





# 1 Covid-19 regulations as overriding mandatory provisions in private international law

## A comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts

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“Alles skud, en dit voel ook meteens  
die aarde dryf los, ’n sinkende vlot,  
en die mishoring roep deur die reëns  
en die winde om genade tot God”  
(Opperman *Joernaal van Jorik* (1974) 57).

### Abstract

This contribution provides a comparative study of the position of overriding mandatory rules in regional, supranational and

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international conflicts instruments, in particular the Rome I Regulation on the Law Applicable to Contractual Obligations (2008) and the proposed African Principles on the Law Applicable to International Commercial Contracts (2020). COVID-19 regulations are referred to as an unequivocal example of overriding mandatory provisions in the context of the disruption of international commerce. The application of the proper law of the contract, the *lex fori* and the law of the country of performance, as well as the application of the legal systems of other countries are considered. Although strongly influenced by the corresponding provision in the Rome I Regulation, it is suggested that article 11 of the African Principles provides more clarity. The African Principles constitute the sole instrument which explicitly mentions that the overriding mandatory rules of the proper law of the contract are applicable in principle. The African Principles clarify that, for the purposes of the application of the law of the country of performance, any substantial performance under the contract is relevant (that is, both the characteristic and the monetary performance). The African Principles expressly include the country of commencement, continuation and completion of the performance in determining the content of the notion of the law of the country of performance. In respect of the application of the overriding mandatory rules of legal systems other than the *lex fori*, the proper law and the law of the country of performance, the African Principles reflect a *via media* between the opposing positions in the Rome I Regulation and its predecessor, the Rome Convention on the Law Applicable to Contractual Obligations (1980): in exceptional circumstances, the overriding mandatory rules of another legal system may be applied, provided that such law has a manifestly close connection to the particular situation. As the doctrine of overriding mandatory rules can be better explained from a unilateralist rather than a Savignian conflicts paradigm, it is argued that American-style comparative interest or impairment analysis could provide valuable ideas in respect of the exercise of the discretion of a court in cases of the cumulation of overriding mandatory rules. Finally, the submission is made that the law applicable to the contract should govern the effect of an overriding mandatory rule on contractual liability, unless the provision itself stipulates the consequences.

### 1 Introduction

COVID-19 regulations are an unequivocal example of so-called overriding mandatory rules when they feature in the context of private

international law.<sup>1</sup> They may disrupt international commerce by, for instance, limiting the export and/or import of certain goods. The term “COVID regulations” will be used consistent with South African custom, irrespective of how similar legislative measures may be called in other legal systems. In this country, COVID regulations are issued in terms of the Disaster Management Act.<sup>2</sup> Once a national state of disaster is declared, the relevant minister<sup>3</sup> may make regulations concerning *inter alia* the movement of goods to, from and within the disaster-stricken or threatened area.<sup>4</sup> For instance, in terms of the regulations of 29 April 2020,<sup>5</sup> the minister in principle closed the borders of the Republic,<sup>6</sup> except for, in respect of the international movement of goods, “essential goods for import”<sup>7</sup> and certain “permitted goods for export”.<sup>8</sup>

The promulgation of COVID regulations and similar measures by many legislators in the world invites a comparison of the position of overriding mandatory rules in various conflicts instruments. This contribution compares the position of overriding mandatory rules in the proposed African Principles on the Law Applicable to International Commercial Contracts<sup>9</sup> with various regional, supranational and international instruments of private international law of contract.

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1 See par 3. On overriding mandatory rules in private international law, in general, see Kuipers *EU Law and Private International Law. The Interrelationship in Contractual Obligations* (2012) 35–175 and Nygh *Autonomy in International Contracts* (1999) ch 9. For a theoretical discussion from a Kantian and Savignian perspective, see Peari *The Foundation of Choice of Law. Choice and Equality* (2018) 205–219; also see Mills *Party Autonomy in Private International Law* (2018) 476–486. For a comparative overview, see Girsberger, Kadner Graziano and Neels “Global perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) *Choice of Law in International Commercial Contracts. Global Perspectives on the Hague Principles* (2021) 3 101–116.

2 57 of 2002, namely, in terms of s 27(2) and 59 of the act.

3 See s 3.

4 s 27(2)(f).

5 Regulations R 480 issued in terms of s 27(2) of the Disaster Management Act 57 of 2002, *Regulation Gazette* 11098, vol 658, no 43258 (29 April 2020).

6 reg 21.

7 title of annexure B (twelve categories are listed). See reg 22(1)(a).

8 title of annexure C. See reg 22(1)(e). The regulations were amended numerous times: see *inter alia* the amendments in terms of R 565 of 27 June 2021 (reg 27(1) deals with the transportation of cargo).

9 hereafter “the African Principles”. See Neels “The African Principles on the Law Applicable to International Commercial Contracts—a first drafting experiment” 2020 *Uniform Law Review/Revue de droit uniforme*

## The Impact of Covid-19 on the Future of Law

The following example may be used to illustrate the various approaches to the applicability of overriding mandatory rules:

ABC is a company incorporated, domiciled and resident in Ethiopia; its central administration and principal place of business are in Ethiopia. DEF is a company incorporated, domiciled and resident in Mauritius; its central administration and principal place of business are in Mauritius. ABC (seller) and DEF (buyer) concluded a contract of purchase and sale in respect of 100 000 bags of roasted coffee beans of *arabica* quality and grown in the Ethiopian highlands by an established cooperation of small farmers. The contract was negotiated and concluded in Mauritius. In terms of the FOB<sup>10</sup> contract, drafted in English, the goods had to be delivered on a ship in the harbour of Massawa (Eritrea), to be transported by the Mediterranean Shipping Company to Durban harbour in South Africa. Payment, by electronic funds transfer from DEF's account in Delhi, India, had to take place in American dollar into ABC's account at GHI Bank located in the Dubai International Financial Centre (Dubai, United Arab Emirates).

The example will be employed in paragraphs 4.2–4.5 to illustrate the difference in outcome, if any, between the application of article 11 of the African Principles and article 9 of the Rome I Regulation on the Law Applicable to Contractual Obligations of 2008<sup>11</sup> in respect of overriding mandatory rules in the form of COVID regulations or similar legislative

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426. Also see Neels and Fredericks “An introduction to the African Principles of Commercial Private International Law” 2018 *Stell LR* 347 and Neels and Fredericks “The African Principles of Commercial Private International Law and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 239.

10 Free On Board. See International Chamber of Commerce *Incoterms 2020. ICC Rules for the Use of Domestic and International Trade Terms* (2019) 103–111.

11 hereafter “the Rome I Regulation”. For introductions to overriding mandatory rules in the private international law of the European Union, see Kadner Graziano, Garcimartín Alférez and Van Calster “European Union perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 749 767–774 and Wilderspin “Overriding mandatory provisions” in Basedow, Rühl, Ferrari and De Miguel Asensio (eds) *Encyclopedia of Private International Law II* (2017) 1330.

instruments. Article 9 of the Rome I Regulation<sup>12</sup> was the most important model in the drafting of article 11 of the African Principles.

## 2 Regional, supranational and international instruments

Instruments (including guides and proposed instruments) taken into account for the purposes of this contribution are (in chronological order): the *Convention sur la loi applicable aux ventes à caractère international corporels* of 1955;<sup>13</sup> the Rome Convention on the Law Applicable to Contractual Obligations of 1980;<sup>14</sup> the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986;<sup>15</sup> the Basel Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities of the *Institut de droit international* of 1991;<sup>16</sup> the Inter-American Convention on the Law Applicable to International Contracts of 1994;<sup>17</sup> the Rome I Regulation; the Hague Principles on Choice of Law in International Commercial Contracts of 2015;<sup>18</sup> title 4 of the *Projet de texte uniforme portant droit general des obligations dans l'espace OHADA* of 2015;<sup>19</sup> the (proposed) Asian Principles of Private International Law of 2018;<sup>20</sup> the Guide on the Law Applicable to International Commercial Contracts in the Americas of 2019, compiled by the Organization of American

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12 Cf a 3(3), 3(4), 6(2) and 8(1) on provisions which “cannot be derogated from by agreement”. Also see a 11(5)(b). On mandatory versus overriding mandatory provisions, see Kuipers (n 1) 63–65.

13 hereafter “the 1955 Hague Sales Convention”.

14 hereafter “the Rome Convention”.

15 hereafter “the 1986 Hague Sales Convention”.

16 hereafter “the Basel Resolution”. See [www.idi-iil.org](http://www.idi-iil.org) (17-11-2021) (rapporteur Jayme).

17 hereafter “the Mexico City Convention”. The convention is also known as the Mexico Convention; it is the product of the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V).

18 hereafter “the Hague Principles”.

19 hereafter “the OHADA Preliminary Draft Uniform Act”. OHADA is the abbreviation for the *Organisation pour l'harmonisation en Afrique du droit des affaires* or the Organization for the Harmonization of African Business Law. See [www.ohada.org](http://www.ohada.org) (17-11-2021).

20 hereafter “the Asian Principles”. See Chen and Goldstein “The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law” 2017 *Journal of Private International Law* 411 and Takasugi and Elbalti “The Asian Principles of Private International Law and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 399.

States;<sup>21</sup> and the proposed African Principles, the first draft of which appeared in 2021.<sup>22</sup>

The instruments drafted under the auspices of the Hague Conference on Private International Law are of an international nature. The 1955 and 1986 Hague Sales Conventions are public-law international conventions on private international law of contract, specifically international contracts of sale. The 1986 convention never entered into force,<sup>23</sup> but the 1955 convention is in effect in one African country (Niger), five European Union countries (Denmark, Finland, France, Italy and Sweden) and two other European countries (Norway and Switzerland).<sup>24</sup> When there is a conflict between the 1955 Hague Sales Convention and the Rome I Regulation, the international convention prevails.<sup>25</sup> The Hague Principles came into effect on 19 March 2015 by consensus among all the member states of the Hague Conference.<sup>26</sup> The instrument is not binding on them but may be used as a model for national, regional, supranational or international instruments;<sup>27</sup> it may also be employed to interpret, supplement and develop rules of private international law<sup>28</sup> by courts and arbitral tribunals.<sup>29</sup> The *Institut de droit international*, established in 1873, is an independent institute which contributes to the development of public and private international law, *inter alia* through non-binding instruments called “resolutions”. The institute issued the Basel Resolution on party autonomy in private international law of contract in 1991.<sup>30</sup>

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21 hereafter “the OAS Guide”. See Organization of American States *Guide on the Law Applicable to International Commercial Contracts in the Americas* (2019). Also see Moreno Rodríguez “The OAS Guide and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 931.

22 Volume 25 of the *Uniform Law Review/Revue de droit uniforme* (see n 9) appeared in 2021.

23 See the relevant status table at [www.hcch.net](http://www.hcch.net) (17-11-2021).

24 See the relevant status table at [www.hcch.net](http://www.hcch.net) (17-11-2021).

25 Rome I Regulation, a 25(1).

26 See Hague Conference on Private International Law *Principles on Choice of Law in International Commercial Contracts* (2015) (official commentary on the Hague Principles) “Foreword” and “Development of the Principles on Choice of Law in International Commercial Contracts” (no page numbers).

27 preamble par 2.

28 preamble par 3.

29 preamble par 4. Cf the preamble to the UNIDROIT Principles on International Commercial Contracts (2016).

30 See (n 16).

The Rome I Regulation is a supranational instrument of private international law of contract; it is applicable in all European Union countries except Denmark.<sup>31</sup> Although it no longer applies in the United Kingdom, most of the text remains applicable there today by interim legislation.<sup>32</sup> The OHADA Preliminary Draft Uniform Act, when it enters into force, will also be a supranational instrument, as uniform acts adopted unanimously by the countries present and voting at a meeting of the OHADA Council of Ministers are directly applicable in all member states.<sup>33</sup>

The Rome Convention is a regional international convention that was open for signature by countries that were member states of the European Economic Community.<sup>34</sup> The convention has been superseded by the Rome I Regulation for contracts concluded as from 17 December 2009.<sup>35</sup> The text of the Rome Convention has been used as the basis for national legislation in, for example, Japan, South Korea and Turkey; it also influenced the private international law of contract in China, Taiwan, Tunisia and Vietnam.<sup>36</sup> The Mexico City Convention is a regional treaty in force only between Mexico and Venezuela.<sup>37</sup> However, the convention has influenced private international law in other Latin American countries, either directly (for instance, in the Dominican Republic and Paraguay)<sup>38</sup> or indirectly (Brazil would be a good example).<sup>39</sup> Furthermore, it remains, due to its experimentation with a teleological substantive-law approach to private international law, “a point of reference in contemporary conflicts discourse”.<sup>40</sup> Academic models of a regional nature include the Asian Principles

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31 On the special position of Denmark, see Kadner Graziano, Garcimartín Alférez and Van Calster (n 11) 748 with n 3.

32 See n 108.

33 Neels “The role of the Hague Principles on Choice of Law in International Commercial Contracts in the revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA region” 2018 *THRHR* 464 466–467.

34 a 28(1).

35 a 28 of the Rome I Regulation.

36 See the references in Girsberger, Kadner Graziano and Neels (n 1) 121–122.

37 Girsberger, Kadner Graziano and Neels (n 1) 125.

38 See the references in Girsberger, Kadner Graziano and Neels (n 1) 125.

39 See Girsberger, Kadner Graziano and Neels (n 1) 125; Gama, Tiburcio and Albuquerque “Brazilian perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 984 998.

40 Neels “Choice of law in the revision of the Mexico City Convention—inspirations from the Hague Principles and beyond” 2018 *THRHR* 661 662. See *eg* the numerous references to the Mexico City Convention

(intended for Asian jurisdictions)<sup>41</sup> and the OAS Guide (intended for countries in North, Central and South America),<sup>42</sup> as well as the African Principles, discussed immediately below.

The formulation of the African Principles on the Law Applicable to International Commercial Contracts is a project of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. The African Principles are envisaged to become a regional model law, or even a binding regional convention, for the member states of the African Union.<sup>43</sup> They could also be considered by regional economic integration organisations, for instance EAC,<sup>44</sup> ECOWAS,<sup>45</sup> OHADA<sup>46</sup> and SADC,<sup>47</sup> or by national legislators on the African continent.<sup>48</sup>

### 3 Definition and nature of overriding mandatory rules

Although the Mexico City Convention contains provisions on (overriding) mandatory rules,<sup>49</sup> it does not provide a definition thereof. Article 9(1) of the Rome I Regulation defines “overriding mandatory rules” as follows:

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

The definition is adopted in article 568(2) of the OHADA Preliminary Draft Uniform Act. Article 11(1) of the proposed African Principles

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in the AOS Guide (n 21) and in the official commentary on the Hague Principles (n 26).

41 Takasugi and Elbalti (n 20) 399.

42 See [www.oas.org](http://www.oas.org) (17-11-2021) for a list of member states.

43 See [www.au.int](http://www.au.int) (17-11-2021).

44 East African Community. See [www.eac.int](http://www.eac.int) (17-11-2021).

45 Economic Community of West African States. See [www.ecowas.int](http://www.ecowas.int) (17-11-2021).

46 See (n 19).

47 Southern African Development Community. See [www.sadc.int](http://www.sadc.int) (17-11-2021).

48 See the sources in (n 9).

49 See a 11.

copies the Rome I definition with some minor linguistic and contextual changes:

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

In the context of the application of the *lex fori*'s rules and principles in this regard, article 11(1) of the Hague Principles refers to “overriding mandatory rules” as provisions “which apply irrespective of the law chosen by the parties”, as this instrument deals only with choice of law in international commercial contracts and not with all cases where an applicable law has to be determined.<sup>50</sup> It may be noted that the Basel Resolution, although it is also limited to situations of choice of law, nevertheless refers to the provisions of the *lex fori* “which must be applied to the situation irrespective of the law applicable to the contract”.<sup>51</sup> The Rome Convention (which makes provision for situations where there is a choice of law and where there is no such choice) also refers to (overriding) mandatory rules as “those rules [that] must be applied whatever the law applicable to the contract”.<sup>52</sup>

COVID regulations would definitely qualify as rules of law that are crucial to safeguard a country's public interests to such an extent that they must apply irrespective of the legal system *prima facie* applicable to the contract.<sup>53</sup> The question could be asked whether the definitions above should not include a specific reference to health issues, as a pandemic (as has become clear) can have a devastating effect on society as a whole. One example in this regard would be article

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50 Cf a 11

51 a 9(1).

52 a 7(1).

53 Piovesani argues that the qualification by the national legislator of certain legislation as consisting of “overriding mandatory rules” is not conclusive for the purposes of a 9(1) of the Rome I Regulation. See Piovesani “Italian *ex lege* qualified overriding mandatory provisions as a response to the ‘COVID-19 epidemiological emergency’” 2021 *Praxis des internationalen Privat- und Verfahrensrecht* 401. Also see Ungerer “Explicit legislative characterisation of overriding mandatory provisions—EU directives seeking for but struggling to achieve legal certainty” 2022 *Journal of Private International Law* 399.

10 of the 2012 Interpretation by the Supreme People's Court<sup>54</sup> of the 2010 Private International Law Act of China,<sup>55</sup> which specifically lists provisions on public health as an example of (overriding) mandatory rules of the forum under article 4 of the act.<sup>56</sup>

The notion of overriding mandatory rules may be regarded as the positive embodiment of the role of public policy in private international law. Rules of certain legal systems, as will be indicated, are applicable on the basis of public policy irrespective of whether or not these legal systems in principle apply to the particular situation. The negative role of public policy in private international law is given effect to by the exclusion of foreign law when the content thereof, or the result of the application *in casu*, clearly infringes on public policy.<sup>57</sup> Article 12 of the proposed African Principles provides for the negative role of public policy as follows: "The application of a provision of the law applicable in terms of this instrument may be refused only if such application would be manifestly incompatible with fundamental notions of the public policy of the forum." The provision is similar to that in article 16 of the Rome Convention, article 18 of the 1986 Sales Convention, article 18 of the Mexico City Convention, article 21 of the Rome I Regulation, article 11(3) of the Hague Principles,<sup>58</sup> article 569 of the OHADA Preliminary Draft Uniform Act and article 2(5) of the Asian Principles.<sup>59</sup> It may be noted here that the 1955 Hague Sales Convention does not contain a provision on (overriding) mandatory

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54 See He "Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations'" 2014 *The Chinese Journal of Comparative Law* 175.

55 Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations of 2010 (for another translation of the title of the legislation, see n 54).

56 See Tsang "From coronation to coronavirus: COVID-19 *force majeure* and private international law" 2020 *Fordham International Law Journal* 187 211–212. Cf the Dutch proposal during the negotiations leading to the Rome I Regulation—McParland *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) 690.

57 See Girsberger, Kadner Graziano and Neels (n 1) 112; Kuipers (n 1) 65–67; Neels and Fredericks "The various roles of public policy in private international law: exclusion, inclusion and reform on the basis of constitutional values" in Hugo and Möllers (eds) *Legality and Limitation of Powers. Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (2019) 311 and Nygh (n 1) 206–208.

58 Cf a 11(4)–(5).

59 Cf a 26 of the Rome II Regulation on the Law Applicable to Non-contractual Obligations (2007) (hereafter "the Rome II Regulation").

rules but determines that the law determined by the convention “may be excluded on a ground of public policy”.<sup>60</sup>

## 4 Potentially applicable legal systems

### 4.1 Introduction

In this section, the legal systems that may play a role in respect of overriding mandatory rules are considered, namely the law applicable to the contract, the law of the forum, the law of the country of performance and, more generally, the law of any other country.<sup>61</sup>

### 4.2 The law applicable to the contract

None of the instruments under discussion, except the African Principles, expressly state the generally accepted principle<sup>62</sup> that the overriding mandatory rules of the proper law of the contract, and indeed all the rules and principles of this legal system, would, in

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60 1955 Hague Sales Convention, a 6.

61 See, in general, Tsang (n 56) 211–215; cf Khanderia and Peari “Party autonomy in the choice of law under Indian and Australian private international law: some reciprocal lessons” 2020 *Commonwealth Law Bulletin* 711 733–737. See Peari (n 1) 218 on the overriding mandatory rules of a state that would have applied in the absence of law. Cf a 11(4) of the Hague Principles; HCCH (n 26) 79; Dickinson “Oiling the machine: overriding mandatory provisions and public policy in the Hague Principles on Choice of Law in International Commercial Contracts” 2017 *Uniform Law Review/Revue de droit uniforme* 406 and Girsberger, Kadner Graziano and Neels (n 1) 114–115. On the difference between the application or the consideration of a legal system, see Dickinson “United Kingdom perspectives on the Hague Principles: beyond the European Union” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 892 909–911 and *Republik Griechenland v Grigorios Nikiforidis* C-135/15 (18 Oct 2016) EU:C:2016:774; cf Calliess *Rome Regulations. Commentary* (2015) 259–261. In the text below, reference will only be made to “application” but “consideration” must be deemed to be included. Cf Hague Principles, a 11(2), (4) and (5).

62 See, eg, Briggs *Private International Law in English Courts* (2014) 590–592; Lord Collins of Mapesbury (gen ed) *Dicey, Morris and Collins on the Conflict of Laws II* (2012) 1835; Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 344–345; Girsberger, Kadner Graziano and Neels (n 1) 113; Lando and Nielson “The Rome I Regulation”, working paper, Bergen meeting of GEDIP (2008), [www.gedip-egpil.eu/en/documents](http://www.gedip-egpil.eu/en/documents) (17-11-2021) par 14; McParland (n 56) 705 n 140; Mills (n 1) 477–478 and Nygh (n 1) 213–215 and 217.

principle,<sup>63</sup> be applicable.<sup>64</sup> The Basel Resolution of the *Institute de droit international* comes closest to formulating the relevant starting point by providing in article 9(1) that “[t]he chosen law shall apply without prejudice to mandatory provisions<sup>65</sup> of the law of the forum” and, in article 9(3), that the (overriding) mandatory provisions of a third legal system (other than the chosen law and the *lex fori*) “can only prevent the chosen law from being applied” in strictly defined circumstances, as discussed in paragraphs 4.4 and 4.5. However, article 11(2) of the proposed African Principles formulates the default position explicitly as follows: “The overriding mandatory rules of the law governing the contract by virtue of this instrument are in principle applicable.” In a working paper drafted by Lando and Nielson for the purposes of the Bergen meeting of the *Groupe Européen de droit international privé*<sup>66</sup> in 2008, it is stated that such a provision would not be necessary:

“However, it seems obvious that such a provision is superfluous, as a reference to a national law under the ordinary choice of law rules refers [to] all the rules of the *lex causae*, including the internationally mandatory provisions, which, by definition, are important parts of the *lex causae*. This follows logically from the nature of the ordinary choice of law rules, and the fact that neither Rome I, Article 9 nor [Rome I, Article] 12 excludes the application of the internationally mandatory provisions of the *lex causae*.”<sup>67</sup>

Nevertheless, it is suggested that article 11(2) of the proposed African Principles provides for greater clarity in this regard, which is particularly useful in an instrument intended to be applied in emerging legal systems. A second choice for drafting purposes would be to adopt the style of formulation used in the Basel Resolution.

The law applicable to the contract (civil-law parlance) or the proper law of the contract (common-law terminology) is, in most legal systems, in the first place determined by a choice of law by the

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63 except in instances of infringement of public policy on an international level: see par 3 *in fine*.

64 African Principles, a 11(2).

65 The mandatory rules that are intended are those “which must be applied to the situation irrespective of the law applicable to the contract” (a 9(1)).

66 GEDIP or the European Group for Private International Law (EGPIL).

67 Lando and Nielson (n 62) par 14.

parties.<sup>68</sup> Party autonomy is recognised in both the Rome I Regulation<sup>69</sup> and the African Principles.<sup>70</sup> If the parties in the example in paragraph 1 chose English law to govern their contract, the overriding mandatory rules of English law would apply (unless in conflict with the forum's public policy), including the COVID regulations applicable in the United Kingdom (or England and Wales). However, the scope of these regulations is probably limited to the import into, and export from, the United Kingdom, and would, therefore, not be relevant in the given example.

The rules of private international law that determine the applicable law in the absence of a choice of law differ among jurisdictions. In the context of a contract of sale, the most popular options seem to be the application of the law of the habitual residence of the seller or the law of the country of delivery (the characteristic performance).<sup>71</sup> If the Rome I Regulation or the African Principles would be applicable to the example provided in paragraph 1, in the absence of a choice of law, the proper law of the contract would typically be the law of Ethiopia as the law of the country of the habitual residence of the seller.<sup>72</sup> In terms of article 11(2) of the African Principles, the overriding mandatory rules of the law of Ethiopia would then in principle be applied, unless in conflict with the forum's public policy. The Rome I Regulation does not contain an express provision in this regard but it is generally accepted that the overriding mandatory rules of the law applicable to the contract must be applied as part of that law.<sup>73</sup> The overriding mandatory rules referred to could include COVID regulations related to the importation and exportation of goods. *In casu* the Ethiopian COVID regulations pertaining to the export from Ethiopia would *prima facie* be applicable.

### 4.3 The law of the forum

The Rome I Regulation determines that none of its provisions “shall restrict the application of the overriding mandatory provisions of the law of the forum”.<sup>74</sup> Comparable provisions are found in the

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68 Girsberger, Kadner Graziano and Neels (n 1) 33–42 and 52–68.

69 Rome I Regulation, a 3.

70 African Principles, a 3–4.

71 Girsberger, Kadner Graziano and Neels (n 1) 126.

72 African Principles, a 6(1)(a); Rome I Regulation, a 4(1)(a).

73 See (n 62).

74 a 9(2).

Rome Convention,<sup>75</sup> the Basel Declaration<sup>76</sup> and the OAS Guide.<sup>77</sup> The African Principles state that “[e]ffect may be given to the overriding mandatory rules of ... (a) the law of the forum”.<sup>78</sup>

Article 11(1) of the Hague Principles subscribes to the same idea, combining it with a definition of overriding mandatory rules: “These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.” A similar formulation is employed in the 1986 Hague Sales Convention, although provision is also made for an objective proper law of contract: “The Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.”<sup>79</sup>

Nevertheless, once classified as an overriding mandatory rule of the forum according to the relevant definition (for instance, of article 9(1) of the Rome I Regulation or article 11(1) of the African Principles), such a rule will necessarily be applied. This is emphasised in the Mexico City Convention (“the provisions of the law of the forum shall necessarily be applied”),<sup>80</sup> the OHADA Preliminary Draft Uniform Act (“[t]he provisions of this Title may not affect”)<sup>81</sup> and the Asian Principles (“are to be applied”).<sup>82</sup>

Returning to the example above,<sup>83</sup> an Ethiopian, Eritrean or South African court would apply the overriding mandatory rules of Ethiopian, Eritrean or South African law, respectively. These would include the local COVID regulations pertaining to the import and/or export of goods. In an Ethiopian court, the COVID regulations of Ethiopia would be applicable in respect of exportation. In an Eritrean court, the COVID regulations of Eritrea would be applicable in respect of importation into, and exportation from, Eritrea. In a South African court, the South African COVID regulations would be applicable in respect of importation. A Mauritian court could in principle also apply

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75 a 7(2).

76 a 9(1).

77 (n 21) 184.

78 a 11(3)(a). The reference to par 3 and 4 in a 11(5) of the African Principles should perhaps be limited to a 3(b) and 4.

79 a 17.

80 a 11.

81 a 568(1).

82 a 2.8. Also see a 9 of the Basel Resolution. *Cf* a 11(1) of the Hague Principles and a 17 of the 1986 Hague Sales Convention.

83 par 1.

its own COVID regulations, but they would probably not make provision for the current situation, which would then fall outside their scope.<sup>84</sup>

#### 4.4 The law of the country of performance

The 1986 Hague Sales Convention,<sup>85</sup> the Asian Principles<sup>86</sup> and the OHADA Preliminary Draft Uniform Act<sup>87</sup> do not make provision for the application of the overriding mandatory rules of the country of performance. The overriding mandatory rules of the country of performance could fall into the category of the “overriding mandatory provisions of another law” or “the mandatory provisions of the law of another State with which the contract has close ties”, as referred to in article 11(2) of the Hague Principles and article 11 of the Mexico City Convention, respectively. However, neither the Hague Principles nor the Mexico City Convention provide any guidance in this regard, as the issue is assigned to the private international law of the forum. Article 11(2) of the Hague Principles reads: “The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.” Article 11 of the Mexico City Convention merely adds a minimum requirement in this regard: “It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.”<sup>88</sup>

Likewise, the Rome Convention does not refer to the overriding mandatory rules of the law of the country of performance; nevertheless, those may be included under the notion in article 7(1) of “the mandatory rules of the law of another country with which the situation has a close connection”, which will be discussed below.<sup>89</sup> However, it may be beneficial to distinguish between the overriding mandatory rules of the law of the country of performance and the notion of the overriding mandatory rules of another legal system closely connected to the contract, as the country of performance is invariably such a legal system of close connection. Moreover, the overriding mandatory rules of another country, so it is suggested in paragraph 4.5, should be applied only under exceptional circumstances.

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84 But see the example in par 4.5.

85 a 17.

86 a 2.8.

87 a 568. Cf Rome II Regulation, a 16.

88 Cf OAS Guide (n 21) 184.

89 See par 4.5.

## The Impact of Covid-19 on the Future of Law

Article 9(3) of the Rome I Regulation provides as follows:

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

Article 11(3)(b) of the proposed African Principles provides: “Effect may be given to the overriding mandatory rules of—... (b) the law of the country of the agreed place of any substantial performance under the contract (including the country of commencement, continuation or completion of such performance).” This provision must be read with article 11(5), which provides: “In considering whether to give effect to any of the overriding mandatory rules mentioned in paragraph (3) ..., regard must be had to their nature and purpose and to the consequences of their application or non-application.”

The Rome I Regulation and the African Principles agree that a court should have the discretion to apply or not to apply the overriding mandatory rules of the law of the country of performance, having regard to their nature and purpose and to the consequences of their application or non-application.<sup>90</sup> However, the Rome I Regulation is not clear on various aspects of the notion of “the law of the country of performance”. Firstly, article 9(3) refers to the law of the country where the performance had to take place in terms of the contract and the law of the country where the performance indeed took place,<sup>91</sup> but some leading authors are of the opinion that only the law of the agreed place of performance was intended and should be considered for application.<sup>92</sup> Secondly, it is unclear whether “the law of the country of performance” refers only to the country of the contractual performance (in respect of delivery under a FOB<sup>93</sup> contract,<sup>94</sup> this would be the country where the goods must be delivered on the ship—

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90 See, *eg*, Calliess (n 61) 260; McParland (n 56) 711 and Rogerson *Collier’s Conflict of Laws* (2014) 325.

91 Also see Calliess (n 61) 257 and McParland (n 56) 706–707.

92 Collins (n 62) 1836.

93 See (n 10).

94 as in the example in par 1.

Eritrea in the example),<sup>95</sup> or whether it also includes the countries where the various steps involved in the broader delivery process must take place (that is, Ethiopia, Eritrea and South Africa). Thirdly, it is not clear whether “the law of the country of performance” refers to the characteristic performance only (delivery, in a contract of sale) or also to the monetary obligation (payment). Surprisingly, the second and third matters are not even mentioned by many of the leading commentaries on the instrument. However, the authors Plender and Wilderspin deal with the issues and reach conclusions that are broadly in line with the text of article 11(3)(b) of the African Principles.<sup>96</sup>

The African Principles, in this sub-article, specifically provide for the application of “the law of the country of the agreed place of any substantial performance under the contract (including the country of commencement, continuation or completion of such performance)”. The law of the country of the characteristic performance (delivery under a contract of sale) and the law of the country of payment are, therefore, included, both constituting substantial performances. Furthermore, the law of substantial performance comprises the countries of its commencement, continuation and completion.

Under both instruments, the overriding mandatory rules of the law of Eritrea may, therefore, be considered for application in respect of delivery. Under the African Principles, the overriding mandatory provisions of the law of Ethiopia, Eritrea and South Africa may be considered for application in respect of delivery. It is not clear whether application of the law of Ethiopia or South Africa is allowed under the Rome I Regulation. In respect of payment, the laws of India and the Dubai International Financial Centre may be applied under the African Principles; it is not clear whether these systems could play any role under the Rome I Regulation. The African Principles, therefore, provide more clarity on all counts.

#### 4.5 The law of other countries

The 1986 Hague Sales Convention,<sup>97</sup> the Asian Principles<sup>98</sup> and the OHADA Preliminary Draft Uniform Act<sup>99</sup> do not make provision for

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95 See n 94 and ICC (n 10) 103 and 106—clauses A1 and A2 (cf clause B2) of the FOB contract.

96 Wilderspin Plender and Wilderspin *The European Private International Law of Obligations* (2015) 363–371.

97 a 17.

98 a 2.8.

99 a 568. Cf Rome II Regulation, a 16.

the application of the overriding mandatory rules of any other law than the country of the forum (and, unexpressed, the proper law of the contract).<sup>100</sup> As has been remarked in paragraph 4.4, the Hague Principles<sup>101</sup> and the Mexico City Convention<sup>102</sup> provide no guidance on the application of the overriding mandatory rules of any other country, as this issue is entrusted to the private international law of the forum. The Mexico City Convention merely provides the minimum requirement of a close connection with the relevant law.<sup>103</sup> The Rome I Regulation provides only for the application of the law of the country of performance in addition to the *lex fori* (and the proper law).<sup>104</sup>

However, the Rome Convention provides in article 7(1) for the application of the (overriding) “mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract”. There is no separate provision for the application of the law of the country of performance; the latter is one of “the law[s] of another country” for the purposes of article 7(1). The court has a discretion to apply or not to apply the law of another country, as the subsection provides that “effect may be given” to such (overriding) mandatory rules.<sup>105</sup> In exercising this discretion, “regard shall be had to ... [the] nature and purpose” of these rules “and to the consequences of their application or non-application”.<sup>106</sup>

The United Kingdom strongly objected to incorporating article 7(1) of the Rome Convention into the Rome I Regulation on the basis of legal certainty. The current formulation of article 9(3) of Rome I was a compromise in order to convince the United Kingdom to opt in to membership of the Regulation.<sup>107</sup> Of course, the United Kingdom is no longer a member country of the European Union.<sup>108</sup> Nevertheless, the

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100 See par 4.2 and 4.3.

101 a 11(2); cf a 11(5).

102 a 11. Cf OAS Guide (n 21) 184.

103 See a 11: “the law of another State with which the contract has close ties”.

104 a 9(2)–(3).

105 a 7(1).

106 a 7(1).

107 See on the relevant legislative history, McParland (n 56) 684–692 and 697–705.

108 The text of the Rome I Regulation, subject to some minor amendments, continues to apply in the United Kingdom: see The Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc) (EU Exit) Regulations SI 2019/834, issued under s 8 of the European Union (Withdrawal) Act, 2018. See, in general, on the influence of Brexit

application of the overriding mandatory rules of the law of another country (besides the *lex fori*, the proper law of the contract and the *lex loci solutionis*) remains a strongly contested issue in private international law of contract.<sup>109</sup> Accepting such a possibility testifies to “an extensive understanding of the principle of comity”,<sup>110</sup> for which there indeed already seems to be some support in African private international law.<sup>111</sup> Article 11(4)–(5) of the African Principles reflect an attempt to formulate the middle ground, making provision for the application of the overriding mandatory rules of other countries but under strict preconditions only, which are provided in italics in the quotation below:

“(4) *In exceptional circumstances*, the overriding mandatory rules of another country may be applied, provided that such law has a *manifestly* close connection to the particular situation.

(5) In considering whether to give effect to any of the overriding mandatory rules mentioned in paragraph (3) or (4),<sup>112</sup> regard must be had to their nature and purpose and to the consequences of their application or non-application.”

It is not easy to provide an example in the context of COVID regulations of when the application of the law of another country would be indicated, but article 11(4), read with section 11(5), leaves the door open for such a possibility in the circumstances of a particular case, if the court is clearly so convinced. One could think of the potential

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on private international law: Beaumont “Some reflections on the way ahead for UK private international law after Brexit” 2021 *Journal of Private International Law* 1; Bouwers “Brexit and the implications for tacit choice of law in the United Kingdom” 2018 *Obiter* 728 and Mortensen “Brexit and private international law in the Commonwealth” 2021 *Journal of Private International Law* 18.

109 For South Africa, see the opposing views in literature as referred to in Neels “South African perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 350 369 n 172.

110 Calliess (n 61) 260.

111 See Dias and Nordmeier “Angolan and Mozambican perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 265 272; Elbalti “Tunisian perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 374 391–392; Neels (n 109) 369 n 172; Zaher “Moroccan perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 336 346.

112 See (n 78).

application of a COVID regulation from Mauritius, where Mauritian law is the law of the habitual residence of the purchaser but not the *lex loci solutionis* nor the *lex fori* or the proper law—which may well be the scenario sketched in paragraph 1. If the Mauritian COVID regulation were to prohibit any transactions (including delivery or payment) by Mauritian companies which involve the exportation or importation of certain goods (for instance, alcoholic beverages), and the regulation is not limited to the importation *into* or exportation *from Mauritius*, but applies extraterritorially, the regulation could be applied under article 11(4) of the African Principles, if deemed appropriate in the particular circumstances by a court outside Mauritius. It may perhaps be argued that there is a manifestly close link between Mauritian law and the contract of sale, as the purchaser is habitually resident in Mauritius. The court must be convinced that the circumstances are exceptional in order to justify the application of Mauritian law, for instance, the reality of the COVID pandemic and the role that the ban on alcohol may play in easing the pressure on the health systems in various countries. In this regard, one may take note of a particular phrase in the Basel Resolution—article 9(2) requires a close link between the contract and the overriding mandatory rules in dispute and also that “they further such aims as are generally accepted by the international community”.<sup>113</sup> As will be discussed in paragraph 6, the proper law of the contract (English or Ethiopian law) will probably determine what the role of the Mauritian COVID regulation is in the determination of the Mauritian company’s liability for not making payment (unless the contractual consequences are spelled out in the regulation).

### 5 Cumulation of overriding mandatory rules

The concept of “the cumulation of overriding mandatory rules” refers to the possibility that the overriding mandatory rules of more than one legal system may simultaneously be applicable,<sup>114</sup> for instance those

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113 Cf the use by Lando and Nielson (n 62) of the notion of “internationally mandatory provisions” (par 14).

114 Cf Calliess (n 61) 258, with references to German literature. On cumulation and gap in the context of the classification of non-unilateral conflicts rules, see Bennett “Cumulation and gap: are they systemic defects in the conflict of laws?” 1988 *SALJ* 444; Forsyth (n 62) 76–90; Neels “Falconbridge in Africa. *Via media* classification (characterisation) and liberative (extinctive) prescription (limitation of actions) in private international law—a Canadian doctrine on safari in Southern Africa (*hic sunt leones!*); or: *semper aliquid novi Africam adferre*” 2008 *Journal of Private International Law* 167 and Neels “Characterization and limitation

of the proper law (English or Ethiopian law *in casu*) and those of the *lex fori* or *lex loci solutionis* (including Eritrean law and the law of the Dubai International Financial Centre).<sup>115</sup> The provisions of the law of the forum may trump the rules of the proper law or any other law in this regard. However, the court should have a discretion to apply the *lex fori* together with the proper law and the *lex loci solutionis* or a law of close connection (if potentially applicable) in as far as they are not irreconcilable. All instruments, in as far as they make provision for the application of the law of the country of performance and/or the law of another country, are clear that the (additional) application of the overriding mandatory rules of these systems is discretionary.<sup>116</sup> In this regard, the court must take into account the nature and scope of the overriding mandatory rule and the consequences of its application or non-application.<sup>117</sup> While a court should always have the option to apply or not to apply the overriding mandatory rules of the potentially applicable legal systems referred to (that is, with the exception of the *lex fori*), it is incumbent that such discretion exists in the event of cumulation, which may entail a true conflict of overriding mandatory rules (the one relevant system may outlaw the importation of all alcoholic beverages while the other one makes an exception for wine). In a field as complicated as the potential application of an additional three<sup>118</sup> or more<sup>119</sup> legal systems, together with the law generally applicable to the contract,<sup>120</sup> often in a cumulative scenario (more than one legal system claims applicability), legislators on all levels (national, regional, supranational and international) would indeed be well-advised to leave much to the discretion of the court. The experiences of the courts grappling with the topic may well, in due course, lead to a further refinement of the parameters of the exercise

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or liberative prescription in private international law—Canadian doctrine in the Eswatini courts (the phenomenon of dual cumulation)” 2021 *Journal of Private International Law* 361.

115 See the example in par 1.

116 Hague Principles, a 11(2) (*cf* a 11(5)); Basel Resolution, a 9(2); Rome Convention, a 7(1); Rome I Regulation, a 9(3); African Principles, a 11(3) (b) and art 11(4).

117 Basel Resolution, a 9(2); Rome Convention, a 7(1); Rome I Regulation, a 9(3); African Principles, a 11(5).

118 a 11(3)–(4): the *lex fori* and two *leges loci solutionis* (for instance, the law of the country of delivery and the law of the country of payment).

119 a 11(4).

120 See par 4.2.

of discretion in this regard.<sup>121</sup> As the doctrine of overriding mandatory rules can be better explained from a unilateralist rather than a Savignian conflicts paradigm, American-style comparative interest or impairment analysis could provide valuable ideas in this regard.<sup>122</sup> Dalhuisen provides the following useful guidance:

“[D]omestic public policy bearing on international transactions may also be evaluated for reasonableness or rationality and weighed or balanced against the public policies of other governments that may also have a legitimate interest in the international transaction .... [C]onduct under and effect of the international transaction on the territory of a concerned state obviously gives its government a legitimate regulatory interest but the outcome will still depend on how much conduct and effect there is on its territory and on the nature of the measures it has taken and on its measured response under standards of governmental behaviour that must be considered increasingly international as well.”<sup>123</sup>

### 6 Effect of overriding mandatory rules on contractual liability

This contribution primarily examines which set(s) of overriding mandatory rules may be applied by a court; it does not exhaustively investigate which legal system should govern the effect of such

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121 On legal development in this fashion, see Neels “Regsekerheid en die korrigerende werking van redelikheid en billikheid” 1998 *TSAR* 702, 1999 *TSAR* 256 and 477.

122 Cf Kuipers (n 1) 67–68; Nygh (n 1) 208–210 and Peari (n 1) 212–215. See, in general, Neels “An experiment in the systematization of South African conflicts rules” in Omlor (ed) *Weltbürgerliches Recht. Festschrift für Michael Martinek zum 70. Geburtstag* (2020) 529.

123 Dalhuisen *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law I Introduction—The New Lex Mercatoria and its Sources* (2013) 327 (cf 274–279). Also see Dalhuisen *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law II Contract and Movable Property Law* (2013) 222: “The appropriateness of applying [overriding mandatory rules] in international situations ... may depend also on proportionality and legitimacy seen from an international perspective” (contrast the discussion of overriding mandatory rules in the Rome I Regulation at 222–223); cf Lando and Nielson (n 62) par 14: “internationally mandatory provisions” and Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 219: “Die kernvraag is dus of die derdelandsreël redelikerwys aanspraak maak op gelding.”

overriding mandatory rules on contractual liability. The issue is not dealt with in any of the listed instruments. Two approaches may readily be envisaged, namely that the legal system of the relevant overriding mandatory rule also determines the effect on contractual liability, or that such effect is determined by the proper law of the contract (for instance, via the doctrines of initial or supervening illegality or impossibility of performance, *force majeure*, frustration or hardship).<sup>124</sup> A third solution that should in our opinion be considered entails that the effect on contractual liability is determined by the proper law (perhaps English law if chosen by the parties) unless the overriding mandatory rule itself (perhaps from Eritrea)<sup>125</sup> stipulates the effect it should have on contractual liability. The overriding mandatory COVID regulation could for instance prohibit the importation or exportation of certain goods during a certain time period and also determine that no damages may be claimed from a contractual party on the basis of the *prima facie* breach of contract due to its provisions. Such an overriding mandatory rule then (co-)determines, or at least influences, the contractual liability of the parties. Some support for the third solution may be found in article 3.3.1 of the UNIDROIT Principles of International Commercial Contracts of 2016, which is primarily a substantive rather than a conflicts instrument:

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124 Cf Calliess (n 61) 259–261 and Collins (n 62) 1837–1840. See on the effect of the pandemic on domestic law of contract in the international sphere: Bahri, Zhou and Boklan *Rethinking, Repackaging, and Rescuing World Trade Law in the Post-pandemic Era* (2021); Eidenmüller, Enriques, Helleringer and Van Zwieten *COVID-19 and Business Law* (2020); Khanderia “Transnational contracts and their performance during the COVID-19 crisis: reflections from India” 2020 *BRICS Law Journal* 52; Khanderia and Peari (n 61) 730–737; So, Sooksripaisarnkit and Garimella “COVID-19 in the context of the CISG: re-considering the concept of hardship and *force majeure*” 2021 *Balkan Yearbook of European and International Law 2020* (2021) 105 and Tsang (n 56) 188–207. On the influence of the pandemic on private international law of delict, see Khanderia “Identifying the applicable law in cross-border disputes on injuries caused by the COVID-19 in India: a critical analysis” 2021 *Commonwealth Law Bulletin* DOI 10.1080/03050718.2021.1894957. Also see O’Callaghan “Return travel and COVID-19 as a grave risk of harm in Hague Child Abduction Convention cases” 2022 *Journal of Private International Law* 587. See, in general, on the effect of the COVID-19 pandemic on private and commercial law, Krans and Nylund (eds) *Civil Courts Coping with COVID-19* (2021). Also see the Online Resolution of the Institute of International Law/*Institut de droit international* on Epidemics, Pandemics and International Law (2021), [www.idi-iil.org](http://www.idi-iil.org) (17-11-2021).

125 See the example in par 1.

“(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin,<sup>126</sup> ... the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.”<sup>127</sup>

### 7 Concluding remarks

This contribution provides a comparative study of the position of overriding mandatory rules in regional, supranational and international conflicts instruments, in particular the Rome I Regulation and the proposed African Principles. Examples pertaining to COVID regulations are used to illustrate the differences and similarities. Although strongly influenced by the corresponding provision in the Rome I Regulation, article 11 of the African Principles, so it is suggested, provides more clarity. The African Principles constitute the sole instrument which explicitly mentions that the overriding mandatory rules of the proper law of the contract are applicable in principle. The African Principles clarify that, for the purposes of the application of the law of the country of performance, any substantial performance under the contract is relevant (that is, both the characteristic and the monetary performance). The African Principles expressly include the country of commencement, continuation and completion of the performance in determining the content of the notion of the law of the country of performance. In respect of the application of the overriding mandatory rules of legal systems other than the *lex fori*, the proper law and the law

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126 Article 3.3.1 here refers to a 1.4: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.”

127 Article 3.3.1(3) list the following factors to be taken into account in this regard: the purpose of the rule which has been infringed; the category of persons for whose protection the rule exists; any sanction that may be imposed under the rule infringed; the seriousness of the infringement; whether one or both parties knew or ought to have known of the infringement; whether the performance of the contract necessitates the infringement; and the parties’ reasonable expectations. Article 3.3.1(1) constitutes the conflicts rule and a 3.3.2(2) contains substantive provisions.

## 1 Covid-19 regulations as overriding mandatory provisions

of the country of performance, the African Principles reflect a *via media* between the opposing positions in the Rome Convention and the Rome I Regulation: in exceptional circumstances, the overriding mandatory rules of another legal system may be applied, provided that such law has a manifestly close connection to the particular situation. Some provisional guidelines are provided on the exercise of the discretion of a court in cases of the cumulation of overriding mandatory rules, and a tentative proposal is made in respect of the legal system(s) applicable to the effect of the various overriding mandatory rules on contractual liability.

