CHOICE OF LAW AND OVERRIDING MANDATORY RULES IN INTERNATIONAL CONTRACTS AFTER ROME I

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I. Preliminary Remarks: the Roles of the Proper Law of the Contract and the Choice of Law

The law applicable to contracts can fulfil three different functions: first, a "supplementary function", filling contractual gaps with default rules. Second, an "interpretative function", determining the meaning of ambiguous or obscure contract terms. Finally, a "restrictive function", voiding contractual clauses that are contrary to mandatory rules. Differentiating between these functions is critical in order to clarify the connections between "substantive or internal autonomy" and "conflict-of-laws autonomy"[1] in the field of international trade, and, beyond this, to deter-

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[1] The internal or substantive autonomy of the parties deals with their faculty to introduce any clauses or conditions into the contract. This autonomy is limited under binding rules of law in any legal system. In cases of international contracts this autonomy also exists, however is limited by the rules of the governing law under private international law rules (proper law of the contract or *lex contractus).* The expression "conflict-of laws autonomy" simply describes the parties' faculty to choose the applicable law, which finally will determine the validity, scope and effects on each contract clause or condition resulting from the "substantive autonomy" of the parties.

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mine the links between contract clauses and the applicable law in the absence of choice.[2]

Under an ideal system of international contract law, "restrictive function" must be considered alien to the role of the *lex contractus*, especially if this has been chosen by the parties. Whenever the parties choose the applicable law, a basic principle of interpretation calls for the restrictive function of the applicable law to be disregarded: the rationale is that the parties would not logically have chosen a law to void their own agreement. However, from other perspectives this conclusion is not self-evident, even in cases of choice of law. By choosing the applicable law, the parties may be interested in establishing a framework for the control of their agreement, "self-limiting" in a sense, and it would not be unreasonable if binding rules of the applicable law voided some clauses or the whole contract. Even if the parties clearly asserted the prevalence of contract clauses over the law chosen, they would be unable to prevent such a consequence, since the validity of a clause may not be excluded from any law.[3] In my opinion, such interpretation is unacceptable, although it is supported by current majority of legal commentators.[4] Both legal certainty and party autonomy prevent us from concluding that the parties have included in their contract conditions incompatible with the selected applicable law, in this way having confidence that agreements would be considered void. The right presumption must be rather the opposite. Notice that the law chosen by the parties does not have to demonstrate a close connection with the contract and therefore its restrictive function is justified only by the parties' will. A fundamental principle of legal certainty and interpretation leads to recognition of the fact that any conditions included in a contract by the parties are compatible and valid as a whole in relation with the law chosen by the same parties. If this interpretation is not possible, conditions will prevail against legal rules, given that only such interpretation respects the will of the parties. This conclusion is especially clear if it has been foreseen in the contract, but it is unnecessary.

In short, under contemporary private international law, "conflict-of-laws autonomy" must be re-oriented towards "substantive autonomy" and restrictive function must be reserved to overriding mandatory rules irrespective of the *lex contractus,* particularly if this law has been chosen by the parties. This understanding shall be considered a general presumption, unless it is possible to induce very clearly from the contract a contrary will of the parties. Consequently, the *lex contractus* will simply accomplish a mere "supplementary" or "interpretative"

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[2] See especially BOUZA VIDAL N., "Aspectos actuales de la autonomía de la voluntad en la elección de la jurisdicción y de la ley aplicable a los contratos internacionales", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2004,* Universidad del País Vasco 2005, pp. 31, 55-57.

[3] This interpretation is even defended in the field of commercial international arbitration (see *Fouchard Gaillard Goldman on International Commercial Arbitration,* The Hague 1999, pp. 797-799).

[4] See recently CARBONE S.M., "L'autonomia privata nei rapporti economici internazionali ed i suoi limiti", in: *Riv. dir. int. priv. proc.* 2007, pp. 891, 903.

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function, while the overriding mandatory rules regime will cover the "restrictive function".

In fact, such a conclusion is suitable in both arbitral and jurisdictional proceedings. Furthermore, the law chosen by the parties frequently complies with this formula. For example, if the parties have selected the UNIDROIT Principles as applicable law, the contract conditions that modify or void those Principles would prevail with few exceptions (Article 5.1) related to general principles of international trade (good faith and fair dealing) and to protection of the integrity of the parties' will (abuse, fraud, threat, gross disparity or unfairness…).

The question seems more complex whenever the applicable law is determined in the absence of choice. In this situation, the applicable law normally fulfils a restrictive function, under jurisdictional approaches. However, this role must not be admitted in commercial arbitration proceedings, due to the preponderant role of contract conditions as "first law". Finally, the *lex causae* in commercial arbitration has a mere "interpretative" and "supplementary" function, but never "restrictive", even in the absence of choice. It is clear that application of overriding mandatory rules also remains possible in arbitral proceedings, although not as *lex contractus* or *lex causae.*

II. Choice of Non-National Laws

Despite the fundamental function that conflict-of-laws autonomy carries out in international trade, parties can only choose a national law and judges will only apply a national law as *lex contractus.* Paul Lagarde, one of the reporters of the Rome Convention, ascribes such a limitation to Article 3 of the Convention, which prevents the parties from a choice of the *lex mercatoria,* UNIDROIT Principles or any non-national legal order.[5] This approach has infected the *Resolution of the International Law Institute* adopted in Basel on 31 August 1991, keeping the *lex mercatoria* out of the conflict-of-laws autonomy in a manner that is contrary to the *Conclusions of the III Commission of IHLADI in San Salvador* (13 September 2002).[6] Finally, all attempts[7] to achieve an open perspective in the original proposal

[5] LAGARDE, P., "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention du 19 juin 1980", in: *Rev. crit .dr. int. pr.* 1991, pp. 287, 300-301.

[6] The second conclusion of the III Commission (Legal Regulation of International Contracts) approved in the XXIIth Congress of IHLADI in San Salvador (8th to 13th September 2002) states: "New Proposals of *Lex Mercatoria* advise superseding traditional restrictions to conflict-of-laws autonomy that reduce the scope of the choice by the parties to the law of a national law. It is necessary to promote the possibility to choose some concrete expressions of a new *Lex Mercatoria,* as the UNIDROIT Principles, even if the litigation does not involve an arbitral proceeding. Legitimate intervention of public interests would be guaranteed by means of mandatory rules doctrine, as suggested by Article 1.4 of the UNIDROIT Principles itself" (*Anuario del IHLADI* 2003, vol. XVI, p. 655).

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of the "Rome I" Regulation were frustrated and current Article 3.1 follows the sense of the Rome Convention, which reaffirmed *a sensu contrario* by the possibility content in Recital 13 (incorporation by reference of a non-national law).[8] Consequently, the following advice in Preamble of the UNIDROIT Principles makes sense: "Parties who wish to choose the Principles as the rules of law governing their contract are well advised to combine such a choice of law with an arbitration agreement".

Ultimately, this question depends on divergent approaches to the restrictive function of the applicable law chosen by the parties.[9] Those who support the exclusion of such a function consider that a choice of a non-national law does not prevent the intervention of public interests by means of public policy (Article 16 of the Rome Convention or Article 21 of the "Rome I" Regulation) or by way of overriding mandatory rules (Article 7 of the Rome Convention or Article 9 of the "Rome I" Regulation).[10] If Article 3 in both texts allowed the choice of non-national laws, a balance between private and public interest would always be possible. Furthermore, the way to protect public interests does not involve refusing a

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[7] See the arguments supporting the provision in this sense content in 2005 Proposal in JUENGER F.K. and SÁNCHEZ LORENZO S., "Conflictualismo y *lex mercatoria* en el Derecho internacional privado", in: *REDI* 2000, pp. 29-44; FERNÁNDEZ ROZAS J.C., *Ius mercatorum. Autorregulación y unificación del Derecho de los negocios internacionales*, Madrid 2003, p. 95; ID. "Lex Mercatoria y autonomía conflictual en la contratación transnacional", in: *Anuario Español de Derecho Internacional Privado* 2004, pp. 35-78; BOUZA VIDAL N., "La elección conflictual de una normativa no estatal sobre contratos internacionales desde una perspectiva europea (Consideraciones sobre el Plan de Acción de la Comisión de febrero de 2003)", in: *Pacis Artes. Obra Homenaje al Profesor Julio D. González Campos,* Madrid 2005, pp. 1309, 1317-1326; LANDO O. and NIELSEN P.A., "The Rome I Proposal", in: *Journal of Private International Law* 2007, pp. 29, 30-34 (a critique of the definitive text from the same authors in: "The Rome I Regulation", *Common Market Law Review* 2008, pp. 1687, 1696-1698); RODRÍGUEZ BENOT A., "El Convenio de Roma de 19 de junio de 1980 veinticinco años después: balance y perspectivas de futuro", in: *Estudios sobre contratación internacional*, Madrid 2006, 497, 516-517; BONOMI A., "Conversion of the Rome Convention on Contracts into an EC Instrument", in: *Yearbook of Private International Law* 2003, pp. 53, 65-66. Opinions against the Proposal underlined the undefined condition related to the "recognition" in the international community (see MANKOWSKI P., "Der Vorschlag für die Rom-Verordnung", in: *IPRax* 2006, pp. 101, 102; LAGARDE P., "Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles", in: *Rev. crit. dr. int. pr.* 2006, pp. 331, 336).

[8] See from a critical point of view LEIBLE S., "Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht («Rom I»)", in: *RIW* 2008, pp. 533-534; ID., "Rechtswahl", in: *Ein neues internationales Vertragsrecht für Europa* (Ferrari/Leible Hrsg.) 2007, pp. 41, 47-48.

[9] If a restrictive function of the law chosen by the parties is admitted, distinctions between internal and international mandatory rules will become absurd (see ROMANO G.P. "Le choix des Principes UNIDROIT par les contractants à l'épreuve des dispositions impératives", in: *Clunet* 2007, pp. 473, 479-480).

[10] See BERGER K.P., Formalisierte oder "schleichende" Kodifizierung des transnationalen Wirtschafsrechts, Berlin 1996 73-75; ROMANO G.P. (note 9), pp. 488-495.

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"mercatoria conflict-of-laws autonomy", but resorting to public policy or overriding mandatory rules of the *forum* or of a third state in exceptional cases through Articles 9 and 21 of the "Rome I" Regulation. This is the very sense of Article 1.4 of the UNIDROIT Principles and of Article 1:103 of the Lando Principles (PECL).

On the other hand, it is rather absurd that Article 3 empowers the parties to choose the law of a state not connected with the contract[11] and further allows a wide *dépeçage*, yet it does not permit a choice of, for example, the UNIDROIT Principles as applicable law.[12] It is also preposterous to reduce such a choice to a European text (Recital 14 of the "Rome I" Regulation). It is ridiculous to defend that behind any contract there is a national law watching zealously over party autonomy, notwithstanding that this law has no minimal connection with the contract. It is more convincing that, given the freedom to choose the applicable law in a wide sense, there are many national laws behind the contract, whose mandatory rules might be considered.

It also does not seem to be a solid argument to refer to the risks inherent in designing undefined or, at least, incomplete legal systems.[13] The parties can foresee the subsidiary application of a national law or, failing that, the gaps can always be filled through the applicable law in the absence of choice. On the other hand, a mere consideration of the choice of a non-national law on the grounds of party autonomy as an incorporation by reference implies that some of the provisions of the chosen law could unexpectedly be considered void under the state law applicable in the absence of choice.

In the field of international arbitration, the extensive freedoms awarded to the parties contrasts with the limits described above.[14] The application of non-national laws chosen by the parties is entirely uncontroversial. Many recent arbi-

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[11] Allowing in such a way an "abstract" conflict of laws (see JACQUET J.M., "Le principe d'autonomie entre consolidation et évolution", in: *Vers de nouveaux équilibres entre ordres juridiques (Liber Amicorum Hélène Gaudemet-Tallon)*, Paris 2008, pp. 727, 731.

[12] See in this sense ANCEL B., "Autonomía conflictual y Derecho material del comercio internacional en los Convenios de Roma y de México", in *Anuario Español de Derecho Internacional Privado* 2002, pp. 33, 44-45; BOSCHIERO N., "Verso il rinnovamento e la transformazione della Convenzione di Roma: problemi generali", in: *Diritto internazionale privato e diritto comunitario*, Maitland 2004, pp. 319, 357; BRIGGS A., *Agreement on Jurisdiction and Choice of Law*, Oxford 2008, pp. 384-385.

[13] GARCIMARTÍN ALFÉREZ F.J., "El Reglamento «Roma I» sobre la ley aplicable a las obligaciones contractuales: ¿Cuánto ha cambiado el Convenio de Roma de 1980?", in: *Diario La Ley* 30th May 2008, § III.

[14] See BERGER K.P., "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts", in: *Am. J. Comp. L.* 1998, pp. 129-150; BORTOLOTTI F., "The UNIDROIT Principles and the Arbitral Tribunals", *Uniform Law Review* 2000, pp. 141-152; BONELL M.J., "A Global Arbitration decided on the Basis of the UNIDROIT Principles: In Re Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Wolrdwide Société Coopérative", in: *Arb. Int.* 2001, pp. 259-262; SERAGLINI C., "Du bon usage des principes UNIDROIT dans l'arbitrage international", in: *Revue de l'arbitrage* 2003, pp. 1101-1166.

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tration laws recognise such a trend, which arbitral practice had already consolidated on the grounds of party autonomy. However, effectiveness of such a choice has often been questioned given that international rules in force, such as the Geneva Convention of 1961, seem to limit the choice to national laws (Article 7).[15] In practice, a more flexible interpretation favouring wide party autonomy has prevailed.

Furthermore, it is true that in both jurisdictional and arbitral litigation a general choice of the *Lex Mercatoria* or international trade usages is more complicated.[16] This mention may be related to common usages or standardised practices in international trade, which have sometimes been considered in international texts such as the UNIDROIT Principles or the CISG,[17] however it is more difficult to justify application of either of those texts in their entirety, particularly in arbitral proceedings.[18] Certainly, the UNIDROIT Principles contain many rules inspired by international trade usages or customs and by the CISG, especially on conclusion and remedies.[19] However, other rules are highly innovative[20] and doubts arise particularly where the Principles move away from English law.[21] The fact that, in a single case, even the London Court of Arbitration has made a reference to common law principles of UNIDROIT Principles must not be generalised.[22] Consequently,

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[15] See GAJA G., "Sulle norme applicabili al merito secondo la nuova disciplina dell'arbitrato internazionale", in: *Rivista dell'arbitrato* 1994, p. 436.

[16] See BRIGGS A. (note 12), p. 385. See for a contrary point of view NIGH P.E., *Autonomy in International Contracts,* Oxford 1999, pp. 177-198.

[17] See ICC Awards nº. 8501, nº. 8502 and nº. 8503/1996.

[18] As VON ZIEGLER A. has pointed out, the absence of traders and the academic background of the UNIDROIT Principles will not benefit its success in practice. Such a fault might explain the failure of legal systems such as the Hamburg Rules (1978) on the carriage of goods by sea (see "Particularities of the Harmonisation and Unification of International Law Trade and Commerce", in: *Private Law in the International Arena: From National Conflict Rules towards Harmonization and Unification. Liber Amicorum Kurt Siehr*, The Hague 2000, pp. 879, 881-883, esp. note 38). In the same sense, see López RODRÍGUEZ, A.M., "Ley aplicable al fondo de la controversia en el arbitraje comercial internacional. El enfoque transnacional de la nueva Ley española de Arbitraje", in: *Cuestiones actuales de Derecho mercantil internacional*, Madrid 2005, pp. 711-712.

[19] See ICC Awards nº. 8246/1997 and nº. 8261/1996.

[20] Supporting this opinion, e.g., BONELL, M.J. "The UNIDROIT Principles and Transnational Law", in: *The Practice of Transnational Law*, The Hague 2001, p. 29.

[21] Certainly, universal recognition is not necessary to affirm a transnational rule. However, an exception of English law is significant because of its importance in international trade, which is why in many fields such an exception means an absence of consensus, as MAYER P. pointed out ("L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence", in: *Recueil des Cours*, t. 217, 1989, p. 432).

[22] See BONELL M.J., *An International Restatement of Contract Law*, 2nd ed., New York 1997, p. 252.

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the affirmation expressed in ICC Award no. 7110/1995,[23] which justifies the application of the UNIDROIT Principles given their character as neutral and general principles that reflect an international consensus,[24] must not be accepted as a general premise and instead requires a careful analysis of any legal question, comparing the rules of the UNIDROIT Principles and its origin in the light of the main legal orders and the usual practice in international trade. Indeed, ICC Award no. 7375/1996 (5 June) underlines the fact that the UNIDROIT Principles may be applied in this context "as far as they can be considered to reflect generally accepted principles and rules".[25]

In sum, a generic reference to the *Lex Mercatoria* does not empower a judge or arbitrator to arbitrarily consider any non-national law as *Lex Mercatoria* and rather calls for a detailed justification of those rules, which in such legal systems are in fact due to practices or principles generally accepted in international trade.[26] However, it is understandable that in cases of absence of choice of law, of divergences between national laws of the parties or of a generic reference to the *Lex Mercatoria* unable to specify principles or practices generally admitted, arbitrators have recourse to the UNIDROIT Principles in order to objectify an award.[27] Nevertheless, the most suitable option for judges consists of looking for the applicable law in the absence of choice, under Article 4 of The Rome I Regulation. Fortunately, this issue is largely theoretical since generic clauses choosing the *Lex Mercatoria* are relatively rare in practice.[28]

[23] *Bull. CCI* 1992, pp. 39-54. See also ICC Award no. 7375/1996 and comments by BERGER K.P. (note 14), pp. 143-149, and ICC Award no. 9797/2000 (BONELL M.J, *I Principi UNIDROIT nella pratica*, Maitland 2002, pp. 721-742).

[24] See FRIGNANI A., L'arbitrato commerciale internazionale (Trattato di diritto commerciale e di diritto pubblico dell'economia dir. F. Galgano), vol. 33, Padova 2004, pp. 153-159.

[25] See BONELL M.J. (note 20), p. 31. In such a prudent manner, ICC Award no. 11256/2003 maintains that UNIDROIT Principles does not necessarily reflect generalised commercial practices (<http://www.unilex.info/case.cfm?pid=2&do=case&id=1416&step =Abstract>), and ICC Award nº. 11926/2003 considers that UNIDROIT Principles must be compared with the proper law of the contract in order to prevent the application of rules that might be unexpected for the parties (<http://www.unilex.info/case.cfm?pid=2&do =case&id=1405&step=Abstract>).

[26] It is interesting to note a similar call for prudence pronounced by authors who maintain the importance of the UNIDROIT Principles in arbitration such as LALIVE P. (see "L'arbitrage international et les principes UNIDROIT", in: *Contratti commerciali internazionali e principi UNIDROIT*, Milan 1997, pp. 71, 88-89).

[27] In this sense ICC Award no. 7375/1996.

[28] See REYMOND PH., "Le droit applicable au fond dans l'arbitrage commercial international", in: *L'arbitrato commerciale internazionale in Svizzera e Italia*, Milan 1992, p. 9).

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III. Limits in European Domestic Cases

A. Conflicts of Laws and Conflicts of Directives

The increasing number of rules from secondary European law that affect private law calls urgently for a specific private international law. This is particularly significant in relation to the spatial sphere of application of directives. Some directives, particularly in the field of consumer protection, include specific rules on spatial delimitation,[29] however most disregard this aspect. One reason justifying the absence of rules in this sense, particularly in the case of regulations, can be found in the public or economic character of such rules and therefore courts arrange in advance the application of the law of the forum (*Gleichlauf*). Nevertheless, as J. Basedow has correctly pointed out, such a consequence is not available in private law matters, so it is not surprising that rules on spatial scope have appeared in consumer directives, a purely private matter.[30]

The absence of rules on spatial delimitation in secondary European law leads to an interpretation based on interests of the internal market, which may determine the application of a directive despite the application of the law of a third state as proper law of the contract. This was the exact interpretative task performed by the ECJ in the "Ingmar" judgment, related to Directive 86/653 (commercial agents).[31]

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[29] For example, Article 6.2 of Directive 93/13 (unfair terms), Article 12 of Directive 2008/122 (timesharing), Article 12.2 of Directive 97/7 (distance contracts) or Article 7.2 of Directive 1999/44 (sale and associated guarantees). For more details see especially MICHAELS R. and KAMANN H.G., "Grundlagen eines allgemeinen gemeinschaftlichen Richtlinienkollisionsrechts – «Amerikanisierung» des Gemeinschafts IPR?", in: *EWS* 2001, pp. 301-311.

[30] See BASEDOW J., "Europäisches Internationales Privatrecht", in: *NJW,* 1996, p. 1924.

[31] ECJ 9 November 2000 (C-381/98: *"Ingmar").* The litigation involved a British corporation (Ingmar) and a Californian firm (Eaton) in relation to a compensation claimed by Ingmar due to termination of a commercial agency contract. The contract included an express choice of Californian law. Ingmar claimed rights guaranteed by Articles 17 and 18 of the European Directive. The ECJ affirmed the binding character, as mandatory rules, of the Directive's provisions (paragraphs 21-22) and its relation with the freedom of services and the need to make the conditions of competition within the Community uniform and to increase the security of commercial transactions (paragraph 24)[31]. That is why ECJ states the application of the Directive and construes a principle of spatial delimitation that implies the application of such a Directive "where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country" (paragraph 26). In the opinion of FONT I SEGURA A., mandatory and extraterritorial nature of the Directive is rooted in public interests related to competition rules (public interests rules) rather than in interests in protecting commercial agents (protection rules); see "ECJ 9 November 2000 – C- 381/98- Ingmar GB Ltd. V. Eaton Leonard Technologies Inc.", in: *The European Legal Forum* 2001/02, pp. 178-179. See for an interesting critique of Ingmar

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In short, directives have a spatial sphere of application limited to situations connected with the internal market. Rules that establish this sphere of application in directives must also be transposed into internal legal orders: such adaptation is carried on through very different means and often incorrectly.[32] The main function of these rules is to delimit the application of European directives against the law of third states ("outward conflict rules" in the sense proposed by J. Basedow).[33] Conflict rules of the Rome I Regulation on consumer contracts might lead to the law of a third state. Rules on spatial delimitation in directives or the "Ingmar" doctrine endeavour to extend the application of mandatory rules of directives that protect consumers and agents against the eventual content of the applicable law. Such a protection typically seems to be available only in cases of choice of law of a third state, however questions will also arise if the law of a third state becomes applicable in the absence of choice.[34]

Although spatial application of a directive leads to affirmation of a generic principle of "interpretation according to the law of a third state", given that directives are not directly applicable it is necessary to implement a spatial criterion able to identify a national law whose internal law adapted to a directive will be put before the law of a third state. This question will also arise in intra-European cases if there are two opposed national versions of the same directive. The intra-European private international law ("inward conflict rules")[35] may be used to identify

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decision as a limit of international party autonomy: VERHAGEN H.L.E., "The Tension between Party Autonomy and European Union Law: Some Observations on *Ingmar GB Ltd v Eaton Leonard Technologies Inc*", in: *I.C.L.Q.* 2002, pp. 135, 147-151. See about the different interests involved in the reflections of FREITAG R. and LEIBLE S., "Internationales Anwendungsbereich der Handelsvertretertichtlinie – Europäisches Handelsvertreterrecht Weltweit?", in: *RIW* 2001, pp. 291-293; MICHAELS R./ KAMANN H.G., "Grundlagen..." (note 29), 303-307. In relation with the Directive 89/104 (trade marks), ECJ 20 November 2001 – C-414 to 416/99: *Zino Davidoff SA v A & G Imports Ltd and Levi Strauss & Co. and Others v Tesco Stores Ltd and Others*) confirms in the same sense that "in so far as it falls to the Community legislature to determine the rights of a trade mark proprietor within the Member States of the Community it would be unacceptable on the basis of the law governing the contract for marketing outside the EEA to apply rules of law that have the effect of limiting the protection afforded to the proprietor of a trade mark by Articles 5(1) and 7(1) of the Directive".

[32] For example, ECJ 9 September 2004 — C-70/03: *Commission/Spain*). About problems of transposition of specific rules on spatial delimitation contents in consumer directives see FREITAG R. and LEIBLE S. "Von den Schwierigkeiten der Umsetzung Kollisionsrechtlicher Richtlinienbestimmungen", in: *ZIP* 1999, pp. 1296-1.301; ESTEBAN DE LA ROSA F., *La protección de los consumidores en el mercado interior europeo*, Granada 2003, pp. 153 *et seq.*

[33] See "EC Regulations on European Private Law", in: *Private Law in the International Arena – Liber Amicorum Kurt Siehr*, The Hague 2000, p. 29; ID., (note 30), pp. 1925-1926; ID., "Conflicto de leyes y armonización del Derecho privado material", in: *Anuario Español de Derecho Internacional Privado,* 2006, pp. 152-158.

[34] See R. MICHAELS R. and KAMANN H.G (note 29), p. 309.

[35] See "EC Regulations..." (note 33), p. 29; ID. (note 30), pp. 1925-1926.

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both the version of a directive under the applicable law of a Member State and the national law which takes care of filling any gaps derived from European rules. If the proper law of the contract is the law of a third state, as in the "Ingmar" case, the best approach would consist of applying the same connecting factor that justifies the mandatory character of European law. In the Ingmar case, English law that adapts the Directive on commercial agents would be taken into consideration as the law of distribution, regardless of whether it coincides with the *forum*. However, the trend in European law clearly points to a mere application of the *lex fori*.[36]

Pure intra-European cases are even more complex. Firstly, one may consider such delimitation unnecessary, given that European laws are harmonised. However, directives are not often implemented or accurately transposed into national legal orders and similar concerns therefore arise in a European country where the same directive has been correctly adapted.[37] At first sight, there is an analogy with cases of application of third states' law,[38] however the proposed solutions are not always available. One can imagine, in an intra-European case similar to "Ingmar", that the law of the country of distribution may not have implemented the commercial agents Directive. Then, the courts of the *forum* have to apply the rights included in the directive even against the law of the country of distribution. Obviously, they might first try to achieve an interpretation of this law according to the directive, but in cases where this were not possible they would apply the directive under the transposition in force in the *forum* on the grounds of public policy or of the overriding mandatory character of those rules.

If a directive has been correctly implemented by the law of a Member State whose law is applicable under conflict of laws rules, the principle explained above may only be used to identify the transposed version of the directive that must be applied. This is also significant due to the current possibility of a "minimum standard" directive that would permit a margin of oscillation among European national legal systems. Nevertheless, such cases are not without controversy, insofar as conflict rules, even European, might be affected by the concrete transposition of rules on spatial application of directives.

It is clear that the complexity introduced by these situations in the final determination of applicable law calls for a European private international law specifically designed to solve conflicts of laws in harmonised fields, beyond the current rules which are arguably characterised by their heterogeneity, unpredictability and the general difficulties in their application.[39]

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[36] See, for example, Article 12 of the Directive 2008/122 (timesharing).

[37] We are talking about the famous "Gran Canaria" cases, related to litigations which have arisen before German courts usually between German parties, due to consumer contracts negotiated in Spain (Canary Islands) away from business premises and submitted to Spanish law when the Directive 85/577 had not been duly transposed. On this question see MICHAELS R. and KAMANN H.G. (note 29), p. 302.

[38] See MAGNUS U., "Die Rom-I Verordnung", in: *IPRax*, 2010/1, pp. 27, 34.

[39] In this respect the expression "Americanisation" of European PIL seems appropriate: see MICHAELS R. and KAMANN H.G. (note 29), p. 311.

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B. Choice of Law in European Domestic Cases

Rules contained in directives generally appear as overriding mandatory rules in the sense of Article 9 of the Rome I Regulation, and their spatial delimitation determines the potential for European provisions to be applied (*Anwendungswille*).[40] However, the Rome I Regulation has introduced an element of confusion in this otherwise reasonable system.[41]

Unlike the Rome Convention, the Rome I Regulation introduces in Article 3.4 a limit to choice of law "where all other elements relevant to the situation at the time of the choice are located in one or more Member States" (including Denmark notwithstanding the fact that it did not take part in the adoption of the Regulation (Article 1.4)).[42] In these cases, parties' choice of the law of a third State shall not prejudice the application of mere mandatory rules (which cannot be derogated from by any agreement) of European law implemented in the Member State of the *forum.* The notion of "mandatory rules" also covers any imperative rule irrespective of its overriding character (in the sense of Article 9 of the "Rome I" Regulation).[43] In any case, such a distinction hardly seems functional in the case of directives.[44]

Moreover, the provision is unnecessary[45] and incomplete. Firstly, secondary European law introduces mandatory rules whose sphere of spatial application extends even where there is just one connecting factor with the European territory

[40] Under some opinions, characterisation of these provisions as overriding mandatory rules in the sense of Article 9 of the Rome I Regulation is incorrect, insofar as this Article only considers rules that protect public interests such as those related to competition law, but not rules that protect private interests such as those related to consumers or commercial agents: see below note 64 and MICHAELS R. and KAMANN H.G. (note 29), p. 309.

[41] FREITAG R. and LEIBLE S. had already pointed out that an analogy with the old Article 3.3 of the Rome Convention was not suitable, given that this Article sought to establish a limit on conflict-of-laws autonomy through the binding application of mere internal mandatory rules, but had nothing to do with the scope of overriding mandatory rules: see note 31, p. 290; MICHAELS R. and KAMANN H.G. (note 29), p. 311.

[42] See LEIBLE S. (note 8) p. 534; MAGNUS U. (note 38), p. 34. By analogy, the concept should include the states from the European Economic Space (Norway, Iceland and Liechtenstein) insofar as they are submitted to the application of rules on internal market and to the European "acquis" (see HEISS H., "Party Autonomy", in: *Rome I Regulation (The Law Applicable to Contractual Obligations in Europe)* eds. Ferrari F. and Leible S., Berlin/New York 2009, pp. 6-7).

[43] Such large extent has been criticized: see JACQUET J.M. (note 11), p. 743-745.

[44] See FORNER DELAYGUA J.J., "La ley aplicable a los contratos internacionales", in: *Derecho contractual europeo (Problemática, propuestas y perspectivas)*, Barcelona 2009, p. 64; GARCIMARTÍN ALFÉREZ F.J. (note 13) § III.

[45] Especially if eviction of fraud is the main aim of this prevision (see FRANCQ S., "Le règlement «Rome I» sur la loi applicable aux obligations contractuelles", in: *Clunet* 2009, pp. 41, 55).

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(for example, distribution location in case of agency contracts):[46] as well as being applicable regardless of the fact that the contract was submitted to the law of a third state by the choice of the parties (Article 3) or in the absence of that choice (Article 4). Thus, in the "Ingmar" judgement Californian law as chosen by the parties did not impede the application of European provisions that protect interests of commercial agents in cases of termination of contract, given that there was a close connection with the European territory where the commercial distribution was located, notwithstanding that not all relevant elements were located in the European territory. Furthermore such eviction of Californian law would also be effective if the agent was resident in the USA and the Californian law was applicable in the absence of choice (under Article 4 of the "Rome I" Regulation). Therefore, Article 3.4 may not be used to justify the application of European provisions whenever the law of a third state is applicable in the absence of choice or all relevant elements are not located within European Union.

The Rome Convention facilitated the submission of all cases to Article 7 and facilitated the application of derived European law provisions as overriding mandatory rules from the *forum* as well as from another Member State.[47] Currently, given the fact that the application of overriding mandatory rules is limited to the country of performance (Article 9.3), the application of European overriding mandatory rules in cases not foreseen by Article 3.4 will be possible only as *lex fori* (Article 9.2). Consequently, European provisions (both in Article 3.4 and in Article 9)[48] shall be applied as *lex fori* to any situation completely or partially connected with the European territory. It is not, in any case, an ideal answer. Most European mandatory rules on contracts lie in directives which are implemented in different ways by different Member States. Given that the duty to apply European law is based on specific spatial criteria (location of immovable property, location of distribution, etc.), the more logical approach consists of applying the implemented version of the directive by the law corresponding to such a connecting factor or by the European law applicable in the absence of choice,[49] but never by the *lex fori* as the first or sole option.[50] The approach proposed was perfectly feasible under the

[46] See in this sense HARRIS J., "Mandatory Rules and Public Policy under the Rome I Regulation", *Rome I Regulation (The Law Applicable to Contractual Obligations in Europe),* eds. FERRARI F. and LEIBLE S., Berlin/New York 2009, pp. 340-341. The Commission Proposal of December 2005 seemed more reasonable, as it just considered a close connection with the European territory.

[47] As originally proposed Article 8 of the Rome I Regulation (see LEIBLE S., "La Propuesta para un Reglamento «Roma I»", *Anuario Español de Derecho Internacional Privado* 2006, p. 556).

[48] See FORNER DELAYGUA J.J. (note 43), p. 66.

[49] See in this sense MANKOWSKI P., "Die Rom I-Verordnung", in: *Zeitschrift für Europarecht* 2009, 13; LEIBLE S. and LEHMANN M., "Die Verordnung über das auf vertragliche Shuldverhältnisse anzuwendende Recht.", in: *RIW* 2008, p. 534; Heiss H. (note 41), p. 5; GARCIMARTÍN ALFÉREZ F.J. (note 13), § III.

[50] See also the arguments that highlight a residual *forum-shopping* effect: D'AVOUT L., "Le sort des règles impératives dans le règlement Rome I", *D.* 2008, pp. 2165, 2167;

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old Article 7 of the Rome Convention, however it is not feasible today, at least in any case arising under Articles 3.4 and 9 of the "Rome I" Regulation. Moreover the direct application of the law of the *forum* is also a clear trend in most recent directives (Article 12 of timeshare Directive).

In fact, the only reason that justifies the application of mere internal mandatory rules of a state, is the connection of all relevant elements of a contract with that particular state. This is the restrictive function of the *lex contractus* in a wide sense (Article 3.3). However, such restrictive function of the *lex contractus* is contradicted in international trade, where must be restricted to the role of overriding mandatory rules. Do European transactions belong to a *tertium genus*? Apparently, they do not. There is not, properly speaking, a European *lex contractus* when all relevant elements of a contract are connected with Member States. Directives are not directly applicable and national implementations are no more pure. Furthermore, provision contents in directives can be qualified as overriding mandatory rules, often relatively (minimum standard directives), depending on their own spatial sphere of application (*Anwendungswille)*. Consequently, the most suitable source for their imperative application must be found in a rule like Article 7 of the Rome Convention (or Article 9 of the "Rome I" Regulation). What remains to be seen is whether the reform of this legal regime contributes to a reasonable answer to this problem (paragraph V below).

IV. Tacit Choice: A Vicious Circle

Choice of applicable law may be tacit where it can be clearly demonstrated by the terms of the contract or the circumstances of the case. The "Rome I" Regulation has opted for a criterion based on a real choice, that is on a true will of the parties independent of any presumption or objective determination.[51] Judges must therefore deduce from the contract and from its context the real, albeit potentially implicit, will of the parties on the applicable law. It is apparent that this criterion is restrictive. The use of standardised contracts or concrete language, despite what is suggested by the Rome Convention Report, cannot be considered a sufficient sign of an implied choice of the law of the state or market where the origin of such a contract or language can be found, particularly when the standardised contract envisages the possibility of a choice of law which has deliberately not been included by the parties. Conclusive signs of real will are required; this is why

GARCIMARTÍN ALFÉREZ F.J. (note 13), § III; ANCEL M.E., "Le règlement Rome I, nouvelle pièce du système communautaire de droit international privé", in: *Revue Droit Civil*, 10-2008, 53-1, pp.1, 4. A contrary opinion in LAGARDE P. and TENENBAUM A., "De la convention de Rome au règlement Rome I", *Rev. crit. dr. int. pr.* 2008, pp. 727, 737).

[51] See MARTINY D., "Vor Art.1-Art. 9 Anh. III Rom-I VO", in: *Münchener Kommentar zum Bürgerliches Gesetzbuch. Internationales Privatrecht*, 5th ed., München 2010, p. 479.

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courts must evaluate and weigh up, albeit in a flexible manner, strikingly different circumstances and variables as well as combinations, since an isolated presence of one circumstance rarely allows such will to be deduced.

Amongst relevant circumstances within the contract, one can underline language, typology, choice-of-forum clauses (Recital 12 of the "Rome I" Regulation), explicit and implicit references to a national law and to concepts that characterise a legal system. Most significant surrounding or contextual circumstances are related to the parties' behaviour during negotiations and performance and to particular usages derived from previous relationships between the parties. Procedural behaviour is paramount.[52] The absence of any debate about the applicable law between plaintiff and defendant is a definitive sign of a litigation that revolves around a law accepted by both parties. As a matter of fact, the flexibility about the time of the choice of law derived from Article 3.2 of the "Rome I" Regulation compels the judge to accept the law deduced from the procedural debate as the law chosen by the parties. In other words, a judge shall apply the law cited by the parties during the procedure whenever it is coincident and not contested.

The difficulties and divergences to determining a tacit choice are well known, as the case-law about Article 3 in various countries evidences.[53] Certain differences have arisen from the linguistic versions of the Rome Convention, and some efforts in this regard[54] have improved the linguistic harmonisation.[55] Nevertheless, the induction of a tacit will derived from subjective and objective, internal and contextual contractual signs invariably generates a vicious circle. The use in a contract of idiosyncratic terminology or definite language, the determination of the *forum* or the arbitration seat,[56] the previous or subsequent parties' behaviour, the reference to general standards terms, etc., can be taken into account to deduce the existence of a parties' tacit will related to an applicable law. However,

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[52] See MARTINY D. (note 51), p. 482.

[53] See the English and comparative case-law analysis by PLENDER R. and WILDERSPRIN M., *The European Contracts Convention: The Rome Convention on the Law Applicable to Contractual Obligations*, 2nd ed., London 2001, pp. 92-100.

[54] Especially from the European Parliament: see WAGNER R., "Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendabre Recht (Rom I-Verordnung): Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung", in: *IPRax* 2008, pp. 377, 379; MARTINY D., "Europäisches Internationales Vertragsrecht in Erwartung der Rom I-Verordnung", in: *ZEuP* 2008, pp. 79, 89.

[55] Definitive versions use expressions as "clearly demonstrated", "de façon certaine", "eindeutig", "de manera inequívoca", "chiaramente"…

[56] This circumstance is especially significant if an arbitration seat is located in London or in any other English place, insofar as English law tends to consider the choice of the seat in England as a powerful evidence of a choice of English law as applicable on the merits, although this doctrine has been tempered of late. See *Tzortis and Another v. Monark Line A/B* (1968), 1 *All ER*, 949. By contrast see ICC Award nº. 5717/1988 *(ICC Bull.,* 1999, vol, 1, nº 2, p. 22).

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such a conclusion implies an interpretation or construction of the contract[57] which can lead to very different results depending on the inclination of the judge to consider purely objective or subjective, previous or subsequent signs.[58] To accomplish such a task, a certain prejudice or pre-understanding (*Vorverständnis*) anchored in a concrete legal system – generally the law of the *forum* that is not applicable to the merits – is necessary. Thus, the influence that the "parole evidence rule" still displays in *common law* countries, particularly under English law, allows us to foresee a wider consideration of objective contextual signs, minimising the parties' behaviour both prior and subsequent to conclusion. By contrast, the typical interpretation and understanding in civil countries allows subjective considerations to prevail over objective contextual signs.

Given that the *lex contractus* may be derived from interpretation of a tacit will, it is self-evident that the vicious circle will be solved by virtue of the interpretative criteria of the *lex fori* that will necessarily be divergent.[59] The varied casuistry will hardly be cleared by the ECJ judgments. In fact, some English doctrine becomes imbued with the procedural understanding suggested by the "parole evidence rule" and equates most aspects of contractual interpretation with a procedural characterisation and submission to the *lex fori* of, clearly submitted to the proper law of the contract under Article 10 of the Rome Convention (Article 12 of the "Rome I" Regulation).[60]

V. Overriding Mandatory Rules as a Counterweight of Choice of Law

A. Before the Courts

If the *lex contractus* chosen by the parties is to fulfil just an interpretative and supplementary function, it will be necessary to guarantee the application of overriding mandatory rules of any law closely connected with the contract. From this point of view, the role of international mandatory rules does not entail a restriction on pre-

[57] On different weight of subjective and objective context in the interpretation of contracts from a comparative point of view see SÁNCHEZ LORENZO S., "La interpretación del contrato", in: *Derecho contractual comparado (una perspectiva europea y transacional)*, Madrid 2009, pp. 458-462.

[58] To a large extent, this argument supports an accusation of "irrationality" in the tacit choice, particularly in international commercial arbitration (see LEW J.D.M., *Applicable Law in International Commercial Arbitration,* New York 1978, p. 183).

[59] See in this sense WILDERSPIN M., "Les perspectives d'une révision de la convention de Rome sur la loi applicable aux obligations contractuelles", in: *Les conflits de lois et le système juridique communautaire*, Paris 2004, pp. 173, 177.

[60] See FAWCETT J.J., HARRIS J.M. and BRIDGE M., *International Sale of Goods in the Conflict of Laws*, Oxford 2005, pp. 718-719.

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dictability or a detriment to party autonomy, but, on the contrary, an actual boost to these ends. It is important to note that an application of mandatory rules of the proper law of the contract as an alternative (restrictive function), even if it deals with the law of a Member State conditioned by the principle of mutual trust,[61] involves a wider restriction on party autonomy than an exceptional application of overriding mandatory rules of a third state. Furthermore, our proposal contains an underlying conflict-of-laws logic, insofar as the overriding mandatory rules of a third state must prove a close connection that often does not exist in the proper law if the *lex contractus* has been chosen by the parties,[62] nor in a *lex fori* determined by a choice-of-forum clause. The old Article 7 of the Rome Convention therefore seemed more reasonable in order to implement such an ideal system, in contrast to the new Article 9 of the Rome I Regulation,[63] the narrow scope of which is

[61] See in this sense DICKINSON A., "Third-Country Mandatory Rules and Contractual Obligations", in: *Journal of Private International Law* 2007, pp. 53, 60-61.

[62] This is why I do not share the opinion of most reputed scholars about the applicability of mandatory rules of the proper law of the contract. For example, BOGDAN M. says: "It is therefore somewhat problematic that Article 7(1) speaks explicitly only about overriding mandatory rules of countries other than that whose law applies to the contract, because this may lead to the rather absurd conclusion that overriding mandatory rules of public-law nature of third countries are given more effects than corresponding rules in the legal system governing the contract. Consequently there are, paradoxically, good reasons to extend the unfortunate Article 7(1) by analogy even to public-law provisions of the legal system which applies to the contract in accordance with the Convention's conflict rules" (see "Foreign Public Law and Article 7(1) of the Rome Convention: Some Reflections from Sweden", in: *Vers de nouveaux équilibres entre ordres juridiques (Liber Amicorum Hélène Gaudemet-Tallon)*, Paris 2008, pp. 671, 680-681). The premise is false, at least in cases of choice of law, because it is not at all absurd to apply an overriding mandatory rule of the place of performance or of the law of origin of a cultural good, and to omit at the same time the overriding mandatory rules on import authorisations or on cultural protection of the own cultural heritage of the proper law of the contract, if there is no connection with the contract (NEUHAUS P.H. nevertheless considered the application of the overriding mandatory rules of the *lex causae* "absurd": *Die Grundbegriffe des internationalen Privatrechts*, 2nd ed., Tübingen 1976, pp. 259-260*)*. The conclusion is therefore only relatively false. Such overriding mandatory rules of the proper law of the contract chosen by the parties will be applied in the same circumstances as those that allow the application of mandatory rules from third states, as has often been proposed especially within the German doctrine (see a good summary of the German doctrine in this regard in FREITAG R., "Einfach und international zwingende Normen", in: *Das Grünbuch zum Internationalen Vertragsrecht (Beiträge zur Fortentwicklung des Europäischen Kollisionsrechts der vertraglichen Schuldverhältnisse* (Stefan Leible Hrsg.), München 2004, pp. 167, 181-184).

[63] See a detailed exposition of the process of adoption of Article 9 in HELLNER M., "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?", in: *Journal of Private International Law* 2009, pp. 447, 451-455. See also the reflections of FREITAG R., "Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art. 9 Abs. 3 Rom I-VO", in: *IPRax* 2009, pp. 109, 110-111) and the analysis of Article 8 of the 2005 "Rome I" Proposal in TORN K., "Eingriffsnormen", in: *Ein neues internationales Vertragsrecht für Europa* (Ferrari/Leible Hrsg.), 2007, pp.129-149. For a critical analysis about objections related to Article 8.3 of such Proposal see DICKINSON A.

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attributable to the desire to incorporate the United Kingdom[64] and to satisfy the Member States who had reserved the application of Article 7 of the Rome Convention.[65]

Currently, in order to protect legal certainty and predictability, Article 9 of the "Rome I" Regulation specifically considers cases of application of overriding mandatory rules of the *forum* and those of the law where the obligations have to be performed, unlike Article 7 of the Rome Convention that allowed the application of mandatory rules of any law closely connected with the contract by means of an issue-by-issue approach.[66]

Mandatory rules of the *forum,* however, usually admit more or less explicit spatial criteria of application reflecting a form of self-limitation that reduces its application to cases related to national markets, interests or policies. Otherwise, mandatory rules are not always internal. In the framework of the European Union, one can easily find rules based on public interests (free competition, freedom of circulation of goods, services, capitals and persons…) and "protection" rules (employees, policy holders, consumers), whose consideration, given their spatial scope, is not only feasible, as Article 9 suggests, but binding.[67] In the sphere of

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(note 60), pp. 56-73; BOSCHIERO N., "«Norme inerogabili», «disposizioni imperative» nel diritto comunitario e «leggi di polizia» nella proposta di regolamento «Roma I»", in: *Il nuevo diritto europeo dei contratti: dalla Convenzione di Roma al Regolamento "Roma I",* Rome 2007, pp.101-128.

[64] It is clear that there is an underlying conflict of contract cultures between common and civil law in the legislative process towards Article 9 of the "Rome I" Regulation. It is hard to combine the common law liberal understanding of contract, anchored in subjective legal certainty and predictability, with a more social perspective that supports public instruments to control contracts, which characterizes civil law countries. While English doctrine distrusts the effects of Article 9 on legal certainty, civil lawyers consider this limit on legal certainty as a logical tribute to legitimate public interests. It is hardly surprising therefore that HARRIS J. could not conceive why legal certainty predominates in "Brussels I" (*Owusu)* but not in "Rome I" (note 45, pp. 288-289). For any civil lawyer, such difference seems logical, since subjective legal certainty (predetermination of the judge) is a more important principle in procedural than in substantive law, in both cases due to the same social understanding (on different roles and functions of party autonomy in Rome I compared to Brussels I see KUIPERS J.J. "Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice", *German Law Journal* 2009, pp.1505-1524).

[65] See the reflections of Harris J. note 45, pp. 269-271.

[66] See BONOMI A., "Mandatory Rules in Private International Law (The Quest for Uniformity of Decisions in a Global Environment)", in: this *Yearbook* 1999, pp. 215, 227. However, even in the USA it was submitted that the old Article 7.1 of the Rome Convention allowed an appropriate balance of certainty and discretion in the context of applying foreign mandatory rules (see "Article 7(1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules", *Harvard Law Review* 2001, pp. 2462, 2475-2476).

[67] There are many doubts in relation to the definition included in Article 9.1, especially with regard to the inclusion of "protection" mandatory rules. See for a general outlook on both opinions BONOMI, A., "Overriding Mandatory Provisions in the Rome I Regulation

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Article 9.2 (mandatory rules of the *forum*) national courts have to consider a double *lex fori*, as noted above.

Application of mandatory rules of third states was considered, as a mere possibility, in Article 7.1 of the Rome Convention, which was subject to reservation, under Article 22.1.a), by several Member States (Germany, Ireland, Luxembourg, Portugal, Slovenia, Latvia and the United Kingdom). Article 9.3 of the "Rome I" Regulation limits, to a considerable extent, the application of mandatory rules of third states, sending a hidden message to England and Ireland in order to facilitate their "opting in".[68] The English law doctrine and case-law are clearly present in the definitive version, which states that "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". Then, such a possibility[69] appears limited to the country of performance of contractual obligations (*lex loci solutionis)*, although there might be different performance locations and therefore several laws to be considered.

The first interpretative difficulty of Article 9.3 deals with the determination of the concept of the "place of performance". As in the field of jurisdiction rules, there is no European notion of "place of contract performance",[70] which is why doubt remains as to whether determination will depend on *lex contractus* or on the law of the third state whose mandatory rule wills to be applied (*lex loci solutionis)*.

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on the Law Applicable to Contracts", in: this *Yearbook* 2008, pp. 285, 291-295; CALVO CARAVACA A., "El Reglamento Roma I sobre la ley applicable a las obligaciones contractuales: cuestiones escogidas", in: *Cuadernos de Derecho Transnacional,* 2009, pp. 108-109; FREITAG R. (note 62), p. 112. Supporting the exclusion: KENFACK H., "Le règlement (CE) nº 593/2008 du 17 juin 2008 sur la loi applicable aux obligations contractuelles («Rome I»), navire stable aux instruments efficaces de navigation?", in: *Clunet* 2009, pp. 3, 37-38; GARCIMARTÍN ALFÉREZ F.J. (note 13), § IX). Delimitation of "protection" rules and "public interests" rules seems in any case utopian (notice, for instance, the mixture of public and private interests arisen in the *Ingmar* case) and finally it is ironic that the definition had been imported from the *Arblade* case, related to rules that protected employees; see in this sense HELLNER M. (note 62), pp. 458 *et seq.*; BONOMI A., *ibid.,* 294-295; ID., (note 7), p. 87; UBERTAZZI B., *Il regolamento Roma I sulla legge applicabile alle obbligazioni* contrattuali, Milan 2008, pp. 122-123.

[68] Certainly, doctrine on overriding mandatory rules in international trade and all related distinctions, often very complex, are closer to civil law tradition (see in this sense KEYES M., "Statutes, Choice of Law, and the Role of Forum Choice", in: *Journal of Private International Law* 2008, pp. 1, 5-10).

[69] Although there are also arguments to support a duty to apply these overriding mandatory rules except when they are contrary to public policy of the forum: see FREITAG R. (note 62), pp. 111-112.

[70] The use of criteria included in Article 5.1 of the "Brussels I" Regulation on services and sales contracts seems certainly inevitable: see HARRIS J. (note 45), p. 316; LEIBLE S. (note 8), p. 543; BONOMI, A. (note 67), p. 297.

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Moreover, it is not clear whether it deals with a legal or a less predictable factual notion of the place of performance.[71]

Secondly, the unique mandatory rules that might be applied are those that entail an unlawful performance, but not an unlawful contract or obligation. Such expression also raises a doubt as to whether the rules to be considered are those related to performance of contracts or whether those related to conclusion and content are also relevant, these latter having merely an indirect impact on performance. Likewise there is an interpretative uncertainty as to the sense of "unlawfulness" of performance.[72] In the narrowest sense, it suggests criminal consequences of contract performance. In a more acceptable intermediate sense,[73] it should include civil unlawfulness. However in a wider sense a simple nullity of inefficacity of contract may be considered.[74] This last extended interpretation might seem excessive and unjustified as an undue limitation of the natural sphere of application of the proper law of the contract.[75] In some cases, however, nullity of contract may mask a penalty or an evident mechanism for public control (for instance, absence of authorisation of an insurance company in the seat's country).

Finally, although most of cases will involve mandatory rules of the *lex loci solutionis*,[76] we need to ask ourselves whether it would be better to include a generic reference to any law closely connected with the contract.[77] For instance, the national law of the country where the provider is established may state the nullity of an insurance contract if the provider is not authorised regardless of the place of performance.[78] Such a rule may be easily characterised as a mandatory rule in the sense of Article 9 of the "Rome I" Regulation. In certain cases, its application may be required by the *lex contractus* determined in the absence of choice, under the ideal system proposed, however it will hardly be justified when parties have chosen any other law. On the whole, using European law as a reference, Article 9.3 seems unsuitable whenever a mandatory rule implies a justified restriction imposed by the *lex originis* instead of the law of destination (*lex loci solutionis)*.[79] Apart

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[71] See FREITAG R. (note 62), p. 114.

[72] The English version uses the expression "unlawful", quite different from "illegal". See BONOMI A. (note 67), p. 297.

[73] See HELLNER M. (note 62), pp. 461-462.

[74] In this sense, FREITAG R. considers more controversial the application of overriding mandatory rules that do not void contracts, but simply modify them, as is usual e.g. in the field of employment contracts (note 62, pp. 112-113).

[75] In this sense: HARRIS J. (note 45), p. 322.

[76] See FORNER I DELAYGUA J.J. (note 43), p. 66.

[77] The advantage of reducing, in this way, the risk of *forum shopping (*see BONOMI A., "Note – Article 7 (1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules", in: *Harvard Law Review* 2001, pp. 2474-2475) is contradicted especially by British authors and jurists, who predict a flight of cases from the City towards New York: see HARRIS J. (note 45), pp. 280-281.

[78] See also BONOMI A. (note 67), pp. 299-300.

[79] See, sharing this critique, FREITAG R. (note 62), p. 116.

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from the example cited above (lack of authorisation of a provider from the law of the establishment or residence), another case is the imperative consideration of export prohibition of a cultural good from the *lex originis* that is not unlawful in the place of delivery.[80] European law provides clear examples about peremptory incidence on contracts, even internal peremptory incidence, of mandatory rules of a country different to the country of performance.[81]

Furthermore, application of the *lex loci solutionis* does not adapt to negative obligations (i.e. an obligation not to do) as a duty of confidentiality, whose hypothetical place of performance may be universal. By contrast it is possible that the application of some mandatory rules limits the effects of confidentiality clauses insofar as they excessively restrict commercial practices;[82] this is why the application of mandatory rules of the market involved seems the most appropriate approach in a field (competition law) characterised by the intervention of the laws of third states.

B. In Arbitral Proceedings

The advisability of rejecting the application of overriding mandatory rules of the proper law of the contract (or of the law applicable on the merits) in international commercial arbitration must be emphasised, insofar as such rules are incompatible with conditions and clauses agreed by the parties (restrictive function of the *lex contractus*). The statement that mandatory rules of the *lex causae* must be applied is highly clichéd,[83] nevertheless it is a more appropriate interpretation to party autonomy and as a principle of both contract law and arbitration actually leads to the opposite conclusion.[84] In cases of silence of the parties, it is natural to interpret that submission to a certain law applicable on the merits may not imply restrictions of contract clauses, which the parties have probably not foreseen.[85] This postulation

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[80] That happens usually in all cases of export prohibition: see Harris J. (note 45), p. 317.

[81] Thus, the determination by the law of the state of the opening proceedings of the effects of insolvency proceedings on current contracts to which the debtor is party: Article 4.2 e) of the Council Regulation (EC) No. 1346/2000 of 20 May 2000 on insolvency proceedings.

[82] As suggested by the commentaries on Article 2.1.16 of the UNIDROIT Principles.

[83] See for instance RACINE J.B., *L'arbitrage commercial international et l'ordre public*, Paris 1999, pp. 241-269. The analysis of arbitral awards in this study demonstrates a wide variety of points of view in this regard.

[84] See a critical but prudent approach in ARFADAZEH H., *Ordre public et arbitrage international à l'épreuve de la mondialisation*, Zürich 2006, pp. 250-254.

[85] As a matter of fact, the exception or exclusion of mandatory rules subsequent to the conclusion of a contract by some authors who support the application of mandatory rules of the proper law of the contract is very significant (e.g. DERAINS Y., "Les normes d'application immédiate dans la jurisprudence arbitrale internationale", in: *Le droit des relations économiques internationales (Études offertes à Bethold Goldman)*, Paris 1987, p.

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is valid not only in cases of mandatory rules based on public interests, but also in relation to rules which try to achieve a contractual balance between the parties.[86]

This obviously does not mean that a law closely connected with a contract, even coincident with the proper law of the contract, may not contain overriding mandatory rules whose consideration by arbitrators was grounded in both the laws overriding character and its close connection with the contract.[87] In any case, the reason for the laws application is not to do with the fact of being the *lex causae*.[88] It would be a characteristic example of the application of Article 7.1 of the Rome Convention or Article 9.3 of the "Rome I" Regulation.

Similarly, in the field of arbitration, mandatory rules of the *lex arbitri* (reflection of the *lex fori* in the sense of Articles 7.2 of the Rome Convention and 9.3 of the "Rome I" Regulation) must be obviated. Some legal orders, like Swiss law (Article 176.1 of the Private International Law Act), compel arbitrators to take into consideration its mandatory rules as the law of the arbitration seat, a stance which must be criticised. The role of the *lex arbitri*, the law of arbitration seat, becomes paramount in the sphere of an arbitral proceeding, where it will normally fulfil a supplementary and restrictive function. But such a role must not be extended to the merits. A very good example of this ideal system can be found in the reasons that justify setting aside an arbitral award under Article 9 of the Geneva Convention. Certainly, if the law of the country of the seat of arbitration considers the possibility of a request for setting aside, based on its own (not transnational) international public policy criteria, the arbitrators will probably take them into account (*Exportfähigkeit*).[89]

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37). Such exception demonstrates that the grounds of its application is not "conflict-of-laws autonomy" as happens in the field of jurisdiction, but it must be found in purely substantive reasons. It is not reasonable to admit a contradiction between an overriding mandatory rule, even prior to the conclusion of a contract, and an express condition included in the contract. Otherwise, the more logical postulate is that clearly restrictive mandatory rules might just be considered in cases of express inclusion and never on the ground of a presumed inclusion made by the parties by means of a mere choice-of-law clause.

[86] See especially RADICATI DI BROZOLO L.G., "Arbitrage commercial international et lois de police (considérations sur les conflits de juridictions dans le commerce international)", *Recueil des Cours*, t. 315, 2005, pp. 453-457. An example of such a trend can be found in ICC Award no. 5030/1992 *(Clunet* 1993, p. 1.004) or in ICC Award no. 8385/1995 *(Clunet,* 1997, p.1061).

[87] For recent support see SERAGLINI CH., *Lois de police et justice arbitrale internationale*, Paris 2001.

[88] Thus, ICC Award no. 12127/2003 (*Yearbook of Commercial Arbitration* 2008, pp. 82-101) proceeds to apply overriding mandatory rules on free competition in force in France, not on the grounds of French law as the law on the merits, but because there were European mandatory rules whose sphere of application depended on the effects of the market, which were France, and not the USA or Canada.

[89] This ability to be exported in cases of decisions pronounced in a certain seat justifies that some legal systems, like Swiss law, remain open to a consideration of mandatory rules of third states: see RADICATI DI BROZOLO L. (note 84), pp. 343-344.

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The application of mandatory rules means that arbitrators will take into consideration and will consider legitimate the binding character and the intervention of economic public policies or governmental interests from a state closely connected with the contract, especially from the country where the contract has to be performed. Applicable mandatory rules do not always derive from internal sources. Within the European Union, most economic public policies must be found in European rules, as with those on competition law.[90]

Consideration by arbitrators of overriding mandatory rules cannot be justified either in a principle of international harmony of decisions or in a requirement of *comity*.[91] Nor are these grounds convincing in the field of jurisdiction. Finally, the application of mandatory rules of the place of performance is due to a generally accepted system or principle, doubtlessly connected to the respect of sovereignty, which compels the parties to comply with some peremptory norms of the country where the contract must be performed related to competition, environment, healthcare, natural resources, etc.[92] However, such consideration by an arbitrator of such rules is rooted in a close territorial connection that makes application predictable, rather than in its public character.[93] Legal certainty and legitimate expectations justify the application of mandatory rules by arbitrators insofar as these rules are recognisable in the frame of principles that govern world trade.[94] It is even feasible and usual that the parties include some conditions and limits on efficacy of the contract related to the respect of some mandatory rules in compliance with a law other than the proper law of the contract. Such a reference in the contract is

[90] ECJ 23 March 1982 — 102/81: "*Nordsee*"; ECJ 1 June 1999 – C-126/9: "*ECO-Swiss*". See LIEBSCHER C., "European Public Policy", in: *Journ. Int. Arb.* 2000, pp. 73-88; HOCHSTRASSER D., "Choice of Law and Foreign Mandatory Rules in International Arbitration", in: *Journ. Int. Arb.* 1994, p. 85; VERBIST H., "The Application of European Community Law in ICC Arbitration", in: *Bull. CIA/CCI (Special Supplement: International Commercial Arbitration in Europe)* 1994, 33-58.

[91] In this sense BONOMI A. (note 7), p. 91. ID. (note 65), *passim*. For more details see CHONG A., "The Public Policy and Mandatory Rules of Third Countries in International Contracts", in: *Journal of Private International Law,* 2006, pp. 27, 37-38.

[92] See DERAINS Y., "Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international", in: *Travaux du comité français de droit international privé (1984-1985)*, Paris 1987, p. 86.

[93] See DERAINS Y., "Public Policy and the Law Applicable to the Dispute in International Arbitration", in: *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCE Congress Series 3 1987, p. 227. In this sense, the main "British" argument against Article 8.3 of the "Rome I" Proposal must be criticized, given that the application of overriding mandatory rules of third states, even other than the country of the place of performance, can be perfectly foreseen in current cases: see in this regard CHONG A. (note 89) pp. 45 *et seq.*

[94] Of course, there were approaches in favour of excluding the application of mandatory rules not expressly foreseen by the parties, and of setting aside therefore an award presumed *ultra vires,* but they are completely outdated: see in this sense GRIGERA NAÓN H., "Choice of Law Problems in International Commercial Arbitration", in: *Recueil des Cours*, t. 289, 2001, p. 186.

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obviously not essential for arbitrators to apply or consider a mandatory rule, but makes its application less flexible.[95]

On the other hand, it is self-evident that some political sanctions contrary to the principles of international trade (as the well-known *Torricelli* or *Helms Burton Acts*)[96] must not be considered by arbitrators irrespective of territorial links. A decision, like the judgment of Swiss Federal Court on 17th April 1990,[97] is also acceptable. This decision considered that prohibition of any intermediation under Algerian law implied a disproportionate restriction to party autonomy and free trade, even sharing the transnational public policy character of the fight against fraud and corruption. On the contrary, the antitrust legal regime of the affected market, the requirement of a governmental authorisation to exploit natural resources or an environmental permit to perform a contract in a certain country must take part in the legal basis of an arbitral award that has to resolve, for instance, a claim for breach of contract.

It is clear that most legal systems, like France, are reluctant to take into account mandatory rules from third states, insofar as it may lead to an award distant from the parties' mandate. Indeed, application of mandatory rules from third states seems much more uncertain if the parties have chosen a different law to govern the contract. But an analysis of arbitral practice[98] actually demonstrates that consideration of state mandatory rules integrates a kind of general principle of comparative PIL.[99] The opinion in this sense of the ICC itself, acting as *amicus curiae* before the US Federal Court in the *Mitsubishi* case, is revealing.[100] However, it is more difficult to determine the conditions under which those mandatory rules will be considered by arbitrators. Basically, a state overriding mandatory rule must be compatible with the transnational public policy,[101] closely connected with such a state and based on generally accepted reasonable public interests. Furthermore, consideration of the concrete rules would have been reasonably expected by the parties.[102] Thus, irrespective of what the applicable law may be, the parties cannot

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[95] See RADICATI DI BROZOLO L. (note 84), pp. 452-453.

[96] See in this sense GAILLARD E., "Aspects philosophiques du droit de l'arbitrage international", in *Recueil des Cours*, t. 329, 2007, pp. 181-183.

[97] In: *Revue de l'arbitrage* 1993, p. 322.

[98] In relation with the arbitral practice within ICC see GRIGERA NAÓN H. (note 92), pp. 296-371.

[99] See such a conclusion in GRIGERA NAÓN H. (note 92), p. 327; RADICATI DI BROZOLO, L.G. (note 84), p. 440; SERAGLINI CH. (note 85), pp. 483 *et seq.*

[100] " … [T]here is a growing tendency of international arbitrators to take into account the antitrust laws and other mandatory legal rules expressing public policy enacted by a state that has a significant relationship to the facts of the case, even though that state's law does not govern the contract by virtue of the parties' choice or applicable conflict rules" ("*Mitsubishi Motors Corp. v. Soler Chrysler – Plymouth"*, 473 US 614).

[101] See LALIVE P., "Ordre public transnational (ou réellement international) et arbitrage international", in: *Revue de l'arbitrage* 1986, pp. 329-373.

[102] See DERAINS Y. (note 90), pp. 89-90.

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take advantage of the omission of public rules that regulate import of goods or authorisations in the place of performance.[103] Notwithstanding the proper law of the contract, a contract set to produce effects in a certain market generates a duty to respect the rules on free competition of the country where the affected market is located.

Obviously, the application of mandatory rules supersedes the applicable law chosen by the parties (also in the absence of that choice) regardless of its legal source (national or non-national law). It is significant that the UNIDROIT Principles, which are widely acknowledged to represent general principles of law or a codified *Lex Mercatoria*, clearly state their compatibility with state overriding mandatory rules.[104] Indeed, the Preamble considers such compatibility on the whole. Under Article 1.4 "[n]othing 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". In fact, this principle is self-evident beyond such a generic provision in several statements and commentaries in the text of Principles (e.g. Articles 1.1., 1.2, 1.3, 2.16, 6.1.11, 6.1.14, 7.2.4., 7.4.10, 9.11, 10.1). All these references are related not only to litigations before the courts, but are also useful in arbitral proceedings. If the UNIDROIT Principles are chosen by the parties, it is therefore clear that such application of overriding mandatory rules is expected in any case.

However, the potential to apply overriding mandatory rules does not exhaust all concerns. Firstly, it remains controversial if the arbitrators may proceed to apply such rules *ex officio* without these having been put forward by the parties. Many authors support such power, but an action to set aside due to an *ultra petita* award is also predictable and uncertain. Even more controversial is the application by arbitrators of overriding mandatory rules explicitly excluded in the contract. Some authors have proposed, in those cases, a renunciation by the arbitrators on the basis of the unlawful character of the arbitration agreement. This represents the most audacious support for the idea that an award that could be efficient and executed and, therefore, necessarily considers such mandatory rules, even at the risk of considering the arbitration mandate to have been exceeded.[105]

VI. Conclusion

The private international law system on contracts, whilst in accordance with party autonomy, efficiency, and even liberal notions, is not necessarily a system which

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[103] E.g. ICC Award no. 6500/1992 applies the mandatory rules on agency contracts of the place of performance, although the parties had not chosen the applicable law.

[104] See SÁNCHEZ LORENZO S., "La unificación del Derecho comercial internacional", *Globalización y comercio internacional*, Madrid 2005, pp. 244-246.

[105] See especially the reflections of RADICATI DI BROZOLO L.G. (note 84), pp. 476-481.

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limits the consideration of overriding mandatory rules of states involved. A wider respect of party autonomy is achieved by refusing a restrictive function to the law chosen by the parties; by giving a mere supplementary and interpretative function to that law and limiting the role of the state and international and institutional public interests involved in the restricted sphere of application of overriding mandatory rules. However, such an ideal system does not operate in harmony with a restrictive rule such as Article 9.3 of the Rome I Regulation. In conclusion, it seems that an appropriate balance of private and public interests is currently evasive both in conflict-of-laws and in the substantive sphere.

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