

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

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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 mandatroy 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?