

OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL CONTRACTS DISPUTE RESOLUTION. A ROMANIAN PERSPECTIVE

NORMAS DE APLICACIÓN INMEDIATA EN LAS RESOLUCIONES EMITIDAS SOBRE LOS CONFLICTOS DERIVADOS DE LOS CONTRATOS COMERCIALES INTERNACIONALES. UNA PERSPECTIVA RUMANA

CARMEN TAMARA UNGUREANU

*Professor of International Commercial Law
Alexandru Ioan Cuza University, Iasi, Romania*

Recibido: 15.06.2020 / Aceptado: 01.07.2020

DOI: <https://doi.org/10.20318/cdt.2020.5630>

Abstract: The parties to an international commercial contract can choose the law applicable to their contract, as the party autonomy principle states. The choice is not unfettered, though, and could be inefficient if the chosen law violates public policy or if certain overriding mandatory rules intervene.

In the first part of this study we will try to clarify the terms used, those of *public policy* and *overriding mandatory rules*, by establishing their scope in the Romanian law as linked to the European Union law (I). In the second part, we will examine the usage of overriding mandatory rules and, tangentially, of public policy in disputes arisen from international commercial contracts, decided in national courts and in commercial arbitration. A few hypothetical cases in the context of certain mandatory rules enacted during the current pandemic will be shortly addressed, as well (II).

Keywords: overriding mandatory rules, public policy, international commercial contracts, international commercial arbitration, pandemic

Resumen: Las partes en un contrato comercial internacional pueden elegir la ley aplicable a su contrato, como lo establece el principio de autonomía de la parte. Sin embargo, la elección no se hace sin restricciones y podría ser ineficiente si la ley elegida viola el orden público o si intervienen ciertas normas de aplicación inmediata.

En la primera parte de este estudio, trataremos de aclarar los términos utilizados, los del orden público y de las normas de aplicación inmediata, estableciendo sus alcances en la ley rumana como vinculado al derecho de la Unión Europea (I). En la segunda parte, examinaremos el uso de las normas de aplicación inmediata y, tangencialmente, del orden público en disputas surgidas de contratos comerciales internacionales, decididas en tribunales nacionales y en arbitraje comercial. También se abordarán en breve algunos casos hipotéticos en el contexto de ciertas normas de aplicación inmediata promulgadas durante la pandemia actual (II).

Palabras clave: normas de aplicación inmediata, orden público, contratos comerciales internacionales, arbitraje comercial internacional, pandemia.

Summary: Introductory remarks. I. The notion, the regulation and the scope of public policy and overriding mandatory rules. 1. What does public policy mean in Romanian law (civil law and private international law)? 2. What are the overriding mandatory rules in Romanian and European

Union private international law? II. Overriding mandatory rules in international commercial contracts' dispute resolution. 1. The application of overriding mandatory rules by Romanian courts. 2. Overriding mandatory rules in international commercial arbitration. Final remarks.

Introductory remarks

1. A principle recognized by all modern legal systems¹ is that of party autonomy or of freedom of contract. At a national level, contracting parties may deviate from all the *waivable rules* (*jus dispositivum*) of the law of the State where the contract is concluded and performed, however with the obligation to comply with the mandatory rules². In international contracts the parties are allowed to agree on contractual clauses, amongst which, on the applicable law. But the recognition of party autonomy cannot be tantamount to "a license to legislate"³. This means that the freedom of contract is subject to limitations. In domestic contracts the parties are bound to observe *public policy* and *good morals* (art. 11 Romanian Civil Code)⁴. In international contracts, party autonomy is limited by *public policy* and *overriding mandatory rules*⁵. Whether party autonomy operates in civil law or in private international law/international commercial law, it is always recognized by national rules. Therefore, the parties are allowed by national/domestic norms to choose the applicable law, a law that may be denied if it violates public policy or if certain overriding mandatory provisions intervene. This way, the contractual parties may be faced with a lack of predictability as to the application of the chosen law. Moreover, at the time of the agreement on the contractual terms the law playing the role of *lex limitativa*⁶ is unknown or at least uncertain.

2. There are a few "candidates" for this role: the law of the state the chosen law belongs to (*lex contractus*), the law of the state that would have been applied if the parties had not chosen the law, the law of the competent authority to decide the dispute (*lex fori*)⁷. Is it possible that the law of the state of the arbitral tribunal's seat be the *lex limitativa*, as well? What about the law of the state where the recognition or enforcement of the arbitral award is sought?

3. We will first try to clarify the terms used, those of *public policy* and *overriding mandatory rules*, establishing their scope in Romanian law as linked to the European Union [*hereinafter EU*] law (I). In the second part, we will examine the usage of overriding mandatory rules and, tangentially, of public policy in disputes arisen from international commercial contracts, decided in national courts and in commercial arbitration (II).

I. The notion, the regulation and the scope of public policy and overriding mandatory rules

4. The notions of public policy and overriding mandatory rules, with a close connection between them, are characterized by a high degree of abstraction and imprecision and are difficult to define. While

¹ S. SYMEONIDES, "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple", Brooklyn Journal of International Law, 2014, vol. 39, no.3, p. 1128, available at: <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1004&context=bjil>, accessed 26.04.2020.

² J.-Y. CARLIER, *Autonomie de la volonté et statut personnel. Etude prospective de droit international privé*, Établissements Emile Bruylant, Brussels 1992, pp. 132-133; M. V. Jakota, *Drept internațional privat*, vol. II, Fundația „Chemarea” Publishing House, Iași, 1997, pp. 187-188.

³ S. SYMEONIDES, *op. cit.*, p. 1124.

⁴ Law no. 287/2009 regarding the Civil Code, published in Official Gazette of Romania, Part I, no. 511 24.07.2009, as subsequently amended and supplemented.

⁵ Limits on party autonomy could have their source in determining the law applicable through fraud, as well (fraudulent circumvention of the law). However, we will not address this issue here.

⁶ S. SYMEONIDES, "The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis", in F. FERRARI/ D. P. FERNÁNDEZ ARROYO (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance*, Edward Elgar Publishing, Cheltenham, UK, 2019, p. 132.

⁷ S. SYMEONIDES, "Party Autonomy..." *op. cit.*, p. 1130.

public policy can be addressed in both national law and private international law/international commercial law, overriding mandatory rules are specific only to the latter, meaning only to legal relations involving a conflict of laws. With the aim of analyzing the overriding mandatory provisions, the institution of public policy will first be clarified.

1. What does public policy mean in Romanian law (civil law and private international law)?

5. In Romanian civil law, the term of public policy is used in the Civil Code, however, without being defined. Art. 11 Civil Code reads: "One cannot derogate by conventions [...] from *the laws of public policy* [...]". In legal literature, it was considered that public policy consists of a cluster of mandatory provisions with the goal of defending fundamental values of a state, values that express the general interest of society, at a certain time and certain socio-political context⁸. Therefore, *the laws of public policy* are mandatory rules by which the general interest is protected. Going beyond the sphere of private interests, *the laws of public policy* protect the public interests of society.

6. All public policy rules are mandatory rules, but not all mandatory rules are public policy rules⁹. This means that the scope of mandatory rules is wider than that of public policy rules, the latter being a type of the former. The delineation criterion is the *nature of the interest protected* (public or private) by the mandatory rule¹⁰. Mandatory rules may also aim to protect private interests. The difference between public policy rules and mandatory rules protecting private interests consists in the sanction applied (in civil law) in case of their violation: absolute nullity, respectively, relative nullity.

7. According to another criterion, that of the prescribed conduct, legal rules can be mandatory (non-waivable/*jus cogens*) and waivable (*jus dispositivum*). Mandatory rules are those rules of law that cannot be derogated from by agreement. Under *Romanian civil law*, the contractual parties cannot derogate from mandatory rules, which include public policy rules and mandatory rules protecting private interests. However, they may deviate from waivable rules, which protect private interests.

8. In *Romanian private international law*/international commercial law, the meaning of public policy is even more abstract than in civil law, albeit defined. According to art. 2564(2) Civil Code, the public policy encompasses the fundamental principles of the Romanian law, of the EU law and the fundamental human rights. Public policy serves at refusing the application of the foreign law (chosen by the contractual parties or determined by conflict of law rules in the absence of choice) which is incompatible with it. It has been argued in the Romanian legal literature that public policy, both in civil law and in private international law, is based on national law; the only difference between them rests in the intensity they operate¹¹. Nevertheless, public policy performs different functions in civil law and in private international law. In civil law public policy limits contractual freedom, whilst in private international law it limits the application of foreign law or/and it may be used as grounds for refusing the enforcement/recognition of a judgement or arbitral award¹².

⁸ Ș. DEACONU, M. ENACHE, "Ordinea publică în dreptul românesc", in Ș. DEACONU, E. S. TANASESCU (eds.), In Honorem Ioan Muraru. *Despre Constituție în mileniul III*, Hamangiu Publishing House, Bucharest, 2019, p. 112.

⁹ C.T. UNGUREANU, *Drept civil. Partea generală. Persoanele*, 3rd Edition, Hamangiu Publishing House, Bucharest, 2016, p. 6

¹⁰ I. REGHINI, Ș. DIACONESCU, 'Dreptul civil. Norma de drept civil. Raportul juridic civil', p. 31, in I. REGHINI, Ș. DIACONESCU, P. VASILESCU, *Introducere în dreptul civil*, Hamangiu Publishing House, Bucharest, 2013.

¹¹ I. P. FILIPESCU, *Drept internațional privat.*, vol. I, Actami Publishing House, Bucharest, 1997, p. 138; I. MACOVEI, *Drept internațional privat, în reglementarea Noului Cod civil și de procedură civilă*, C.H. Beck Publishing House, Bucharest, 2011, p. 72.

¹² For example, art. 1097 lit. a) and art. 1125 Civil Procedure Code (Law no. 134/2010 regarding the Civil Procedure Code, republished in Official Gazette of Romania, Part I, no. 247, 10.04.2015, as subsequently amended and supplemented).

2. What are the overriding mandatory rules in Romanian and European Union private international law?

9. There is a close connection between public policy in private international law/international commercial law and overriding mandatory rules. Overriding mandatory rules are a specific form of public policy¹³. *The main difference between them is not the content, but the way they operate*. Overriding mandatory rules are provisions that apply *directly* to certain situations, without involving negative/critical assessments regarding the chosen law; their effect is “repellant”: the chosen law is refused without having its content analyzed. Public policy is a negative way, implying the *non-application* of the chosen law, in whole or in part, if it contravenes the public policy of the forum; this time, the refusal is based on the content of the chosen law.

10. Another difference between the overriding mandatory rules and public policy is that the court called upon to decide may apply its own overriding mandatory rules or, under certain restrictive conditions, foreign overriding mandatory rules, but never foreign public policy. If the court refuses to apply a foreign law on the grounds of public policy, it will apply its own law instead (*lex fori*)¹⁴. Also, the issue of overriding mandatory rules rises only when determining the applicable law to the merits of the dispute, whilst public policy could be invoked both at the moment of determining the applicable law and at the recognition/enforcement of the judgment/arbitral award procedures before a foreign authority.

11. According to art. 2566 Romanian Civil Code¹⁵, *overriding mandatory rules are the mandatory rules* of either the forum or, under certain conditions, of a foreign state. It seems that in Romanian law overriding mandatory rules have an excessively broad meaning. As already mentioned, mandatory rules can be both public policy rules and mandatory rules protecting private interests. Under Romanian law every mandatory rule is seen as an overriding mandatory rule.

12. Quite to the contrary, in the Rome I Regulation¹⁶, directly applicable in Romania, as mentioned in art. 9, not all mandatory rules are overriding mandatory ones, but only those “the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization”; *per a contrario*, under EU law the rules protecting the *private interests* of a contracting party (for example, in case of imbalance between the franchisor and the franchisee’s

¹³ G.VAN CALSTER, *European Private International Law*, Second dition, Hart Publishing, Oxford, 2016, p. 229. In some legal systems, such as the English one, until the Rome Convention, public policy was the only institution applicable if the law of the contract deviated from the English law; see, J. HARRIS, “Mandatory Rules and Public Policy under the Rome I Regulation”, pp. 297-298, in F. FERRARI/ S. LEIBLE (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Sellier, European Law Publishers, Germany, 2009.

¹⁴ See art. 2564 of Romanian Civil Code [“Refusal of foreign law application. (1) The application of the foreign law is refused if it violates the public policy of Romanian private international law or if the foreign law has become competent by fraudulent circumvention of the Romanian law. In case the application of the foreign law is refused, the Romanian law is applied instead. (2) The application of the foreign law violates the public policy of Romanian private international law insofar as it would lead to a result incompatible with the fundamental principles of the Romanian law or of the law of the European Union and with the fundamental human rights.”] and art. 21 (Public policy of the forum) of the Rome I Regulation: „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.”[Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union, L 177, 4.7.2008].

¹⁵ Art. 2566 Romanian Civil Code, with the title *Overriding mandatory rules* reads: “(1) The mandatory provisions provided by the Romanian law for legal relations involving a foreign element are applicable with priority. In this case, the provisions of this book (Book VII "Provisions of private international law" - n.n., C.T.U.) regarding the determination of the applicable law are not incidental. (2) The mandatory provisions provided by the law of another state for legal relations involving a foreign element may also be applied directly, if the legal relationship is closely related to the law of that state and the legitimate interests of the parties impose it. In this case, the object and purpose of these provisions shall be taken into account, as well as the consequences arising from their application or non-application. ”.

¹⁶ Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union, L 177, 4.7.2008.

rights and obligations) are not part of the overriding mandatory rules. A fairly clear distinction is made in Rome I Regulation between rules that cannot be derogated from by convention, meaning (*ordinary mandatory rules*) and *overriding mandatory rules*, which should apply *in exceptional circumstances* and should be interpreted more *restrictively*¹⁷.

13. Although the distinction is clear, the characterization of a rule as an overriding mandatory one is difficult and rests with the authority called upon to decide (national court or arbitral tribunal, in some cases), which assesses, almost discretionary, on a case-by-case basis. Even in the less common cases, when certain provisions are characterized by their enactment as overriding mandatory rules, the court/arbitral tribunal will assess whether they meet all the conditions to be considered overriding mandatory rules.

14. Significant differences between Romanian law and EU law also exist regarding the foreign overriding mandatory rules. According to art. 2566(2) Romanian Civil Code, “The mandatory provisions provided by the law of another state for legal relations involving a foreign element may also be applied directly, if the legal relationship is *closely related* to the law of that state and the *legitimate interests of the parties* impose it. In this case, the *object and purpose* of these provisions shall be taken into account, as well as *the consequences arising from their application or non-application*.”. This provision seems to be a version of art. 7.1 of 1980 Rome Convention on the law applicable to contractual obligations¹⁸, the precursor of Rome I Regulation. However, in the Rome I Regulation the application of a foreign overriding mandatory rule is much more restricted, being limited to 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.”.

15. The application of foreign overriding mandatory rules raises difficulties for national courts and/or arbitral tribunals so as to determining whether certain mandatory rules of a foreign state are considered overriding in the state they belong to. In order to do so, the court/arbitral tribunal applies its own rules on the information and interpretation of foreign law¹⁹.

II. Overriding mandatory rules in international commercial contracts` dispute resolution

16. First, the delineation between Romanian overriding mandatory rules and EU overriding mandatory rules should be addressed. If a Romanian national court is called upon to decide on a dispute regarding an international commercial contract, which rules will apply: the Romanian ones (the provisions of the Civil Code) or the European ones (the provisions of the Rome I Regulation)?

¹⁷ Recital 37 of Rome I Regulation. For details, see, F. J. GARCIMARTÍN ALFÉREZ, “The Rome I Regulation: Much ado about nothing?”, *The European Legal Forum* (E) 2-2008, pp. 76-77; N. C. ANITEL, *Normele de aplicație imediată în dreptul internațional privat român conform dispozițiilor Codului civil și ale reglementărilor europene în domeniu*, *Moldavian Journal of International Law and International Relations*, vol. 37, no. 3/ 2015, pp. 40-42.

¹⁸ 1980 Rome Convention on the law applicable to contractual obligations, *Official Journal of the European Communities*, C 27/36, 26. 1. 98, art. 7.1: “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.”.

¹⁹ For details, C.T. UNGUREANU, *Dreptul comerțului internațional*, Hamangiu Publishing House, Bucharest, 2018, pp. 382-384; *European Convention on Information on Foreign Law*, London, 1968, available at : <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680072314> (Romania became a party to the Convention through H.G. no. 153/1991 on Romania's accession to the European Convention on Information on Foreign Law, signed in London on June 7, 1968, and to the Additional Protocol to the Convention, signed in Strasbourg on March 15, 1978, published in the *Official Gazette of Romania*, Part I, no. 63 bis, 26.03.1991).

17. Usually, the contractual parties to an international commercial agreement choose both the applicable law and the competent authority for deciding any dispute that may arise during the performance of the contract. Nevertheless, it is possible that the chosen law be refused if it violates public order or if certain overriding mandatory rules intervene. We will analyze only the latter, as a limitation of party autonomy, with brief references to public policy whenever necessary, trying to answer the questions addressed at the beginning of this paper on *lex limitativa*.

1. The application of overriding mandatory rules by Romanian courts

18. Although the competent court and the applicable law are different issues, the first related to jurisdiction and the second to determining the law applicable to the merits of the dispute, the applicable law depends on the competent court (at least on the matter of overriding mandatory rules). Thus, when the contractual parties have chosen a court and that court has its seat in Romania, it will be bound by the EU regulations on contracts, more precisely by the Brussels I²⁰ and Rome I regulations.

19. Regarding the governing law of the contract, in Romania, as an EU member state, the Rome I Regulation is applicable. National courts must apply it directly. Thus, art. 2640 Romanian Civil Code stipulates that the law applicable to contractual obligations is determined according to the regulations of EU law, and in matters not covered by EU regulations, the provisions of the Civil Code on the law applicable to the legal acts are given effect. According to the Romanian Civil Code, the applicable law is the law chosen by the parties [art. 2637(1)]. According to EU law, "The contract is governed by the law chosen by the parties" [art. 3 (1) Rome I Regulation].

20. Neither art. 3(1) in Rome I Regulation, nor art. 2637(1) of the Romanian Civil Code specify that any connection between the chosen law and the contract should exist. The parties may choose any law that best suits their common interests, without justifying the reasons for its choice. Rome I Regulation is applicable even when the parties have chosen the law of a third country (non EU member state), because the regulation has a so-called universal application. This freedom of choice is directly connected with the interests of international trade²¹.

21. Therefore, irrespective of the law chosen by the contracting parties, if a Romanian court is seized, the court will apply the Rome I Regulation. The Regulation still applies if the contracting parties have their seats/or are incorporated in states outside the EU or if the international commercial contract was concluded and performed outside of the EU. The only condition required is that the competent court have its seat within the EU, for instance, in Romania²². The Romanian court will apply overriding mandatory rules, if that is the case, in the meaning given in art. 9 Rome I Regulation and not that of art. 2566 Romanian Civil Code. The overriding mandatory rules within the meaning of the Romanian Civil Code could be applied only in the case of disputes in areas not regulated at EU level.

22. To illustrate the practical use of overriding mandatory rules, a hypothetical situation will be envisaged, based on the provisions of Romanian Military Ordinance no. 8/2020 on prevention measures against the spread of COVID-19²³, which, in art. 7 and 8 prohibited/suspended the export of agro-food pro-

²⁰ Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in J.O. L 351, 20.12.2012.

²¹ P. STONE, *EU Private International Law*, Second edition, Edward Elgar Publishing, Cheltenham, 2010, p. 301.

²² "Regulation determines the law applicable *ad intra* and *ad extra*, that is, to «intra-Community cases» and to «extra-Community cases». Hence, for example, the Regulation even applies to a contract concluded and executed in a third country between two extra-Community firms which, for any conceivable reason, come to a Member State to litigate." (F. J. GARCIMARTÍN ALFÉREZ, *op.cit.*, p. 62.).

²³ Published in the Official Gazette of Romania, Part I, no. 301, 10.04.2020.

ducts (from an attached list), so as to in one week to repeal it, by Military Ordinance no. 9/2020 (art. 6)²⁴. If disputes arose between the contracting parties during the week of the ban or as a result of the ban, could the Romanian regulation be considered an overriding mandatory rule? Supposing that the dispute concerns liability for non-performance of contractual obligations by a Romanian exporter towards its contractual party from a third country, outside of the EU (call it X). The law applicable to the contract would be the law of the state X, as the contractual parties agreed. The competent court, according to the parties' agreement, would be a national court of an EU member state, Y. The court seized, having its seat in the EU, will apply EU regulations. The court could consider that, according to art. 9(3) Rome I Regulation, the mandatory prohibitive rules from the place of contract's performance (if the place of performance is in Romania) render the performance of the contract unlawful, so those rules should apply as overriding mandatory provisions. As a consequence, the chosen law (*lex contractus*) would be replaced by the foreign (Romanian) overriding mandatory rules. It should be noted though that the national court has a discretionary power in assessing the application or non-application of foreign overriding mandatory rules.

23. When rules enacted in a state are called overriding mandatory rules from their birth (which rarely happens), should they be considered as such by a national court settling a dispute concerning an international commercial contract, governed by a law chosen by the contractual parties? For example, among the urgent legislative measures adopted in Greece²⁵ on 13 April 2020²⁶ one concerns international tourism service contracts concluded between tourism companies. According to art. 71, the law applicable to the reimbursement of payments made under contracts concluded between professionals and terminated between 25.02.2020 and 30.09.2020, is the Greek law, irrespective of the law chosen by the parties as applicable to their contract. The payments made are not to be reimbursed, but vouchers valid for a period of 18 months from the date of their issuance are issued. If, by the end of this period, no new contracts are concluded between the tourism companies, in order for the issued vouchers to be used, the company that issued them is bound to return the creditor the monetary value of those vouchers. It is also specified that the provisions of art. 71 shall apply on the condition that the rights referred to in the text are provided for by European law.

24. In this situation should the Greek provisions be considered overriding mandatory rules? EU laws on consumer protection could collide with Greek rules. Art. 12 of Directive (EU) no. 2015/2302 on package travel and linked travel arrangements²⁷, dealing with the termination of the package travel contract and the right of withdrawal before the start of the package, reads: "3. The organiser may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package, but shall not be liable for additional compensation, if: [...] (b) the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.". Art. 71 of the Greek law in question is not applicable, however, to consumer contracts (B2C)²⁸, concluded between tourism companies and consumers of tourist services, but between professionals, tourism companies (B2B)²⁹. Although, seemingly, the Greek law does not impinge the EU law, it indirectly affects consumers; tourism companies, which receive vouchers instead of refunds, are unable to comply with the obligation of reimbursement towards consumers.

²⁴ Published in the Official Gazette of Romania, Part I, no. 321, 16.04.2020.

²⁵ Italy also adopted various measures, which were called overriding mandatory rules. See, E. PIOVESANI, available at: <https://conflictoflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/>, accessed 20.04.2020.

²⁶ Government Journal (ΕΦΗΜΕΡΙΔΑ ΤΗΣ ΚΥΒΕΡΝΗΣΕΩΣ) Α' 84/13.04.2020, p. 1390.

²⁷ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, published in J.O. L 326, 11.12.2015.

²⁸ B2C stands for business to consumer.

²⁹ B2B stands for business to business.

25. In case of a dispute arising out of the Greek provisions, if the competent court is a Greek one, it is obvious that the mandatory rules of the forum will be applied, regardless of *lex contractus*. If the competent court is not a Greek court, but one located in another EU member state, the application of Greek rules as foreign overriding mandatory rules, will be scrutinized, according to art. 9(3) Rome I Regulation. To that end, the court will have to determine whether the contractual obligations were to be performed in Greece and whether, under Greek law, the performance of the contract would have been unlawful. Even if these conditions were to be met, the court may refuse their application, as art. 9(3) gives *the possibility* of application without imposing it. The seized court could consider the Greek provisions exorbitant³⁰. If the court called upon to decide is located outside of the EU, the significance of the Greek provisions and their impact on the settlement of the dispute will be assessed according to its own rules (*lex fori*).

2. Overriding mandatory rules in international commercial arbitration

26. Are the arbitrators in international commercial arbitration³¹ bound to apply the overriding mandatory rules of the seat of arbitration? What about foreign overriding mandatory rules?

27. International commercial arbitration relies on an international or transnational legal framework. Arbitration is considered to have an international commercial character when it settles a dispute between professionals, having a patrimonial subject matter³², which is related to at least two legal orders or, in other words, if the commercial relationship has a foreign element³³.

28. In international commercial arbitration, the issue of overriding mandatory rules is controversial. It was said³⁴ that a conflict between the will of the state that enacted the mandatory rules and the will of the parties the arbitrators' power is granted arises. The arbitrators should settle this conflict by taking into account all circumstances and thus ensuring a balance by applying the overriding mandatory rules³⁵.

29. Along the same line of thought there is the so-called *jurisdictional theory* of international commercial arbitration³⁶, according to which arbitration cannot exist in a legal vacuum; international arbitration is as international as private international law, meaning that both are national, in the strict

³⁰ J. HARRIS, *op. cit.*, p. 297 („Of course, the fact that a foreign law decrees that its rules are to apply regardless of the governing law clearly cannot be conclusive of the question of whether its law is to be applied in the courts of a foreign state. Some foreign legislation might be considered by the courts of the forum to be exorbitant in its scope; and it is difficult to see how the courts of the forum can avoid making some form of value judgment that there is insufficient justification for applying that foreign law in the courts of the forum. Otherwise, the more exorbitant foreign rules might be in purporting to apply regardless of the governing law of the contract, the more they would fall to be applied around the world.”).

³¹ We will not analyze here the issue of the overriding mandatory rules in international investment arbitration, ie in the case of disputes between a foreign investor and the host state.

³² P. FOUCARD, Part I, „Definitions and sources”, in E. GAILLARD/ J. SAVAGE (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, Haga/Londra/Boston, 1999, pp. 35 and the following.

³³ See art. 1110 (1) Civil Procedure Code.

³⁴ P. MAYER, „Mandatory Rules of Law in International Arbitration”, apud. A.K.A. GREENAWALT, „Does International Arbitration Need a Mandatory Rules Method?”, *The American Review of International Arbitration*, vol. 18/2007, p.103, available at: <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1820&context=lawfaculty>, accessed 22.04.2020.

³⁵ A.K.A. GREENAWALT, *op. cit.*, pp.103-110.

³⁶ F. A. MANN, „Lex Facit Arbitrum”, in P. SANDERS (ed.), *International arbitration. Liber amicorum for Martin Domke*, The Hague, Nijhoff, 1967 (republished as “The UNCITRAL Model Law - Lex Facit Arbitrum”, *Arbitration International*, vol.2, no.3/1986), apud. H.-L. YU, “A theoretical overview of the foundations of international commercial arbitration”, *Contemporary Asia Arbitration Journal*, vol. 1, no. 2/2018, pp. 258-261, available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.2751&rep=rep1&type=pdf>, accessed 26.04.2020; Y.D. RAMPALL/ R. FEEHILY, “The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium”, *Harvard Negotiation Law Review*, vol. 23/2018, pp. 376 and the following, available at: <https://www.hnlr.org/wp-content/uploads/sites/22/The-Sanctity-of-Party-Autonomy-and.pdf>, accessed 26.04.2020.

sense, belonging to a certain legal system; their internationality is given only by the foreign element(s). In this context, the law of the place of arbitration (*lex loci arbitri*) plays the role of the law of the national court (*lex fori*). In arbitration proceedings arbitrators must act according to the parties' agreement, but within the limits imposed by the law of the place of arbitration, including the overriding mandatory rules and public policy. Ignoring them could result in a vulnerable arbitral award, that might be set aside by a court at the place of arbitration or whose recognition/enforcement might be refused.

30. In legal literature it has also been appreciated that arbitration always takes place in the shadow of judicial control, which a party may request in a national court³⁷. The "supervision" of national courts at the place of arbitration is based, *inter alia*, on the fact that the *power of arbitrators* to act has as its source, beyond the will of the parties, the *recognition* by the state at the place of arbitration. The party autonomy itself is based on a national law which determines the conditions and limits of its exercise³⁸. The state control over arbitration is also confirmed by the New York Convention of 1958³⁹, which in art. V (2) lit. (a) provides that an arbitral award may not be recognized and enforced if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is *not capable of settlement by arbitration* under the law of that country and, as set out in art. V (2) lit. (b), the recognition or enforcement of the award may be refused on the grounds of violation of *public policy* of that country.

31. Other authors⁴⁰, supporters of the so-called *contractual theory*, consider that arbitration is based on party autonomy that the power granted to arbitrators to reach a decision on a dispute is based on the parties' agreement and that arbitration has no *forum* and therefore no *lex fori*. Arbitrators should apply overriding mandatory rules only when their non-application is contrary to international public policy⁴¹. In this case arbitrators would apply international public policy and not the overriding mandatory rules. The difficulty in this approach is to define the notion of international public policy and to establish its content⁴². For example, in the *Hilmarton* case⁴³, in an arbitration held in Geneva, the arbitrator applied foreign overriding mandatory rules (from the place of contract's performance), refusing the application of the Swiss law as chosen by the parties, and decided, on their basis, to annul the contract between the contracting parties; the arbitral award was set aside by a Swiss courts (from the place of arbitration) on the grounds that, under Swiss law, the contract was not void and that the reasons invoked for the annulment of the contract could not be considered as part of international public policy. International public policy should encompass, it was said, the fundamental principles of justice recognized by the international community, such as the condemnation of racial discrimination, corruption, drug trafficking, etc.⁴⁴

32. There are other theories, as well, in legal literature, one combining the jurisdictional theory with the contractual one, another in which it is argued that arbitration is an autonomous, supranational jurisdiction⁴⁵.

³⁷ A.K.A. GREENWALT, *op.cit.*, p. 105; J. ENGELMANN, *International Commercial Arbitration and the Commercial Agency Directive. A perspective from Law and Economics*, Springer International Publishing, ebook, 2017, pp. 144-145.

³⁸ E. GAILLARD, "Part IV The Arbitral Procedure", In E. GAILLARD, J. SAVAGE (eds.), *op.cit.*, p. 786.

³⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) [Romania acceded to the Convention by Decree no. 186/1961, published in B. Of. no. 19 of July 24, 1961], which applies in 163 states, available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed 22.04.2020)

⁴⁰ E. GAILLARD, *op. cit.*, pp. 850-861; H.-L. YU, *op. cit.*, pp. 265 and the following.

⁴¹ E. GAILLARD, *op. cit.*, p. 850.

⁴² *Ibidem*, p. 862.

⁴³ ICC case no. 6522/1988, analyzed by P. DOBIÁŠ, "The Recognition and Enforcement of Arbitral Awards Set Aside in the Country of Origin", Czech (& Central European) Yearbook of Arbitration, Vol. IX, 2019, pp. 6-8, available at: <https://ssrn.com/abstract=3408735> or <http://dx.doi.org/10.2139/ssrn.3408735>, accessed 26.04.2020 and by E. GAILLARD, *op. cit.*, pp. 854-855.

⁴⁴ E. GAILLARD, *op. cit.*, pp. 863-864.

⁴⁵ Y.D. RAMPALL/R. FEEHILY, *op. cit.* pp. 380-382.

33. Although the arbitration case law, as perceived in the legal literature⁴⁶, showed that arbitrators are reluctant to apply overriding mandatory rules, there have been awards showing that, in certain particular cases, overriding mandatory rules must be applied by arbitrators, in the interest of all those involved in the arbitration⁴⁷. One such a case is *Hilmarton*, which, as mentioned above, was settled by an arbitral award, annulled by the court at the place of arbitration. Subsequently, although annulled, the arbitral award was enforced in France, the French Court of Cassation holding that a foreign arbitral award is not incorporated in the legal system of the state of the place of arbitration and therefore subsists throughout annulment⁴⁸; its recognition is not contrary to international public policy⁴⁹.

34. It is difficult to take a categorical stance in this sensitive area. It seems that arbitrators must decide taking into consideration the final purpose pursued by the parties by initiating the arbitration proceedings, namely, the enforcement of the arbitral award. Every time overriding mandatory rules should be observed, either they are of the *place of arbitration* (so as to avoid the annulment of the arbitral award) or of the *place of enforcement* (so as to prevent the award from being refused at enforcement on grounds of public policy)⁵⁰. If the place of enforcement is not certain, overriding mandatory rules of the states where the contract in dispute has links with, as *potential place of enforcement*, should be taken into consideration. The arbitrators, even though constrained to respect the *will* of the parties should see beyond that and give an award meeting the *expectations* of the parties, meaning, an award that can be enforced⁵¹.

35. In Romanian law an arbitral award, be it national or foreign, can be set aside in court for multiple reasons, amongst which violation of *public policy* or of *mandatory rules*, as set out in art. 1121 (3) and in art. 608 (1) lit. h) Romanian Civil Procedure Code⁵². This means that when the place of arbitration is in Romania, the arbitral award decided without observing the overriding mandatory rules could be annulled. According to art. 1125 Romanian Civil Procedure Code, a foreign arbitral award can be recognized and enforced in Romania if, amongst other conditions, do not impinge the Romanian private international law` public policy.

36. Supposing that the Greek pandemic provisions discussed above give rise to disputes between international tourism companies and there is an arbitration clause in their contract, should the arbitral tribunal apply those self-denominated overriding mandatory rules? The answer to this question depends on several elements, amidst which, the place of arbitration, the chosen law/lack of choice of law, the place of enforcement of the arbitral award.

⁴⁶ E. GAILLARD, *op. cit.*, pp. 856-859.

⁴⁷ A significant award in this regard was handed down in the case *Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth*, intensely analyzed and criticized in the legal literature; see, for example, L. SOPATA, „Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc: International Arbitration and Antitrust Claims”, *Northwestern Journal of International Law & Business*, 1985-1986, pp.595 and the following.; A.K.A. GREENWALT, *op. cit.*, pp. 104 and the following.

⁴⁸ The issue of recognition and enforcement of arbitral awards set aside at the place of arbitration is controversial. See, A.J. VAN DEN BERG, „Should the Setting Aside of the Arbitral Award be Abolished?”, *ICSID Review*, 2014, pp. 1–26; P. DOBIÁŠ, *op. cit.*, pp. 3-27; E. ZUCCONI GALLI FONSEVA/ C. RASIA, “Recognition and Enforcement of an Annulled Foreign Award”, *Czech (& Central European) Yearbook of Arbitration*, Vol. IX, 2019, pp. 125-141. In the Romanian law, according to art. 1129 lit. f) Civil Procedure Code [identical with the art. V.1 (e) of the New York Convention 1958], the recognition or enforcement of the foreign arbitral award is refused by the court if the arbitral award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

⁴⁹ P. DOBIÁŠ, *op. cit.*, pp. 7-8.

⁵⁰ A.-L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, „Lex Mercatoria and private international arbitration”, *Cuadernos de Derecho Transnacional* (Marzo 2020), Vol. 12, Nº 1, pp.72-73.

⁵¹ M. MOSES, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York, 2008, p. 83.

⁵² Art. 608 (1) lit. h) reads: “Action for annulment. 1. The arbitral award may be set aside only by an action for annulment for one of the following reasons: h) the arbitral award violates public order, good morals or mandatory provisions of law;”; art. 1121 (3): “The arbitral award shall be enforceable and binding upon its communication on the parties and may be challenged only by an action for annulment on the grounds and in the manner set out in Book IV, which shall apply accordingly”.

37. It has been considered in the Romanian legal literature⁵³ that, in case the place of arbitration is in the EU, the arbitral tribunal is *not bound* to apply the Rome I Regulation for determining the law applicable to the merits of the dispute, *unless*: the parties agreed on the Rome I Regulation as governing law; the application of the conflict of law rules of a certain country within the EU is mandatory according to the law applicable to arbitration; the arbitrators decide to apply a certain national law of an EU member state.

38. Assuming that the arbitration would take place in Paris and that the law chosen by the parties (which are two tourism companies, one based in Greece and the other based in Romania) would be the Romanian law, which law is the arbitral tribunal to apply? If the parties chose the Romanian substantive/material law (except the conflict of law rules), then the arbitral tribunal might apply the Romanian law, without raising the issue of the overriding mandatory rules in the Romanian Civil Code or in the Rome I Regulation. The Greek company could use other defenses, such as a force majeure clause, if the conditions for this purpose are met.

39. If the parties chose Romanian law as a whole, the conflict of law rules should be included. As the Romanian law refers to the Rome I Regulation in contractual matters (art. 2640 Civil Code), the arbitral tribunal might apply the Rome I Regulation, including the provisions of art. 9 on the overriding mandatory rules. If the arbitral tribunal were to act similarly to a national court, it would consider the possibility of applying foreign overriding mandatory rules, the Greek ones, refusing Romanian law. Yet, since the judge has the power to apply or not the foreign overriding mandatory rules, all the more, the arbitrator should have this power. But if we observe the final goal pursued, namely the enforcement of the arbitral award, as the place of enforcement is in Greece, public policy could come into play as a reason for enforcement denial. This hypothetical example can have another solution in a certain dispute, depending on the facts, the contractual clauses, the applicable law and the authority called upon to decide it.

Final remarks

40. The law chosen by the contracting parties for dispute resolution may be subject to limitations or may even be refused if it infringes public policy or if certain overriding mandatory rules come into play. The two notions, “public policy” and “overriding mandatory rules”, are not clearly delimited, neither in legislation, nor in legal literature. The main difference between them is not in content, but in the way they act.

41. When the dispute falls within the jurisdiction of a national court, that court may, on a case-by-case basis, apply its own overriding mandatory rules (from *lex fori*) or foreign overriding mandatory rules, refusing in whole or in part the law chosen by the contracting parties. When the court is located in Romania, it will apply the Rome I Regulation (and not the provisions of the Civil Code regarding the overriding mandatory rules). In the EU, the Rome I Regulation applies in all cases, even when the contract is concluded and performed in a third country, outside of the EU, by two non-EU contracting parties, who have chosen as competent court to settle their disputes a national court of an EU member state.

42. When the dispute is settled by arbitration, the issue of the overriding mandatory rules application is controversial. Although arbitrators are not bound to apply or take them into account, it seems that they must do so, as an attempt to fulfill the parties' expectations, giving them the “ticket” for the enforcement of the arbitral award.

43. As to the mandatory rules adopted in pandemic times, either self-proclaimed overriding mandatory rules or not, the national courts or/and the arbitral tribunals are to decide on a case-by-case basis.

⁵³ C. LEAUA/Ș. DEACONU, “Se aplică Regulamentele «Roma I» și «Roma II» în contextul arbitrajului internațional în care locul arbitrajului este în Uniunea Europeană?”, *Pandectele Române* no. 8/2013, pp. 42 and the following.