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?