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EUROPEAN JUDICIAL SPACE AND DIPLOMATIC RELATIONS: A UNIFORM CONFLICT OF LAWS ISSUE?

Stefano Dominelli*

SUMMARY: 1. Introduction. – 2. The scope of investigation. – 3. The notion of “State” in public and private international law. – 3.1. Clear cases. – 3.2. New State(s), neither recognized nor rejected as such. – 3.3. Problematic scenarios of frictions and tensions between law, facts, and politics: Direct effects of diplomatic relations on conflict of laws. – 3.3.1 Direct effects of diplomatic relations on conflict of laws: A critique. – 3.3.2 Direct effects of diplomatic relations on conflict of laws: Overruling the previous case law by distinguishing between public and private international law. – 3.3.3 Autonomy of “Statehood” and of “Applicable Law”: Limits set in the case law. – 3.3.4 Problematic scenarios: *proposed theory v practice* – 3.3.5 What are the alternatives to the facts-based approach? – 4. Can the facts-based approach be adopted at the EU level as well? – 4.1. The (lack) of a definition of “States” for conflict of laws purposes under EU Law. – 4.2. The facts-based approach as a general theory of EU conflict of laws? – 4.3. The EU facts-based approach and EU principles of party autonomy: A reconciliation. – 5. Uniform law, uniform solutions? – 6. Conclusions.

1. Introduction

Traditionally and historically speaking, the branches of public and private international law have different goals and aims. Following what seems to be a well-established taxonomy, the first is seen as a set of rules called to govern the relationships between sovereign States¹, or between those actors that have in time acquired a full or limited international personality. On the contrary, private international law *lato sensu*² tackles different issues of private cross-border relationships, laying down rules to determine

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¹ H. KELSEN, *La dottrina pura del diritto* (a cura di M.G. LOSANO), Torino, 1990, p. 352 ff.

² Cf. for all, F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Volume I: Parte generale e obbligazioni*, Milano, 2015, p. 2 ff.

jurisdiction and applicable law, and to regulate recognition and enforcement of foreign decisions³.

The interplay between these branches of law has long been debated in the legal literature⁴, and recently the topic has again been the subject of studies by public and private lawyers⁵. Starting from the traditional assumption consistent with the Westphalian evolution of the international community that international law was only limited to the rules between sovereigns, the crisis of the State's paradigm in international law and the acquisition of relevance by non-State actors in the private regulation of international commerce, has led some to challenge traditional labels and to "solve" the "schism" between public and private international law⁶. In recent years, scholars have sought to identify convergences⁷ between these two branches to identify points of contact and communication.

Of course, the imperative to analyze the degree of unity between the diverse rules is not merely an interesting exercise in academic style⁸, but rather serves to find answers to significant questions, such as whether public international law sets a minimum core essence for international civil procedure or for conflict of laws, that should be respected by all States when adopting domestic laws or international conventions⁹. Of course, from a different perspective, the relationship between conflict of laws and human rights¹⁰, and the extent to which private international law can help manage phenomena ranging from international economic activities¹¹ to migration issues¹², becomes fundamental.

³ E.B. CRAWFORD, J.M. CARRUTHERS, *International Private Law: A Scots Perspective*, London, 2006, p. 1 f.

⁴ See for example J.R. STEVENSON, *The Relationship of Private International Law to Public International Law*, in *Columbia Law Review*, 1952, n. 5, p. 561 ff. See also G. MORELLI, *Elementi di diritto internazionale privato italiano*, Napoli, 1971, p. 12 f., writing that «[...] oggetto delle norme di diritto internazionale privato è la disciplina dei fatti che presentano, rispetto allo Stato, dati elementi di estraneità. Se si ha riguardo a questo oggetto specifico, può apparire, fino ad un certo punto, giustificato l'aggettivo "internazionale" [...]. L'aggettivo non potrebbe, invece, in alcun modo giustificarsi in quanto fosse diretto a indicare la natura delle norme del c.d. diritto internazionale privato, attribuendosi queste norme al vero e proprio diritto internazionale, cioè al diritto regolatore dei rapporti fra Stati».

⁵ Cf. S. LEIBLE, M. RUFFERT (hrsg.), *Völkerrecht und IPR*, Jena, 2006.

⁶ H. MIUR WATT, *Private International Law Beyond the Schism*, in H. MIUR WATT (edited by), *Private International Law and Public Law, Volume II*, Cheltenham, 2015, p. 949 ff.

⁷ A. MILLS, *The Confluence of Public and Private International Law*, in H. MIUR WATT (edited by), *Private International Law and Public Law, Volume II*, cit., p. 737 ff.

⁸ J.R. STEVENSON, *The Relationship of Private International Law to Public International Law*, cit., p. 561.

⁹ R. MICHAELS, *Public And Private International Law: German Views On Global Issues*, in *Journal of Private International Law*, 2008, p. 121, at p. 125.

¹⁰ For a study on the topic, in the vast scholarship, see J.J. FAWCETT, M.N. SHÚILLEABHÁIN, S. SHAH, *Human Rights and Private International Law*, Oxford, 2016; D. LOOSCHELDERS, „Die Ausstrahlung“ der Grund- und Menschenrechte auf das Internationale Privatrecht, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2001, n. 3, p. 463, and P. IVALDI, C. TUO, *Diritti fondamentali e diritto internazionale dell'Unione europea nella prospettiva dell'adesione alla CEDU*, in *Rivista di diritto internazionale privato e processuale*, 2012, n. 1, p. 7.

¹¹ H. MIUR WATT, *Private International Law Beyond the Schism*, cit.

¹² Amongst the scholarly writings, see H. MIUR WATT, D.P. FERNÁNDEZ ARROYO (edited by), *Private International Law and Global Governance*, Oxford, 2014; S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN, *Children on the Move: A Private International Law Perspective*, Brussels, 2017; ID, *Private International Law in a Context of Increasing*

Scholars have not reached a consensus regarding the relationships between public and private international law that stem from the postulate that conflict of laws rules were¹³ historically expressed by domestic laws intended to unilaterally govern cross-border cases (thus with a necessity to eventually reach coherent private international law solutions by way of bilateral or multilateral treaties¹⁴). Whereas in continental Europe, private international law *lato sensu* has traditionally been conceived as a branch of private law, an opposite conceptualization has taken place for some time in the United States of America. For example, conflict of laws rules in Italy were contained in the introductory act to the civil code¹⁵, and still are in the German EGBGB¹⁶. On the contrary, in other systems the two areas were not considered at the beginning¹⁷ as separate: as recently noted, «*The founders of conflict of laws initially viewed their subject as “part and parcel of international law, namely the part that deals with private entitlements and litigation” - and, for this reason, Joseph Story named it “private international law”*»¹⁸. This might lead, to a certain extent, to an approach more inclined toward a possible limited conceptual unification between public and private international law, whereas in other

International Mobility: Challenges and Potential, Brussels, 2017, and G. BIAGIONI, F. IPPOLITO (edited by), *Migrant Children: Challenges for Public and Private International Law*, Napoli, 2016.

¹³ On the international origin of private international law provisions one could today think of the established work of the Hague Conference on private international law.

¹⁴ P.S. MANCINI, *Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali*, in *Antologia del diritto internazionale privato*, Milano, 1964, p. 45. This solution would, however, not solve the issue of uniform interpretation and application of the treaty in the different State parties, save the creation of a supra-national court entrusted with the task to ensure uniform interpretation.

¹⁵ Codice civile, Regio Decreto 16 marzo 1942, n. 262, Disposizioni sulla legge in generale, artt. 17 ff., now repealed by the Italian Private international law act (*Riforma del sistema italiano di diritto internazionale privato*, Legge 31 maggio 1995, n. 218, in *Gazzetta ufficiale* 3 giugno 1995).

¹⁶ *Einführungsgesetz zum Bürgerlichen Gesetzbuche* in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061), last amendment by art. 5 Law 11 June 2017 (BGBl. I S. 1607).

¹⁷ Justice Gray wrote that «*International law, in its widest and most comprehensive sense, - including not only questions of right between nations, governed by what has been appropriately called the ‘law of nations,’ but also questions arising under what is usually called ‘private international law,’ or the ‘conflict of laws,’ [...] - is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination*» (US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113, at 163). A position that found opposition in the Court of Appeals of the State of New York, *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (N.Y. 1926), at 386 f., where it can be read: «*To what extent is this court bound by Hilton v. Guyot? It is argued with some force that questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States [...]. But the question [of foreign judgments] is one of private rather than public international law [...]. A right acquired under a foreign judgment may be established in this State without reference to the rules of evidence laid down by the courts of the United States. Comity is not a rule of law, but it is a rule of practice, convenience and expediency. It is something more than mere courtesy [...]. It, therefore, rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment*».

¹⁸ C.A. WHYTOCK, *Symposium on the Third Restatement of Conflict of Laws: Toward A New Dialogue Between Conflict of Laws and International Law*, in *American Journal of International Law Unbound*, 2 October 2016. On the creation of the term by Story, and on his public international law views, see also A.F. LOWENFELD, *International Litigation and the Quest for Reasonableness*, in *Collected Courses of the Hague Academy of International Law*, Volume 245, Leiden, 1994, p. 9, at p. 26.

States «*the distinction between private and public law, considered passé in many other systems, is still central [in their] legal thought*»¹⁹.

It is, however, outside the scope of the present work to seek a tentative answer to the general question concerning the existence of a “global law” comprising both public and private international law. The present investigation wishes to tackle one of the specific issues that can be linked to the general matter, namely what courts should do if they have to apply the law of a State with whom their own legal system has significant problems in terms of diplomatic relations. In “diplomatic law terms”, the question is whether diplomatic relations can negatively affect the possibility for a court to apply foreign laws. In “private international law terms”, the question is how to interpret the term “State” used by connecting factors.

2. The scope of investigation

Amongst the different questions that arise from the necessity to coordinate public and private international law (as in the case of State immunity²⁰), the proper qualification of “State” and “country” is now particularly significant for conflict of laws purposes. Contested territories, annexations and secessions from the unitary State lead to the question whether third country courts should apply the laws of these entities.

The aim of the present work is to reconstruct how domestic courts have addressed the issue of the applicability of laws of foreign non-recognized States or Governments. This reconstruction seems necessary to select the option that would be better placed to ground a general theory in light of the general principles of both public and private international law. Such option seems the one that favors effectiveness. Where an entity has control

¹⁹ R. MICHAELS, *Public and Private International Law: German Views On Global Issues*, cit., p. 123.

²⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* of 12 December 2012, in OJ L 351, 20.12.2012, p. 1–32, art. 1(1), last phrase. In the case law, cf. BGH, 26.11.2015 - III ZR 26/15, and the Court of Justice of the European Union, judgment 15 February 2007, *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, case C-292/05, in *Reports*, 2007 I-01519. In the very specific context of the enforcement in Germany of a Greek decision against Germany for damages caused during WWII, see BGH, 26.06.2003 - III ZR 245/98. See also Tribunal de première instance Bruxelles, 26.10.2005 – R.R. 05/3092/B, in *unalex* BE-113 («*Le non-respect de l’immunité de juridiction dans une décision étrangère condamnant un État au paiement de dommages et intérêts est une question d’ordre public. Le juge saisi d’une demande ayant pour objet l’exequatur d’une telle décision peut donc le refuser sur le fondement de l’art. 27-1 de la Convention de Bruxelles, au motif que la responsabilité internationale de l’État, dont le juge saisi est l’organe, est potentiellement en cause*»). In the legal scholarship see in general O. DÖRR, *Staatenimmunität als Anerkennungs- und Vollstreckungshindernis*, in S. LEIBLE, M. RUFFERT (hrsg.), *Völkerrecht und IPR*, cit., p. 175, in part., p. 186 ff.; S. FRANCO, P. MANKOWSKI, *Article 45*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Volume I: Brussels Ibis Regulation*, Köln, 2016, p. 45, at p. 950 f.; K. KROPHOLLER, J. VON HEIN, *Europäisches Zivilprozessrecht: Kommentar zu EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, Frankfurt a.M., 2011, p. 548; R. GEIMER, *Internationales Zivilprozessrecht*, München, 2015, p. 1049, and S.L. GÖSSL, *The Public Policy Exception in the European Civil Justice System*, in *The European Legal Forum*, 2016, n. 4, p. 85, at p. 91. The issue of State immunity and international jurisdiction has also been raised in the context of State bonds, on whose connected issues in the most recent case law see amongst all BGH, 08.03.2016 - VI ZR 516/14.

over a territory and over a population, its laws should be applied by third country courts, as long as no external recognition of the entity's Statehood follows.

The last part of the work dwells with the same question from a European Union conflict of laws perspective. Focusing on uniform rules in contractual and non-contractual matters, the aim is to determine if and to what extent a general theory developed by some domestic courts might find application at the EU level as well and how such a theory can be reconciled with fundamental principles of the European judicial space, such as the principle of party autonomy in contractual matters.

3. The notion of "State" in public and private international law

In general, if a "State" is considered as such under the public international law perspective, it will also be considered a "State" for "conflict of laws" purposes. For some, the existence of an entity as a "State" for private international law matters is an issue of public international law²¹. Others assume that this determination is autonomous, even though the conflict of laws criteria to determine Statehood are the same as those employed under public international law²².

In public international law, an entity is deemed to be a "State" if it fulfills a number of conditions, namely that it has i) a permanent population; ii) a defined territory; iii) a government; and iv) capacity to enter into relations with other States²³. According to traditional theories²⁴, recognition²⁵ of States has no effect in terms of their existence under international law²⁶.

The idea that is supported here is that the same elements should be taken into consideration for conflict of laws purposes. Regardless of domestic recognition of the foreign entity, its laws should be applied by foreign courts if said entity is in effective control over its own territory. Of course, the same should hold true in the opposite case: domestic recognition of a foreign entity should not oblige courts of the recognizing State to apply the laws of an entity that has no control over its territory.

The above postulates that "Statehood" and "foreign applicable law" are not necessarily dichotomous. To some extent, this seems to find indirect comfort in those provisions that allow for the application of the laws of a "territorial unit" (or, under some circumstances,

²¹ P. MANKOWSKI, *Article 3*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Volume II: Rome I Regulation*, Köln, 2017, p. 87, at p. 179.

²² J. KROPHOLLER, *Internationales Privatrecht*, Tübingen, 1990, p. 49.

²³ In these very terms, art. 1, Montevideo Convention on the Rights and Duties of States, December 26, 1933. Amongst the most complete works on the Statehood, see J. CRAWFORD, *The Creation of States in International Law*, Oxford, 2006.

²⁴ Montevideo Convention on the Rights and Duties of States, art. 3.

²⁵ On the role of recognition of States, see S.M. CARBONE, *I soggetti e gli attori nella comunità internazionale*, in AA.VV., *Istituzioni di diritto internazionale*, Torino, 2016, p. 1, at p. 15 ff.

²⁶ Noting that recognition does not bear any value as a condition for participation in the United Nations (the question of whether sufficient majority is reached within the UN Security Council being different), see B. CONFORTI, C. FOCARELLI, *The Law and Practice of the United Nations*, Leiden, 2010, p. 33.

a group of minorities recognized by a State²⁷), rather than of a State²⁸. Whereas federated States are not considered as “States” for the purposes of public international law²⁹, their substantive laws are nonetheless to be applied³⁰, as suggested by the European “system”³¹ established by the Rome I and Rome II Regulations³².

²⁷ E. JAYME, *Identité culturelle et intégration: le droit international privé postmoderne*, in *Collected Courses of the Hague Academy of International Law*, Volume 251, Leiden, 1995, p. 262.

²⁸ M. BOGDAN, *Private International Law as Component of the Law of the Forum. General Course*, The Hague, 2012, p. 278. Cf. also J. HILL, M. NÍ SHÚILLEABHÁIN, *Clarkson & Hill’s Conflict of Laws*, Oxford, 2016, p. 3.

²⁹ Montevideo Convention on the Rights and Duties of States, art. 2.

³⁰ See for example art. 18(1), Italian Private international law act («*Se nell’ordinamento dello Stato richiamato dalle disposizioni della presente legge coesistono più sistemi normativi a base territoriale o personale, la legge applicabile si determina secondo i criteri utilizzati da quell’ordinamento*»), on which see C. RICCI, *Il richiamo di ordinamenti plurilegislativi nel diritto internazionale privato*, Padova, 2004; L. FUMAGALLI, *Rinvio ad ordinamenti plurilegislativi*, in R. BARATTA (a cura di), *Diritto internazionale privato*, Milano, 2010, p. 431; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Volume I: Parte generale e obbligazioni*, cit., p. 255; C. FOCARELLI, *Lezioni di diritto internazionale privato*, Perugia, 2005, p. 53; G. CONETTI, *Art. 18*, in S. BARIATTI (a cura di), *Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato*, in *Nuove leggi civili commentate*, 1996, p. 1072, and S.M. CARBONE, C.E. TUO, *Art. 18 “Ordinamenti plurilegislativi”*, in F. PREITE, A. GAZZANTI PUGLIESE DI CROTONE (a cura di), *Trattato di diritto internazionale privato e comunitario*, Torino, 2010, p. 642. Similarly, in Germany before uniform European Union, Section 35(2) EGBGB also provided that «*Umfasst ein Staat mehrere Gebietseinheiten, von denen jede für vertragliche Schuldverhältnisse ihre eigenen Rechtsvorschriften hat, so gilt für die Bestimmung des nach diesem Unterabschnitt anzuwendenden Rechts jede Gebietseinheit als Staat*».

³¹ On the discussion of whether the European Union is creating a “system” of private international law, see R. LUZZATTO, *Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato*, in *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar, Vol. II*, Milano, 2009, p. 613 ff., in particular p. 619 ff.; S. BARIATTI, *Cases and Materials on EU Private International Law*, Oxford, 2011, p. 57 ff., and R. BARATTA, *Note sull’evoluzione del diritto internazionale privato in chiave europea*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 721 ff.

³² Regulation (EC) No 593/2008 of the European Parliament and of the Council, *on the law applicable to contractual obligations (Rome I)*, of 17 June 2008, in OJ L 177, 4.7.2008, p. 6–16, and Regulation (EC) No 864/2007 of the European Parliament and of the Council, *on the law applicable to non-contractual obligations (Rome II)*, of 11 July 2007, in OJ L 199, 31.7.2007, p. 40–49. In this sense, under art. 22(1) Rome I Regulation, for the purposes of identifying the law applicable to contractual obligations, a territorial unit such as “Scotland” can be considered a “State” as long as this unit has its own rules of law in contractual matters, Rules such as art. 22(1) Rome I Regulation have a specific function, and thus can only indirectly have relevance, if any, to answer the question whether a “State” must be recognized for its law to be applicable. Only later can the focus turn to whose law the existence of this unit has to be assessed by. The above rule usually presumes that a “State” accepts the legislation of part of its regions or provinces; in this sense, the rule does not appear adequate to solve issues related to the applicability of laws promulgated by organs of contested territories. However, as the rule refers to “countries” (P. FRANZINA, *Article 22*, in U. MAGNUS, P. MANKOWSKI (edited by), *European Commentaries on Private International Law, Volume II: Rome I Regulation*, Köln, 2017, p. 837, at p. 839) rather than to “States”, it might be considered as an indirect indicator that for conflict of laws pragmatism is of paramount importance, and that Statehood and applicable law, in some limited case, are not always a necessary dichotomy.

The above could lead to one preliminary conclusion, namely that both public³³ and private³⁴ international law adopt an “effectiveness test”³⁵ for their own purposes, with recognition having a declaratory rather than a constitutive nature.

If it is maintained that the two areas of law adopt the same effectiveness test or fact-based approach, in many cases this convergence will not assume particular weight, but it will be consequential where facts and international relations drift apart. This clearly stems from the case law of a number of States. The analysis of this case law, on the one hand, helps identify problematic scenarios, and, on the other hand, allows for a study of the different options interpreters have when addressing the question of the applicability of the law of a non-recognized State.

3.1. Clear cases

Some cases appear unproblematic. This is when facts and diplomatic relations run side by side: if a territorial entity fulfills the effectiveness test and is expressly recognized³⁶ as a “State” by the State of the forum, seized courts will have no problems. No court of any European Union Member State will ever raise the problem of the theoretical applicability of the law of another EU Member State, such as Italy, or the law of a State such as Japan.

Also, if a territorial entity does not pass the effectiveness test and, at the same time, the State of the forum does not recognize the territory as being a sovereign independent member of the international community, no court will raise any point on the matter. There appears to be little doubt about the fact that American or German judges will dwell with the choice of whether to apply Italian law should a connecting factor identify Seborga³⁷ as the place whose law governs the contractual or non-contractual obligation.

³³ P. FIORE, *International law codified and its legal sanction: or, The legal organization of the society of states*, New York, 1918, p. 106, para. 57.

³⁴ On what constitutes a “State” and what constitutes a “country”, compare A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, in J. BASEDOW, U. MAGNUS, R. WOLFRUM (edited by), *The Hamburg Lectures on Maritime Affairs 2011-2013*, Heidelberg, 2015, p. 69; P. MANKOWSKI, *Zuordnung okkupierter oder annektierter Gebiete im IPR und IZVR*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2017, n. 4, p. 347, at p. 349, and G. BALLADORE PALLIERI, *Diritto internazionale privato*, Milano, 1950, p. 95. See also E. VITTA, *Diritto internazionale privato, Vol. I, Parte generale*, Torino, 1972, p. 10 ff. («[...] Ma, oramai abbandonata la teoria internazionalistica, il richiamo effettuato dalle norme di d.i.pr. appare del tutto indipendente dai rapporti di diritto internazionale pubblico tra gli Stati di cui si tratta»).

³⁵ On the principles of effectiveness, see in particular, S.M. CARBONE, *Principio di effettività e diritto comunitario*, Napoli, 2009.

³⁶ The most straightforward case is the one where both States have established diplomatic missions on each other's territory, as such establishment presupposes mutual recognition (cf. E. DENZA, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, Oxford, 2016, p. 19, and C. CURTI GIALDINO, *Lineamenti di diritto diplomatico e consolare*, Torino, 2015, p. 65).

³⁷ P. MANKOWSKI, *Article 3*, cit., p. 179. Similar conclusions should also be drawn with reference to the self-proclaimed Principality of Sealand off the coast of the United Kingdom (see Verwaltungsgericht Köln, 03.05.1978 - 9 K 2565/77, whose English headnote available online stresses that «*International law required three essential attributes for Statehood. The State must have a territory, a people and a government. At least two of these requirements were absent in the case of the “Duchy”. Territory must consist in a natural segment of the earth's surface. An artificial island, albeit connected to the earth's surface, did not satisfy this criterion*»; critical to the decision, A.H.E. LYON, *The Principality of Sealand*,

3.2. New State(s), neither recognized nor rejected as such

Some argue that where the creation of a new State follows the extinction of the former, a presumption in favor of the continuity of the predecessor State³⁸ might find application at the public international law level. However, the application of the laws of the new State to a civil dispute seems justifiable. Of course, this solution seems plain where there is an immediate recognition of the new entity as a member of the international community. More doubts could be raised if a generalized acceptance is missing and the State of the forum has not taken an express position on the matter.

If recognition is not constitutive in nature, its function is to get rid of some legal uncertainties surrounding the birth of a new State³⁹. Nevertheless, if its quality is not founded on recognition, and the State of the forum takes no express position on the point, and thus does not politically declare the Statehood of the new member of the international community, the duty to run the effectiveness test will fall upon courts called to apply the law of a foreign State. In this case, the judicial qualification of the new international actor as “State” for conflict of laws purposes does in no way embarrass⁴⁰ its political system, as no statement concerning foreign policy is directly or indirectly disregarded. Where the new entity passes the effectiveness test, it should be treated as a State for conflict of laws purposes, and its laws should be applied by the seized court⁴¹.

and Its Case for Sovereign Recognition, in *Emory International Law Review*, 2015, n. 3, p. 637 ff., at p. 657 f.).

³⁸ J. CRAWFORD, *The Creation of States in International Law*, cit., p. 51.

³⁹ J. VERHOEVEN, *Relations internationales de Droit privé en l’Absence de Reconnaissance d’un État, d’un Gouvernement, ou d’une Situation*, in *Collected Courses of the Hague Academy of International Law*, Volume 192, Leiden, 1985, p. 20.

⁴⁰ Cf. E.E. KOBAY, *International Law – Recognition and Non-Recognition of Foreign Governments*, in *Marquette Law Review*, 1951, n. 4, p. 282, at p. 287.

⁴¹ To some extent, confirming that entities whose international legal personality is disputed can be given limited relevance for specific purposes, see Court of Justice of the European Union, judgment of 10 December 2015, *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, case T-512/12, and the appeal 21 December 2016, case C-104/16 P. The Tribunal argued at the first stage of the proceedings that the action for annulment did not necessarily require the determination of the legal personality of the Front Polisario, as it was sufficient to determine whether this could have been considered a legal person according to the autonomous definition of EU law. For a comment on the cases, see A. CALIGIURI, *La situazione del Sahara occidentale e la sua incidenza sull’applicazione degli accordi internazionali conclusi dall’UE con il Marocco*, in *Diritti umani e diritto internazionale*, 2016, p. 490; A. ANNONI, *C’è un giudice per il Sahara occidentale?*, in *Rivista di diritto internazionale*, 2016, p. 866, and P. MORI, *La Corte di giustizia annulla la sentenza T-512/12, Fronte Polisario c. Consiglio: l’accordo tra l’Unione e il Regno del Marocco relativo a misure di liberalizzazione in materia di agricoltura e di pesca non si applica al territorio del Sahara occidentale*, in *Diritto dell’Unione europea*, n. 2, 2017, *Osservatorio europeo*.

3.3. Problematic scenarios of frictions and tensions between law, facts, and politics: Direct effects of diplomatic relations on conflict of laws

If, as in the scenarios depicted above, there is no direct or indirect inconsistency among facts, legal theories on Statehood, and foreign policy of the State of the forum, it seems that the application of the foreign law by the seized court should be relatively plain. The exception, of course, is general limits to the application of foreign laws such as overriding mandatory provisions or the public policy exception.

However, opposite scenarios where the effectiveness test for conflict of law purposes could go against the foreign policy of the State of the forum should be exceptional circumstances⁴². A similar conclusion here seems however to need a deeper reasoning, and a more careful evaluation and justification.

The first set of cases that has specifically dealt with this question has followed the idea that seized courts cannot apply laws of non-recognized States. In this sense, public international law and international relations have a direct effect on the determination of what “State” means for conflict of laws purposes. The Tribunal in *Bolzano* did not recognize a divorce issued by a court of the German Democratic Republic as the State, not being recognized by Italy, was considered “non-existing”⁴³ (even though the divorce was granted under Italian law in light of the fact that the impossibility for the spouse residing in East Germany to leave the country met the requirement of the interruption of matrimonial life, thus making an appeal undesirable for the party).

The English Court of Appeals, by adhering to a similar theory, rejected the application of an Eastern German *Stiftung* created by the Government of the German Democratic Republic, as doing otherwise would have meant recognizing the foreign legal order and its acts, in opposition to the Crown’s non-recognition⁴⁴.

⁴² M. BOGDAN, *Private International Law as Component of the Law of the Forum. General Course*, cit., p. 284 f., noting that the position of the government as regards the recognition of foreign entities and regimes in most cases corresponds to a “realistic evaluation” of the factual situation abroad.

⁴³ Tribunale di Bolzano, sentenza del 21 maggio 1971, *Kweton c. Ullmann*, in *Rivista di diritto internazionale privato e processuale*, 1972, p. 288 ff., and in G. SACERDOTI, *Diritto e istituzioni della nuova Europa*, Milano, 1995, p. 182 ff., on which see C. FOCARELLI, *Diritto internazionale*, Vol. II, Padova, 2008, p. 27 f.

⁴⁴ Court of Appeals, *Carl-Zeiss-Stiftung v. Rayner And Keeler, Ltd. And Others* (No. 2), 17 December 1964, in *International Legal Materials*, n. 3, 1965, p. 551 ff., on which see J. FROWEIN, *Die Entscheidung des britischen Court of Appeal in Sachen Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. and others – zur Bedeutung der Nichtanerkennung der DDR*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1965, 516 ff. In that occasion Diplock L.J. argued that «*The lex loci actus to the consequences of which English courts will give effect is thus limited to laws made by or under the authority of those persons who are recognised by the Government of the United Kingdom as being the sovereign government of the place where the thing happens [...]*». In *Aksionairnoye Obschestvo A. M. Luther v. James Sagor and Co.* [1921] 1 K.B. 456, 476 Roche J. similarly argued that «*No doctrine is better established, than that it belongs exclusively to governments to recognise new states in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered*».

Along a similar line, the U.S. Court of Appeals for the Third Circuit⁴⁵ denied effects to decrees promulgated by the Soviet Union in Baltic countries due to non-recognition of the Government⁴⁶.

3.3.1 Direct effects of diplomatic relations on conflict of laws: A critique

At first sight, these solutions seem convenient for the seized court as it delegates the national government for the solution of the problem concerning the applicability of the foreign law. Additionally, such a solution would seem to ensure a certain degree of consistency between private international law and foreign policy, a matter over which some domestic courts have proven to be hesitant in their intervention in other fields such as that of diplomatic protection⁴⁷.

However, the same might not be true as regards the relationships between private and public international law, as recognition does not create Statehood. Moreover, it leaves the door open to a question, namely what is the law that the court should apply where the “old” recognized State no longer exists and its rules can hardly be qualified as “existing laws”⁴⁸.

The “non-existence” theory purported in the past by some courts and criticized in the legal scholarship⁴⁹ seems inconsistent with a number of principles, not lastly the fact that non-recognized States do exist under public international law, and in whose respect other States have some obligations regardless of their recognition⁵⁰. Where an entity qualifies as a State under public international law, other States have some obligations to respect its sovereignty.

Whereas the non-recognizing State is not obliged to enter into diplomatic relations with the new entity, the latter’s sovereignty should be respected to some extent. As noted in the legal scholarship⁵¹, a distinction between the *legal* and *political* recognition of new States should be drawn, meaning that unilateral or multilateral recognition does not affect the sovereign rights of other international actors as long as these fulfill the conditions

⁴⁵ *The Maret*, 145 F.(2d) 431 (C. C. A. 3d, 1944).

⁴⁶ For a comment, under the human rights perspective, see T.D. GRANT, *United States Practice Relating to the Baltic States, 1940-2000*, in 1 *Baltic Yearbook of International Law*, 2001, p. 23, at p. 65.

⁴⁷ Cf. *Khadr v. Canada (Prime Minister)* [2010] 1 SCR 44, para. 40 ff.

⁴⁸ F. FERRARI, *Art. 3 Rom-I Vo*, in F. FERRARI, E.M. KIENINGER, P. MANKOWSKI, K. OTTE, I. SAENGER, G. SCHULZE, A. STAUDINGER, *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar*, München, 2012, p. 29, at p. 34, and P. MANKOWSKI, *Article 3*, cit., p. 178.

⁴⁹ Cf. EDITORIAL, *International Law. Effect of Non-Recognition of Annexation by Foreign State. Statutory Maritime Lien Held Not to Attach for Advances Authorized by Shipowner Holding Title Solely under Unrecognized Foreign Nationalization Laws*, in 58 *Harvard Law Review*, 1945, n. 4, p. 612 ff.; A. BERNARDINI, *Sedimenti sentenze estere o pseudo-sentenze italiane di divorzio (Nota a Trib. Bolzano, 21 maggio 1971)*, in *Il Foro italiano*, 1972, p. 226 ff., and G. CONETTI, *Sull'applicazione della legge della cittadinanza ai cinesi residenti all'estero*, in S. TONOLO (a cura di), *Giorgio Conetti, Scritti di diritto internazionale privato*, Milano, 2011, p. 249, and there fn. 9.

⁵⁰ R. WILDE, A. CANNON, E. WILMSHURST, *Recognition of States: The Consequences of Recognition or Non-Recognition in UK and International Law*, Meeting summary of the International Law Discussion Group at Chatham House, 4 February 2010, available online, p. 9.

⁵¹ H. KELSEN, *Recognition in International Law: Theoretical Observations*, in *The American Journal of International Law*, 1941, n. 4, p. 605 ff.

under which international law connects Statehood. In this sense, those who⁵² call for a factual determination of the State from a conflict of laws perspective argue that “a fact is a fact”, and, by resorting to such theories, put into the correct light that the tensions are not between the international law on Statehood and private international law, but between domestic foreign policy and conflicts of laws.

Following this reasoning, if a non-recognized entity exists under international law as this passes the effectiveness test, its sovereignty should be respected. According to some, one of the basic assumptions underlying conflict of laws theory is that, to some extent, there is equal legislative sovereignty between States. This holds even though there appears to be no clear customary international law concerning connecting factors to be employed by conflict of laws rules⁵³, and that arguably the only obligation set by international law is that States should have a system to deal with private international law questions⁵⁴. This makes it appropriate to apply the law that seems to be more closely connected to a specific legal order from a domestic perspective. In this sense, the declination of equal sovereignty into conflict of laws might contribute to constructing the argument in favor of the application of the law of the effective territorial entity that amounts to a “State” under the effectiveness test⁵⁵.

3.3.2 Direct effects of diplomatic relations on conflict of laws: Overruling the previous case law by distinguishing between public and private international law

Part of the case law soon realized the inadequacy of the recognition theory for the purposes of the applicable law in private disputes⁵⁶. However, those courts that have admitted the application of the foreign law despite politically rejecting the foreign entity’s Statehood rest their solutions on different grounds than those above, namely the belief that the application of a foreign law is not a service rendered to the foreign entity as such⁵⁷.

In House of Lords, settling the *Carl-Zeiss-Stiftung* case, Lord Wilberforce argued in an *obiter* that «*the idea that non-recognition cannot be pressed to its ultimate logical limit and that where private rights, or acts of everyday occurrence, or perfunctory acts of*

⁵² P. MANKOWSKI, *Zuordnung okkupierter oder annektierter Gebiete im IPR und IZVR*, cit., p. 349.

⁵³ H.P. MANSEL, *Staatlichkeit des Internationalen Privatrechts und Völkerrecht*, in S. LEIBLE, M. RUFFERT (hrsg.), *Völkerrecht und IPR*, Jena, 2006, p. 89, at p. 129.

⁵⁴ R. MICHAELS, *Public And Private International Law: German Views On Global Issues*, cit., p. 125.

⁵⁵ MANCINI P.S., *Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali*, in *Antologia del diritto internazionale privato*, cit., p. 54, argues that the application of foreign laws is a duty of the judge, a duty that has its foundation in the principle (of public international law) of equality of Nations. Differently, F.C. VON SAVIGNY F.C., *System des heutigen roemischen Rechts, Vol. VIII*, Berlin, 1849, p. 28, argued that the obligation of domestic courts to apply foreign law had to be considered a «*freundliche Zulassung*» to pay respects to the foreign State.

⁵⁶ The first were probably Swiss courts (Supreme Court 10 December 1924, *Banque internationale de commerce de Petrograd v. Hausner*, RO. 50 II 507, in *Clunet*, 1925, p. 488), as reported by J. VERHOEVEN, *Relations internationales de Droit privé en l’Absence de Reconnaissance d’un État, d’un Gouvernement, ou d’une Situation*, cit., p. 111.

⁵⁷ M. BOGDAN, *Private International Law as Component of the Law of the Forum. General Course*, cit., p. 285.

*administration are concerned, the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question [even though] no trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing [...] which would prevent its acceptance... I should wish to regard it as an open question [...]*⁵⁸.

Japanese courts denied relevance to recognition of foreign State for the purposes of conflict of laws grounding their *ratio* upon a strict differentiation of goals, a solution that has become dominant in the last century⁵⁹, save for the recalled post-WWII cases that, in this sense, appear to be the last vestiges of an abandoned approach.

According to the district court in Kyoto, «*private international law is designed to find the most appropriate law ... and it is not concerned with adjusting the mutual relationship of sovereigns. Therefore, foreign law applied under private international law principles should not be limited to the law only of a recognized State or Government; effectiveness of foreign law should not depend on recognition*»⁶⁰. This seems consistent with the distinction English courts have made between external and internal effects of recognition. According to Lord Denning, «*The executive is concerned with the external consequences of recognition, vis-à-vis other states. The courts are concerned with the internal consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it - in its impact on individuals - as justice and common sense require*»⁶¹.

Lord Denning's reasoning recalls the distinction made by Kelsen between factual Statehood and the unilateral recognition thereof made by the State whose courts are seized. In this sense, arguments such as that private international law is concerned with facts can be fully understood.

3.3.3 Autonomy of “Statehood” and of “Applicable Law”: Limits set in the case law

From the recalled case law, it emerges that courts should apply the law of an entity that passes the effectiveness test, at least where acts of everyday occurrence are at stake,

⁵⁸ House of Lords 1966, *Carl Zeiss Stiftung v Rayner and Keeler Ltd* (No 2), [1967] 1 AC 853, on which see E. LAUTERPACHT, C.J. GREENWOOD, A.G. OPPENHEIMER, K. LEE (edited by), *International Law Reports, Volume 133*, Cambridge, 2008, p. 387; M. DIXON, R. MCCORQUODALE, S. WILLIAMS, *Cases and Materials on International Law*, Oxford, 2011, p. 171; T. TREVES, *Les nationalisations en Allemagne de l'Est et la Fondation Carl Zeiss*, in *Revue critique de droit international privé*, 1967, p. 23, ff., IDEM, *Il caso Zeiss*, in *Rivista di diritto internazionale privato e processuale*, 1967, p. 437 ff., K.E. DAWKINS, *International Law Recent Developments in the Law*, in *Otago Law Review*, 1972, n. 3, p. 360, at p. 362.

⁵⁹ For all, see E. VITTA, *Diritto internazionale privato, Vol. I, Parte generale*, cit., p. 10 f., and C. VON BAR, P. MANKOWSKI, *Internationales Privatrecht Band I: Allgemeine Lehren*, München, 2003, p. 126 ff.

⁶⁰ District Court of Kyoto, 7 July 1956, reported by J. VERHOEVEN, *Relations internationales de Droit privé en l'Absence de Reconnaissance d'un État, d'un Gouvernement, ou d'une Situation*, cit., p. 113, and, in the same terms, by J. CRAWFORD, *The Creation of States in International Law*, cit., p. 18.

⁶¹ *Hesperides Hotels v. Aegean Holidays Ltd* [1978] 1 QB 205, at p. 217 f.

provided that no public policy issue is in the balance. This is most probably the case of an “internal recognition” leading to an “external recognition”, subject to the condition that it conforms to principles of justice.

In terms of principles of justice, the non-application of the foreign entity’s law could most probably result in damage to an interest of private parties rather than to those of the non-recognized entity. Contractual parties habitually residing and domiciled in a non-recognized State starting proceedings before another court would be surprised, at least, that the law of their State, especially if chosen by way of agreement, were not applied by the seized court. The non-existence of this law outside its original borders could in some cases enhance internal instability, to the sole detriment of the population⁶². Outside the field of contractual obligations, injustice for private parties might even be greater and more apparent for laws and acts regulating the daily life of individuals, such as those concerning personal status⁶³.

However, to avoid external recognition, domestic courts must not treat, in procedural terms, the foreign rejected entity as a foreign sovereign⁶⁴.

Only within these limits should the application of the law of an entity whose Statehood is contested by the State of the forum be applied. Of course, the principle should also hold true in the reverse case, *i.e.* where the State recognizes as such a foreign entity that is not effective in the terms above. For the purposes of the application of the foreign law to private disputes, courts will have to determine the effective legal system and ensure that it governs the relationship of the parties⁶⁵.

⁶² Taking into consideration the relationship between effective control and social stability, Lord Denning wrote in *In re lames (An Insolvent) (Attorney-General intervening)* [1977] Ch. 41, at p. 62, that «*When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy*».

⁶³ Regarding the laws adopted by a non-recognized government, the International Court of Justice expressed that «*the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory*» (ICJ, Advisory Opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, in *I.C.J. Rep* 1971, p. 16, at p. 56).

⁶⁴ Supreme Court 10 December 1924, *Banque internationale de commerce de Petrograd v. Hausner*, RO. 50 II 507, cit., noting that the non-recognized government is not allowed to represent its State both in public and in private law. Cf. also District Court, S.D. New York, *Knox v. Palestine Liberation Organization*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004), recalling in this sense *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03, 22 L. Ed. 816 (1875); *Texas v. White*, 74 U.S. (7 Wall.) 700, 733, 19 L. Ed. 227 (1868); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir.1970), cert. denied, 403 U.S. 905, 91 S. Ct. 2205, 29 L. Ed. 2d 680 (1971), and *Sabbatino*, 376 U.S. at 409-10, 84 S. Ct. 923.

⁶⁵ On the practice of some States who kept recognizing the Baltic States during the Soviet annexation, see M. BOGDAN, *Private International Law as Component of the Law of the Forum. General Course*, cit., p. 285.

Additionally, similar conclusions should be reached if the subject of contestation is not the foreign State, but its government⁶⁶, given that the applicability of the law of that State to private disputes seems less problematic, as contesting the government of a State does not amount to rejecting the Statehood of the entity⁶⁷. As connecting factors identify the law of the effective State, or of its territorial unit, the non-recognition of the government should bear fewer consequences⁶⁸.

3.3.4 Problematic scenarios: *proposed theory v practice*

Few elements appear to stand against the application of the law of a sovereign entity unrecognized by the State of the forum as long as no external recognition follows. This fact must be read against a pragmatic background. Courts might feel the urgency to exercise some sort of self-restraint in other, more complicated, cases. Italian courts have shown that, in the end, avoiding a judgment in sensitive scenarios could turn out to be an easy solution. The *Corte di cassazione*⁶⁹ rejected the recourse of an Eastern German company for registration of a trademark. The application was deemed inadmissible, as diplomatic and consular agents in the State of origin did not legalize the power of attorney of the East German company. A legalization would have been impossible due to the lack of embassy or consular posts⁷⁰.

In problematic scenarios, courts can also avoid the application of foreign laws within the limits of public policy. This general limit to the application of foreign laws becomes particularly relevant where, whilst acknowledging a new State or Government, new substantive rules run against the founding values of the forum⁷¹.

⁶⁶ Noting that the case law concerning the non-recognition of governments can be taken into consideration for the purposes of the same issue as regards the contestation of Statehood, H. LAUTERPACHT, *Recognition in International Law*, Cambridge, 1947, p. 72, and there fn. 2, last phrase.

⁶⁷ On the relationship between the recognition of the foreign State and its government, see C. CURTI GIALDINO, *Lineamenti di diritto diplomatico e consolare*, cit., p. 65.

⁶⁸ The case law has dealt with such an issue, particularly the non-recognition of the Union of Soviet Socialist Republics. For example, excluding the applicability of Soviet Union's decrees, U.S. Court of Appeals for the Third Circuit - 145 F.2d 431 (3d Cir. 1944), cit. *Contra*, admitting for the applicability of foreign laws of unrecognized governments subject to the condition that no violation of public policy follows, Court of Appeals of the State of New York, *Sokoloff v. National City Bank*, 239 N.Y. 158 (N.Y. 1924), and, in the same sense, more recently, District Court, S.D. New York, *Knox v. Palestine Liberation Organization*, 306 F. Supp. 2d 424, cit. In general, on the issue of applicability of foreign laws passed by a non-recognized government see H. LAUTERPACHT, *Recognition in International Law*, cit., p. 70 ff.; E.D. DICKINSON, *The Unrecognized Government or State in English and American Law*, in *Michigan Law Review*, n. 1, 1923, p. 29; D.E. HUDSON, *Recognition of Foreign Governments and Its Effect on Private Rights*, in *Missouri Law Review*, 1936, p. 312; EDITORIAL, *Further Developments as to the Effect of Soviet Decrees*, in *The Yale Law Journal*, n. 1, 1925, p. 98; EDITORIAL, *Confiscation and Corporations in Conflict of Laws*, in *The University of Chicago Law Review*, n. 2, 1938), p. 280, and EDITORIAL, *United States v. Pink: A Reappraisal*, in *Columbia Law Review*, n. 6, 1948, p. 890.

⁶⁹ Corte di cassazione, sentenza del 7 febbraio 1975, n. 468, *Warenzeichverband Regelungstechnik c. Ministero dell'industria, del commercio e dell'artigianato*, in *Rivista di diritto internazionale privato e processuale*, 1976, p. 351, on which see C. FOCARELLI, *Diritto internazionale*, Vol. II, cit., p. 28 f.

⁷⁰ C. FOCARELLI, *Diritto internazionale*, Vol. II, cit., p. 29.

⁷¹ In these terms, recalling the case of the laws of the revolutionary soviet regime, see R. QUADRI, *Lezioni di diritto internazionale privato*, Napoli, 1969, p. 109.

A feeling of self-restraint, which still is to be found in some cases⁷², might be exacerbated where the new entity co-exists with the old one whose territory has been taken away or where the States concerned are at war.

With regard to entities that are formed by taking over part of the territory of a surviving State, the cases of the Turkish Republic of Northern Cyprus, and that of the Republic of China might be the most well-known. By avoiding any possible generalization, it seems necessary to take into different consideration the positions of courts of the former unitary State, and of courts of third countries⁷³.

I) Third countries' courts

As regards courts of third countries, following the facts-based theory reconstructed above, the application of the effective law of the territory should take place, as long as this in no way leads to an "external" recognition of said entity. Such a solution could ensure the respect of the principle of justice and simultaneously avoid a political recognition operated by domestic courts that might put the government of the forum in an unpleasant diplomatic position with the former unitary State.

II) Courts of the former unitary State: internal acceptance of the territory's autonomy

As regards the courts of the former unitary State, the solution to the problem could depend heavily upon domestic law. If to some extent the unitary State recognizes that the territory, whilst still being part of the State, has its own effective rules of private law under a conflict of laws perspective, no significant issue arises. This might be the case of Taiwan, which is not recognized as a State within the international community, and which is treated by Mainland China as a province entrusted with a high degree of autonomy. The Supreme People's Court of the People's Republic of China has indeed on different occasions admitted that decisions from Taiwan, as a Chinese special province, can be recognized in Mainland China, and that Taiwanese law can govern contracts⁷⁴.

III) Unilateral secessions: third country courts

The situation seems somewhat different where the new "State" or "territorial unit" results from an unlawful self-proclamation condemned by the international community, and by the surviving State. Balancing principles of justice, internal and external recognition, and public interests, courts from third countries, despite rejecting the Statehood of the new international actor might end up applying the law of this entity to private relationships. In this sense, under domestic conflict of laws, Lord Denning recognized acts of the Turkish Republic of Northern Cyprus to protect individual rights

⁷² CRAWFORD, *The Creation of States in International Law*, cit., p. 17 f., at fn. 65 and corresponding text, quoting *Matimak Trading Co v. Khalily*, 118 F 3d 76 (2nd Cir, 1997, where the court of appeals argued at p. 86 that the company could not have been considered a citizen or subject of a foreign State; for a reading on the decision, see T.M. MOZINA, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, in *Pace International Law Review*, 1998, n. 2, p. 575.

⁷³ Also suggesting a similar distinction, E. VITTA, *Diritto internazionale privato, Vol. I, Parte generale*, cit., p. 11.

⁷⁴ See in particular J. HUANG, H. DU, *Private International Law in the Chinese Judicial Practice in 2001*, in *Chinese Journal of International Law*, 2003, p. 387, and A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 106.

«as justice and common sense require»⁷⁵. As carefully noted by some scholars⁷⁶, other English courts⁷⁷ have more clearly specified that Cyprus is one single State, but with two territorial units for conflict of laws purposes only. This leads to the consequence that, in a creative balancing of public and individual interests, third country courts apply the law of the northern part of the island without recognizing the international personality of the entity that adopts the “laws” or delivers judgments to be recognized. Overall, this solution seems confirmative of the effectiveness of the Turkish Republic that is well known to European Union primary law⁷⁸.

IV) *Unilateral secessions: courts of the former unitary State*

On the contrary, it seems that Cypriot courts might not be able or willing to accept a drift between facts and foreign policy to apply the law of the Turkish Republic of Northern Cyprus.

As the general theory of conflict of laws might run against the constitutional values of territorial unity, this might be the case where the “public policy” of the State of the forum prevails over individual interests⁷⁹. In these circumstances, the exception developed by some as regards the facts-based theory could be applied to avoid considering the non-controlled area as a territorial unit. This is regardless of the content of the “foreign” law (this “public policy” being an exception to the operability of conflict of laws rules, rather than a concrete limit to the application of the foreign law that would otherwise govern the specific private relationship).

The exception to the rule should prevent *ex ante* the operability of connecting factors allowing for the application of the territorial unit’s laws, with the consequence that, if this area is still considered to be part of the forum State, despite the lack of effective control, the seized court will end up applying its own laws in numerous cases.

Of course, significant problems might arise at the enforcement stage (just as they might for enforcement of decisions between States with different heads of jurisdiction absent international treaties), or in those cases related to the personal status of persons where the connecting factor is the non-recognized nationality, making it necessary for the seized court to carefully evaluate the opposing values at play and offer substantive protection to private interests.

If the theory, as framed and tested against the background of practice, is correct, other complex scenarios could be scrutinized under its lenses, namely those of annexed

⁷⁵ *Hesperides Hotels v. Aegean Holidays Ltd* [1978] 1 QB 205.

⁷⁶ A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 92.

⁷⁷ *Emin v Yeldag (Attorney-General and Secretary of State for Foreign and Commonwealth Affairs Intervening)*, Family Division [2002] 1 FLR 956.

⁷⁸ See Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the Treaties on which the European Union is founded, in OJ L 236, 23 September 2003, p. 33 ff., Protocol 10, art. 1(1) («*The application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control*»).

⁷⁹ A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 109, who, at p. 97, also contends that a “facts based approach” should not always take precedence over the “law of the State approach” where it comes to the determination of the existence of a territorial unit for conflict of laws purposes.

territories whose annexation is condemned at the international level. In these cases, it seems that courts of third States, if called to apply a foreign law to private relationships, should apply the law of the effective entity, as long as this serves the interests of justice and does not lead to an external recognition of the change in sovereignty. In this sense, for example, authoritative scholars⁸⁰ have recently re-argued that for private international law purposes, East Jerusalem should be considered part of Israel by third States' courts⁸¹. Of course, modern international practice offers a multitude of cases against which the theory can be studied, such as Crimea, States that are at war, States against whom embargoes have been adopted either by the State of the forum or by other States whose legislation might be of relevance in the case at hand⁸².

3.3.5 What are the alternatives to the facts-based approach?

As seen, the first alternative to the theory that some courts have developed is to refer to the law of the forum. Here, the seized court will refer to the law of the territorial unit as long as the government of the seized court recognizes the law-making authority of the foreign territorial unit. A consequence of this is that public international law non-recognition might run against private interests where private parties might have a legitimate expectation that the law of this entity effectively regulates their relationship.

A second alternative (developed in a different context) appears to be the *Law of the State Approach*⁸³. Here, the seized court will determine the applicability of a territorial unit's laws mainly in light of constitutional provisions of the State that comprises the territorial unit. In general, the preference for this theory over the facts-based approach could lead to few differences in terms of results, as the foreign State's recognition of partial autonomy of territorial units could be seen as a formal recognition of the effectiveness in authority of local entities. On the contrary, it appears that the theory, if employed to determine whether a "State" is considered as such for conflict of law purposes, might lead to problems in at least two cases. The first one concerns the possible scenarios of dissolution of a State into two new States, as no recognized superior entity would be able to certify that a "territorial unit" exists. The second one concerns the case

⁸⁰ P. MANKOWSKI, *Zuordnung okkupierter oder anektierter Gebiete im IPR und IZVR*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, n. 4, 2017, p. 347, in part. at p. 352.

⁸¹ For conflicting views in the German case law, cf. OLG München, Beschluss v. 18.12.2015 – 12 UF 1239/15; AG Koblenz, Beschluss v. 23.8.2012 – 202 F 248/12; OLG Koblenz, Beschluss v. 7.03.2012 – 202 F 468/12, and AG Saarbrücken, Beschluss v. 12.06.2007 – 52 F 32/07. For an in-depth study on the same matter seen from the perspective of the courts of the actors involved, on choice of law in the context of occupation, and namely on how Israeli courts have come to conduct their choice of law analysis in occupied Palestinian territories, see M. KARAYANNI, *Choice of Law Under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs*, in *Journal of Private International Law*, 2009, n. 1, p. 1 ff.

⁸² On which see most recently, P. MANKOWSKI, *Drittstaatliche Embargonormen, Außenpolitik im IPR, Berücksichtigung von Fakten statt Normen: Art. 9 Abs. 3 Rom I-VO im praktischen Fall*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, n. 5, p. 485, commenting Cour d'appel de Paris, 25.2.2015 – 12/23757, in *idem*.

⁸³ A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 96 ff.

of contested territories. In these cases, seized courts would again apply the law of the legal system that is not in effective control of the territory.

4. Can the facts-based approach be adopted at the EU level as well?

4.1. The (lack) of a definition of “States” for conflict of laws purposes under EU Law

The following question is whether the facts-based approach should also be fostered within the context of European uniform conflict of laws. Few elements are certain in this regard. The first being that the Rome I and Rome II Regulations are not conclusive on what “States” are for the purposes of conflicts of laws. Some argue that the reference to Statehood should be read alongside theories of public international law⁸⁴ to identify a recognized sovereign State⁸⁵. However, it could be argued that the different expression – third countries – used in the Treaty on the functioning of the European Union leans towards the same conclusion, as art. 216 speaks of third countries without any specific additional information, whilst art. 215, concerning restrictive measures, specifically states that such measures can be taken against third countries and non-State entities as well. In this sense, the different terminology does not seem to offer significant guidance.

The second certain element is that the Rome I Regulation is the expression of traditional views when it comes to the applicability of the law of a State. Recital 13 excludes that the parties can exercise their private international law party autonomy by selecting non-State law, thus excluding the choice of religious law and of principles of contractual law elaborated by international organizations or other groups of experts⁸⁶ (whilst not prejudicing their contractual incorporation). In general, the exclusion of non-State law can be understood as the heritage of a legal positivism axiom favoring Statehood law⁸⁷. Even though this idea is currently reconsidered by some in limited fields⁸⁸, is

⁸⁴ P. MANKOWSKI, *Article 3*, cit., p. 179.

⁸⁵ A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 88, arguing that the «*Rome I Regulation, Art. 1(1)*, providing that the Regulation “shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”, [is] consistent with this conclusion».

⁸⁶ For example, the *Draft Common Frame of Reference* has been criticized and called a “Professorenrecht” (cf. B. VAN ZELST, *The Politics of European Sales Law*, Alphen aan den Rijn, 2008, p. 244 ff., and C. TWIGG-FLESNER, *Introduction: Key Features of European Union Private Law*, in C. TWIGG-FLESNER (edited by), *The Cambridge Companion to European Union Private Law* Cambridge, 2010, p. 13).

⁸⁷ In these very terms, M.J. BONELL, *Il regolamento CE 593/2008 sulla legge applicabile alle obbligazioni contrattuali (“Roma I”) – ovvero sia una grande occasione perduta*, Bocconi Legal Papers, Paper No. 2011-02/IT, p. 7.

⁸⁸ See, January 15th, 2015, Paraguay, Ley n. 5.393 – Sobre el Derecho aplicable a los contractos internacionales, in *Gaceta Oficial*, 20 January 2015, n. 13, whose art. 5 writes that «[e]n esta Ley, la referencia a derecho incluye normas de derecho de origen no estatal, generalmente aceptadas como un conjunto de normas neutrales y equilibradas». Furthermore, the *Principles on Choice of Law in International Commercial Contracts* (19th March 2015), also admit the possibility for the parties to choose non-State law to some extent (on which see P. MANKOWSKI, *Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law?*, in *22 Uniform Law Review*, n. 2, 2017, p. 369 ff.).

supported by part of the legal scholarship⁸⁹ as an “un-controlled” opening towards non-State law could go far beyond the acceptance of some technical and neutral codifications of rules developed by academics or agencies and organs of the United Nations.

It is however unclear whether Recital 13 can also be a guideline in the matter at hand, namely whether for the purposes of EU conflict of laws rules a “State” is a territorial unit in effective control of a territory, regardless of formal recognition. The provision, on this point, gives no indication.

At the same time, Recital 13 could be an indicator that Member States are not ready to give particular relevance to actors other than States, which they have usually defined by themselves for conflict of laws purposes (either by way of the effectiveness test, or by a refusal of domestic courts to determine the limited internal recognition of Statehood for conflict of laws purposes).

Since the Rome I and the Rome II Regulations are supposed to create a coherent system⁹⁰, unless otherwise explicitly provided, it appears that the same issue can be framed in the context of the uniform conflict of laws rules governing the law applicable to non-contractual obligations as well.

The third certain element is that art. 22(1) Rome I Regulation, as currently framed, cannot be seen as a solid alternative basis to include or exclude the applicability of the facts-based theory for the purposes of European uniform conflicts of laws rules. The provision at hand rests upon the postulate that a foreign State and its territorial unit do not contest their own legislative powers. The provision (reading that «*Where a State comprises several territorial units, each of which has its own rules [...]*») turns out to be inadequate to solve cases where there is a dispute. However, if the provision bears any relevance, it could be argued that European conflicts of laws rules are more interested in the effective law of a place, rather than in the international sovereignty of an international actor.

It seems that an amendment in wording of art. 22(1) Rome I Regulation could directly help its interpretation in cases of contested territories, and indirectly contribute to defining what “States” are for conflict of laws purposes. If changed, the provision could expressly determine what “comprises” means, and thus whether contested territorial units must be officially recognized by their “State” (thus leaning towards the *Law of the State Approach*). Alternatively, it could determine whether their laws are to be applied regardless of this recognition thus indirectly favoring the *Facts based Approach*, as the *Law of the Forum Approach* has been rejected by a number of courts.

4.2. The facts-based approach as a general theory of EU conflict of laws?

In the current legislative vacuum, the silence of the Regulations on the definition of “States” leads to the consequence that the notion should be reconstructed in light of the

⁸⁹ See for all P. MANKOWSKI, *Article 3*, cit., p. 185 ff.

⁹⁰ Cf. Recital 7 in both the Rome I and Rome II Regulations. See in general E. LEIN, *The New Rome I / Rome II / Brussels I Synergy*, in *Yearbook of Private International Law*, 2008, p. 177.

aim of European rules in the absence of a specific qualification⁹¹. This turns out to be rather difficult in the case at hand as the Regulations' goal is to create uniform conflict of laws rules for the proper functioning of the internal market.

Should the Court of Justice of the European Union ever be called to rule on the issue, the Court might argue that an autonomous interpretation would be necessary as no reference to national law is foreseen. If this were to happen, the Court could be in favor of the adoption, at the EU level, of the effectiveness test developed by some domestic courts at the national level. This would impose on the domestic courts applying the Regulations the obligation to determine the effective authority, save contrary domestic (and European) imperative interests.

The facts-based approach, on the one hand, would be consistent with the role of recognition in public international law and also be suitable for the cases of occupied territories, where some argue that the «effective» laws of a territory are those to be applied⁹². On the other hand, it remains that a facts-based approach leads to uncertainties, and possible differentiated application of EU law as different courts might take different conclusions as regards the effectiveness of the laws to be applied.

Of course, the Court of Justice might rule in favor of a different solution, and avoid adopting the reconstructed theory at the European level. As noted by some scholars⁹³, the recalled case law might be difficult to adapt to the European Regulation, especially if one considers that the theory goes beyond the public policy exception therein contained. However, if Lord Wilberforce's "public policy" exception is considered not as a concrete limit to the otherwise applicable law, but as a "public interest" whose respect is required for the very operability of conflict of laws and the determination of the (non)applicable set of rules regardless of their content, a possible acceptance of the theory by the Court of Justice of the European Union might not to be excluded *a priori*.

4.3. The EU facts-based approach and EU principles of party autonomy: A reconciliation

Assuming that third-countries' seized courts must apply to private disputes the foreign law of the "territorial unit" (thus avoiding an external recognition of sovereignty) that exerts effective control over a given area, and that regulates the daily life of people who might reasonably expect their relationships to be regulated by the law they must comply with, unless public interests of the State of the forum impose a unitary treatment of its

⁹¹ Cf. Court of Justice of the European Union, judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG.*, case C-347/08, in *Reports*, 2009, I-8661.

⁹² P. MANKOWSKI, *Zuordnung okkupierter oder annektierter Gebiete im IPR und IZVR*, cit.

⁹³ Cf. A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 93 ff., where the A. argues that «[...] it is submitted that the law of the State approach should prevail in the application of the Rome Regulations. If that solution is thought too ambitious, the non-uniform, law of forum approach should be adopted instead. The fact-based approach should be rejected as a uniform solution». With the necessary consequence that «if the law of the State approach is adopted, a "non-recognised State" or a territorial area controlled by a non-recognised regime cannot constitute a "country" under the Rome Regulations unless it constitutes a "territorial unit" within the sovereignty, or under the lawful authority».

territory, a sensitive question concerns the role party autonomy might assume in such a scenario. The cases where foreign laws and acts of unrecognized States was accepted by domestic courts had a substantive connection with the territorial unit in question. This was either because the recognition of a decision on separation or divorce was at stake, or because immovable properties adjudicated by the State were located in the “territorial unit’s area”. It is in this respect that some judges constructed the idea that courts are only concerned with internal recognition, as common sense and justice demands for the protection of the inhabitants of the unrecognized State⁹⁴. The question thus becomes whether or not the theory, as framed above, still holds true where choice of law leads to the application of the territorial unit’s laws.

Assuming that the Court of Justice of the European Union, as suggested above, follows the facts-based approach at the EU level, the question turns to determining the extent of party autonomy. Party autonomy⁹⁵, especially nowadays as witnessed in the Rome I and Rome II Regulations for example⁹⁶, is vast, but not without limits. As is known, parties cannot choose non-State law⁹⁷, even though they might “incorporate” such rules into their substantive contractual regulation. Nonetheless, if the Turkish Republic of Northern Cyprus, for example, is recognized as a territorial unit for the purposes of domestic

⁹⁴ See Lord Denning in *Hesperides Hotels v. Aegean Holidays Ltd* [1978], cit., at p. 221, where he stresses that local people must comply with local laws («*The real state of affairs is, however, very different. There is an effective administration in North Cyprus which has made laws governing the day to day lives of the people. According to these laws, the people who have occupied these hotels in Kyrenia are not trespassers. They are not occupying them unlawfully. They are occupying them by virtue of a lease granted to them under the laws or by virtue of requisitions made by the existing administration. If an action were brought in the courts of this northern part - alleging a trespass to land or to goods - it would be bound to fail*»). More clearly, referring to the need to protect the interests of the inhabitants of the non-recognized State, ICJ, Advisory Opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, cit.

⁹⁵ On which, in the extensive scholarship, see for all J. BASEDOW, *The Law of Open Societies. Private Ordering and Public Regulation in Conflict of Laws*, The Hague, 2015.

⁹⁶ In the matter specifically dealt with, see A. DICKINSON, *Territory in the Rome I and Rome II Regulations*, cit., p. 94, also suggesting that the scope of application of the Regulations is wider than the case law of some States, even though this seems suitable for application even where the choice of law is made by parties that are not inhabitants of the non-recognized State, as principles of justice and common sense require.

⁹⁷ F. FERRARI, *Art. 3 Rom-I Vo*, cit., p. 35; A. BONOMI, *La legge applicabile al contratto internazionale*, in U.P. GRIFFI (a cura di), *Manuale di diritto commerciale internazionale*, Milano, 2012, p. 113 ff.; P. MANKOWSKI, *Article 3*, cit., p. 185 ff.; C. ESPLUGUES MOTA, G. PALAO MORENO, C. AZCÁRRAGA MONZÓNIS, *Regulations (EC) n. 593/2008 on the Law Applicable to Contractual Obligations (“Rome I”) and (EC) n. 864/2007 on the Law Applicable to Non-Contractual Obligations (“Rome II”)*, in E. VASSILAKAKIS, N. NATOV, R. BALZAN (eds.), *Regulations Rome I and Rome II and Maritime Law*, Turin, 2013, p. 1, at p. 7; P. FRANZINA, *L’autonomia della volontà nel regolamento «Roma I» sulla legge applicabile ai contratti*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (a cura di), *La tutela dei soggetti deboli tra diritto internazionale, dell’Unione europea e diritto interno*, Roma, 2012, p. 29, at p. 36 ff.; A. GARDELLA, *Art. 3. - Libertà di scelta (Commento I)*, in F. SALERNO, P. FRANZINA (a cura di), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 611, at p. 619 ff., and B. UBERTAZZI, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milano, 2008, p. 61. In the case law, see Court of Appeal (Civil Division) [2004] EWCA Civ 19 - (1) *Beximco Pharmaceuticals Ltd*, (2) *Bangladesh Export Import Co Ltd*, (3) *Mr A.S.F. Rahman / Shamil Bank Of Bahrain E.C.*; Court of Appeal (Civil Division) [2007] EWCA Civ 291 - *Halpern & Ors / Halpern & Anr*; OLG Köln 08.04.1994 - 20 U 226/92, in *Zeitschrift für das gesamte Familienrecht*, 1994, 1523.

conflict of laws in family matters, could it also be argued that the law of this territorial unit has to be applied even where the case does not concern a “daily life aspect” of the parties? Should the law of this territorial unit also be applied when it is chosen by the parties in contractual matters?

It seems that if the case involves parties to a contract, rather than the recognition of a divorce, this would not be sufficient to make a distinction and argue that in contractual matters where the only connection to the territorial unit is the will of the parties, there is no legitimate expectation of the parties to see their relationship governed by the (chosen) law. Once the applicability of a territorial unit’s law is admitted in some fields where the parties can reasonably expect their relationship to be governed by that law, it seems that no different conclusion should be reached where that expectation follows a (non-abusive) choice of law.

The above seems even more correct where the law of the territorial unit would be applicable due to objective connecting factors, if for example the Turkish Republic of Northern Cyprus is the place where the seller has its habitual residence⁹⁸, or the place where the damage occurred in the context of a car accident⁹⁹. In other words, even in such a scenario, despite the different field, it still seems that justice and common sense require the application of the territorial unit’s substantive private law, save a contrary public interest (understood as above).

5. Uniform law, uniform solutions?

If the current uniform conflict of laws instruments are *per se* not conclusive on the definition of “State”, with the consequence that general theories for the identification of the authority issuing “State-law” could also find application within their context, and acknowledging that differentiated application of uniform law might follow, the additional, and unanswered, question is whether the Court of Justice of the European Union might impose a uniform recognition of Statehood upon all Member States.

As of today, it does not seem possible to give a final answer on what the Court could do if called to rule on the point, as is the case when the Court is called to take into consideration factual elements that are decisive for the application of EU law, even

⁹⁸ Rome I Regulation, art. 4(1)(a).

⁹⁹ Rome II Regulation, art. 4(1), para. (2) not being applicable in the scenario constructed. In general, on road traffic accidents in private international law, see T. KADNER GRAZIANO, *Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2009, p. 1, at p. 25; L. SANDRINI, *Risarcimento del danno da sinistri stradali: è già tempo di riforma per il Regolamento Roma II?*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 677; J. PAPETTAS, *Choice of Law for Cross Border Road Traffic Accidents*, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Brussels, 2012; N. REISINGER, *International Verkehrsunfälle. Gerichtszuständigkeit und anwendbares Recht*, Wien, 2011, p. 1, and S. DOMINELLI, *Cross-Border Road Traffic Accidents and Damages Suffered by the Parents of the Victim: the Florin Lazar v Allianz SpA Case and the Interpretation of Art. 4(1) of the Rome II Regulation*, in *The European Legal Forum*, 2016, n. 3, p. 60 ff., where further references in the case law and in legal writings.

though practical appreciation of the facts usually rests with domestic courts. Most will depend on how the preliminary question will be framed – if ever – by the remitting court, either in broad or specific terms. Most will also depend on the self-restraint, or lack thereof, the Court might exercise in offering the vague or strict criteria to the domestic court who will have to apply them to the merits of the case. Additionally, even though this kind of recognition remains “internal”, the Court might be influenced by the common foreign and security policy, where relevant.

Lastly, the impossibility to foresee the outcomes of a Court’s decision lies in the fact that it could take specific features of a single case into consideration. For example, should a case involve Cyprus, the Court might clear up the general applicable theory and frame it in such a way as to ensure that Cypriot courts are not obliged, under EU law, to make any “recognition” whatsoever – neither with internal or external effects – of the Turkish Republic of Northern Cyprus. In this sense, and this being indirectly relevant for the matter at hand, by offering a proper distinction between the territorial scope of application of the (now) Brussels I *bis* Regulation and its “reference area”¹⁰⁰, the Court¹⁰¹ has already argued that Cypriot decisions concerning immovable properties located in the Turkish Republic of Northern Cyprus are to freely move within the European judicial space as they still fall within the scope of application of the Regulation. From a Cypriot perspective and in spite of Protocol 10, these decisions wish to avoid recognizing lack of control over the area and the existence of the jurisdiction to adjudicate on the TRNC. Other Member States must recognize and enforce these decisions, as the lack of effective control of the State of origin over the territory of execution does not constitute a valid reason to invoke the public policy exception.

6. Conclusions

Statehood is a matter of relevance for both public and private international law; regardless of whether or not these converge towards a global law, interconnections and interplays between the two branches are numerous and relevant, as the issue concerning the determination of the “entity-State” for the purposes of intra-State and cross-border private relations shows. The traditional difference of aims of the two branches has turned out to be the starting point of some case law¹⁰² that has revisited prior experiences¹⁰³, to deny that the non-recognition of a foreign State or Government plays any role in the applicability of the foreign non-recognized State laws.

¹⁰⁰ Opinion of the Advocate General Kokott, 18 December 2008, Case C-420/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, paras. 28 ff.

¹⁰¹ Court of Justice of the European Union, judgement of 28 April 2009, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, case C-420/07, in *Reports*, 2009, I-3571. Applying the principle of the Court of Justice of the European Union on the merits of the case, see England and Wales Court of Appeal (Civil Division), [2010] EWCA Civ 9.

¹⁰² Swiss Supreme Court 10 December 1924, *Banque internationale de commerce de Petrograd v. Hausner*, RO. 50 II 507, cit., and District Court of Kyoto, 7 July 1956, cit.

¹⁰³ Tribunale di Bolzano, 21 maggio 1971, *Kweton c. Ullmann*, cit.

Authors¹⁰⁴ and courts¹⁰⁵ have distinguished the effects of judicial recognition of the foreign State as such from the mere application of the law of the effective territorial unit that has control over a territory. Such a solution postulates that laws only exist as long as they are effective, and inhabitants of a “territorial unit” are imposed such laws, which they must respect. The non-application abroad of a law that is binding for them in their country of origin might run against the proper administration of justice. For example, individuals would be punished if a judicial decision concerning divorce were not recognized, even though public international law non-recognition is meant as a “reaction” in intra-State relations¹⁰⁶.

However, the idea that domestic courts should carry out an effectiveness test of sovereignty and apply substantive law consequently encounters the limit of the public interests of the State of the forum. This exception seems justifiable at least where the court would have to apply rules of a secessionist State in violation of a constitutional principle of territorial unity. It appears that in this case, the public interest of the State of the forum not to give any kind of credit to the unlawful secession could overrule the interests of individuals. This seems to be the case even though the court would have to determine another applicable law, or apply the *lex fori*, with possible significant issues at the enforcement stage if the decision has to be enforced in the territory under the effective control of the unlawful secessionist State.

Nonetheless, once it is admitted that the application of laws of a non-recognized State entity does not amount to recognition of Statehood and that the application of said laws is necessary as justice and common sense require to protect the interests of the daily life aspects of the inhabitants of the non-recognized State, it does not seem possible to introduce a different treatment for said inhabitants and other individuals who might have a real (and non-abusive) interest in the application of the law of that “territorial unit” in contractual and non-contractual matters. This seems even more relevant where the objective connection factors absent a choice lead to the application of the territorial unit’s law.

In this sense, it appears that the adoption of uniform rules at the European level concerning the law applicable to contractual and non-contractual obligations does not significantly change the scenario. As the two instruments do not clearly and expressly define the term “State”, absent a commendable legislative amendment that might offer clear guidance as regards the preference for the facts based approach, the law of the forum approach, or the law of the foreign State approach, the reconstructed facts-based theory could also be followed within their scope of application. This, of course, raises the sensitive risk that if domestic courts must determine by themselves what a “State” is for the purposes of the application of EU uniform instruments, even though possibly instructed by the Court of Justice of the European Union, different application of the Regulations might follow in different Member States (a known problem where factual

¹⁰⁴ H. Kelsen, *Recognition in International Law: Theoretical Observations*, cit.

¹⁰⁵ *Hesperides Hotels v. Aegean Holidays Ltd* [1978] 1 QB 205, cit.

¹⁰⁶ Cf. E. VITTA, *Diritto internazionale privato, Vol. I, Parte generale*, cit., p. 11.

elements are relevant, for example to establish the jurisdiction of domestic courts). This possible different application might be settled by the authentic interpretation of the Regulations entrusted to the Court, even though it does not seem possible as of today to develop a forecast model in whose light different possible decisions of the Court might be predicted. What appears certain is that the Court could have the possibility to avoid imposing a uniform qualification of a territorial entity as a “State” for the purposes of the Rome I and Rome II Regulations, should it frame the theory in very general terms.

ABSTRACT: Undeniably, Public and Private international law have common roots, and courts have dwelled on a number of occasions whether or not they can apply the law of a State that is not recognised, or with whom the State of the forum has ended international relations. To answer this question, I juxtapose public and private international law concepts such as “Statehood” and “State” to identify possible conundrums and interplays of the two fields. In light of the available cases, different theories as to the effects on recognition on the applicable law are reconstructed, expressing a preference over the one that ensures the application of the law of non-recognized States to private relationships, by building upon the theoretical division between public and private international law. This holds, provided no fundamental public interest of the State of the forum runs against it, and provided courts do not externally recognize the foreign entity as a “State”. The theory will also be weighed against the background of uniform conflict of laws rules, also raising the question whether or not the Court of Justice of the European Union could impose a definition of “State” for conflict of laws purposes upon (disagreeing) Member States.

KEYWORDS: Public and Private international law – notion of “State” – Statehood – cross-border private relations.