

INTERNATIONAL CONTRACTS, PARTY AUTONOMY AND MANDATORY RULES

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A. FROM THE ROME CONVENTION TO ROME I REGULATION

On December 17, 2009, more than five years ago, the Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation)¹ has substituted – except for Denmark² – the Convention of 19 June 1980 on the law applicable to contractual obligations (Rome Convention)³ and entered into force. The Rome Convention entered into force between eight Member States on 1 April 1991⁴. Since that time, for 18 years courts and scholars in the European Union gathered experience with a unified international contract law which may also help to apply the newly enacted Rome I Regulation correctly. Today I will concentrate on party autonomy under the Rome I Regulation and the limitation of party autonomy by mandatory rules⁵.

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¹ O.J.E.U. 2008 No. L 177/6.

² According to no. 46 of the considerations to Rome I Regulation Denmark does not take part in the adoption of the Regulation. The United Kingdom decided to take part: Commission opinion of 7 November 2008, COM (2008) 730 final.

³ O.J.E.C. 1980 No. L 266/1.

⁴ These Member States were Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg and the United Kingdom.

⁵ See commentaries on the Rome I Regulation: *Robert Freitag* and others in: *Thomas Rauscher* (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Kommentar*, Rom I – VO * Rom II – VO, München: Sellier 2011, Rom I – VO; *Eva-Maria Kie-*

B. UNRESTRICTED PARTY AUTONOMY

The parties' freedom to choose the applicable law is one of the cornerstones of the system of conflict of law rules in matters of contractual obligations⁶. By a choice-of-law agreement, parties may even substitute mandatory rules of the objectively applicable law by the rules of a chosen legal system. Only international mandatory rules may not be excluded by party autonomy. There are, however, restrictions as to these rules. In other areas party autonomy is limited and only certain laws may be chosen. What is the solution of the Rome I Regulation in this respect? Can contracting partners choose every law? May merchants of Athens choose English applicable to their contract? What is the attitude in this respect of the Rome I Regulation?

According to Article 3 Rome I Regulation the parties of a contract are free to choose the applicable law to their contract. They may designate this law at the beginning of their relation or afterwards (e.g. during the proceedings). They can select the law applicable to the whole or only to part of the contract. But the question is whether the parties to a contract may also choose a non-State body of law (e.g. the Lando Principles, the Principles of European Contract Law, the Unidroit Principles of International Commercial Contracts or the European Contract Code of Pavia) or an international convention?

ninger and others in: *Franco Ferrari/Eva-Maria Kieninger/Peter Mankowski/Karsten Otte/Ingo Saenger/Götz Schulze/Ansgar Staudinger*, Internationales Vertragsrecht, Rom I – VO, CISG, CMR, FacÜ, München: Beck 2012, Rom I – VO; *Stefan Leible* and others in: *Rainer Hüßtege/Heinz-Peter Mansel* (eds.), Rom-Verordnungen, Baden-Baden: Nomos 2014, Rom I; *Ulrich Magnus* and others in: *Staudinger*, Kommentar zum BGB mit EGBGB und Nebengesetzen, Rom I – VO, Berlin: Sellier/de Gruyter 2011, Rom I – VO; *Dieter Martiny* in: *Münchener Kommentar zum BGB*, 6th ed., vol. 10, München: Beck 2015, Rom I – VO.

⁶ See *Kathrin Kroll-Ludwigs*, Die Rolle der Parteiautonomie im europäischen Kollisionsrecht, Tübingen: Mohr Siebeck 2013; *Sonia Maire*, Die Quelle der Parteiautonomie und das Statut der Rechtswahlvereinbarung im internationalen Vertragsrecht, Basel: Helbing & Lichtenhahn 2011; *Maya Mandery*, Party Autonomy in Contractual and Non-contractual Obligations, Frankfurt/Main: Academic Research 2014; *Peter E. Nygh*, Autonomy in International Contracts, Oxford: Clarendon 1999; *Andreas Spickhoff* (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht, Bonn: Notarverlag 2014; *Wilhelm Wengler*, IPR-Rechtsnormen und Wahl des Vertragsstatuts, Saarbrücken: Europa-Institut 1991; commentaries of Article 3 Rome I Regulation in commentaries, *supra* note 5.

I. Choice-of-Law Clause

Everybody will agree that parties of a contract may choose the applicable law. If I decide to stipulate a contract with Greek friends of mine in Athens, all conflicts lawyers will expect us to conclude a choice-of-law agreement. But when, how far, and what law should be chosen by a valid agreement? The choice shall be made expressly or clearly demonstrated by their terms of the contract or the circumstance of the case [Article 3 (1) sentence 2 Rome I Regulation]. When two lawyers decide to make a choice-of-law agreement, they can be expected to choose expressly German or Greek law. But can they also choose English or Chinese law? Yes, they can. Art. 3 Rome I Regulation does not set limits to the choice of the parties. They will make a sensible choice and choose English law if they stipulate an arbitration agreement and submit to an arbitration tribunal of the City of London. Whether they will choose Chinese law to be applicable seems to be more questionable. They must know that they may have to prove Chinese law in the court and that this may be a very expensive and burdensome enterprise. My conflict-of-laws teacher, Professor Zweigert, told that parties who make such an unpractical choice, are either insane or they want to tease the judge having to find out *ex officio* the foreign law applicable to the case before him.

We all know that in Europe several projects are launched to provide a “Code Européen des Contrats” or they provide “Principles of International Commercial Contracts”, „Principles of European Contract Law” or a “Common European Sales Law”. Can these instruments also be chosen or any other international instrument not being law anywhere? The Max-Planck-Institute in Hamburg in its opinion to the Rome I Regulation gave an affirmative answer.⁷ Of course, there is the danger of gaps and lacunae of these instruments to be filled with the rules of some other law, but nonetheless it should be made possible. According to consideration no. 13 of Rome I Regulation the Regulation “does not preclude parties from incorporation by reference into their contract a non-State body of law or any international convention.” Does this mean that such a “reference” is a “choice” as described by Article 3 Rome I Regulation on freedom of choice? Appar-

⁷ Max-Planck-Institute for Comparative and International Private Law: Comments on the European Commission’s Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization: *RebelsZ* 68 (2004) 1-118 [30 et seq. and 100: Art. 3 (1) lit. c)]. To the world-wide problem of such a choice see *Symeon C. Symeonides*, *Codifying Choice of Law Around the World*, Oxford: OUP 2014, 140 et seq.

ently with this “reference” it is meant that it may only amount to a “Sachnormverweisung” which works only on the level of the applicable law and would not qualify as a “Kollisionsnormverweisung”. It would be a pity if the European Court of Justice limited such a choice accordingly.

Normally a choice of law is agreed upon expressly. But it can also be done otherwise, e.g. it may be inferred by other terms of the contract or by circumstances [Art. 3 (1) sentence 1 Rome I Regulation]. Can one deduce from the common nationality of the parties living in different countries the application of the law of the common nationality? Can an arbitration clause mean that the *lex fori* of the arbitration tribunal has been chosen? Can any reference to specific provisions or conditions of contract law of a special legal system amount to the choice of this system? Yes, there may be circumstances which indicate a silent choice of the applicable law. However, common nationality of the parties does not by itself point to the choice of the law of the common nationality. If a Greek person living in Hamburg buys goods from a Greek seller living in Paris, it is very unlikely that they may have tacitly chosen Greek law as applicable to their contracts. If they agree that any dispute between them should be decided by an arbitration tribunal in London, it is very likely that such a choice of arbitration will be regarded also as a choice of the London *lex fori* as applicable to the contract.⁸

If, however, the Greek persons are going to make reference to certain conditions prevailing in Germany and refer to German legal provisions that, of course, may constitute the choice of German law.

II. Time of Choice of Law

Normally a choice-of-law clause is already stipulated in the original contract concluded between the parties. Hence it would be considered as normal if in my contract with the Greek friend of mine the choice of the applicable law to the contract would be done in the original terms of the contract. But is this the rule of the Rome I Regulation?

The clear answer is no! A choice-of-law clause may be stipulated “at any time” [Article 3 (2) sentence 1 Rome I Regulation]. For instance the parties, when they fight in court, may stipulate the application of the *lex fori* if this law is different from the originally chosen or the objectively applicable law. Such a rather late choice happens very often in civil proceedings and should not be excluded.

⁸ See Consideration 12 of Rome I Regulation.

III. Partial Choice of Law

Normally the chosen law will be applicable to the entire contract. But this is not necessarily so. The parties to a very complex contract may also split their choice and limit their choice-of-law clause to certain parts of their contract. This, however, hardly exists in continental-European countries. Parties are afraid that the whole body of contract law will be mutilated by a partial choice of the applicable law.

IV. Choice of Non-State Body of Law

Let me come back to the question whether non-State bodies of law may be chosen by the parties. Would you as a lawyer recommend any set of rules of European *private* codifications to be chosen by the parties to their contract? The answer should be given in the affirmative. But they should know about the disadvantages of such a choice. I will only mention two of them. The first one relates to the incompleteness of non-state law. If the claim is brought rather late, the question may be whether it was brought *too* late, whether it will be barred by statutes of limitations. If the Principles of International Commercial Contracts or the Principles of European Contract Law are chosen, you must be aware that these Principles do not provide any rule on this question. Therefore you have to find out which law applies and the law of which country governs limitation of actions. The other problem concerns the lack of jurisprudence interpreting unclear or new questions of law. In any state law you may find some hint at least in court decisions of the past. With respect to the Principles, however, there is not yet court practice and you have to rely completely on the judges applying the Principles.

C. RESTRICTED PARTY AUTONOMY

I. Contracts of Carriage

With respect to contracts of carriage two different contracts have to be distinguished according to the Rome I Regulation: contracts of carriage of goods and of passengers.⁹

⁹ See Article 5 Rome I Regulation and the detailed commentaries to this provision in the commentaries mentioned *supra* note 5.

1. Contract of Carriage of Goods

Contracts for the carriage goods may be subject to every law chosen by the parties. There is complete party autonomy. For a transportation of goods from Hamburg to Athens parties may choose any law whatsoever as applicable law.

2. Contract of Carriage of Passengers

A contract for the carriage of passengers the situation is different. The parties to such a contract may choose five different laws: the law where the passenger or the carrier has his habitual residence, where the carrier has his place of central administration, and the law at the place of departure or destination. For my flight to Athens with Lufthansa I could have chosen with Lufthansa either German law or Greek law, but not English law.

The reason for this limitation seems to be that contracts for the carriage of passengers may be consumer contracts and likely to do injustice to the consumer. Minimum standards of Community law are respected by Article 3 (4) Rome I Regulation if parties have chosen the law of a non - Member State, e. g. the law at the place of the central administration of the carrier in Tel Aviv. Then Community law would guarantee that no damage is done to the passengers by overbooking an aircraft.¹⁰

II. Insurance Contracts

Also insurance contracts have a special regime in Article 7 Rome I Regulation.¹¹ Three different kinds of insurance contracts have to be distinguished: reinsurance contracts, insurance of large risks, and all other insurance contracts.

1. Reinsurance Contracts

According to Article 7 (1) sentence 2 Rome I Regulation Article 7 does not apply to reinsurance contracts. Hence the general principles of Arti-

¹⁰ LG Frankfurt /Main 29 April 1998, Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht (NJW-RR) 1998, 1589 = IPRspr. 1998 Nr. 49.

¹¹ See the commentaries of Article 7 Rome I Regulation in commentaries mentioned *supra* note 5.

cle 3 and 4 Rome I Regulation apply. The applicable law may be chosen freely according to Article 3 Rome I Regulation.

2. Insurance Contracts of Large Risks

With respect to insurance contracts of large risks, as defined by certain directives, also the law applicable may be chosen freely and without any limitation: Article 7 (2) Rome I Regulation.

3. All Other Insurance Contracts

All other insurance contracts, whether they are concluded by consumers or by professionals are treated in Article 7 (3) Rome I Regulation. Choice of the applicable law is limited to the laws mentioned in Article 7 (3) § 1 Rome I Regulation and further protection is granted by Articles 3 (4), 9 and 21 Rome I Regulation.

Let us be more specific. For my travel to Athens I concluded a travel insurance covering the risks of travelling to and from Athens. The insurance is a contract based on forms provided by the insurance company. In these forms is provided a choice-of-forum clause with German courts and a choice of law clause choosing German law as applicable to the contract. According to Article 13 No. 3 Brussels I Regulation the choice-of forum clause is valid if insurer and the insured person have their domicile or habitual residence/seat in the same State. This is the case here because I took insurance coverage with an insurance company located in Germany. But what about the choice of law clause? Under the Rome I Regulation this clause is also valid according to Article 7 (3) § 1 lit. (b) Rome I Regulation because German law has been chosen and is the country in which the policy holder, that is me, has his habitual residence. Fortunately I do not have to deal with a contract without a choice-of-law clause because such a contract is governed by the law the Member State in which the risk is situated at the time of conclusion of the contract: Article 7 (3) § 3 and (6) Rome I Regulation.

D. LIMITATION BY INTERNATIONAL MANDATORY PROVISIONS

Under B I discussed the restriction of party autonomy with respect to certain legal systems which may be chosen. Here I am dealing with limitations of party autonomy with respect to certain mandatory rules which are

internationally important. With respect to these internationally mandatory provisions it has to be asked whether they are really applied/given effect or must be left aside.

First, I have to explain the European system of mandatory provisions in private international law. Mandatory provisions may be nationally binding or international mandatory rules. Of course *nationally* binding mandatory provisions may be avoided by choice of law and substituted by nationally binding mandatory rules of the chosen legal system. This implies that in purely local contracts (my Colleague Vrellis buys fruit in the market hall of Athens) no foreign law can be validly chosen and, hence, no nationally binding mandatory provision of the applicable local law can be eliminated by a choice of law clause. This is mentioned in Article 3 (3) of Rome I Regulation and has been legal practice since many decades.¹²

With respect to *internationally* binding mandatory provisions, another distinction has to be made, i. e. between provisions of public interests within the sphere of Article 9 (1) Rome I Regulation and provisions of private interests as, e.g., provisions protecting internationally consumers, employees and other weak parties.

(1) Internationally binding mandatory provisions of private interests

(a) In contracts whose elements are located in one or more Member States, any choice of foreign law not being the law of a Member State cannot derogate from internationally binding provisions of *European private law*: Article 3 (4) Rome I Regulation. In other words: In Europe centered contracts the parties are not allowed to derogate from internationally binding European private law.

(b) In certain privileged international *consumer and labor contracts* the parties may stipulate foreign law as governing law their contract but they are not allowed to derogate from rules which would deprive the consumer or employee of the protection by the objectively applicable law under the Regulation.

(2) Internationally binding mandatory provisions of public interests of Article 9 (1) Rome I Regulation

(a) Those provisions of the country where the obligations arising out of the contract have to be or have been *performed* may be given effect in the forum state: Article 9 (3) Rome I Regulation.

¹² *Guido Alpa*, Party Autonomy and Choice of Law Applicable to “Domestic” Contracts: *European Business Law Review* 25 (2014) 605-621.

(b) Should also overriding mandatory provisions of other countries be given effect, especially of

- the *forum state* [Article 9 (2) Rome I Regulation] or
- *any other country* except the country of performance or the forum state?

(3) Finally: Internationally binding principles of *public policy* of the forum state: Article 21 Rome I Regulation.

I. EU Law as Minimum Standard: Art. 3 (4) Rome I Regulation

Many directives have been passed in the European Union which deal with certain contracts (mainly consumer contracts) and indirectly harmonize substantive contract law of the Member States of the European Union. These directives have been implemented by the Member States and thereby harmonized contract law at a minimum level. When drafting the Rome I Regulation, the European commission, the European Parliament and the Council were interested to guarantee this minimum standard as far as possible. Therefore they provided in Article 3 (4) Rome I Regulation that those contracts with “all other elements relevant to the situation at the time of choice ... located in one or more Member States”, the parties are not allowed to disregard this minimum standard of European contract law by choosing the law of a country which is not a Member State of the Union. An example: In a contract between a private person in Germany and a Greek winery for many bottles of Greek wine to be delivered to Hamburg, the parties to the contract having its center exclusively in the European Union cannot avoid binding European contract law by choosing Turkish law.

II. Protection of Weaker Parties: Art. 6 and 8 Rome I Regulation

Party autonomy is restricted with respect to some other contracts, consumer contracts¹³ and individual employment contracts.

¹³ *Michael Coester*, Party Autonomy and Consumer Protection: *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 2014, 170-177; *Alexandra Meerfeld*, Beschränkungen der kollisionsrechtlichen Parteiautonomie durch verbraucherschützende Privatrechtsangleichungsrichtlinien der EG, Aachen: Shaker 1999; and the commentaries of Articles 6 and 8 Rome I Regulation in commentaries mentioned *supra* note 5.

1. Consumer Contracts: Article 6 Rome I Regulation

We normally know what a consumer contract is. It is a contract on goods or services for private and non-professional use by the consumer. We do not care about the value of the goods or services and we do not care about the wealth of the consumer. Also Mr. Soros buying a painting of Pablo Picasso for his home (value: 3-4 million) is in this respect a consumer and is protected under consumer law. This is national substantive law. But what about private international law? Here we have to distinguish four different types of cases.

a) Special Cases Treated Elsewhere

We have already dealt with contracts for the carriage of passengers and with insurance contracts. These contracts are not touched by Article 6 Rome I Regulation. This is formulated in Article 6 (1) Rome I Regulation according to which consumer contracts are regulated “without prejudice to Articles 5 and 7”.

b) Contracts Enumerated in Article 6 (4) Rome I Regulation

Article 6 (4) Rome I Regulation mentions five different types of contracts to which Articles 6 (1) and (2) Rome I Regulation does not apply. These five types of contracts are: contracts for local services [Article 6 (4) lit. a Rome I Regulation], contracts of carriage other than package travels within the meaning of the Directive on such contracts [Article 6 (4) lit. b Rome I Regulation], contracts relating to a right in rem in immovable property other than timeshare contracts within the meaning of the Directive on such timeshare contracts [Article 6 (4) lit. c Rome I Regulation], rights and obligations arising from public offers [Article 6 (4) lit. d Rome I Regulation], and, similarly, some other contracts qualifying under Art. 4 (1) lit. h Rome I Regulation.

c) International Consumer Contracts

For centuries consumer contracts were unknown in private international law. Of course, there were local consumer contracts since ancient times and consumers were cheated since times immemorial. Goods were sold to them at extremely high prices and money was lent to them at usurious

rates. But what about international consumer contracts? Why are they of only recent origin? The reason for this may be twofold. First consumers, for a long time, were not used to make contracts with partners living in foreign countries. This has changed since some time. Today many consumers buy products via internet, take part in eBay-sales and order tickets online. The second reason for the late arrival of consumer contracts in private international law is to found in private international law itself. In former times private international law was rather formal. It did not care about substantive law or arguments of substantive nature. This was a matter of the law designated by conflict-of-law rules.¹⁴ Also this has changed since some decades. The first statute providing a special rule for consumer contracts were the Austrian Federal Law of 15 June 1978 on Private International Law.¹⁵ It stated in § 41 that certain consumer contracts are governed by the law of the country in which the consumer has his habitual residence. In June 1980, the Rome Convention on the Law applicable to Contractual Obligations was signed and it provided in Article 5 a rule on international consumer contracts. Since then consumer law in private international law is a hotly debated issue.

There are international and local consumer contracts. Only for some privileged international consumer contracts Article 6 (1) (a) and (b) Rome I Regulation provides special rules. Privileged international are those consumer contracts in which the professional “pursues his commercial or professional activities in the country where the consumer has his habitual residence” or “by any means, directs such activities in that country or to several countries including that country” and the contract falls within the scope of such activities [Article 6 (1) Rome I Regulation]. These privileged international consumer contracts are, absent a choice by the parties, governed by the law of the country in which the consumer has his habitual residence. All other contracts are local consumer contracts (see *infra* B III 1 d).

Why, one has to ask, is the law of the country in which the consumer is habitually resident, the most favourable to the consumer? Of course, this need not be the case but the consumer has easy access to this law and, in English procedure, has no burden to give evidence to foreign law at the place of the professional living in a foreign country. Therefore the Rome I Regulation did not exclude party autonomy altogether as it is done in

¹⁴ *Konrad Zweigert*, Zur Armut des Internationalen Privatrechts an sozialen Werten: *RabelsZ* 37 (1973) 435- 452.

¹⁵ *Bundesgesetzblatt der Republik Österreich* 1978 Nr. 304; English translation in: *Am.J.Comp.L.* 28 (1980) 222-234.

Article 120 (2) of the Swiss Federal Act on Private International Law. The Rome I Regulation provides in Article 6 (2) that parties may choose the applicable law but such a choice, however, may not “have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable”. This means that mandatory consumer protection law of the country of the habitual residence of the consumer cannot be derogated by a choice-of-law clause. The higher standard of consumer protection at the place of the consumer’s habitual residence will prevail in any case.¹⁶

d) Local Consumer Contracts

As it has already been indicated, all consumer contracts which do not qualify as privileged international ones according to Article 6 (1) Rome I Regulation are local consumer contracts which are – normally - governed by Article 3 and 4 Rom I Regulation. Recently I had to give an opinion in such a case. A German tourist in Greece bought jewelry from a Greek artisan on credit to be paid after the return of the tourist to Germany. She took the jewelry with her and later at home declined to pay for it. She was of the opinion that German applied with its rules against usury, with rules on door step sales and with rules on error and mistake. She herself was mistaken. Greek law at the place of the professional’s habitual residence applied as the law of the place where the characteristically performing party is habitually resident (CISG is not applicable according to Article 2 lit. a CISG) and this law gave no remedy – as, by the way, German law also did. Also under German law tourist are not protected if they buy in southern countries goods for a high price. Tourists are supposed to behave like local people and to bargain for their goods. So even if the parties had stipulated Greek law as applicable such a choice were valid and German law would not have to say anything except for public policy which was not given in my case.

¹⁶ The Directives of European law applicable to consumer contracts are listed in Article 46b (3) EGBGB version of 25 June 2009 (Bundesgesetzblatt 2009 I p. 1574) and 17 January 2011 (Bundesgesetzblatt 2011 I p. 34, concerning the Gesetz vom 25.6.2009 zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EG) Nr. 593/2008.

e) Intermediate Summary

The rule on the law applicable to consumer contracts seem to be rather complex. It has, however, not to be forgotten that the Rome I Regulation shall not prejudice – except for insurance contracts – “the application of provisions of Community law, which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations” (Article 23 Rome I Regulation). Are there any rules of such kind? Yes, there are such rules. They are part of some directives and provide that in certain consumer contracts (e.g. timesharing contracts, consumer credit contracts) which have a close connection with the territory of a Member State the consumer shall not be deprived of the minimum standard of protection guaranteed by the relevant directive by the choice of law in favour of a non-member state. There are not less than six directives which contain such clauses.¹⁷ This means that with such special contracts such clauses remain valid although Article 3 (4) Rome I Regulation lays down similar ideas.

2. Individual Employment Contracts

The law applicable to individual employment contracts may be chosen by the employer and the employee. Such choice, however, should not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the objectively applicable law under Article 8 (2) – (4) Rome I Regulation.

III. Overriding Mandatory Provisions

1. Definition

Overriding mandatory provisions are defined in Art. 9 (1) Rome I Regulation:

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding the public interest, such as the political, social and 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.

¹⁷ These directives are enumerated in Article 46b (4) of the German statute of adjusting the rules of private international law to Regulation (EC) No 593/2008, *supra* note 16.

Important is the very limited notion of overriding mandatory provisions as rules “safeguarding the public interest, such as the political, social and economic organisation”.¹⁸ It has already been pointed out by the German Bundesgerichtshof that provisions protecting the consumer are not such a provision in the public interest.¹⁹

2. Overriding Mandatory Provisions of the Forum State

a) Overriding mandatory provisions

Article 9 (2) Rome I Regulation reads as follows:

Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

As an example a recent case of the European Court of Justice may be given.²⁰ In 2005 the Belgian company United Antwerp Maritime Agencies (Unamar) NV and the Bulgarian defendant company Navigation Mar-

¹⁸ As to this provision see commentaries mentioned in N. 5 and the literature mentioned in N. 35. In addition to these sources see *Louis d'Avout*, Le sort des règles imperatives dans le règlement Rome I: Recueil Dalloz 2008, 2165-2168; *Andrea Bonomi*, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts: Yearbook of Private International Law 10 (2008) 285-300; *Andrew Dickinson*, Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations – So Long, Farewell, auf Wiedersehen, adieu? Journal of Private International Law 3 (2007) 53-88; *Cédric Montfort*, Article 9 – Lois de police, Article 21 – Ordre public du for: Revue Lamy Droit des affaires, Juillet/Août 2008, 82-83.

¹⁹ BGH 13.12.2005, BGHZ 165. 248 = 2006, 762 = Juristenzeitung 2006, 673 with note by *Marina Tamm* = IPRspr. 2005 Nr. 13b: concerning a consumer loan between a Swiss bank and a German consumer. The defendant consumer pleads German consumer protection but the court dismissed this plea because German consumer law cannot be pleaded under Article 34 EGBGB [= Article 7 (2) Rome Convention of 1980] which is limited to the protection of public interests and not private interests.

²⁰ ECJ 17 October 2013, Case C-184/12 (Unamar v. Navigation Maritime Bulgare), Recht der internationalen Wirtschaft 2013, 874 = Zeitschrift für Vertriebsrecht 2014, 55 = Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2014, 174 with comments by *Jan D. Lüttringhaus* on pp. 146-152 = Clunet 141 (2014) 625 with note by *Jean-Michel Jacquet*. As to this decision see *Gerald Gräfe/Kai-Oliver Giesa*, Von Ingmar zu Unamar – Welche Beschränkungen der Rechts- und Gerichtswahlfreiheit ergeben sich aus der Entscheidung des EuGH vom 17.10.2013, C-184/12? Zeitschrift für Vertriebsrecht 2014, 29-34; *Pascal Hollander*, L'arrêt Unamar de la Cour de justice – une bombe atomique sur le droit belge de la distribution commerciale? Journal des tribunaux 2014, 297-301; *Wulf-Henning Roth*, Eingriffsnormen im internationalen Versicherungsrecht nach Unamar, in:

itime Bulgare (NMB) concluded a commercial agency agreement for the operation of NMB's container liner shipping service. This agreement provided that it was to be governed by Bulgarian law. Three years later NMB informed their agents that, because of economic difficulties, NMB has to terminate the agreements with the agents and therefore terminated the contract with Unamar as of 31 March 2009. Unamar held that the agreement was unlawfully terminated and brought an action in Belgium against NMB for various forms of compensation provided under the EC Directive 86/653 on self-employed commercial agents²¹ and the Belgian statute of 13 April 1995 on commercial agency contracts.²² The Rechtbank van koophandel Antwerp applied the Belgian statute as directly applicable "mandatory rule" of Belgian law and gave judgment on 12 May 2009 for Unamar. On 23 December 2010, the Hof van beroep Antwerp upheld the appeal of NMB and did not apply Article 7 of the Rome Convention of 1980 as the Belgian statute of 1995 does not form part of the Belgian international public policy with the meaning of Article 7 Rome Convention. The Belgian Hof van Cassatie, uncertain how to interpret the Rome Convention, stayed proceedings on 5 April 2012 and referred the question to the ECJ whether the Belgian statute of 1995 can be held as applicable under Article 7 (2) Rome Convention.²³ Of course, the ECJ could not interpret Belgian law, it could only remind the referring court the standards of interpretation of European law, here of Article 7 Rome Convention. The ECJ emphasized that Article 7 Rome Convention is limited to provisions which are "so crucial for the protection of the political, social and economic order in a Member State concerned", that Article 7 Rome Convention is consistent with the wording of Article 9 (1) Rome I Regulation and that this limitation has to be interpreted strictly.²⁴

Versicherungsrecht, Haftungs- und Schadensrecht, Festschrift für Egon Lorenz, München: Versicherungswirtschaft 2014, 421-440.

²¹ O.J.E.C. 1986 L 387 p. 17.

²² *Moniteur belge* 2 June 1995, p. 15621 = *Jean-Yves Carlier/Marc Fallon/Bernadette Martin-Bosly*, Code de droit international privé, 4. ed. Bruxelles: Bruylant 2010, 1032 (excerpts). Article 27 of this statute reads as follows: "Sous réserve de l'application des conventions internationales auxquelles la Belgique est partie, toute activité d'un agent commercial ayant son établissement principal en Belgique relève de la loi belge et de la compétence des tribunaux belges."

²³ Article 7 (2) Rome Convention states the principle as Article 9 (2) Rome I Regulation.

²⁴ ECJ 17 October 2013, *supra* note 20, paragraphs 47-49: "Thus, to give full effect to the principle of the freedom of contract of the parties to a contract, which is the cornerstone of the Rome Convention, reiterated in the Rome I Regulation, it must be ensured that ... the plea relating to the existence of a "mandatory rule" within the meaning of the Mem-

The final decision of the Belgian Cour de Cassation is not yet known. As the Belgian statute of 1995 only applies to agents with their main establishment in Belgium, it can hardly be qualified as containing “overriding mandatory provisions” of public interest.²⁵ It is rather protective for a limited number of agents and therefore a statute with provisions of “individual” interest which might be applied under the general clause of public policy (Article 21 Rome I Regulation).

b) Ordre public international: Article 21 Rome I Regulation

Article 9 (2) Rome I Regulation does not preclude the application of Article 21 Rome I Regulation on public policy of the forum state. This provision reads:

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Even if the Belgian statute of 1995 does not qualify as “overriding mandatory provision” this statute may be enforced in Belgium under Article 21 Rome I Regulation. Of course, Article 21 Rome I Regulation is an independent safety valve and serves as a limitation of foreign law in the forum country.²⁶ The requirements of Article 21 Rome I Regulation are, however, quite different from those of Article 9 (2) Rome I Regulation. Under Article 21 Rome I Regulation local law is not applied as a *loi d’application immédiate* but the *result*, found under the application of foreign law, is corrected according to the public policy standards of the forum state. Also this exception applies only in cases if the situation has close contacts with the forum state. In other countries, e.g., third states, this law will not be given effect. Therefore the outcome of a solution may be quite different whether you apply local law under Article 9 (2) Rome I Regulation or whether you correct a result found under foreign law according to the minimum standards of Article 21 Rome I Regulation.

ber States concerned, as referred to in Article 7 (2) of that Convention, must be interpreted strictly.” (paragraph 49).

²⁵ *Hollander, supra* note 20; contra *Arnaud Nuyts*, Les lois de police et dispositions impératives dans le Règlement Rome I: *Revue de Droit Commercial Belge* 2009, 553-568 (559-560).

²⁶ *Münchener Kommentar – Martiny, supra* note 5, Art. 9 Rome I Regulation, marginal note 111.

3. *Overriding Mandatory Provisions of the lex causae*

The Rome I Regulation does not mention at all whether overriding mandatory rules of the applicable law can or should be applied. This may be explained by the very nature of private international law and the limitation of this branch of law to refer to *private law* governing the private law relations existing between the parties of a dispute and not to *public law* which might be applicable according to the intention of the public law provisions.

The rule that foreign public law is not at all applicable in private international law relations has, however, been modified in recent years. In 1975 at the Wiesbaden Session, the Institut de Droit International accepted the resolution on “The Application of Foreign Public Law”,²⁷ which under A I reads as follows:

1. The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy.
2. The same shall apply whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into consideration.

This resolution was transferred into Article 13 of the Swiss Federal Act on Private International Law²⁸ which reads as follows:

The reference to a foreign law in this Act includes all the provisions which under such law are applicable to the case. The application of a foreign law is not precluded by the mere fact that a provision is considered to have a public law character.

Now I may give some examples to illustrate this situation. In 1973 the River Mississippi broke its banks and flooded almost all fields with soya beans. An export ban was ordered by the United States Department of Commerce because soya beans should reserve for local demands and many sellers of American soya beans could not perform their contracts

²⁷ *Annuaire de L'Institut de Droit International* 56 (1975) 551 et seq. with General Report of *Pierre Lalive* at pp. 219-259. Also in: *Institut de Droit International, Tableau des Résolutions adoptées (1957-1991)*, Paris 1992, pp. 315 et seq.

²⁸ Translation by *Andreas Bucher/Pierre-Yves Tschanz*: *Private International Law and Arbitration, Switzerland, Basic Documents*, Basel: Helbing & Lichtenhahn 1996, pp. 1 et seq.

with their foreign clients.²⁹ Let us assume that these contracts were governed by US law and European customers applied in Europe for damages because of non-delivery of the promised merchandise. According to the law of all American States the seller has to pay damages if he cannot perform his contract and deliver the merchandise promised. This, however, may be different if non-performance was due to export bans of the government. Then the contracts of soya beans may be frustrated because of force majeure and had to be adjusted to changed circumstances or the seller may be even relieved from responsibility. The question is whether the American export ban is an “overriding mandatory provision” which should be taken into account in a trial for damages against the seller by a disappointed buyer. This was tacitly accepted in the GAFTA arbitration proceedings in London.³⁰ The export ban was based on public interests, especially on the social and economic organisation of the USA.

This may be different with *political* embargos as happened in the late 1970s and early 1980s with the American pipeline embargo.³¹ The United State prohibited the export of pipes for oil and gas delivery to Eastern Europe including Russia. When a buyer of such pipes asked for livery of the sold pipes the seller pleaded the American embargo of these pipes, told the court of heavy fines for illegal export and denied responsibility. The buyer succeeded in a Dutch court and the seller was obliged to deliver or pay damages.³² In other cases mandatory provisions of the *lex causae* have been applied and enforced in foreign courts, e.g. with respect to Italian exchange control provisions applicable to a contract governed by Italian

²⁹ See *Michael Bridge*, The 1973 Mississippi Floods: „Force Majeure“ and Export Prohibition, in: *Ewan McKendrick* (ed.), *Force Majeure and Frustration of Contract*, 2d ed. London: Lloyd’s of London Press 1995, 287-303 (290-291).

³⁰ *Toepfer v. Cremer*, [1975] 1 Lloyd’s Reports 406 (Q.B., Com.Ct.); [1976] 2 Lloyd’s Reports 118 (C.A.); *Tradax v. André*, [1975] 2 Lloyd’s Reports 516 (Q.B., Com Ct.).

³¹ As to this embargo cp. *German Yearbook of International Law* 27 (1984) 28-141 with contributions by *Klaus Bockslaff*, *Detlev F. Vagts*, *A.V. Lowe*, *Pieter Jan Kuyper*, *Karl M. Meessen* and *Jürgen Basedow*.

³² Pres. Rb. Den Haag 17.9.1982, Kort Geding 1982 Nr. 167 = *RabelsZ* 47 (1983) 141 (German translation) and note by *Jürgen Basedow* pp. 147-172.

private law,³³ to a smuggling contract violating Italian import controls,³⁴ and with respect to a Belgian contract violating EU antitrust law.³⁵

4. Overriding Mandatory Provisions of Third States

In private international law cases we normally deal with law of two states: the *lex causae* and the law of the forum state which may interfere with its public policy limitation. But what about the law of third states which want to be taken into consideration or even demand application? This problem of *Eingriffsnormen*, *lois de police*, *norme di applicazione necessaria* or mandatory rules of third states is heavily discussed since years³⁶ and no final solution has been offered so long.³⁷ For the first time the Rome Convention of 1980 on the Law Applicable to Contractual Obligations provided in Article 7 (1) for giving effect of such overriding mandatory provisions of third states:

³³ Kantonsgericht Wallis 15.9.1981, Zeitschrift für Walliser Rechtsprechung 16 (1982) 252.

³⁴ Handelsgericht Zürich 9.5.1968, Schweizerische Juristen-Zeitung 1968, 354; a similar case is the English case *Foster v. Driscoll*, [1929] 1 K.B. 470 (C.A.) where a contract for smuggling whiskey into the USA in times of prohibition was held illegal.

³⁵ Schweizerisches Bundesgericht 28.4.1992, BGE 118 II 193.

³⁶ Early studies of this problem were written by *Wilhelm Wengler*, Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht: Zeitschrift für vergleichende Rechtswissenschaft 54 (1941) 168-212; *Konrad Zweigert*, Nichterfüllung auf Grund ausländischer Leistungsverbote: *RebelsZ* 14 (1941) 283-307; *Gerhard Kegel/Hans Rupp/Konrad Zweigert*, Die Einwirkung des Krieges auf Verträge, Berlin: de Gruyter 1941.

³⁷ *Elke Benzenberg*, Die Behandlung ausländischer Eingriffsnormen im internationalen Privatrecht, Jena: Wissenschaftliche Verlagsgesellschaft 2008; *Andrea Bonomi*, Le norme imperative nel diritto internazionale privato, Zürich: Schulthess 1998; *Raphaël Callsen*, L'influence croissante du droit de l'Union européenne en droit du travail international, l'exemple des lois de police, Nanterre: Université Nanterre 2012; *Lisa Günther*, Die Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I – und Rom II – Verordnungen, Saarbrücken: Alma Mater 2011; *Trevor C. Hartley*, Mandatory Rules in International Contracts – The Common Law Approach: *Recueil des Cours* 266 (1997) 337-426; *Paul Hauser*, Eingriffsnormen in der Rom I – . Verordnung, Tübingen 2012; *Andreas Köhler*, Eingriffsnormen, der „unfertige Teil“ des europäischen IPR, Tübingen: Mohr Siebeck 2013; *Mathias Kuckein*, Die „Berücksichtigung“ von Eingriffsnormen im deutschen und englischen internationalen Vertragsrecht, Tübingen: Mohr Siebeck 2008; *Irene Pötting*, Die Beachtung forumsfremder Eingriffsnormen bei vertraglichen Schuldverhältnissen nach europäischem und Schweizer IPR; Frankfurt/Main: Lang 2012; an exhaustive bibliography may be found in: Münchener Kommentar – *Martiny*, *supra* note 5, Art. 9 Rom I-VO, before marginal note 1.

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

This is an exception clause for giving effect to *any* kind of mandatory rules of a third country.³⁸ Such a general exception clause was copied and provided by Article 19 of the Swiss Federal Act on Private International Law of 1987:

- (1) When interests that are legitimate and clearly preponderate according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.
- (2) In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.

When the Rome I Regulation was discussed and prepared the British government did not like a general exception clause of the former Rome Convention and asked to reduce it to overriding mandatory provisions of the country “where the obligations arising out of the contract have to be or have been performed”. Therefore Article 9 (3) of Rome I Regulation provides only a limited exception clause:

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.

³⁸ Very critical about the draft of this provision *Francis A. Mann*, Sonderanknüpfung und zwingendes Recht im internationalen Privatrecht, in Festschrift für Günther Beitzke, Berlin: de Gruyter 1979, 607-624 (616 et seq.).

Let me give an example for the application of this limited exception clause.³⁹

a) Country of Performance

Thirty years ago, in 1984 when the Rome Convention had not yet entered into force in Germany, the Bundesgerichtshof had to decide a dispute between an Iranian importer of German beer and German exporter of these beverages.⁴⁰ Their relation was governed by German law. Because of some transport damages the parties settled their controversies in 1978 and the seller agreed to pay for these damages against a continuation of selling beer to the Iranian buyer for reduced prices. In January 1979 the Ayatollah Khomeini came into power after the Shah of Persia had left the country and Khomeini prohibited any alcoholic beverages and their import into the Republic of Iran. Any violation of this prohibition was punishable by death. The Iranian buyer sued the German seller in German courts and asked for the damages to be paid by the seller according to the settlement by the parties. The German courts accepted jurisdiction, applied German law, took into consideration the Iranian import prohibition and adjusted the settlement to the changed circumstances of the settlement under the German principles of frustration (*Wegfall der Geschäftsgrundlage* under § 242 BGB) and awarded to the plaintiff only part of the damages asked for.

In this case the law of the third country of Iran (German law governed the sale and was the *lex fori*) was qualified as mandatory provision which wants to be applied whichever law governs the contract between the parties. This law, never anticipated by either party, was finally given effect indirectly by application of § 242 BGB (principle of *Treu und Glauben*) and adjusting the settlement of the parties according to the rules of *Wegfall der Geschäftsgrundlage*. Today the German court would have applied Article 9 (3) of Rome I Regulation. The Iranian import ban would have to be characterized as rule safeguarding the public interest (social organisation of Iran) of the country in which the contract has to be performed and, hence, this law had to be given effect, not applied, by the law governing the contract.

³⁹ For 11 different categories of overriding mandatory provisions see *Münchener Kommentar – Martiny, supra* note 5, Article 9 Rom I – VO, marginal notes 51- 103.

⁴⁰ BGH 8.2.1984, BGHWarn. 1984 Nr. 44 = *Neue Juristische Wochenschrift* 1984, 1746 = *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 1986, 154 with comments by *Peter O. Mülbart* at p. 140-142.

Another case is a very early one decided by the German Reichsgericht in 1918.⁴¹ A contract had been concluded before World War I about exclusive distribution of certain merchandise of Argentina with payment obligations of the distributor in Paris, London and Antwerp. War broke out and Great Britain passed the Trading with the Enemy Act of 1914 and banned any trade with Germany or German business people. The defendant could not any more provide the merchandise and the distributor could not pay in London, Paris and Antwerp. The distributor sued his contractual partner for damages because of breach of contract. There were doubts whether the Trading with the Enemy Act should be applied in Germany. The Reichsgericht decided that the issue is not one of directly enforcing this statute of a foreign country but to consider whether the Trading with the Enemy Act must be indirectly given effect, making performance of the contract impossible and therefore does not give any claim for damages. There was an affirmative answer and the law suit failed.

b) Other Countries than Those of Performance

The very limited field of application of Article 9 (3) of Rome I Regulation leaves five questions open and still unanswered: (1) Can overriding mandatory provisions of a country other than that of performance be directly enforced? (2) Need there be any close connection to the case in dispute? (3) Have all foreign mandatory provisions to be respected? (4) What about cases with no close connection to the situation in dispute? (5) Is it allowed also to take into consideration other mandatory rules of a third state which do not qualify as safeguarding the public interest?

(1) Direct Enforcement of Overriding Mandatory Provisions

Article 9 (3) Rome I Regulation requires only that “effect may be given” to foreign overriding mandatory provisions. It does not require direct application. This was, however, asked for in the British case *Attorney General of New Zealand v. Ortiz*.⁴² The Attorney General of New Zealand asked for direct enforcement of mandatory provisions of New Zealand

⁴¹ RG 28.6.1918, RGZ 93, 182.

⁴² [1984] 1 A.C. 1, 35 = [1983] 2 W.L.R. 809 (H.L.).

prohibiting the export of cultural objects. This was declined. He could not present a title in the Maori carvings and therefore lost the lawsuit.⁴³

(2) Overriding Mandatory Provisions with Close Connection to the Case

More than 40 years ago the German Bundesgerichtshof passed the famous Nigeria-judgment also reported in the International Law Reports.⁴⁴ Pieces of cultural property (Nigerian masks and statues) had been illegally exported from Nigeria, shipped to Hamburg/Germany and insured against transport risks with a German insurance company. The Nigerian cultural treasures got lost during their voyage to Hamburg and the insured party brought a law suit in Hamburg against the insurance company and asked for payment for the lost Nigerian bronze statues. This claim was based on German insurance law because German law governed the insurance contract. The claim was dismissed. The court considered the illegal export of cultural property and remarked: “The Export of items of cultural interest contrary to a prohibition in the country of origin does not deserve to be protected under civil law, in the interest of maintaining propriety in international trade in *objets d’art*.”⁴⁵ Therefore the court denied an insurable interest and an insurance claim of the plaintiff.

This case was decided before Germany ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁴⁶ and before implementing the EC Directive 93/7/1993 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.⁴⁷ Nevertheless I am pretty sure that today such a case would be decided the same although the overriding mandatory provisions of Nigeria are not provisions of the country of performance.

Another case of a similar type arose recently in Germany. In Germany there are about 300.000 Greek people. Most of them send their children to German schools but also others prefer Greek schools with teachers paid by the Greek government. The contract of these teachers provide that the German collective contract for government employees (BAT) applies, the

⁴³ This was different in the case of Government of the Islamic Republic of Iran v. Barakat, [2007] EWCA Civ. 1374 (H.L.) where the plaintiff had title in the art objects.

⁴⁴ BGH 22.6.1972, BGHZ 59, 82 = 73 International Law Reports 226.

⁴⁵ BGH, last Note, 73 Int. L. Rep. 229.

⁴⁶ 823 UNTS 231; BGBl. 2007 II S. 627.

⁴⁷ O.J.E.C. of 27 March 1993 No. L 74/74.

teachers have to be paid in Germany and that German courts have jurisdiction in all matters governed by these teaching contracts. Since 2009 Greece was struck by a financial crisis and therefore reduced the salary of government employees to 90% of their original salary. This reduction was also applied by the Greek government in Germany and the teachers in German schools got also the reduced payment of their salaries. Many teachers went to court and asked for their full salary as stipulated some years ago. These teachers were successful.⁴⁸ Was the Greek statute on reduction of salaries not applicable in Germany in German courts against their schools and the Greek government? What went wrong? Yes, the Greek statute was not directly applicable in German courts because it is a unilateral change of employment contracts which may apply immediately in Greece but not in Germany for contracts governed by German law. The Greek statute on reduction of salaries can be qualified as overriding mandatory provisions in the public interest (economic organisation of Greece imposed by the EU) but not provisions of a country where the contract has to be performed. Nevertheless such provisions can be given effect in German labour law with the institution of *Änderungskündigung* (dismissal with changed conditions). The teachers should have given an offer to finish their contracts combined with an offer to stipulate a new contract with less payment.⁴⁹

The result may be summarized like this. Article 9 (3) of Rome I Regulation obliges all Member States of the Union to give effect to overriding mandatory provisions of the country of performance, but does not prohibit the taking into account of overriding mandatory provisions of other countries when applying substantive law governing the contract.⁵⁰ EU law does

⁴⁸ Landesarbeitsgericht (LAG) Düsseldorf 17. 11. 2011, file: 15 Sa 864/11, juris; LAG Hamm 24.11.2011, file: 17 Sa 1067/11, juris; Bundesarbeitsgericht 10.4.2013, NJW 2013, 2461 = Neue Zeitschrift für Arbeitsrecht 2013, 1102. On 25 February 2015, the Bundesarbeitsgericht requested the ECJ for a preliminary ruling on the question whether Art. 9(3) Rome I Regulation excludes that national law gives indirect effect of foreign mandatory rules.

⁴⁹ See Kurt Siehr, *Deutsche Arbeitsverträge mit der Republik Griechenland und Gehaltskürzungen nach griechischem Recht: Recht der Arbeit* 2014, 206-213.

⁵⁰ Some persons even urge – with some good reasons – that EU Member States have to give effect to overriding mandatory provisions of other Member State according to the EU Treaty: Johannes Fetsch, *Eingriffsnormen und EG-Vertrag, Die Pflicht zur Anwendung der Eingriffsnormen anderer EG-Staaten*, Tübingen: Mohr Siebeck 2002; Wulf-Henning Roth, *Europäische Kollisionsrechtvereinheitlichung: Überblick – Kompetenzen – Grundlagen*, in Eva-Maria Kieninger/Oliver Remien (eds.), *Europäische Kollisionsrechtsvereinheitlichung*, Baden-Baden: Nomos 2012, 11-49 (43 et seq.): Article 9 (3) Rome I Regulation violates Article 4 (3) EU Treaty and the obligation to solidarity.

not change German insurance law by demanding German courts to accept an insurable interest in insurance contracts covering illegally exported cultural objects and EU law also does not prohibit the taking into consideration a Greek statute reducing salaries when applying the well-known German institution of labour law, the *Änderungskündigung*. This would be an intrusion into substantive law leading to different results in international and in local cases.

(3) Overriding Mandatory Provisions not to be Respected

Article 9 (3) Rome I Regulation in its second sentence provides: “In considering whether to give effect to those [overriding mandatory] provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.” The foreign overriding mandatory provision has therefore to be evaluated whether it should be given effect in the forum state. Here are two examples of the bygone times of “cold war”.

In the early 1970s two German publishing houses went to court and sued each other pretending to have acquired the exclusive right to print, publish and distribute the German translation of Alexander Solzhenitzyn’s book “August 1914”. The plaintiff, publishing house Luchterhand, showed that it had a contract with the author himself, concluded in Switzerland without permission of Soviet Foreign Trade Commission, responsible for distributing copy rights of Soviet authors in Western countries. Luchterhand sued the defendant company, Langen Müller of Munich, which had acquired the copy right from the Soviet Foreign Trade Commission, to stop distributing the German translation of “August 1914”. The German Bundesgerichtshof held for the plaintiff.⁵¹ The court did not like the marketing of private copy rights by the Soviet Foreign Trade Commission, construed this permit strictly with only territorial dimensions within the Soviet Union and emphasized that the copy right for Germany is an independent right of the author.

The other situation deals with so-called *Fluchthelfer-Verträgen* (contracts for helping to escape from East Germany). With such contracts the *Fluchthelfer* obliged themselves to bring people from East Germany to West Germany and the other party (mostly those who wanted to escape)

⁵¹ BGH 16.4.1975, BGHZ 64, 183 = GRUR Int. 1975, 361 with comments of *Adolf Dietz* on pp. 341-344 = IPRspr. 1975 Nr. 118 = Rev. crit. 66 (1977) 72 with note by *Ernest Mezger*.

paid or obliged themselves to pay the Fluchthelfer. The flight from East Germany was strictly forbidden by the East German legislator and government and anybody arranging such flights were severely punished. When the escaped person refused to compensate the Fluchthelfer, the contracts covering such activities had to be scrutinized in West German courts. They were held valid, the East German prohibition to escape was not applied and the contracts not qualified as illegal or immoral under West German law of § 138 BGB.⁵²

On the other hand, Germany supported the American embargos against the Eastern countries during the “cold war” and held contracts knowingly avoiding the embargo rules for illegal and void because of their violation of good morals.⁵³ The same happened in England where a contract intentionally violating an Indian embargo against South Africa was held illegal also by the English courts.⁵⁴

(4) Overriding Mandatory Provisions without any Close Connection with the Case

Every case, either falling under Article 9 or 21 Rome I Regulation, has to have some contact with the situation of the case in dispute. This principle of proximity, *proximité* or *Inlandsbeziehung* or – for purposes of Article 9 (3) Rome I Regulation a connection of the case with the foreign country providing the mandatory rule – is well accepted in European conflict of laws.⁵⁵ There is hardly any real case in which a foreign overriding mandatory provision with no connection with the situation in dispute wanted to be applied. Of course, a foreign exchange control provision need not be given effect if – absent an international obligation – the situation has no connection with the country of exchange control.⁵⁶

⁵² BGH: 29.9.1977, BGHZ 69, 295 = JZ 1978, 61 and also of 29.9.1977, BGHZ 69, 302 = JZ 1978, 62 and also of 29.9.1977, JZ 1978, 64 with note by *Wilhelm Wengler*.

⁵³ BGH 21.12.1961, BGHZ 34, 169 (Borax case); BGH 24.5.1962, NJW 1963, 1436 (boric acid case).

⁵⁴ *Regazzoni v. Sethia*, [1958] A.C. 301 = [1957] 2 W.L.R. 752 = [1957] 3 All E.R. 286 (H.L.).

⁵⁵ Against this requirement *Francis A. Mann*, *supra* note 38, 616 et seq.

⁵⁶ *Wengler*, *supra* note 36, 185 et seq.

(5) Simple Mandatory Rules of Every Country

Article 9 Rome I Regulation applies only for overriding mandatory provisions as defined by Article 9 (1) of Rome I Regulation. If there are simply international mandatory rules of any foreign third state, may they – apart from Article 3 (3) of Rome I Regulation and the limitations in favour of weaker parties – be taken into consideration as well when applying the governing substantive law? There is no obligation to do so under the Rome I Regulation. If courts want to give effect to foreign mandatory provisions, they may qualify them as being “overriding mandatory provisions” within Article 9 (1) Rome I Regulation. If they do not want to do this, they may decline to such a qualification and apply only the law governing the contract.⁵⁷

E. CONCLUSION

I. Party autonomy is the cornerstone of the Rome I Regulation. Some restrictions and limitations of party autonomy have, however, to be observed.

II. In some types of contracts only a restricted choice-of-law agreement may be made. This is the case of some contracts of carriage and of some contracts of insurance.

III. In any case certain limitations of a choice-of-law agreement have to be taken into account.

1. In contracts exclusively centered in the EU, European minimum standards cannot be evaded by choosing the law of a non-Member State: Article 3 (4) Rome I Regulation.

2. Certain consumers and certain employees are protected insofar as a choice-of-law agreement cannot deprive these persons of *individually* protective provisions afforded to this person under the law governing objectively, i.e. without a choice of law: Articles 6 (2) and 8 (1) Rome I Regulation.

3. Overriding mandatory provisions for safeguarding *public* interests, defined by Article 9 (1) Rome I Regulation, unless unacceptable and unless they have no close connection to the situation, shall be given effect if

⁵⁷ See, e.g., Hoge Raad 13.5.1966, Ned. Jur. 1967 No. 3 (case Alnati) = Rev. crit. 56 (1967) 522 with note by *A.V.M. Struycken*.

a) these overriding mandatory provisions are those of the place of performance: Article 9 (3) Rome I Regulation, or

b) these overriding mandatory provisions are those of the forum state: Article 9 (2) Rome I Regulation, or

c) these mandatory provisions are those of the *lex causae* and can be given effect by the substantive law of that jurisdiction.

IV. In all cases the result of foreign law can violate public policy of the forum state and not be applied at all or in a different version: Article 21 Rome I Regulation.