-General (U.K.) v. Heinemann Publishers Australia Pty. Ltd.* (1988), 165 C.L.R. 30 (H.C.A.).

enforced.⁴⁷ Here again, the dispute over the extent of the exclusionary rule has simply shifted the problem into different categories, which are now proxies for the public category.

The use of private law as a vehicle for regulatory policies has exacerbated this difficulty since foreign regulatory law can provide private mechanisms, with civil remedies, for its enforcement. For example, some such regulatory regimes provide for multiple damages that can be far in excess of the damage actually suffered.⁴⁸ Under the traditional rules, treble or multiple damages would not be excluded as such, since they are recovered by an individual, for the individual's benefit. So in principle, a private individual should be able to enforce a foreign judgment based on such a foreign law, or even perhaps to rely on such a foreign law as the basis for a domestic action for multiple damages. Yet this possibility has encountered resistance.⁴⁹ Monopolistic or criminal activity can also cause damage to states – for example losses in revenue or increases in the cost of public medical care. Actual losses such as these are clearly different from simple tax debts, but in the United States, claims for lost revenue have been blocked by the revenue rule.⁵⁰ Some private enforcement mechanisms provide class actions as a way of pursuing remedies for damage caused by breach of regulatory laws. Could a group of individuals rely on such a foreign law in a domestic court? The remedy is civil, and it is in the hands of injured individuals, but it is not really designed to provide full individual compensation. Moreover, since class actions are special procedural mechanisms, foreign class action statutes might impose an unreasonable procedural burden on a domestic court and be almost impossible to apply. Some systems allow the state to sue, on behalf

⁴⁷ *Islamic Republic of Iran v. Barakat Galleries Ltd.*, [2007] EWCA Civ 1374, [2009] Q.B. 22.

⁴⁸ American antitrust law and American anti-racketeering law (RICO) both permit individuals injured by the forbidden activity to sue for compensation individually and to obtain treble damages.

⁴⁹ Although enforcement of a foreign public regulatory law by private mechanisms to recover actual damage will probably be considered a “civil” matter that will not attract the exclusionary rule (Dicey, Morris & Collins, *supra* note 23 at para. 11–034), the editors suggest that multiple damages might still be regarded as penal, or be found to be against public policy (*ibid.* at para. 14–022). Recovery of such multiple damages has been prevented by statute (see discussion *infra* and note 63).

⁵⁰ See *Attorney-General of Canada v. R.J. Reynolds Tobacco Holdings Inc.*, 268 F. (3d) 103 (2nd Cir. 2001), where the revenue rule was used to prevent Canada from recovering under RICO for losses in revenue caused by smuggling cigarettes into Canada to sell them on the black market and avoid taxes; *European Community v. RJR Nabisco Inc.*, 424 F. (3d) 175 (2nd Cir. 2005) (cert. denied 126 S. Ct. 1045)), where the rule was used to bar the European Community from a similar suit. In 2016, the European Community was similarly blocked from recovering damages for lost revenue, increased law enforcement costs, damage to financial institutions and currency instability – all resulting from money laundering activities involving drugs - because the relevant RICO provisions were interpreted as requiring local damage (*RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090 (2016)).

of a group of injured individuals, as *parens patriae*. Could a foreign state rely on such a law in this capacity? Again, in the United States, such actions have encountered difficulties.⁵¹ Thus, although formally private mechanisms, all these are clearly tools of economic and social policy and therefore they still raise the spectre of foreign public interests.

3.3 Equivocation over public policy

So much for the doctrines excluding foreign public bodies and laws as such. The fate of the public policy exception was even more dramatic. Originally, as we have seen, the assumption was that private law was value free; that there would be no need to give preference to any specific rule of domestic private law; and that compelling domestic public interests could be admitted only to prevent the application of a specific repugnant foreign law. As rules of private law came to be used as instruments for promoting substantive policies, and often regulatory policies, this assumption was challenged. Determining the scope of application of these new kinds of rules without being able to consider their purpose threatened to undermine the interests they were designed to protect and the policies they were designed to pursue. For example, treating employment contracts in the context of choice of law as if they were ordinary contracts might permit employers to evade many of the mandatory rules imposed on them in the purely domestic context; treating strict liability cases in the context of choice of law as if they were ordinary torts might enable manufacturers to evade domestic liability for defective products by strategic location of their manufacturing plants.

In order to incorporate domestic policy interests, the choice of law model was reconceptualised as a process that employs a number of different tools for different purposes. Traditional choice of law rules exclude policy interests and preserve sovereign equality; other tools have been developed in order to incorporate important domestic policy considerations. In addition to the familiar negative role of public policy at the end of the choice of law process, a new form of positive public policy is now recognised that functions at the beginning of the process to express domestic interests.

⁵¹ For discussion of this doctrine, see Richard P. Ieyoub & Theodore Eisenberg, “State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*” (2000) 6:1 74 *Tul. L. Rev.* 1859, which analysed some interstate cases in the United States and pointed out that foreign states will not necessarily be recognised as having *parens patriae* status. In any case, however, since that status requires showing a particular sovereign interest, rather than simply a representative interest in passing on compensation, such actions would surely be blocked precisely because they are foreign sovereign acts.

It is now generally acknowledged that systems may remove some rules from the control of traditional choice of law rules, and define their geographical and personal scope individually, by reference to their substantive policies rather than to their categorical nature. These policies sometimes require restricting the scope of application of a law as compared with the scope it would have had under the relevant choice of law rule. For example, a special rule of liability, associated with special national insurance arrangements, might be restricted to injured local residents, rather than to just anyone injured locally.⁵² By the same token, these policies might require expanding the normal application of a rule.⁵³

First discussed as *lois de police*, and then as *lois d'application immédiate*,⁵⁴ rules such as these are now commonly referred as “overriding mandatory” laws. As defined in art. 9 of the European Rome I Regulation on choice of law in contract, these rules are mandatory not simply in the domestic sense that they cannot be derogated from by agreement. Because they are regarded as crucial to a society’s political, social, or economic organisation, they override choice of law

⁵² In addition to having a different scope from what might have been expected in the traditional choice of law rule, such a rule would also be unilateral in the sense that it would determine the scope only of the domestic rule, and not of similar foreign rules.

⁵³ Additional steps that might precede ordinary choice of law rules in this process are special *choice of law* rules that can themselves help to promote the relevant policy in a special area of law. For example, instead of applying the law of the place of conduct to product liability, a special choice rule might allow the plaintiff to choose between the law of the manufacturer’s place of business and the law of the place where the product was marketed. This might promote the protective policy involved by allowing the system with the higher level of protection to control. Special choice of law rules like these are now a common feature in areas like product liability, unfair competition law, environmental damage, traffic accidents, and so forth. Similarly, instead of regulating such areas *indirectly* through special choice of law rules, some systems have adopted special *substantive* rules to regulate transnational situations in a particular area of law *directly*. These rules are often based on international conventions, and thus also promote internationally uniform substantive policies. For example, the CISG convention (*United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 U.N.T.S. 3 (entered into force 1 January 1988)) provides special substantive rules for contracts for the international sale of goods; the Warsaw convention (*Convention for the Unification of Certain Rules relating to International Carriage by Air*, 12 October 1929, 137 U.N.T.S. 11 (entered into force 13 February 1933)) provides uniform substantive rules of liability for the international carriage of passengers by air. The Hague Rules (*International Convention on the Unification of Certain Rules of Law relating to Bills of Lading*, 25 August 1924 (entered in force 2 June 1931)) provides uniform substantive rules of liability for the international carriage of goods by sea, etc.

⁵⁴ For early discussions see P. Graulich, “Règles de conflit et règles d’application immédiate” in Jean Dabin, *Mélanges en l’honneur de Jean Dabin*, vol. 2 (Brussels: Bruylant, 1963) 629; Phocion Francescakis, *Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflit de lois*, (1966) 55 Rev. crit. dr. int. privé 1; Pierre Gothot, *Le renouveau de la tendance unilatéraliste en droit international privé* (1971) 50 Rev. crit. dr. int. privé 1; Jean-Pierre Karaquillo, *Etude de quelques manifestations des lois d’application immédiate dans la jurisprudence française de droit international privé*, (Paris: Presses universitaires de Limoges, 1977).

rules.⁵⁵ In other words, once a rule is identified as being of such exceptional importance to the local system, it will apply, rather than the law indicated by the applicable choice of law rule.

This development has broken down many of the barriers between private international law and public law. So much so that even *foreign* overriding mandatory laws might well be applied even though, by definition, they protect and promote foreign public interests. When the domestic choice of law rule refers to a foreign law, and the applicable rule there is an overriding mandatory rule, it will not automatically be rejected, just as public law in general will not automatically be rejected.⁵⁶ It is further anticipated that foreign overriding mandatory laws might apply even when they are *not* part of the law referred to by the domestic choice of law rule.⁵⁷

While originally the identification of overriding mandatory rules was thought to be a judicial task of some delicacy,⁵⁸ the increasing importance of private law in the pursuit of public aims has further encouraged legislatures to use this tool in a blunter way in attempting to promote or protect specific local economic interests.⁵⁹ A number of offshore jurisdictions, such as the Cayman Islands, Guernsey, and Jersey, attempting to increase their attractiveness as trust

⁵⁵ See Audit & d'Avout (*supra* note 26 at paras. 179ff.), who explain that immediate application is the inevitable result of publicisation of private law, and who discuss the economic, social and commercial interests that might require immediate application. Even Savigny (*supra* note 11 at para. 349) mentioned strictly imperative laws as laws that cannot participate in the egalitarian system of choice of law rules, and in para. 367, he identified laws governing local land as strictly imperative laws that must override personal law in matters of capacity with respect to such land.

⁵⁶ See Audit & d'Avout, *supra* note 26 at para. 181; Mayer & Heuzé (*supra* note 26 at para. 127) stress that such public laws often protect private, rather than state rights.

⁵⁷ Article 9.2 of the Rome I Regulation (*supra* note 5) provides very limited scope for this possibility, allowing only rules of the place of performance of a contract that render its performance illegal to be applied as overriding mandatory rules even though they are not rules of the *lex contractus*. The French literature reveals disappointment over the limited nature of this rule.

⁵⁸ Such an identification would depend on the facts of the case, its relationship to the forum, and the social effect of non-application of the rule in the individual case. Local rules would not simply be given universal application. Examples brought by Audit & d'Avout (*supra* note 26 at para. 177) demonstrate the kind of relationship with the forum that is required: the application of unfair competition law might have to be extended to extraterritorial conduct, and not just to local conduct, if it would adversely affect the local market; and conversely, it might not apply even to local conduct if it would have no local effect. Mandatory employment law might override the law chosen by foreign parties to an employment contract if the contract was to be performed in the forum, whereas, if it was to be performed abroad it would not. It might also apply to employment performed abroad if both parties are connected with the forum. The principle of the best interests of the child might override the choice of law rule indicating the personal law of the child's guardian if the child was in the forum and needed care, but not if the child was somewhere else.

⁵⁹ Audit & d'Avout (*supra* note 26 at para. 353), point out that states are more reluctant than scholars to admit foreign law. It appears they are also more reluctant to do so than are their courts.

jurisdictions, have passed “firewall” laws that forbid their courts to apply foreign laws or enforce foreign judgments if they would injure rights relating to trusts governed by domestic law.⁶⁰ Local trust activity has thus been elevated to the status of an essential economic interest. A French law from 1968 makes it illegal to give assistance to foreign courts in the collecting of evidence, in cases where this might endanger essential local economic interests, banking secrets, and trade secrets.⁶¹ Banking secrets and trade secrets are thus elevated to the status of essential economic interests. Often referred to as “blocking legislation” since they block the application of foreign law or judgments, such laws create a form of “legal protectionism”. Regardless of the specific facts of the case, any derogation from domestic trust law, any breach of banking or trade secrets, is forbidden.

Legislation such as this promotes specific, defined, local interests and targets *any* foreign law that undermines them. Legislation has, however, also been used to target *specific* foreign laws or judgments, defining them *a priori* as inapplicable. The French law referred to above, for example, also renders illegal collection of evidence for a foreign court in ways that undermine local procedural values. The prime case of collecting evidence in ways that undermine local procedural values is the infamous pre-trial discovery mechanism common in the United States.⁶² The British *Protection of Trading Interests Act* of 1980 forbids British courts to enforce foreign judgments that award multiple damages – typically American regulatory laws that assign civil liability in the area of unfair competition and racketeering and permit awards that simply treble the amount of actual damage; it further permits actions in Britain for recovery of excessive damages imposed abroad.⁶³ The United States recently passed a law, intriguingly named the *Securing the*

⁶⁰ Trust (Foreign Element) Law (Cayman Islands) 1987, later incorporated in their general trust law: Trusts Law (2011 revisions) (Cayman Islands), s. 90; Trusts (Guernsey) Law 2007, s. 14; Trusts (Jersey) Law 1984, s. 9. See also Trusts (Private International Law) Act 2015, s. 4 (Gib.) (Gibraltar); Trustee (Amendment) Act, 2003, s. 19 (Virgin Is.)

⁶¹ *Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères*, J.O., 27 July 1968, 7267.

⁶² Indeed, because of widespread opposition to such mechanisms, article 23 of the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (18 March 1970, 847 U.N.T.S. 231), upon which collection of evidence for foreign courts is based, permits states to enter a reservation about them, and a number of states have taken advantage of this possibility.

⁶³ *Protection of Trading Interests Act, 1980* (U.K.), c. 11. See Dicey, Morris & Collins, *supra* note 23 at paras. 14R-271 to 14-277; A. V. Lowe, “Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980” (1981) 75 *Am. J. Intl. L.* 257; Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (New York: Clarendon Press, 1997) at 348; Elaine Kellman,

Protection of our Established and Enduring Constitutional Heritage Act (commonly referred to as the Speech Act). This act forbids American courts to enforce foreign libel judgments from systems that do not afford the same constitutional protection of free speech as does the United States, or in circumstances in which First Amendment protection would have applied had the action been heard in the United States. Typically, these are libel judgments given in England or Canada, and indeed the act has been used to prevent enforcement of Canadian libel judgments.⁶⁴

Each of these can be said in some sense to protect an essential local value. The French law protects local procedural values; the British law protects the value of compensation only for actual damage; the American law protects the value of freedom of speech. But it is uncontroversial that at least the British and American laws were both really enacted in order to protect local defendants: in the case of Britain, from extraterritorial application of American competition law,⁶⁵ and in the case of the United States, from the phenomenon of libel tourism.⁶⁶ In other words, unlike overriding mandatory laws, which positively require application of essential domestic law, this mechanism is used primarily as an exclusionary mechanism. But unlike the exclusionary public policy exception that examines each case on its own merits, this mechanism creates an *a priori* category of foreign laws whose consequences (foreign judgments) will never be recognized or enforced.⁶⁷

Turning these values into overriding mandatory values, rather than relying on the public policy exception, expands their scope of application significantly. Unlike overriding mandatory laws – where the case must have some connection with the territory in order for the rule to apply,⁶⁸ the only connection required to apply a rule forbidding enforcement is a bare jurisdictional

“Enforcement of Judgments and Blocking Statutes: *Lewis v Eliades*” (2004) 53:4 I.C.L.Q. 1025. Similar laws have been passed in other countries, such as Canada, Australia and South Africa.

⁶⁴ See *Pontigon v. Lord*, 340 S.W. (3d) 315 (Mo. Ct. App. 2011); *InvestorsHub.com, Inc. v. Mina Mar Group, Inc.*, 2011 WL 12506239 (Fla. Dist. Ct. 2011); *Trout Point Lodge, Ltd. v. Handshoe*, 729 F. (3d) 481 (5th Cir. 2013).

⁶⁵ Dicey, Morris & Collins, *supra* note 23 at para. 14–272, articles cited in n.1028.

⁶⁶ U.S., House Committee on the Judiciary, *Recognition of Foreign Defamation Judgments* (H.R. Rep. No. 111–154) (2009); U.S., Senate Committee on the Judiciary, *Securing the Protection of Our Enduring and Established Constitutional Heritage (“Speech”) Act* (S. Rep. Doc. 111–224) (2010).

⁶⁷ Prior to enactment of the law, some American courts had refused to enforce such judgments on public policy grounds. See e.g. *Abdullah v. Sheridan Square Press Inc.*, 1994 WL 419847 (N.Y. Dist. Ct.); *Bachchan v. India Abroad Publications Inc.*, 154 Misc. (2d) 228, 585 N.Y.S. (2d) 661 (N.Y. Sup. Ct. 1992); *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.C. Dist. Ct. 1995).

⁶⁸ See notes 54, 58.

requirement – the minimal jurisdictional connection required for enforcement proceedings.⁶⁹ In the British context, a foreign judgment for multiple damages would always be excluded, even though it might arguably not be offensive to enforce such an American judgment against an American company sheltering its assets in England. In the American context, a foreign libel judgment not consistent with First Amendment protection would never be enforced, even though it might arguably not be offensive to enforce such an English judgment against an English writer with assets in the United States who had defamed an English person in England.⁷⁰ The use of preemptive legislation that rejects all these judgments as such highlights the political motivation of these rules and demonstrates the explicit use of private international law for public, political ends.⁷¹

4. Conclusion

The tension between private international law and the “public” is not simply a result of the breakdown of the distinction between private and public law. It is a constant and inevitable feature of a discipline whose purpose is to determine how individual rights and expectations should be shaped in a legal situation that crosses the borders of sovereign legal systems. The ways in which this tension is expressed, however, do follow and reflect the relationship between public and private law in general. The greater the reciprocal involvement of public and private law, the harder it is to keep specific public interests out of private international law, and the more explicitly conflictual it becomes.

⁶⁹ In common law jurisdictions, where jurisdiction for enforcement of a foreign judgment is no different from jurisdiction for an ordinary civil action, it would be enough that the defendant is present for service. Usually enforcement of a foreign judgment will be requested only where the defendant has assets, but these assets do not create a connection of the same type as that required for the conclusion that application of a law is overriding and mandatory in a particular case.

⁷⁰ Universalising the scope of the First Amendment protection in this way is even more remarkable given how difficult it has been to extend other constitutional protections to non-Americans in American courts, at least those functioning outside the United States in places like Guantanamo.

⁷¹ In this sense they resemble laws such as the *Defense of Marriage Act*, Pub. L. No. 104–199, 110 Stat. 2419, designed to enable states to refuse to recognise same-sex marriages contracted in other states (ultimately held unconstitutional), and the various versions of the American Law for American Courts Acts, designed to prevent judges from identifying local public policy by defining various categories of foreign law as inapplicable *per se*.