International Commercial Law
Mandatory Rules of National Law
Overriding the Chosen Law

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Supplementary reading

• G. Cordero Moss, International arbitration and the quest for the applicable law, (2008) *Global Jurist*: Vol. 8: Iss. 3 (Advances), Article 2 pp.1-42

Can be retrieved at:
http://folk.uio.no/giudittm/GCM_List%20of%20Publications.htm
Party Autonomy and Overriding Interests

• Party Autonomy enhances predictability
• Party Autonomy assumes that conflicting laws are equivalent to each other
• Party Autonomy is restricted when other policies override predictability and equivalence is not true
Examples of overriding interests-I

Protection of the weaker contractual party

- Commercial Agency
- Maritime Law
- Unfair Terms of Contracts
- Labour Law
- Competition Rules
- Insurance
Examples of overriding interests-II

Protection of Third Parties

– Company Law
– Encumbrances
– Immovable property
– Intellectual Property
– Insolvency
– Product liability
– Legal capacity
Examples of overriding interests-III

Regulation of National Economy

• Securities exchange
• Foreign Exchange
• Taxes and charges
• Import-export
Examples of overriding interests-IV

Protection of Community’s Interests

– Expropriation
– Embargo
– Money Laundering
– Terrorism
– Freedom of speech
Choice of Law - Restrictions

• Party autonomy is not applicable in certain areas:
  – Immovable Property
  – Encumbrances
  – Company Law
  – Tort
  – Insolvency
  – Intellectual Property
  – Product Liability
  – Legal Capacity
Governing Law – Limitations I

• Rules of the Lex Causae assuming that the factual consequences of the foreign rule are taken into consideration
• Rules of the Lex Causae sanctioning the violation of foreign rules in certain areas
• Comity of Nations
• Good faith
Governing Law – Limitations II

- Overriding mandatory rules (e.g. Art. 7 Rome Convention/art. 9 Rome I)
- Not all mandatory rules are overriding
- Balancing of interests – predictability vs overriding interests
Overriding Mandatory Rules

• Of the lex fori: Art. 7.2 Rome Convention/Art. 9.1 Rome I

• Of a third country: Art. 7.1 Rome Convention
  – Close connection
  – Regard to the rules’ nature and purpose
  – Regard to the consequences of application

• Of a third country: Art. 9.3 Rome I
  – Place of performance
  – In case of unlawfulness
  – Regard to the rules’ nature and purpose
  – Regard to the consequences of application
Governing Law – Limitations III

• **Ordre Public**
  – Application of a foreign rule is
  – Manifestly
  – Incompatible with public policy of the forum
Ordre Public

• Restrictive interpretation
  – International ordre public
  – Ordre public
  – Overriding mandatory rules
  – Mandatory rules
  – Non mandatory rules
International Contracts and National Law

• It is not in the power of the parties to exclude applicability of national overriding mandatory rules or of ordre public

• In some cases: the parties can allocate the risk (e.g.: INCOTERMS, Force Majeure clause)

• Choice of arbitration to solve disputes: does it really permit to disregard national rules?