implementing the Directive, but this objective would also be accomplished after the application of Art. 23 Regulation (EC) No 593/2008.[140]

Besides, the Court of Justice of the European Communities has not only approached a definition of this complex category, but has also tried to restrict its application in order to make mandatory provisions – in the field of Labour Law – compatible with community freedoms (i.e. cases *Arblade*[141] and *Mazzoleni)*[142], thus favouring the integrative objective of the EU.[143] In accordance with that has been mentioned, only a limited number of Labour Law provisions (those establishing minimum working conditions) can be characterized as mandatory in relation to Art. 8.[144] In this respect, the following conditions could be mentioned as mandatory: health, safety and hygiene at work, right to strike, redundancy protection, or minimum rest periods.[145] In relation to this, Art. 3 Directive 96/71/EC offers a good illustration of the kind of terms of conditions covered by this category, when listing the "hard core".[146]

Finally, mandatory provisions could be contained not only in the collective agreements and arbitration awards affecting the contract of employment, but also in the following national laws (in accordance to Arts. 8 and 9 Regulation (EC) No 593/2008): the law applicable to the individual contract of employment, the law of the place where the work has to be performed and the law of the competent *forum*.[147]

Article 9: Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

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140 *Mankowski*, in: Ferrari/Leible, 184–185.

141 ECJ 23 November 1999, joined cases C-369/96 and C-374/96, *Criminal proceedings against jean-Claude Arblade, Arblade & fils SARL, Bernard and Serge Leloup and Sofrage SARL*, [1999] ECR I-8453, I-8513.

142 ECJ 15 March 2001, Case C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL*, [2001] ECR I-2189.

143 *Liukkunen*, 165; *Palao Moreno* AEDIPr (2005), 309, 333; *Zabalo Escudero*, in: Pacis Artes. Obra homenaje al Profesor Julio D. González Campos, 1833–1834.

144 *Guardans Cambó*, 402 *et seq.*; *Zabalo Escudero*, 184. However, not all mandatory provisions are equally imperative, *Junker* IPRax (1989), 69.

145 Giuliano/Lagarde, Report, 23; *Martiny* ZEuP (1999), 252–260; *Kaye*, 224 *et seq.*; *Lyon-Caen/Lyon-Caen*, 31; *Salvadori*, in: Sacerdoti/Frigo, 139 *et seq.*; *Villani*, in: Verso una disciplina comunitaria della legge applicabile ai contratti, 265, 282. The delimitation of this category may vary from one national judge to the other. *Calligaro*, in: Droit social et situations transfrontalières, 148. See Cass, 27.4.2000, Clunet (2001), 523.

146 A list which could also be used to illustrate the scope of this category in relation to Art. 8 (1) Regulation, (EC) No. 593/2008, *Polak*, in: Meeusen/Pertegás/Straetmans, 338.

147 *Guardans Cambó*, 444 *et seq.* The accumulation of these provisions may cause a protection "at any cost", according to *Bonomi*, 179. See *Grusic*, 751.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. 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. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

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I. General Remarks

1. Purpose of the rule

1 In the system for the determination of the applicable law instituted by the Rome I Regulation, an important role is attributed to the "overriding mandatory provisions", dealt with by Art. 9 of the Regulation. This provision aims at ensuring a balance between the main objectives of the Regulation, in particular the uniformity of the choice-of-law rules among the Member States and the admission of party autonomy, on the one hand, and the safeguard of fundamental States' interests, on the other.[1]

2 The choice-of-law rules included in the Regulation are mainly based on the protection of party interests. This is obviously the case for Art. 3, which recognizes party autonomy in a quite broad way. Failing a party choice, most of the connecting factors of Arts. 4, 5 and 7 are also conceived with the purpose of striking a balance between the parties' interests, in particular by giving priority to the party who is to effect the characteristic performance under the contract. Finally, the declared goal of Arts. 6 and 8 is to protect the weaker party, i.e. the consumer or the employee.

3 States' regulatory interests do not play a central role in the economy of the Regulation, contrary to the prevailing approach in the United States, where, since the so-called "American revolution", conflicts of laws are commonly addressed through the prism of "governmental interests' analysis".[2] This is partially corrected by Art. 9.[3] This provision deals with those mandatory rules whose observance is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation. Because of their importance for the State that has enacted them, such provisions must be observed even in international situations, irrespective of the law governing the contract under the normally applicable choice-of-law rules of the Regulation.

4 The practical importance of Art. 9 should not been overestimated.[4] As stressed by Recital 37 of the preamble, the application of overriding mandatory provisions is only allowed "in exceptional circumstances", as it is also the case for public policy under Art. 21. According to the ECJ, Art. 9 – "as a derogating measure" – must be interpreted strictly.[5] Particularly rare are the courts' decisions giving effect to foreign overriding mandatory provision, as allowed by Art. 9 (3).[6]

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1 The need for a balance between overriding mandatory provisions and the principle of the freedom of contract was underlined by the ECJ, *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 49.

2 As is well-known, interest analysis was first proposed by *Brainerd Currie*: see his Selected Essays on the Conflict of Laws (1963). On the distinction between the American *interest analysis* and the European notion of overriding mandatory provisions, see *Guedj*, The Theory of the Lois de Police, A Functional Trend in Continental Private International Law, AJCL (1991), p. 681 *et seq.*

3 See *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 43.

4 *Magnus*, para. 2.

5 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 44.

6 See, however, the recent ECJ decision in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016). See also Cour d'Appel de Paris, 25.2.2015 – 12/23757.

2. Terminology

The term "overriding mandatory provisions", which now appears in the title and in the wording of Art. 9, has been preferred to "mandatory provisions" used in Art. 7 Rome Convention. This expression refers to the capacity of these provisions to "override" (i.e. to "be more important than", to "prevail over") the otherwise applicable law. Other terms used in legal English to define such provisions are "overriding statutes" or "internationally mandatory rules".[7] **5**

This language was chosen in order to clearly distinguish such rules from simply "internally" (or "domestically") mandatory provisions, which cannot be derogated from by contract. Internally mandatory provisions must be observed in purely domestic situations; they must also be complied with in international situations, but only when they belong to the law applicable to the contract. By contrast, overriding mandatory provisions are applicable, in international situations, even when they are not part of the law governing the contract. In order to avoid confusion between these notions, all references to "mandatory provisions", which were included in the Rome Convention were replaced with the language "provision […] which cannot be derogated from by contract" (see Arts. 3 (3), 3(4), 6 (1) and 8 (2) of the Regulation). The term "mandatory provisions" is now only used in Art. 9 of the Regulation.[8] **6**

In the French version of the Regulation, the expression "lois de police", echoing Art. 3 of the French Civil Code and widely-used in French legal doctrine and case law, corresponds to that used in Art. 7 Rome Convention. It has been preferred to other common expressions, such as "lois d'application immédiate" or "règles d'ordre public". The same term ("leyes de policía") has been used in the Spanish text, although it is not very common in the Spanish legal language (where these provisions are normally qualified as "normas de aplicación necesaria"). In the German version, "Eingriffsnormen", which refers to the ability of these norms to "interfere" ("eingreifen") in the contractual relationship in order to safeguard public interests,[9] has been preferred to "zwingende Vorschriften" (or "international zwingende Vorschriften"). In Italian and Portuguese, the terms "norme di applicazione necessaria" and "normas de aplicação imediata" reflect the general use. **7**

3. Remarks as to Methodology

In conformity with the doctrinal understanding, overriding mandatory provisions require a different approach to conflict of law issues. To rule on their applicability, the court does not have to determine "which law is applicable" to a certain relationship, but rather whether the object and the purpose, or, in other words, the policy of a mandatory rule, commands its application in the particular case. Using German terminology, one can say that, in the **8**

7 See *Hartley*, Mandatory Rules in International Contracts: the Common Law Approach, 266 Collected Courses (1997), p. 365.

8 *Nuyts*, RDC (2009), p. 556.

9 Refer for instance to: *Neuhaus*, Die Grundbegriffe des internationalen Privatrechts, 2nd ed. (1976), p. 33 *et seq.*; *Schulte*, Die Anknüpfung von Eingriffsnormen, insbesondere wirtschaftrechtlicher Art, im internationalen Vertragsrecht (1975); *Drobnig*, Die Beachtung von ausländischen Eingriffsgesetzen – eine Interessenanalyse, in: Festschrift für Gerhard Kegel (1987), p. 95 *et seq.*; *Siehr*, Ausländische Eingriffsgesetze im inländischen Wirtschaftskollisionsrecht, RabelsZ (1988), p. 41 *et seq.*

presence of such norms, the solution of a conflict-of-law issue requires reasoning based on the content and purpose of a rule ("vom Gesetze aus") and not, as with "classical" conflict-of-laws methodology inspired by von Savigny's theory, on the legal issue ("vom Sachverhalt her").

9 Contrary to classical, "bilateral" choice-of-law rules, which can indistinctly lead to the application of the *lex fori* or of a foreign law, overriding mandatory provisions are the expression of a "unilateral" approach to conflict of laws. Based on their content and their policy, these rules unilaterally determine their own scope of application, irrespective of the choice-of-law rules of the forum. Such unilateral determination of the rule's scope cannot be directly "extrapolated" in order to determine the applicability of similar provisions belonging to a different legal system; the applicability of these foreign rules depends, in turn, on their own content and policy.

10 Notwithstanding a certain similarity with the policy-oriented methodology proposed in the United States by the tenants of the "interest analysis",[10] the European approach is less radical than the American approach.[11] While interest analysis applies to all kinds of legal rules and is meant to entirely replace "bilateral", "jurisdiction-selecting" choice-of-law rules, overriding mandatory provisions coexist in the Regulation with "classical" choice-of-law rules and only exceptionally prevail over them. This is one expression of what has been called "a pluralist approach" to conflict of laws, meaning that different methodologies are used in parallel in order to attain a balanced solution to conflict-of-laws issues.

4. Legislative history of the provision

11 The predecessor of Art. 9 was Art. 7 Rome Convention, a widely discussed provision. Art. 7 (2) of the Convention dealt with the overriding mandatory provisions of the *lex fori*. Although the effects of that rule were not disputed, it raised the very difficult and controversial question of the characterisation of a national rule as an overriding mandatory provision. Art. 7 (1) of the Convention was even more controversial, since it opened up the possibility for the national courts to "give effect" to foreign mandatory provision not belonging to the law of the contract. Fearing the lack of legal certainty allegedly caused by this provision and its potentially disruptive effects on the uniformity of the applicable law, five Contracting States (Germany, Ireland, Luxembourg, Portugal and the United Kingdom) made a reservation against Art. 7 (1), as allowed by Art. 22 Rome Convention.

12 In its Proposal,[12] the Commission suggested including the definition of overriding mandatory provision, which we find now in Art. 9 (1). Besides some drafting changes, no other significant novel additions were included in the Proposal. During the subsequent legislative stages, the negotiation focused on the future of Art. 7 (1).

13 The new provision of Art. 9 introduces various novel changes, one of which is purely formal whereas the other two relate to very substantial issues. At the formal level, the order of the

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10 See also *Stone*, EU Private International Law, 2nd ed. (2010), p. 342.

11 See *Guedj*, The Theory of the Lois de Police, A Functional Trend in Continental Private International Law, AJCL (1991), p. 681 *et seq.*

12 COM (2005) final, of 15.12.2005.

two paragraphs of Art. 7 of the Convention has been judiciously reversed. The provision of Art. 7 (2) of the Convention relating to overriding mandatory provisions of the *lex fori*, which has become Art. 9 (2) of the Regulation, now precedes the rule relating to foreign overriding mandatory provisions that has been included, with certain important modifications, in the third paragraph of Art. 9. This amendment, which is purely cosmetic and without practical effect, deserves approval, since it simplifies the comprehension of this complex provision. Much more significant are the modifications relating to the substance, in particular the introduction of a definition of overriding mandatory provisions in Art. 9 (1)[13] and the reformulation in a more restrictive manner of the conditions for the application (or the consideration) of the foreign overriding mandatory provisions under Art. 9 (3).[14]

5. Comparison with other texts

a) Rome II Regulation

Some other European regulations on private international law also include a specific section dealing with overriding mandatory provisions. Thus, Art. 16 Rome II Regulation on the law applicable to non-contractual obligations refers to the overriding mandatory provision of the *lex fori*. The language of this provision is identical to that of Art. 7 (2) Rome Convention. In substance, the rule also corresponds to Art. 9 (2) Rome I Regulation. However, Art. 16 does not, unlike Art. 9 (1), include a definition of overriding mandatory provisions, nor does it include a provision dealing with foreign mandatory provisions such as that seen in Art. 9 (3).[15] **14**

However, without referring to overriding provisions, Art. 17 Rome II Regulation resembles Art. 9 (3), in that it provides that "account shall be taken" of the rules of safety and conduct which are in force at the place of the event giving rise to the liability.[16]

b) Succession Regulation

The Succession Regulation includes in Art. 30 a provision referring to the "special rules" which are "applicable irrespective of the law applicable to the succession". These overriding mandatory provisions must apply to the succession when, "for economic, family or social considerations", they "impose restrictions concerning or affecting the succession" in respect of specific assets (such as immovable property, certain enterprises or other special categories of assets) located in the country where the provisions are in force. This rule is not limited to mandatory rules of the *lex fori* but also covers foreign mandatory rules provided that they belong to the law of the place of the asset's location. **15**

c) Matrimonial Property and Registered Partnership Regulations

The regulations on Matrimonial Property and on the Property Consequences of Registered Partnership both contain a provision (Art. 22 resp. Art. 17) referring to the overriding mandatory provision of the *lex fori*. The language of these sections includes a definition **16**

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13 See *infra*, Art. 9 para. 53 *et seq.*

14 See *infra*, Art. 9 para. 128 *et seq.*

15 According to *Hellner* JPIL (2009), p. 452, "no strong case was really made for the need of such a provision" in the area of non-contractual obligations.

16 See also *Hellner* JPIL (2009), p. 452.

on the line of Art. 9 (1) Rome I Regulation. However, no reference is provided to foreign mandatory provisions.

d) Other regulations

17 Other PIL regulations do not even refer to overriding mandatory provisions. This is the case for the Rome III Regulation on the law applicable to divorce and of the Maintenance Regulation; for the purpose of determining the applicable law, the latter refers to the Hague Protocol of 23 November 2007, which does not include a section on overriding mandatory provisions.

e) National codifications

18 Several national codifications of private international law include a section referring to overriding mandatory provisions.[17] However, only a few of them contain a definition of such provisions. Even rarer are provisions on foreign overriding mandatory rules.[18]

f) International instruments

19 Besides the Rome Convention, other international instruments also include specific norms on overriding mandatory provisions. This is the case for some Hague Conventions, such as the Hague Convention on the Law Applicable to Agency of 14 March 1978 (Art. 16), the Hague Convention on the Law Applicable to Trusts and their Recognition of 1 July 1985 (Art. 16) and the Hague Principles on Choice of law in International Commercial Contracts (Art. 11).[19] The Mexico Convention on the Law Applicable to Contracts (CIDIP V) of 17 March 1994 also includes a specific provision (Art. 11).

II. The Scope of Application of Art. 9 and its Relationship to Other Provisions of the Regulation

1. Scope of application

a) Material scope

20 As a part of the Rome I Regulation, Art. 9 directly governs overriding mandatory provisions in the area of contracts, i.e. such provisions, which, irrespective of their private or public law nature, have an effect on the formation, the validity, or the interpretation of a contract, or on the rights and duties of the parties thereof.

21 In the absence of a "Rome 0 Regulation", covering the general questions of private international law, the definition of overriding mandatory provisions in Art. 9 (1) is probably also relevant for other European regulations, which refer to this category of norms without defining them, such as the Rome II Regulation (Art. 16) and the regulations on matrimonial

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17 See for instance: Art. 17 of the Italian PIL Statute of 1995, Art. 20 of the Belgian PIL Code of 2004; Art. 7 of Book 10 of the Dutch Civil Code; Art. 8 of the Polish PIL Act of 2011.

18 Well-known examples are Art. 19 of the Swiss Private International Law Act of 1987 and Art. 3079 of the Quebec Civil Code of 1994. Among the most recent national codifications see for instance: Art. 20 (3) of the Belgian PIL Code of 2004; Art. 7 (3) of Book 10 of the Dutch Civil Code; Art. 8 (2) of the Polish PIL Act of 2011.

19 The text of the Principles is available on the website of the Hague Conference of Private International Law, www.hcch.net.

property and the property consequences of registered partnership.[20] However, paragraphs 2 and 3 of Art. 9 do not have this indirect function. Therefore, it is not possible, in the absence of a specific provision in the relevant regulation, to resort to Art. 9 Rome I Regulation in order to apply or to give effect to overriding mandatory provisions in areas of law other than contractual obligations.

It has been suggested that the reference in some provisions of the Rome II Regulation (such as Arts. 4 (3), 10 (1), 11 (1) and 12 (1)) to the law applicable to the contract also encompasses Art. 9.[21] However, such an extension of Art. 9's scope is not a matter of course. It seems that either the overriding mandatory provision has an effect on the contract as such (and is therefore not relevant for the non-contractual obligations falling under the Rome II Regulation), or it specifically applies to the non-contractual obligation at hand; in the latter case, it is not covered by Art. 9 but by its counterpart, Art. 16 Rome II Regulation, which does not provide for third countries' provisions. **22**

b) Universal application

As all other rules of the Rome I Regulation, Art. 9 enjoys a universal scope (Art. 2). In other words, the overriding mandatory provisions referred to by this rule are applicable whether or not they are part of the law of a Member State. This is not relevant for Art. 9 (2), which only refers to the overriding mandatory provision of the *lex fori* (which necessarily is the law of a Member State), but for Art. 9 (3): this rule allows the court, under certain conditions, to give effect to foreign overriding provisions, irrespective of whether they are part of the law of a Member State or not. **23**

2. Art. 9 and other provisions of the Regulation

a) Art. 9 and the "ordinary" choice-of-law rules of the Regulation

Art. 9 belongs to the provisions of the Regulation with a general scope of application. As with Arts. 3 and 4, but contrary to Arts. 5 to 8 of the Regulation, Art. 9 is applicable to contracts in general and not to some specific categories of contracts only. **24**

Art. 9 applies in parallel with Arts. 3, 4, 5 and 7 of the Regulation. These choice-of-law rules determine the law applicable to the contract. Irrespective of this, Art. 9 allows, under certain conditions, the application of overriding mandatory rules belonging to the *lex fori* or to the law of a third State. When such rules are applicable under Art. 9, they prevail over any irreconcilable provision belonging to the law of the contract. In this sense, one can say that Art. 9 partially derogates from the choice-of-law rules included in the Regulation. **25**

b) Art. 9 and the protective choice-of-law rules of Arts. 6 and 8

The relationship of Art. 9 with Arts. 6 and 8 of the Regulation is much more controversial. Latter provisions contain special choice-of-law rules, the objective of which is to protect the weaker party to the contract, i.e. the consumer and the employee respectively. This goal is pursued, on one hand, by submitting the contract to a law, with which the weaker party is particularly familiar, i.e. respectively the law of the country of the consumer's habitual residence and the law of the place where (or from where) the employee habitually carries **26**

20 *Magnus*, para. 48.

21 *Magnus*, para. 15.

out his work (Arts. 6 (1) and 8 (2)). On the other hand, if the parties have chosen the law applicable to the contract, such a choice cannot have the result of depriving the weaker party of the protection afforded to him by the mandatory provisions of the law, which would be applicable in the absence of a choice (Arts. 6 (2) and 8 (1)). In this framework, it is disputed whether Art. 9 can also be relied upon by the weaker party in order to invoke a protective provision, which would not be applicable under Arts. 6 or 8.[22]

27 Before taking a position, it should be noted that the problem mainly arises in two scenarios.[23] The first one is when, although the contract is a consumer contract covered by Art. 6, the specific conditions set up by this provision are not satisfied: this is the case, in particular, when the trader did not pursue his activities in the country of the consumer's habitual residence, nor did he direct such activities to that country, as required by Art. 6 (1). Can a protective provision in force in the country of the consumer's habitual residence be nonetheless applied based on Art. 9?[24] The second situation arises when, although all conditions set up by Arts. 6 and 8 are satisfied, the weaker party relies on a protective rule belonging to a law other than that designated by those choice-of-law rules: for instance, failing a party choice, can the consumer invoke, based on Art. 9, a rule in force in the country of the trader's place of business? Can the employee rely on a rule in force in the country of its own habitual residence?

28 To answer this question, it is first necessary to determine whether a provision aimed at the protection of the weaker party can qualify as an overriding mandatory provision within the meaning of Art. 9. As will be shown when discussing the definition of overriding mandatory provisions under Art. 9 (1), the answer is probably yes.[25] However, this does not yet mean that Art. 9 can be applied concurrently with Arts. 6 and 8. In fact, according to a widely held view,[26] which was endorsed by German courts under the Rome Convention,[27] the concurrent application of these provisions should be rejected, because recourse to Art. 9 when the

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22 This was accepted in France by the Cour de cassation, 23.5.2006, Dalloz (2006), p. 2798, note by *Audit*; RCDIP (2007), p. 85, note *Cocteau-Senn*; see also *Mankowski* ZEuP (2008), p. 845 *et seq.* Quite surprisingly, this decision classified as a *loi de police* within the meaning of Art. 7 (2) Rome Convention a jurisdictional rule of the French *Code de la consommation*. See also the decisions of the Luxembourg courts *Hames v. Spaarkrediet* and *Branczyk v. Gramegna and Grand-Duché de Luxembourg*, cited by *Plender/Wilderspin*, para. 12–0138 *et seq.*

23 A different situation arises when Art. 6 points towards the law of the consumer's habitual residence, but the law of the forum includes an overriding mandatory provision, which is less favourable to the consumer. In such a case, there is a real conflict between Arts. 6 and 9. However, this can only be the case if (a) the rule of the *lex fori* is a rigid rule as opposed to a "minimum standard" rule (something which is not very common in the field of consumer protection: see *Plender/Wilderspin*, para. 12–034 and 12–043) and (b) if it is also aimed at protecting consumers who have their residence abroad (which is also rather uncommon).

24 *Plender/Wilderspin*, para. 12–033.

25 See *infra*, Art. 9 para. 76 *et seq.*

26 See for instance *Roth*, in: Festschrift für Gunther Kühne (2009), p. 868; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 26.

27 Bundesgerichtshof, 19.3.1997, published in French in RCDIP (1998), p. 610, with note by *Lagarde*. See also Bundesgerichtshof, 26.10.1993, IPRax (1994), p. 449.

conditions set up by Arts. 6 and 8 are not satisfied would be inconsistent with the rationale of these rules.

29 In our opinion, the concurrent application of Art. 9 is in itself not inconsistent with Arts. 6 and 8, in particular because these provisions do not share the same purpose.[28] Arts. 6 and 8 specifically aim at the protection of the weaker parties as individuals. They only focus on such individual interests, and determine how and under which conditions those interests should be protected. Thus, by setting the specific conditions of Art. 6 (1), the drafter of the Regulation considered that a consumer should only be entitled to rely on the protective rules of his country's law when the trader, in some way, "targeted" that country; failing this, the consumer does not deserve a specific protection. However, Art. 9 has a different purpose, its goal being the safeguarding of a country's public interests. As made clear by its wording, recourse to this article is only possible when the application of a specific provision (even if it is a rule protecting consumers or employees) is regarded by a country as crucial for safeguarding its political, social or economic organisation. The individual consumer's interests are not decisive in this regard. That being so, it is perfectly conceivable, at least in theory, that a country has a crucial interest in compliance with a specific overriding mandatory provision in the area of consumer or employment law, even though the specific conditions of Arts. 6 or 8 are not satisfied.

30 In practice, however, this will only very rarely be the case, in particular in the area of consumer law, where the protection net of Art. 6 is now very wide.[29] Thus, it is extremely unlikely that the country of the consumers' habitual residence will assert a crucial public interest in protecting its consumers when they were not specifically "targeted" by foreign traders, such as when they buy goods or services during their holidays abroad.[30] It is also unlikely that a country other than the country of the consumer's habitual residence will have a crucial interest in imposing the application of its mandatory rules for the protection of "foreign" consumers. The conditions for a concurrent application of Art. 9 can probably more easily be satisfied in the area of employment law: thus, it cannot be *a priori* excluded that a country might have a crucial interest in protecting its citizens through mandatory regulations when involved in working activities abroad. In any case, these instances are probably quite rare: thus, the concurrent application of Arts. 6, 8 and 9, albeit theoretically possible, should be allowed only in very exceptional cases.[31]

31 However, preceding remarks only refer to mandatory rules protecting the consumers or the employees. The analysis is completely different with regard to overriding mandatory provisions having a different goal, notably the safeguarding of a State's political or economic interests. With respect to such norms, there is no doubt that Art. 9 can be applied in parallel with Arts. 6 and 8. Thus, embargo measures prohibiting the import of specific goods from a foreign country are obviously applicable under Art. 9, even when they impact on a consumer

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28 *Magnus*, para. 25 *et seq.* See also *Plender/Wilderspin*, para. 12–040, and *Renner*, in: Calliess, Art. 9 Rome I, para. 5, who underline the opening words of Art. 9 (2) ("[n]othing in this Regulation shall restrict […]").

29 See also *Archer*, EJCL (2009), p. 699; *Roth*, in: Festschrift für Gunther Kühne (2009), p. 868; *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 337; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 26.

30 This kind of scenarios has led to the decisions of the above-mentioned decisions of the German courts.

31 In the result, we agree with *Freitag* IPRax (2009), p. 112, who invites the "greatest prudence".

contract. Also, provisions reducing the salary of employees in the public sector for reason of financial difficulties of the employer State can fall under Art. 9.[32]

32 It should also be pointed out that the applicability of Art. 9 should not be disputed when the contract is not covered by Arts. 6 or 8, either because it is not a consumer or employment contract within the meaning of these provisions (for instance an insurance contract, a carriage contract or a commercial agency contract), or because it is specifically excluded from the scope of Art. 6 under paragraph 4. In such cases, in the absence of special choice-of-law rules, the protection of the weaker party is only possible under Art. 9 provided that one country's mandatory provision are regarded as crucial for the safeguard of its crucial public interests.

c) Art. 9 and other mechanisms for the application of mandatory provisions

33 Art. 9 refers to "overriding mandatory provisions". It thus covers only those mandatory provisions that, because of their "crucial" role for the safeguarding of a country's public interests, are applicable "irrespective of the law otherwise applicable to the contract".

34 Although it doesn't use the term "overriding mandatory provisions", Art. 11(6) of the Regulation also implicitly refers to this kind of provisions. In particular, this rule imposes compliance with the overriding mandatory provision of the *lex rei sitae*, which set formal requirements for contracts concerning immovable property (rights in rem in or tenancy of immovable property). Contrary to Art. 9, Art. 11(6) does not distinguish between provisions of the *lex fori* and foreign provisions: the provisions of the *lex rei sitae* are declared applicable, irrespective of the place of proceedings.

35 Arts. 3 (3), 3 (4), 6 (2) and 8 (1) of the Regulation refer to provisions "which cannot be derogated from by agreement". Contrary to Art. 9 and 16 (1), this reference encompasses all mandatory provisions of a certain legal system, even if they do not have an "overriding" reach and therefore do not fall under the definition of Art. 9 (1). As will be discussed later, mandatory provisions form a broader category of norms, among which only some qualify as overriding mandatory provisions. Therefore, if all mandatory provisions of a certain law are applicable by virtue of a rule of the Regulation, this also covers overriding mandatory provisions, so that recourse to Art. 9 is superfluous in that case.

36 The first of such rules, Art. 3 (3), corresponds to Art. 3 (3) Rome Convention. Pursuant to this article, in contracts without cross-border elements, the parties' choice of the applicable law shall not prejudice the mandatory provision of the law of the only country with which the contract is connected. The observance of overriding mandatory rules is also safeguarded by this provision. In such a case, the parties' choice can only derogate from the dispositive rules of the otherwise applicable law, similar to that which occurs when the parties incorporate a foreign law into their contract.

37 Similarly, Art. 3(4), which is a "novelty" of the Regulation, ensures the application of the mandatory provisions of European law notwithstanding the parties' choice of the law of a non-Member State, provided that all other elements relevant to the situation are located in one or more Member States. In this case also, the reference to mandatory provisions of

[32] See also the ECJ decision in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016).

European law obviously includes overriding mandatory provisions of that legal system. However, contrary to an isolated opinion, this does not mean that Art. 9 cannot be applied, or is superfluous, with respect to European law provisions. It should be kept in mind that Art. 3(4) only covers pure "intra-European" situations, i.e. contracts without any relevant connection to a non-Member State. By contrast, if relevant elements of the situation are located outside the European Union, only Art. 9 (and in particular Art. 9 (2)) can be relied upon to ensure the application of overriding mandatory provisions of European law. This is, for instance, the case in situations like the one which led to the *Ingmar* decision of the European Court of Justice.[33]

As already mentioned, Arts. 6 (2) and 8 (1) of the Regulation also refer to provisions which cannot be derogated from by contract. Under these articles, the parties' choice of the applicable law cannot deprive the consumer, respectively the employee, of the protection afforded to him by the mandatory provision of the otherwise applicable law. Once again, this reference also includes overriding mandatory provisions. However, as mentioned before, the concurrent application of Art. 9 is possible (although this does not occur very frequently) for ensuring the application of those provisions which are not covered by Arts. 6 or 8, provided that these are regarded as crucial for safeguarding a country's public interest. **38**

d) Special choice-of-law rules in EU law instruments

Pursuant to Art. 23, the Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations. By virtue of this provision, choice-of-law rules included in European law acts prevail over the rules of the Regulation. **39**

As shown by the legislative history of Art. 23, this provision also covers the specific clauses, included in several European directives in the area of consumer protection.[34] Pursuant to these clauses, the Member States have to take the necessary measures to ensure that the parties' choice of the law of a non-Member State as the law applicable to the contract cannot deprive the consumer of the protection granted by the substantive rules of the relevant directive, provided that the contract has a close connection with the territory of a Member State. According to a widely held view, this "applicability rule" makes clear that the protective provisions in the EU directives are regarded, by the European legislator, as overriding mandatory provisions having priority over the law chosen by the parties.[35] Therefore, in the **40**

[33] *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305; RCDIP (2001), p. 107, note *Idot*. On this case, see *infra*, para. 41.

[34] Art. 6 (2) of the Unfair Terms Directive No. 93/13/EC of 5.4.1993; Art. 12 (2) of the Distance Contract Directive No 97/7/EC of 20.5.1997 on the protection of consumers in respect of distance contracts; Art. 7 (2) of the Consumer Sales Directive No. 1999/44/EC of 25.5.1999; Art. 12 (2) of the Timeshare Directive 2008/122 of 1.1.2008; Art. 22(4) of the Consumer Credit Directive No 87/102/EEC of 23.4.2008. On these directives, see *Wilderspin*/*Lewis*, "Les relations entre le droit communautaire et les règles de conflit de lois", RCDIP (2002), p. 1 *et seq*., 289 *et seq*. According to some scholars, even the 'internal market clause' included in Art. 3 of the Directive on electronic commerce is to be construed as a "règle d'applicabilité" imposing, under certain circumstances, the mandatory application of the law of the country of origin: *Fallon*/*Meeusen*, "Le commerce électronique, la directive 2000/31/CE et le droit international privé", RCDIP (2002), p. 486 *et seq*. On this questions see also *Plender*/*Wilderspin*, para. 12–051 *et seq*.

[35] *Contra*: *Martiny*, in: Münchener Kommentar, para. 24.

absence of Art. 23, the effect of such clauses would depend on Art. 9 of the Regulation. By virtue of Art. 23, however, these clauses immediately prevail over the Regulation as a matter of European law, so that recourse to Art. 9 is not needed.[36]

41 One might wonder whether Art. 23 also covers implied applicability rules of European law, such as that announced by the European Court of Justice in its *Ingmar* decision. In that case, it was held that Arts. 17 and 18 of the Directive on Commercial Agents could be relied upon by a commercial agent domiciled in a Member State, irrespective of the parties' choice of the law of a non-Member State.[37] The result of such case law is very similar to that of the internal market clauses mentioned above. Notwithstanding this, it is submitted that Art. 23 only covers explicit rules included in European law acts. Implied applicability rules such as that in the *Ingmar* case require a thorough examination of the content and policy of the European law rule at hand; for the sake of consistency with mandatory provisions of State law, such an analysis should rest on the criteria set for overriding mandatory provisions by Art. 9 (1).

e) Art. 9 and public policy

42 Since overriding mandatory provisions prevail over bilateral choice-of-law rules when a fundamental interest of the forum is at stake, they are functionally very similar to the traditional *ordre public* exception, which is referred to in Art. 21 of the Regulation.

43 According to a widely held opinion, the difference between these two devices lays in the fact that *ordre public* is only a defensive measure against the application of the foreign law designated by the choice-of-law rules, whereas overriding provisions are to be "immediately" applied irrespective of the *lex causae*. The first operates ("as a shield") after the governing law has been selected, whereas the latter are applicable ("as a sword") prior to selection of the applicable law. However, this traditional understanding is challenged by the fact that the application of overriding mandatory rules should not be blind, but should be based on a weighing of policies, by which courts cannot ignore the content of the otherwise applicable law.[38]

44 In practice, these two devices have similar effects, in particular because after the refusal of a certain foreign law rule for public policy reasons, the resulting gap is frequently (although not always) filled through the application of the *lex fori*. Furthermore, public policy is the main tool by which non-compliance with an overriding mandatory provision can be sanctioned at the stage of recognition and enforcement of a foreign decision.[39]

III. The Notion of Overriding Mandatory Provisions

1. The sources of overriding mandatory provisions

a) National law rules

45 Overriding mandatory provisions are often part of the national legal system of a country.

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36 This is also suggested by *Plender/Wilderspin*, para. 12–047.

37 *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305; RCDIP (2001), p. 107, note *Idot*.

38 See *infra*, Art. 9 para. 85.

39 See *infra*, Art. 9 para. 207 *et seq.*

This includes both the law in force in the whole of the country and the law applicable in one or more territorial units, such as sister states in a federal system or regions. Of course, not only written law rules, but also non-codified rules, such as customary law or case law rules, can qualify as overriding provisions within the meaning of Art. 9 (1).[40]

Because of the universal reach of the Regulation (Art. 2), Art. 9, and in particular its paragraph 3, also encompasses the overriding mandatory provisions in force in a non-Member State. **46**

b) European law rules

European law rules can also be qualified as internationally mandatory within the meaning of Art. 9. This is widely accepted for rules included in EU directives as well as for the national law rules implementing them. **47**

The case law of the European Court of Justice also confirms this. Thus, in the well-known *Ingmar* case,[41] the Court held that a commercial agent established in a Member State can rely on Arts. 17 and 18 of the Commercial Agents Directive (and on the national transposition rules) to claim an indemnity upon termination of the contract, even though the law chosen by the parties as applicable to the contract is that of a non-Member State. Although the Court did not use the expression "overriding mandatory provisions" nor any similar notions, and did not refer to the (then applicable) Art. 7 Rome Convention, that decision is generally interpreted as meaning that mandatory provisions included in EU directives (as well as national transposition rules) are applicable irrespective of the otherwise applicable law, provided that they can be regarded as crucial for safeguarding overriding European law interests. **48**

This reading is corroborated by the *Unamar* decision of the European Court of Justice. In this case, a similar question arose with respect to national (Belgian) transposition rules, which had extended the scope of the Commercial Agents Directive, thus ensuring commercial agents protection going beyond that provided by the directive. Contrary to the *Ingmar* case, the law chosen by the parties was the law of a Member State that had implemented the directive, meeting its minimum standard requirements. This time, the Court examined the issue through the prism of Art. 7 (2) Rome Convention, and came to the conclusion that, in those specific circumstances, the national transposition rules could only have priority over the law chosen by the parties if the court seized found "on the basis of a detailed assessment, that […] the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by that directive, taking account in that regard of the nature and of the objective of such mandatory provisions." In other words, according to this decision, the seized court has to determine whether the national transposition rules can be qualified as overriding mandatory provisions in the case at hand.[42] **49**

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40 *Magnus*, para. 49.

41 *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305; RCDIP (2001), p. 107, note *Idot*.

42 See already *Plender/Wilderspin*, para. 12–048.

50 According to a widely held (although not unanimous) opinion,[43] the specific clause included in several consumer law directives[44] also have the effect of conferring on the relevant substantive rules the character of overriding mandatory provisions. However, reference to Art. 9 has become superfluous for such rules, since their application is now ensured by Art. 23 of the Regulation.[45]

51 It has been held that recourse to Art. 9 is superfluous in order to ensure the application of mandatory provisions of EU law which enjoy direct applicability, such as those included in the EU treaties or in EU regulations. Following this opinion, the application of these rules does not depend on their classification as overriding mandatory provisions, because they have in any case priority over national law.[46] This is certainly true when the law applicable to the contract is the law of Member States: in this event, EU law provisions are directly applicable to all situations falling within their scope and prevail over contrary national law rules. However, the question is different when the law of a non-Member State governs the contract by virtue of the EU Regulation. In this case, the priority of EU law rules cannot be simply based on their direct applicability, but needs a legal basis under the Rome I Regulation. As we have seen for directives, that legal basis will be Art. 23, when the EU act contains a special choice-of-law rule within the meaning of that provision. Failing this, the relevant EU rules can only prevail over the law applicable to the contract under the conditions of Art. 9. This also means that not all EC law rules, albeit mandatory, can be regarded as internationally mandatory.

c) International law

52 Overriding mandatory provisions can also have their sources in public international law, in particular in international treaties and in the acts of international organisations. Trade embargoes or other personal or economic sanctions adopted by the United Nations are a good example for that. The rules included in these acts are obviously applicable when they are in force (as self-executing provisions or by virtue of a transposition into national law) in the country, the law of which governs the contract under the Regulation. They can also prevail over the law otherwise applicable provided that they meet the conditions of Art. 9.

2. The definition of overriding mandatory provisions and its impact

53 A definition of overriding mandatory provisions was introduced in Art. 9 (1) of the Regulation, following the European Commission's proposal.[47] Pursuant to the new text, overriding mandatory provisions are "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract" under the Regulation.

54 The introduction of a normative definition of this category of legal provisions no doubt constitutes an important innovation compared with Art. 7 Rome Convention. This defini-

43 *Roth* IPRax (1994), p. 169. *Contra*: *Magnus*, para. 37; *Martiny*, in: Münchener Kommentar, para. 24.

44 See *supra*, Art. 9 para. 40.

45 *Magnus*, para. 37.

46 *Magnus*, para. 37; *Martiny*, in: Münchener Kommentar, para. 28.

47 See Art. 8 (1) of the Proposal.

tion is also unique from a comparative law perspective; indeed, to the best of our knowledge, no other text – national or international – contains such a detailed definition of overriding mandatory provisions.

As regards its content, the definition is not particularly innovative. Its direct source is to be found in the well-known *Arblade* decision of the European Court of Justice.[48] It should be recalled, however, that, in that decision, the European Court of Justice did not intend to create its own notion of overriding mandatory provisions (the question posed by the Belgian court did not require the Court to do so) and restricted itself to confirming the principle – clear, in and of itself – that Community law takes precedence over internal law, including those national norms which, in their own legal system, are regarded as overriding mandatory provisions.[49] Thus, the definition of *lois de police* endorsed by the Court was no other that that used in Belgian law. In turn, this definition stems from French legal doctrine, in particular from the writings of Phocion Francescakis on "lois d'application immediate".[50] **55**

Although the doctrinal and jurisprudential origins of the definition appear unequivocal, the consequences of its inclusion into the Regulation are more controversial. **56**

The definition certainly has the beneficial effect of *clarifying the meaning* of overriding mandatory provisions. On this point, the Rome Convention maintained a certain ambiguity between the notion of *lois de police* and that of mandatory rules. Indeed, the expression "mandatory rules" was used with different meanings in various provisions of the Convention. Whereas pursuant to Arts. 3 (3) (contracts having no cross-border elements), 5 (2) (consumers contracts) and 6 (1) (employment contracts), this term referred to all the rules "which cannot be derogated from by contract", the same term was used in the title of Art. 7 **57**

48 *Jean-Claude Arblade, Arblade & Fils SARL* and *Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453, para. 30, where it was held that the terms "lois de police et de sûreté" as used in Belgian law should be understood "as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State." See the note by *Fallon* in RCDIP (2000), p. 710. However, this definition was not mentioned in the *Mazzoleni* case, which also concerned the conformity with EU law of Belgian rules on the protection of workers: *Procédure pénale contre André Mazzoleni et Inter Surveillance Assistance SARL* (case C-165/98) (2001), ECR 2001, p. I-2189, para. 22 *et seq.*; RCDIP (2001), p. 495, with note by *Pataut*.

49 *Jean-Claude Arblade, Arblade & Fils SARL* and *Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453, para. 31: 'the fact that national rules are categorised as public-order legislation [*lois de police*] does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of Community law would be undermined. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest'. This aspect of the *Arblade* case is rightly emphasised by *P. Mankowski* (note 1), p. 109.

50 *Francescakis*, Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles sur les conflits de lois, RCDIP (1966), p. 1 *et seq.*; *Francescakis*, Lois d'application immédiate et règles de conflit, RCDIP (1967), p. 691 *et seq.*; *Francescakis*, Conflits de lois (principes généraux), in: Rép. Dalloz, Droit international, t. 1 (1968), p. 480.

with respect to those rules which are now called "overriding mandatory provisions", i.e. a more restricted category of mandatory legal provisions that are to be applied "irrespective of the law otherwise applicable to the contract." Such ambiguous language did not facilitate the understanding of the system, in particular for legal practitioners not specialised in private international law. The difficulty became much more serious in the Contracting States that did not recognise the notion of *lois de police* in their internal law.[51] The definition introduced in the Regulation clarifies that overriding mandatory provisions form a sub-set of the more general category of mandatory rules. To prevent all ambiguity, the drafter of the new text also preferred to avoid the term "mandatory rules" in other provisions of the Regulation; this is the reason why Arts. 3 (3), 3(4), 6 (2) and 8 (1) of the Regulation now only refer to rules "which cannot be derogated from by contract". The need to clearly distinguish between these two notions is also expressed in Recital 37, where it is stated that "[t]he concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively." To this purpose, the new definition is certainly useful.

58 The definition, which is formulated in terms that are deliberately restrictive, should also have a *dissuasive effect* for the Member States. The reference to norms deemed to be "crucial" for the safeguard of "public interests" as well as maintaining the "political, social and economic organisation" of the State, is clearly meant to prevent national legislators and courts from conferring too easily an overriding character to domestic mandatory rules. This should prevent a too frequent derogation from the uniform choice-of-law rules of the Regulation by means of excessive recourse to Art. 9.[52] This concern is clearly demonstrated by Recital 37 which emphasises that recourse to overriding mandatory provisions, as well as to public policy, should only be possible in "exceptional circumstances" and that this notion should be "construed more restrictively" than that of internal mandatory rules. The normative definition will certainly result in the courts of Member States being required to provide appropriate reasoned justification of their decision to qualify a domestic provision as a *loi de police*.[53]

59 The definition in Art. 9 (1) should also promote a more *uniform application* of the Regulation. Indeed, this definition reflects a new European law notion of overriding mandatory provisions, an autonomous notion which is distinct from those which may exist in the Member States (although it is certainly intended to influence them) and should be construed accordingly. Of course, States remain free to determine whether a provision should be regarded as crucial for safeguarding their own interests: this decision can be taken either by the national legislators or, failing an express indication, by the national courts. However, as is now widely accepted with respect to public policy,[54] EU law fixes the limits within which

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51 The problem arose particularly in the common law countries, where the entry into force of the Rome Convention led the doctrine to forge a new concept, that of "overriding statutes", as opposed to "simple" mandatory norms ("mandatory rules"). See *Harris*, p. 297 *et seq.*

52 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 43 *et seq.*

53 Such a justification should specify that the mandatory norm pursues an objective essential to the enacting State and that its application to the case at hand is necessary for the realisation of this result. See *infra*, Art. 9 para. 85.

54 *Dieter Krombach v. André Bamberski*, (case C-7/98) (2000), ECR 2000-I, p. 1935, para. 23; *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* (case C-394/07) (2009),

the Member States may legitimately have recourse to the concept of overriding mandatory provisions, and provides an indication of "the interests which a country can legitimately take into account in determining whether a rule is overriding."[55] Also, the existence of a European law notion necessarily implies that the Court of Justice is competent to interpret it.[56] Therefore, the inclusion of this definition in the Regulation has an impact that goes well beyond the *Arblade* decision where the Court of Justice, as we have noted, did not intend to formulate a general definition of overriding mandatory provisions.

3. The elements of the definition

60 According to Art. 9 (1), for a rule to qualify as an overriding mandatory rule, three conditions must be satisfied: a) the provision should be mandatory; b) its observance should be regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization; c) the provision should be applicable irrespective of the law that otherwise governs the contract under the Regulation. These conditions are cumulative, i.e. they all need to be fulfilled.[57] All these elements can be expressly stated by the provision or can be inferred from it by way of construction.

61 The classification of the provision as a part of private or public law is not relevant.[58] However, for the application of Art. 9, it is necessary that the provision has an effect on a contract or on the rights or obligation arising thereof.

a) A mandatory provision

62 As it clearly results from the language of Art. 9 (1) as well as from the title of this article, only "mandatory provisions", i.e. rules that cannot be derogated from by party agreement, belong to this particular category of *lois de police*. This is now quite generally accepted. The reason is self-evident: if a rule of law can be excluded or derogated from by contract, it can hardly be regarded as the expression of a fundamental policy of the forum. Therefore, there is no reason why it should prevail over the law applicable to the contract, designated by the ordinary choice-of-law rules.

63 It is not always easy to establish whether a rule of law is mandatory or not. In some cases, this is clearly stated by an express provision. Failing such an indication, it is a matter of construction and interpretation, which has to be decided under domestic law (or EU law, or international law), by examining the content of the rule and its underlying policy.[59]

64 Since the mandatory nature is not sufficient to classify a rule as an overriding provision, the examination of the other requirements set up by Art. 9 (1) will often absorb the specific question of the mandatory nature; in other words, if a rule is regarded as "crucial for safe-

ECR 2009-I, p. 2563, para. 34; *Rüdolfs Meroni v. Recoletos Limited (et alia)* (case C-559/14) (2016), para. 40.

55 See *Plender/Wilderspin*, para. 12–013.

56 See *infra*, Art. 9 para. 97 *et seq.*

57 *Magnus*, para. 46.

58 *Martiny*, Münchener Kommentar, para. 12.

59 See *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 50.

guarding the public interests" of a country, it is normally clear that it cannot be derogated from by contract. Conversely, if it is accepted under domestic law that a specific provision is not mandatory (because it can be derogated from by party agreement), this will be sufficient to reject its overriding character.

65 As already mentioned, not all mandatory provisions belong to the restricted category of overriding mandatory provisions; in other words, not all mandatory rules command their application irrespective of the law designated by the choice-of-law rules. As a matter of principle, choice-of-law rules prevail over domestic rules, even if the latter are mandatory. Thus, when the contract is governed by the law of a foreign country, the rules of the *lex fori* will be discarded, even if they are mandatory.

66 Normally, the same is true even when the governing law was selected by the parties, as widely permitted by Art. 3 of the Regulation. Thus, when the parties have chosen the law applicable to the contract, their choice excludes all rules of the otherwise applicable law (i.e. of the law which would have been applicable in the absence of a choice), including its mandatory rules. Under the Regulation, there are only few exceptions to this general principle. One of these is Art. 3 (3) of the Regulation, pursuant to which all mandatory rules of the otherwise applicable law prevail over the law designated by the parties, if the contract has no genuine cross-border element (i.e. if it is a purely "domestic" contract). Similarly, in intra-European relationships the mandatory rules of EU law prevail over the parties' choice by virtue of Art. 3(4). Finally, under Arts. 6 (2) and 8 (1) of the Regulation, the parties' choice in a consumer or employment contract cannot deprive the weaker party of the protection afforded to him by the mandatory rules of the law which would be applicable to the contract in the absence of choice.

67 Subject to these few exceptions (and to the "classical" public policy clause of Art. 21), only overriding mandatory provisions take priority over the choice-of-law rules. Therefore, as stated in Recital 37, a clear distinction should be drawn between "domestically mandatory" (or "internally mandatory") provisions, which cannot be derogated from by agreement, on one side, and "overriding mandatory" (or "internationally mandatory") provisions, on the other.

b) A provision, the respect for which is crucial for safeguarding public interests

68 According to the definition in Art. 9 (1), overriding mandatory provisions are, "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation." The purpose of this language is to clarify how overriding mandatory provisions should be distinguished from simply "domestically" mandatory provisions and why they have to be applied in cross-border situations irrespective of the otherwise applicable law.[60] As the language of Art. 9 (1) makes clear, only an overriding mandatory provision involves the "crucial" interests of a country and must therefore be observed, even if in derogation from the law applicable pursuant to the ordinary choice-of-law rules.

69 The assessment of these conditions is a matter for the court, in conformity with the criteria which might be formulated by the European Court of Justice. It is very unlikely that these

[60] See *infra*, Art. 9 para. 86 *et seq.*

elements directly result from the wording of the provision. Therefore, the court will have to make a "detailed assessment", based on the "general structure" of the provision and on "all the circumstances in which that law was adopted".[61] The fact that a rule is provided with a specific definition of its territorial or personal scope is, of course, a strong indication that it could amount to an overriding mandatory provision. The sanctions provided for in case of non-observance are also important: thus, the fact that the rule is enforced by way of criminal or administrative sanctions can be an important element. However, civil law sanctions, such as the nullity or enforceability of the contract or liability for damages, may also be significant.

According to the language of Art. 9 (1), only the safeguard of a country's "public interests" can justify a derogation from the ordinary choice-of-law rules. In particular, these interests could involve the political, social or economic organisation of that country. **70**

Based on this, there is no doubt that Art. 9 covers provisions, whether of public or private law, directly aimed at the protection of collective interests of a country, provided that they are regarded as crucial to that purpose. This is typically the case of anti-trust legislation and rules against unreasonable restraint of trade, commercial embargoes and other political or economic sanctions against foreign countries, rules on the import and export of goods and services, provisions on the access and the exercise of specific trades or professions, regulations on stock exchanges and other public markets, regulations on prices and fees (e.g. rules against champerty), legislation on exchange control or restricting credit in the interest of currency stability, and so on. All of these rules are not concerned with the protection of the individual interests of a contractual party, but are directly aimed to safeguard the overriding public interests of a country (or, as the case may be, of a supranational organization or a group of countries). **71**

Typically, these rules do not have an exact equivalent in the law of foreign countries, because their foreign counterpart – when they exist – usually target the protection of the foreign country's interests and therefore have a different spatial or personal scope. Thus, only their mandatory application, irrespective of the otherwise governing law, ensures, in international situations, the safeguard of the protected interests. This is, for instance, the case for anti-trust legislation; the foreign country, the law of which can be chosen by the parties, may well have enacted its own anti-trust rules, but these normally have a different scope, because their aim is the protection of the foreign country's market. Only the application of the anti-trust rules in force in the forum ensures the protection of the forum's overriding interests. **72**

By contrast, it is highly debatable whether Art. 9 also covers mandatory rules that are designed to protect certain categories of individuals, in particular weaker parties, such as consumers, employees, tenants, commercial agents, franchisees, etc. **73**

Norms of this kind are meant to directly protect the private interests of a party. Notwithstanding this, there is a widely held opinion that considers that they may be assimilated to the category of overriding mandatory provisions, at least when they also protect, in an **74**

[61] *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 50.

indirect manner, interests of a public nature.[62] This idea is particularly strong in some Member States, such as France,[63] Italy[64] and Belgium.[65] Under the Rome Convention, this opinion was corroborated by the plain language of the explanatory report[66] mentioning the rules on consumer protection as well as those relating to carriage contracts as possible examples of *lois de police* within the scope of Art. 7. Apparently, the European Court of Justice also took the same position in the *Ingmar* case, holding that some protective provisions of the Commercial Agents Directive could prevail over the law of a non-Member State chosen by the parties.[67]

75 However, according to a different opinion, a clear distinction should be made between the mandatory norms pursuing public goals and those protecting individual interests. Thus, most German scholars distinguish between *Eingriffsnormen*, on one hand, and *Parteischutzvorschriften* (or *Sonderprivatrecht*, i.e. "special private law"), on the other. The norms of the first category "interfere" ("eingreifen") with the traditional contract law rules in order to further goals of public interest.[68] This is, for instance, the case of the anti-trust legislation and of the rules governing imports and exports of goods. These rules clearly pursue collective interests and not only those of the parties to the contract. By contrast, with respect to the norms of the second category, their mandatory nature serves to preserve (or re-establish) a balance between the parties to the contract (the expression *Ausgleich privater Interessen* is used in Germany): typical examples are the rules protecting consumers and employees. Several German scholars argue that only *Eingriffsnormen* should be qualified as overriding mandatory provisions.[69] This scholarly view has largely influenced German courts: as early

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62 An example is provided by the decisions rendered by the French *Cour de cassation* which attributed the nature of *lois de police* to the rules providing the sub-contractor with a the direct action against the owner (a particularity of French law provided for by a law of 31.12.1975): Cass, Ch. mixte, 30.11.2007, *Agintis*, *Juris-Classeur Périodique* G 2008, II, 10000, note *D'Avout*; *Clunet* 2008, note *Perreau-Saussine*; Cass. Ch. com., 27.4.2011, RCDIP (2011), p. 624, note *M.-E. Ancel*. Even though this rule certainly has an indirect effect on competition, it is intended to protect, at least in the first instance, the individual interests of a category of (often small) entrepreneurs. A different conclusion was arrived at by *Cass. com.* 13.7.2010, Clunet (2011), p. 91, note *Jault-Seseke*, with reference to the direct action of the carrier of goods (Art. L.132–8 of the *Code de commerce)*.

63 See the decisions of the French Cour de cassation of 23.5.2006, Dalloz (2006), p. 2798 (concerning consumer law) and those of 30.11.2007 and 27.4.2011 (quoted in the previous footnote) The French doctrine refers in such cases to *lois de police* '*de protection*' as opposed to *lois de police* '*de direction*'. See also *Boskovic*, Dalloz (2008), p. 2178. *Kuipers*/*Migliorini* ERPL (2011), p. 195.

64 See *Pocar*, La protection de la partie faible en droit international privé, in: Recueil des cours, t. 188, 1984, V, p. 392 *et seq.*; *Pocar*, La legge applicabile ai contratti con i consumatori, in: Treves (ed.), Verso una disciplina comunitaria della legge applicabile ai contratti, Padua 1983, p. 314 *et seq.*; *Bonomi*, Le norme imperative (1998), p. 190; *Boschiero*, p. 111.

65 Thus, the Belgian provisions protecting commercial agents and exclusive distributors are traditionally regarded as lois de police: see *Nuyts* RCDIP (1999), p. 31–74. Overriding provisions also exist in the field of consumer and workers protection, as illustrated by the *Arblade* and *Mazzoleni* cases.

66 Report by *Giuliano*/*Lagarde*, p. 28.

67 *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305; RCDIP (2001), p. 107, note *Idot*.

68 On the differences between the German and the French approaches, see also *Kuipers*/*Migliorini* ERPL (2011), p. 189 *et seq.*

as the first half of the 1990's, the Federal Labour Court *(Bundesarbeitsgericht)*, relying on this restrictive reading of Art. 7 (2) Rome Convention (more precisely, of the German rule implementing that provision, Art. 34 (2) EGBGB), refused to apply a number of German rules protecting employees against abusive dismissal.[70] In a more recent judgment, and after having left the question open in some previous decisions,[71] the Federal Supreme Court *(Bundesgerichtshof)* held that the norms protecting certain categories of individuals, in particular the weaker party to a contract, do not fall under Art. 34 (2) EGBGB, even when they also tend to promote, indirectly, collective interests *("Belange der Allgemeinheit reflexartig mitgeschützt werden")*.[72]

Although Art. 9 (1) refers to the safeguarding of public interests, several elements of its wording indicate that this provision should not be construed as implying an *a priori* exclusion from its scope of all norms aimed at the protection of individual interests.[73] **76**

First of all, it is important to note that such a restrictive reading does not necessarily follow from the wording of Art. 9 (1). As it was frequently pointed out, norms protecting specific categories of individuals can also have a crucial importance for a country's political, social and economic organisation, and thus indirectly further its public interests.[74] It therefore follows from the *Ingmar* decision that, although the immediate purpose of Arts. 17 and 18 of the Commercial Agents Directive is the protection of commercial agents as weaker parties, the objective of these provisions is, at the same time, to promote some fundamental goals of EU law such as freedom of establishment and unrestricted competition.[75] Some national **77**

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69 *Mankowski* RIW (1996), p. 8 *et seq.*; *Martiny*, in: Münchener Kommentar, para. 13. For additional references see *Bonomi*, Le norme imperative (1998), p. 172 *et seq.*

70 *Bundesarbeitsgericht*, 29 October 1992, in: IPRax 1994, p. 123, pursuant to whose terms § 613a BGB, that protects the rights of employees in the event of a sale of a company, does not have an international mandatory character. See *Bonomi*, Le norme imperative (1998), p. 174, and the references therein.

71 Cf. the judgments of 26.10.1993, in: IPRax 1994, p. 449, and of 19.3.1997, published in French in RCDIP (1998), p. 610, with note by *Lagarde*.

72 Bundesgerichtshof, 13.12.2005, in: IPRax (2006), p. 272, with the commentary of *Th. Pfeiffer*, p. 238 *et seq.*; see also Bundesgerichtshof, 9.7.2009, EuZW (2009), p. 907, para. 32 (concerning the rules on standard terms included in §§ 307–309 BGB).

73 *Boschiero*, p. 111 *et seq.*; *Freitag* IPRax (2009), p. 112; *Hellner* JPIL (2009), p. 458; *Nuyts* RDC (2009), p. 559; *Pfeiffer* EuZW (2008), p. 628, note 45; *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 336; *Stone*, EU Private International Law, 2nd ed. (2010), p. 342; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 11. See also the opinion of Advocate General *Wahl* in the case *Unamar* (Case C-184/12), paras. 53 *et seq.* For a narrow reading of Art. 9: *Archer* EJCL (2009), p. 701; *D'Avout* Rec. Dalloz (2008), p. 2167; *Garcimartín Alférez*, ELF (2008), p. I-16; *Martiny*, in: Münchener Kommentar, para. 15.

74 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 11. According to *Nuyts* RDC (2009), p. 558, the reference to "public interests" is larger than that to the organisation of the State.

75 In order to justify the overriding reach of the rules of the Directive, the ECJ stressed that they were intended "to eliminate restrictions on the carrying-on of the activities of commercial agents, to make the conditions of competition within the Community uniform and to increase the security of commercial transactions", and that their purpose was "to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market.": *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305, para. 29.

decisions on the issue also confirm this.[76] That being so, a literal understanding of Art. 9 (1) cannot lead to the exclusion *a priori* of all of "protective" rules from the category of overriding mandatory provisions.[77]

78 The legislative history of Art. 9 also indicates that such a narrow understanding of overriding mandatory provisions has not been sought by the drafters of the Regulation. The definition was already included, with more or less the same language, in the Commission Proposal.[78] In this respect, the Explanatory Memorandum accompanying the Proposal simply stated that the definition originated from the *Arblade* decision, but did not mention the intention of changing the current understanding of *lois de police*. Admittedly, one of the objectives of the definition was to discourage a too frequent recourse to this notion by the Member States, but nothing indicated that the Commission intended to rule out from the scope of the provision the whole category of rules protecting individuals. There is also no indication that the distinction between *Eingriffsnormen* and *Parteischutzvorschriften* was discussed in the subsequent stages of the legislative procedure.[79] Both in the Council and in the European Parliament, the debate focused on the very controversial issue of foreign overriding provisions and on the drafting of what became Art. 9 (3). Given that the notion of *lois de police* was interpreted quite widely under the Rome Convention – as it clearly appears from the Explanatory Report and from the case law in at least some Contracting States – it cannot be that a fundamental change of approach would have been brought about covertly, without any open debate on the issue. At the very least, more explicit language would have been needed for that purpose.

79 A significant argument in the same vein can also be inferred from the *Arblade* case itself, which is the direct antecedent of the Art. 9 (1) definition.[80] One must not lose sight of the fact that, in that case, as in the following *Mazzoleni* case, the Court of Justice used the notion of overriding mandatory provisions with regard to national norms of employees' protection. It would be extremely surprising if the language taken from the Court's ruling were to be read as excluding norms protecting employees and other weaker parties.

80 In more general terms, a narrow interpretation would be at odds with the already mentioned tendency of the European legislator to confer an overriding reach on norms that protect the weaker party. This is the case for several directives on consumer protection which contain a specific clause, aimed at ensuring the priority of the substantive rules on the parties' choice of the law of non-Member State.[81] In the Posting of Workers Directive, an overriding effect is attributed also to certain national rules on workers' protection which are in force in the

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76 So the decision of the French Cour de cassation of 30.11.2007, quoted above.

77 This is implicitly recognised by one of the principal proponents of the interpretation of overriding mandatory provisions as *Eingriffsnormen*, *Mankowski* IPRax (2006), p. 109, who deplored the fact that, in the definition included in Art. 8 (1) of the Proposal "[d]ie Dichotomie Ausgleich zwischen Vertragsparteien/überindividuelle Interessen taucht als solche bedauerlicherweise nirgends auf." See also *Kuipers/Migliorini* ERPL (2011), 201.

78 Art. 8 (1) of the Proposal.

79 See also *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 11.

80 *Jean-Claude Arblade, Arblade &/Fils SARL and Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453.

81 See *supra* note 30.

Member State where the worker is posted.[82] This legislative tendency is also corroborated by the case law of the European Court of Justice. In the previously cited *Ingmar* decision, the Court implicitly recognised the nature of overriding mandatory provisions of the norms protecting commercial agents.[83] In the same vein, in the *Mostaza Claro* case,[84] the Court regarded the consumer protection rules of the Unfair Terms Directive as belonging to the European public policy. Certainly, this trend mainly (but not only) concerns norms belonging to European law, the application of which is now often (but not always) ensured by the new Art. 23 of the Regulation. However, it would be strange if the Court adopted a radically different approach with respect to the protective provisions in force in the Member States.

Finally, it should be noted that, if the German distinction between *Eingriffsnormen* and *Parteischutzvorschriften* were adopted for the purpose of Art. 9 (1), its impact would be stronger than under current German law. In that Member State, the distinction serves as a limit for the courts when the overriding nature of a provision does not result clearly from its wording. By contrast, if such a distinction were adopted for the purpose of the Regulation, it would also limit the autonomy of the Member States' legislators, because they could no longer confer an overriding reach on internal norms protecting individuals.[85] It is unlikely that the European legislator intended to restrain the power of the Member States to determine their own crucial interests to such a large extent. **81**

For all of these reasons, it is submitted that rules aimed at the protection of individual interests can also qualify as overriding mandatory provisions. Of course, this is only a possibility and does not mean that all rules of this kind have an overriding effect.[86] It would certainly be wrong to assume that all protective rules are internationally mandatory; however, it cannot be excluded *a priori* that some of them belong to this category. As Art. 9 (1) makes clear, a mandatory rule can prevail over the ordinary choice-of-law rules only when it is regarded as crucial by a country for safeguarding its public interests. This means that a rule protecting individuals can only be regarded as *lois de police* when it also promotes public interests: in other words, the rule must have a dual or multiple purpose.[87] The decisions cited above offer some examples of this. **82**

As a consequence of the suggested interpretation, Art. 9 can be invoked by the weaker party to a contract in order to seek protection of mandatory rules of national law, provided that these rules are crucial for safeguarding a country's public interests. As stated above, this **83**

82 We refer here to certain protective norms of the State to which an employee is posted, to which the Directive 96/71/EC[77] attributes the nature of overriding mandatory provisions.

83 *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305.

84 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* (case C-168/05) (2006), ECR, 2006-I, p. 10421; Rev. arb. (2007), p. 199, note *Idot*, in which the Court affirms that the rules of Directive 93/13/EEC concerning unfair contract terms are a part of the European public policy. See also *Asturcom Comunicaciones SL v. Cristina Rodríguez Noguera*, (case C-40/08) (2009), ECR, 2009-I, p. 9579.

85 See *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 12.

86 *Nuyts* RDC (2009), p. 560.

87 Also *Hellner* JPIL (2009), p. 459; *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 336 *et seq.*; *Renner*, in: Calliess, Art. 9 Rome I, para. 20; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 11. However, it is not necessary that the protection of a public interest is paramount, as suggested by *Magnus*, para. 59 *et seq.*, and *Martiny*, in: Münchener Kommentar, para. 13.

possibility also exists in the areas covered by the special choice-of-law rules of Arts. 6 and 8 of the Regulation (i.e. consumer and employment contracts); however, in these areas the conditions for the concurrent application of Art. 9 are rarely satisfied. By contrast, the effects of the proposed, broad understanding of Art. 9 are more important for the protection of those weaker parties, who are not benefitting from the special choice-of-law rules of the Regulation, in particular in those areas where an unrestricted party choice of the applicable law is permitted. This is the case, *inter alia*, for rental agreements, carriage of goods and persons, insurance, distribution (agency and exclusive distribution contracts) and other commercial transactions involving SME.

84 Although Art. 9 (1) does not clearly state it, only important public interests can justify recourse to Art. 9.[88] This results from the reference to a country's political, social or economic "organization": not all public interests are so important that they can be regarded as having an impact on a country's organization. Recital 37 also stresses that the application of overriding mandatory provisions is possible only "in exceptional circumstances" and that this concept should be construed "restrictively".[89]

85 Furthermore, the language of Art. 9 (1) makes clear that the provision in question must be "crucial" for safeguarding the interests at stake. This implies that the application of the provision in the case at hand is not only necessary but is also the most effective way of promoting the underlying policy. This opens the door to a proportionality test.[90] Thus, if the country's public interest can be (sufficiently or even better) satisfied through the application of the law governing the contract, the court seized should refrain from resorting to Art. 9. This reasoning also has a significant consequence from a methodological point of view: contrary to traditional understanding, overriding mandatory provisions do not operate "blindly", but should take into account the content of the law otherwise applicable to the contract.

c) A provision with an overriding reach

86 The third element of the definition in Art. 9 (1) reflects the traditional understanding of overriding mandatory rules. Because of their particular purpose and content, these rules derogate from the ordinary choice-of-law rules and demand to be applied to all situations falling within their scope, "irrespective of the law otherwise applicable to the contract under this Regulation". The term "overriding", which is now commonly used in legal English to qualify these provisions, refers to their ability to derogate from the ordinary choice-of-law rules. The same idea is present in the expressions used for these provisions in other languages (e.g. "norme di applicazione necessaria", i.e. "norms of *necessary* application" in Italian).

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88 *Magnus*, para. 61.

89 See also *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 49, where the Court held that "[…] to give full effect to the principle of the freedom of contract of the parties to a contract, […] the plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Art. 7 (2) of [the Rome] Convention, must be interpreted strictly." In the same sense see now also *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 43 *et seq*.

90 See *Bonomi*, Le norme imperative (1999), p. 219 *et seq*.; *Bonomi* YPIL (1999) p. 89 *et seq.*

In some instances, the overriding reach of a provision expressly results from its wording, or from the wording of other rules having the purpose of defining its scope of application.[91] However, this is not very frequent. More commonly, a provision is simply accompanied by an express delimitation of its (territorial or personal) scope. Where the criterion adopted for this purpose does not coincide with that used by the ordinary choice-of-law rules in the relevant field, this is an indication that, in accordance with the intention of the legislator, that specific provision should be observed "irrespective of the otherwise applicable law". Thus, when the national anti-trust law provisions are expressly declared to be applicable to all conduct having an effect on a country's market,[92] they will affect all transactions having such an effect, even if they are governed by a foreign law. However, this is not necessarily the case. An express definition of a provision's scope does not necessarily mean that that provision is not subject to the ordinary choice-of-law rules. In fact, it may be the case that the provision is subject to a double limitation (that resulting on the ordinary choice-if-law rules and that based on its own scope); then, it does not have an overriding reach. These rules have been referred to as "self-limited" rules or "inherent limitations in statutes".[93] **87**

Under Art. 7 (2) Rome Convention, the overriding reach was the only element expressly referred to as characterising a *loi de police*. In that framework, the fact that a provision was conferred an overriding reach by the legislator or by the courts could legitimately be regarded as sufficient for qualifying that provision as an overriding mandatory rule. Therefore, subject to the inherent limitations of European law,[94] Member States' legislators and courts were free to confer an overriding reach on their internal provisions and thus derogate from the choice-of-law rules of the Convention. This has changed with the definition in Art. 9 (1). The overriding reach has ceased to be a self-sufficient condition for a *loi de police* and is now to be regarded rather as the consequence of the other conditions, in particular of a norm being crucial for safeguarding a country's public interests. Failing this, a provision cannot override the choice-of-law rules of the Regulation. **88**

At least in theory, this means that when a rule does not reflect a crucial interest of the country, the national courts could (and should!) refuse its application based on Art. 9, even if that rule is expressly provided with an overriding effect.[95] Admittedly, in practice, an express indication of the provision's scope and/or of its overriding character will continue to be interpreted by the courts as meaning that the rule is crucial for a country's public interests.[96] **89**

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91 A typical example is the clause included in several consumer law directives, pursuant to which the substantive provisions of the relevant directive are to be applied irrespective of the party choice of the law of a non-Member State. See *supra*, note 30.

92 See for instance § 130 (2) of the German statute against restrictions of competition (GWB) or Art. 2 (2) of the Swiss anti-trust statute.

93 *Hay*, Comments on "Self-Limited Rules of Law" in Conflicts Methodology, AJCL (1982), p. 281 *et seq.*; *Lipstein*, Inherent Limitations in Statutes and the Conflict of Laws, ICLQ (1977), p. 884 *et seq.*

94 See *infra*, Art. 9 para. 91 *et seq.*

95 *Harris*, p. 296 ("[…] an English court could refuse to apply its own law under Art. 9 (2), even in circumstances where the UK Parliament has clearly stated that is to be applied regardless of the governing law"). According to *Hellner* JPIL (2009), p. 460, "this would be unfortunate."

96 *Nuyts* RDC (2009), p. 560; *Plender/Wilderspin*, para. 12–007. According to these scholars, the fact that a rule expressly states its overriding reach is to be regarded as "strong prima facie evidence that respect of the rule was indeed regarded by a country as crucial to its public interests."

However, the European Court of Justice can now prevent an excessive use of Art. 9 by dictating more specific criteria for the "public interests-test" under Art. 9 (1).

90 In the majority of cases, mandatory provisions do not include an express statement as to their overriding reach, nor an express definition of their scope. In such instances, the task of determining a provision's scope and of stating, where appropriate, its overriding reach, rests entirely with the courts, which will have to, for this purpose, scrutinise the provision's content and objectives.[97]

4. Other unwritten conditions

a) Compatibility with EU law and public international law

91 Overriding mandatory provisions in force in the law of a Member State are obviously to be treated, from the point of view of EC law, as all others national measures. As made clear by the decision of the European Court of Justice in the *Arblade* case,[98] the characterization of national provisions as *lois de police*, "does not mean that they are exempt from compliance with the provisions of the Treaty."[99] Thus, although these provisions aim at safeguarding crucial interests of a Member State, they can only derogate from the fundamental freedoms under the very narrow conditions allowed by EU law. In particular,

'the considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.'[100]

92 Moreover, the national mandatory provisions will have to comply with the principle of proportionality, i.e., "they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it."[101]

93 This is nothing new from a theoretical point of view. Since EC law prevails over the domestic law of the Member States, it is simply logical that it should also prevail over those national rules which pursue fundamental interests of the State concerned. It should be noted, however, that the definition of overriding mandatory provisions in Art. 9 has the effect of introducing a new test of compliance, which is distinct and logically prior to that of the compatibility of overriding mandatory norms with the principles of European law. The two

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97 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 50.

98 *Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453, para. 30. See also *Procédure pénale contre André Mazzoleni et Inter Surveillance Assistance SARL* (case C-165/98) (2001), ECR 2001, p. I-2189, para. 22 *et seq.*

99 *Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453, para. 31.

100 *Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999), ECR 1999-I, p. 8453, para. 31.

101 *Kamer van Koophandel en Fabrieken voor Amsterdam contre Inspire Art Ltd.*, (case C-167/01) (2003), ECR 2003-I, p. 10155, para. 133.

tests have a different purpose (compliance with the definition of overriding mandatory provisions on one hand, conformity with EU law on the other) and scope (intra-EU cases or also cases involving third States). However, they are based on similar criteria (overriding interests, proportionality) and will therefore overlap to a certain extent.

It is also obvious that overriding mandatory provisions must furthermore respect public international law rules and principles, insofar as these are binding and applicable under the general principles.[102] **94**

b) A connection with the enacting State ("Inlandsbeziehung")

Because of the similarity between overriding mandatory provisions and public policy, one can wonder whether the former are, as with the latter, also subject to the condition that the situation presents a connection to the State that has enacted them ("Inlandsbeziehung" in the German terminology). Such a connection was required by Art. 7 (1) Rome Convention as a condition for giving effect to foreign *lois de police*; for the same purpose, a narrower condition is now set by Art. 9 (3), which allows only overriding mandatory provisions that are in force at the place of performance to be applied. By contrast, no such condition is mentioned in the first two paragraphs of Art. 9. **95**

Notwithstanding the lack of an express reference to such condition, it is submitted that a close connection is implicitly required for the purpose of Art. 9.[103] This follows from the condition, established by Art. 9 (1), that an overriding mandatory provision is to be, "regarded as crucial by a country for safeguarding its public interest". This condition can only be satisfied when the situations falling within that provision's scope are somehow connected to the State that has enacted the provision at hand.[104] Furthermore, the need for a genuine connection also follows from public international law, which limits the scope of a State's "jurisdiction to prescribe" to situations having a genuine connection with the enacting State.[105] However, this condition does not need to be specifically examined besides the other conditions under Art. 9 (1). As mentioned, the existence of a genuine connection is necessarily implied in the test imposed by that provision. **96**

5. The competence to examine the compliance with the conditions under Art. 9 (1)

As mentioned, the definition of overriding mandatory provisions under Art. 9 (1) means that this notion is part of European law and therefore implies the competence of the Euro- **97**

102 See *Rechtbank s'Gravenhage*, 17.9.1982, *CEP v. Sensor*, RabelsZ (1983), p. 141, note *Basedow*, p. 147.

103 *Magnus*, para. 82; in a number of well-known decisions, in: Münchener Kommentar, paras 122 *et seq.*

104 This is confirmed by the *Ingmar* decision, in which the ECJ held that the mandatory provisions of the Commercial Agency Directive were applicable when "the commercial agent carries on his activity within the Community": *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, (C-381–98) (2000), ECR 2000-I, p. 9305, para. 25. See also Cass., Ch. com., 27.4.2011, RCDIP (2011), p. 624, note *M-E Ancel*, which refused the application of the French rules on the direct action of the sub-contractor in the absence of a sufficient connection to France.

105 In the *Sensor* case, the Dutch judge refused the application of US embargo provisions, holding that they didn't meet the genuine connection requirement set by public international law: *Rechtbank s'Gravenhage*, 17.9.1982, *CEP v. Sensor*, RabelsZ (1983), p. 141, note *Basedow*, p. 147. See also *Renner*, in: Calliess, Art. 9 Rome I, para. 27.

pean Court of Justice to interpret it.[106] The national court having the task to apply Art. 9 can seize the Court for a preliminary ruling under Art. 267 TFEU.

98 This is an important change of approach given that, under the Rome Convention, the decision on whether to apply a national norm as an overriding mandatory provision fell within the discretion of the Contracting States.[107] While it is not for the Court to define which national rules are "overriding mandatory,"[108] it is nonetheless entitled, as with public policy,[109] "to review the limits within which the courts of a Contracting State may have recourse to that concept."

99 It is not easy to predict what the practical impact of this Court's competence will be. It is submitted that nothing will change in the cases where the application of a national provision is in any event contrary to EU law, as was the case in *Arblade* and *Mazzoleni*.[110] In these instances, the Court of Justice will likely prefer to refer to the European freedoms rather than venturing into the arduous question of clarifying the concrete scope of the definition of overriding mandatory provisions of Art. 9 (1) of the Regulation.

100 However, there might be cases where the application of a national mandatory rule, albeit in conformity with the principles of European law, does not comply with Art. 9 (1) of the Regulation. In these instances, the Court will certainly insist, as it already did under the Rome Convention in the *Unamar* case, that the national court seized must proceed to "a detailed assessment" of the conditions set up by Art. 9 (1).[111] It is to be seen whether the Court will agree to fully assume its task, by formulating more specific criteria for the interpretation of the language of Art. 9 (1) (e.g. the meaning of the terms "public interests") and/or guidelines on the inclusion of specific kinds of provisions into the scope of that article.

IV. Overriding Mandatory Provisions of the lex fori

101 After having defined overriding mandatory provisions, the Regulation describes in Art. 9 (2) and 9 (3) the legal effect of these norms. For this purpose, it is convenient to distinguish the overriding mandatory provisions belonging to the *lex fori*, those belonging to a foreign *lex causae* and those belonging to the law of a "third" country.

102 As with Art. 7 (2) Rome Convention, Art. 9 (2) states that "[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". As

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106 *Hellner* JPIL (2009), p. 458; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 11, p. 136; *Roth*, in: Festschrift für Gunther Kühne (2009), p. 869.

107 *Nuyts* RDC (2009), p. 557.

108 Thus, the concern expressed by *Plender/Wilderspin*, para. 12–012, that a country might be required, "to treat its own rules as overriding even where a domestic characterization would not attribute this effect," is unfounded.

109 *Dieter Krombach v. André Bamberski*, (case C-7/98) (2000), ECR 2000-I, p. 1935, para. 23; *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* (case C-394/07) (2009), ECR 2009-I, p. 2563, para. 34.

110 See *supra*, Art. 9 para. 91 *et seq.*

111 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) (2013), para. 52.

already mentioned, this is the normal effect of an overriding mandatory provision: such a norm is applicable, "irrespective of the law otherwise applicable" under Arts. 3 to 8 of the Regulation. As it results from the term "lois d'application immediate" used by legal scholars and adopted in some linguistic versions of the Regulation (in Portuguese: "normas de aplicação imediata"), these rules are of "immediate" application, i.e. their application does not depend on the ordinary choice-of-law rules.

The terms "application" makes clear that the overriding mandatory provision determines both its applicability conditions and its legal effect. Contrary to foreign mandatory provisions under Art. 9 (3), the provisions belonging to the *lex fori* are not only "given effect". **103**

Nothing changes when the *lex fori* is in any event applicable to the contract by virtue of the ordinary choice-of-law rules of the Regulation. By contrast, when the contract is governed by a foreign law, the overriding mandatory provisions of the *lex fori* take priority over the irreconcilable provisions of the foreign law otherwise applicable. Nevertheless, the provisions of the foreign *lex contractus* continue to be applicable, provided that they can be reconciled with the overriding mandatory provisions of the *lex fori*. Thus, the foreign *lex contractus* is not necessarily and entirely replaced, but continues to govern the contract, with the only exception being those aspects which are directly controlled by the overriding mandatory provisions. **104**

As already mentioned, the application of a national overriding mandatory provision is subject to some conditions. First, the provision must comply with the conditions set by Art. 9 (1). Second, overriding mandatory provisions in force in a Member State cannot infringe on European law. Finally, public international law must also be respected when it is applicable in the State of the forum. **105**

When these conditions are satisfied, the Regulation, "does not restrict the application," of the overriding mandatory provision, as stated in Art. 9 (2). This language means that such provisions can be applied, but do not have to be. In other words, the question of whether to apply a national law provision within the meaning of Art. 9 is a decision of the court seized. Of course, the court will normally have to respect the lawmaker's intention. However, as mentioned above, it also has to apply a proportionality test to ascertain whether the application of the provision at hand is the most effective way to promote the underlying policy.[112] **106**

Although paragraphs 1 and 2 of Art. 9, by referring, respectively, to provisions of "a country" and to provisions "of the law of the forum", seem only to cover provisions of national law, it is not disputed that mandatory provisions of European law can also have an overriding reach and thus benefit from the immediate applicability under Art. 9 (2). Admittedly, Arts. 3 (4) and 23 of the Regulation also ensure, when they are applicable, the precedence of mandatory rules of European law; nevertheless, recourse to Art. 9 is necessary when the conditions of application of Arts. 3(4) and 23 are not satisfied. This is notably the case when not all elements of the situation are located in one or more Member States and when no special conflict-of-law rule is laid down by European law. Overriding mandatory provisions originating from public international law can also benefit from Art. 9 (2), when they are in **107**

[112] See *supra*, Art. 9 para. 85.

force in the forum country. A typical example is provisions on commercial embargo included in resolutions of the UN Security Council.

V. Overriding Mandatory Provisions of a Foreign lex contractus

1. Applicability of the provisions of the lex contractus

108 Art. 9 (2) of the Regulation only covers the overriding mandatory provisions of the law of the forum, and Art. 9 (3) refers to overriding mandatory provisions of the law of the country where the contractual obligations have to be or have been performed. Neither Art. 9, nor other sections of the Regulation refer to the overriding mandatory provisions of the law of the contract, i.e. the law designated by the ordinary choice-of-law rules of the Regulation.

109 At first glance, the reasons for this omission are obvious. Art. 9 only refers to the rules which are applicable, "irrespective of the law otherwise applicable to the contract". It is implied that, subject to the public policy exception (Art. 21), the mandatory rules of the law governing the contract are in any event applicable by virtue of the ordinary choice of law rules, without the need to resort to Art. 9. This is obviously the case for "domestically mandatory" rules: by selecting a law as applicable to the contract, the choice-of-law rules refer to that law in its entirety, including both default rules and mandatory rules. *A fortiori*, this must be true for overriding mandatory rules, since these are, by definition, particularly important to the interests of the country, the law of which is applicable to the contract.[113]

110 This reading of Art. 9 corresponds to an approach known, among German scholars, as the "Schuldstatutstheorie".[114] According to some experts, this was the prevailing view during the negotiations of the Regulation.[115]

111 However, this understanding is not unanimous. According to a different view, which is, in particular, widely held among German scholars,[116] the reference to the foreign *lex contractus* by the ordinary choice-of-law rules does not include the overriding mandatory provisions ("Eingriffsnormen") of that legal system. Since these rules have their own applicability criteria, which do not necessarily coincide with the connecting factors adopted by the ordinary choice-of-law rules, their application depends on "special" conflict rules other than those governing the contract ("Sonderanknüpfung").[117] Under the Regulation, this reasoning implies that overriding mandatory rules of the *lex contractus* would only be applicable under the very restrictive conditions of Art. 9 (3).[118] This counter view should be rejected because, for several reasons, it does not fit into the system of the Regulation.[119]

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113 *Magnus*, para. 134 *et seq.* See also the opinion of the A-G *Szpunar* in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 76.

114 Or, more exactly, "Kumulationslösung" because it accepts the application of the overriding mandatory provisions of both the *lex contractus* and the law a third State under Art. 9 (3). See *Martiny*, in: Münchener Kommentar, para. 43; *Roth*, in: Festschrift für Gunther Kühne (2009), p. 870.

115 *Lando/Nielsen* C.M.L. Rev. (2008), p. 1687.

116 See for instance *Martiny*, in: Münchener Kommentar, para. 43; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 78.

117 On the theory of *Sonderanknüpfung*, see *infra*, Art. 9 para. 120.

The main reason, which we have already referred to, is based on the clear wording of Art. 9 (1). Overriding mandatory provisions are defined as provisions which are applicable irrespective of the otherwise applicable law, i.e. as a derogation from the law governing the contract. *A contrario*, when the special conditions of Art. 9 are not satisfied, the only applicable rules are those of the law of the contract, irrespective of whether they are mandatory or not. **112**

Admittedly, this reading followed more clearly from the language of Art. 7 (1) Rome Convention. By stating that "[w] hen 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" (we emphasize), this provision clearly referred to the *lois de police* belonging to the law of a "third" country, i.e. a legal system other than the *lex fori* and the *lex contractus*. It was obvious, therefore, that overriding mandatory provisions belonging to the *lex contractus* were not covered by Art. 7 and should be applied as a part of the law of the contract. The wording of Art. 9 (3) is not so clear in this respect, since it does not distinguish between the *lex contractus* and the law of a third country. However, there is no indication that the drafters of the Regulation intended to depart from the approach of the Convention on this point.[120] **113**

It should also be noted that the counter view is based on several assumptions which are not necessarily shared by all of the Member States, and which in any event are not valid under the Regulation: **114**

- On one hand, the exclusion of the overriding mandatory provisions of the *lex contractus* is based on an understanding of such norms as "Eingriffsnormen" within the German meaning, as opposed to rules protecting the interests of individuals.[121] However, as mentioned above, the definition of overriding mandatory provisions under Art. 9 (1) is broader, since it also encompasses rules protecting individuals. Now, although some commentators take the opposite view,[122] there is no reason why a mandatory rule of the *lex contractus* aimed at protecting individuals should be discarded, simply because it has an overriding reach.
- On the other hand, the counter view that the reference to the foreign *lex contractus* by the ordinary choice-of-law rules does not include the overriding mandatory provisions of that legal system is largely influenced by some older German decisions excluding the application of foreign rules of public law.[123] The question of the applicability of foreign public law rules is not directly dealt with in the Regulation and we will not examine it here in detail. However, we would like to stress three points. First, the distinction between private and public law is blurred and increasingly disputed, and it does not even exist as

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118 *Martiny*, in: Münchener Kommentar, para. 43; *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 341; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 78.

119 This is accepted even by some of the proponents of the counter view: see *Roth*, in: Festschrift für Gunther Kühne (2009), p. 873.

120 On the contrary, experts involved in the negotiations report that the application of the provisions of the *lex contractus* was regarded as a matter of course: *Lando/Nielsen* C.M.L. Rev. (2008), p. 1687.

121 See *supra*, Art. 9 para. 75.

122 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 78.

123 See in particular Bundesgerichtshof, 17.12.1959, NJW (1960), p. 1101; RCDIP (1961), with a note by *Metzger*.

such in the legal systems of certain Member States (such as common law countries). Second, the German position on the non-applicability of foreign public law rules is not unanimously shared among the Member States. Third, non-applicability of foreign public law (even if it were accepted in principle) does not mean that private law effects cannot be extrapolated from foreign public law rules. This is expressly accepted by the Regulation: as a matter of fact, under Art. 9 (3) effect may be given to certain foreign overriding provisions even if they belong to public law. If this is possible under Art. 9 (3), there is no compelling reason to exclude it with respect to the mandatory rules of the *lex contractus*.

115 Moreover, it is certainly true that overriding mandatory provisions have their own applicability criteria, which are often different from the connecting factors used by the ordinary choice-of-rules. However, applicability of these rules under the foreign *lex contractus* does not mean that such criteria will be disregarded. The rules of a foreign *lex causae* apply in any event only to the situations falling within their scope: therefore, the court seized must examine whether the relevant rule is applicable or not in the case at hand. In other words, the "self-limitation" of the foreign rule will not be ignored. If the norm does not cover the situation at hand, it will be discarded and other rules of the *lex contractus* will apply instead. So, the anti-trust legislation of the *lex contractus* will normally not apply unless the parties' conduct had an impact on that country's market. Similarly, the national rules protecting exclusive distributors will probably not apply when the distribution takes place on foreign markets.[124] This has nothing to do with *renvoi*, excluded under Art. 20 of the Regulation.[125] Moreover, the same is also true under Art. 9 (3): the overriding mandatory provisions of the law of the place of performance, referred to under that provision, are not based necessarily on that connecting factor and will only be given effect if the situation at hand falls within their scope.

116 The criticised opinion would also lead to some unacceptable consequences. First, if overriding mandatory provisions of the *lex contractus* were not applicable, they would have to be distinguished in each case from the other provisions of that law, including its "domestically" mandatory provisions. This would not only represent a very heavy burden for the court seized, but also prove extremely detrimental to legal certainty, thus running counter to the arguments that led to the new wording of Art. 9 (3). At the same time, the seized court would have the power of discarding certain provisions of the *lex contractus* without these being contrary to the public policy of the forum, thus circumventing the choice-of-law rules of the Regulation. Last but not least, the effect of the counter view is that foreign overriding mandatory provisions could only be given effect under the very narrow conditions of Art. 9 (3). Given that, one can wonder whether the restrictive wording of Art. 9 (3) would have been accepted during the negotiations.

2. The impact of the will of the parties

117 It follows from our understanding of Art. 9, that the overriding mandatory provisions of the *lex contractus* are applicable even when that law has been chosen by the parties, as allowed by Art. 3, as well as by other rules of the Regulation. This means that the parties' will can have an impact on the application of overriding mandatory provisions.

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124 See the decision of the Belgian Cour de cassation, 28.2.2008, Clunet (2011), p. 994, note *Watté*.

125 *Contra*: *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 78.

This is not particularly shocking. First, because the provisions of the *lex contractus* will only be applicable if the situation falls within their scope: normally, the parties' intention is not sufficient for that purpose. Second, because the parties, by entering a choice-of-forum or an arbitration agreement, can probably escape from the overriding mandatory provisions of the law of a country, the courts of which would otherwise have jurisdiction over their disputes.[126] Under the new Art. 9 (3), they can even escape from the overriding mandatory provisions of other foreign countries, by entering into an agreement on the place of performance. That being so, there seems to be no compelling reason to exclude that the parties' will can also lead to the application of such provisions. **118**

Can the parties also agree, through a "submission clause", on the applicability of the overriding mandatory provisions of a given country, the law of which is not applicable to the contract?[127] To answer this question, it is important to recall that under Art. 3 (1) of the Regulation, the parties can select to have the law applicable to only a part of their contract. Therefore, they should also have the right to submit to provisions governing specific aspects of the contract, the only limitation being consistency with the rules applicable under the law governing the contract as a whole. Furthermore, the parties can always incorporate by reference into their contract the provisions of a law other than the *lex contractus*.[128] Although Recital 13 refers only to the incorporation of a non-State body of law or an international convention, this possibility should be recognised *a fortiori* with respect to the rules of a State's legal system. **119**

VI. Overriding Mandatory Provisions of the Law of a "Third" State

1. General remarks

a) Content

Art. 9 (3) of the Regulation sets up the conditions for giving effect to foreign overriding mandatory provisions as opposed to those belonging to the *lex fori*, covered by Art. 9 (2). The direct antecedent of Art. 9 (3) was Art. 7 (1) Rome Convention. This rule was inspired by the German doctrine of the "Sonderanknüpfung" ("separate connection"), pursuant to which overriding mandatory rules ("Eingriffsnormen") are not subject to the ordinary choice-of-law rules but should be applied according to special criteria.[129] **120**

In case law, the only direct forerunner of Art. 7 (1) of the Convention was the well-known decision of the Dutch Supreme Court in the *Alnati* case.[130] In this and other subsequent **121**

126 See *infra*, Art. 9 para. 195 *et seq.*

127 *Remien*, RabelsZ (1990), 473 *et seq.*

128 *Martiny*, in: Münchener Kommentar, para. 46.

129 *Wengler*, Die Anküpfung des zwingenden Schuldrechts im internationalen Privatrecht. Eine rechtsvergleichende Studie, ZvglRW (1941), p. 168 *et seq.*; *Wengler*, Sonderanknüpfung, positive und negative ordre public, JZ (1979), p. 175 *et seq.*; *Zweigert*, Nichterfüllung auf Grund ausländischer Leistungsverbote, RabelsZ (1942), p. 283 *et seq.* The theoy had its roots in the reference, made by von Savigny's, to "Gesetze von streng posituiver, zwingender Natur": *von Savigny*, System des heutigen römischen Rechts, vol. VIII (1849), p. 182. See also *Roth*, in: Festschrift Gunther Kühne (2009), p. 860 *et seq.*

130 *Hoge Raad*, 13.5.1966, RCDIP (1967), p. 522, note *Struycken*.

decisions,[131] Dutch courts accepted, at least in principle,[132] that foreign overriding mandatory provisions could be given effect although they were not part of the law governing the contract, provided that a close connection existed between the situation and the enacting State. In other countries, although the direct applicability of foreign overriding provision was not recognised as a principle, the courts developed alternative approaches, based on substantive rules of the *lex contractus* or on public policy, which allowed them to sometimes give effect to such provisions.[133]

122 As mentioned above, Art. 9 (3) does not cover all foreign overriding mandatory provisions. In particular, it does not deal with the provisions of the *lex contractus*, but only with those belonging to the legal order of a "third" State, *i.e.* a law other than the *lex fori* or the *lex causae*.[134] Among these, effect may be given only to the provision of the law of the country where the contractual obligation has to be or has been performed. By contrast, the overriding provisions of the *lex contractus* are applicable as part of that legal system, provided that the situation falls within their scope. In this respect, the Regulation, as with the Rome Convention before it, deviates from the theoretical postulates of the "Sonderanknüpfung" doctrine.[135]

b) Purpose of Art. 9 (3)

123 Several arguments can be invoked for giving effect to foreign overriding mandatory provisions not belonging to the *lex contractus*:[136]

- In some instances, the courts of a country may be willing to assist a foreign country in promoting its policies or, at least, in preventing the violation of its laws. The reason for this can be the wish to cooperate in the pursuit of specific common or shared interests, or more generally the idea of "international comity", based among other on the assumption that foreign jurisdictions will reciprocate the courtesy shown to them.[137]
- By taking into account foreign mandatory rules, the courts can also shelter a party from "conflicting duties" arising out of the contract and/or contradictory laws of different countries. This concern is particularly important when a foreign State is in fact in a position to enforce its laws, and/or to impose effective sanctions for non-compliance ("Machttheorie").[138]
- The quest for international harmony of decisions can also justify the application of foreign mandatory rules; in fact, it is desirable that judgments rendered in the forum

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131 *Hoge Raad*, 12.1.1979, *Sewrajsingh* RCDIP (1980), note *van Rooij*; Rechtbank s'Gravenhage, 17.9.1982, *CEP v. Sensor*, RabelsZ (1983), p. 141, note *Basedow*, p. 147.

132 In the cases cited above, foreign mandatory provisions were actually never given effect, due to the absence of the required conditions.

133 See *infra*, Art. 9 para. 186 *et seq.*

134 Of course, in many cases *lex fori* and *lex contractus* are the same, so that the usual reference to a "third" country is not accurate: *Martiny*, in: Münchener Kommentar, para. 34 ("unechter Drittstaatsfall").

135 See *supra*, Art. 9 para. 120.

136 See also the opinion of the A-G *Szpunar* in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 80.

137 Thus, in the *Ralli* case, which directly influenced the wording of Art. 9 (3), English courts considered that they should not assist the parties in violating the laws of a foreign friendly country (see *infra*, Art. 9 para. 129). On the role of comity in this context, see *Chong* JPIL (2006), p. 37 *et seq.*

138 On the "Machttheorie", see *Martiny*, in: Münchener Kommentar, para. 39.

be in harmony with those that could be rendered by other potentially competent courts in a foreign State.[139] In turn, international uniformity prevents forum shopping and ensures that judgments can circulate freely, without clashing with the fundamental interests of other States concerned.

Art. 9 (3) does not give guidance as to which of these (and possibly other) objectives should be pursued. In this respect, it is submitted that courts continue to enjoy a very wide discretion.[140]

By contrast, legal certainty pleads against giving effect to foreign overriding mandatory provisions that are not part of the *lex contractus*. In fact, predictability is enhanced if the contract is governed by one single law designated by the choice-of-law rules, in particular when that law has been selected by the parties. Art. 9 (3) tries to strike a balance among these (and others) conflicting interests. **124**

c) The new conditions set by Art. 9 (3)

The direct antecedent of Art. 9 (3) was Art. 7 (1) Rome Convention. This provision allowed a court to give effect to foreign overriding mandatory norms on the sole condition that the situation presented a close connection with the State having enacted them. This decision was left to the court's discretion. It had to be based on diverse considerations related to the nature of these rules and their purpose, as well as any consequences that would derive from their application or non-application. **125**

This innovative, open-ended provision[141] had generated strong reactions. While some commentators celebrated it as an important step forward, opening new perspectives for the future development of private international law, its detractors criticised the legal uncertainty that this provision would entail and feared that it could vest courts with a quasi-political role, well beyond the normal judge's powers.[142] **126**

Because of the serious objections voiced by some Contracting States, Art. 22 Rome Convention allowed a reservation against Art. 7 (1) – an option chosen by seven Contracting States.[143] Since reservations cannot be made with respect to a European regulation, a compromise had to be reached between the States that favoured Art. 7 (1) and those that were **127**

139 *Bonomi* YPIL (1999), p. 239 *et seq.*; *Chong*, JPIL (2006), p. 38 *et seq.*; *Hellner* JPIL (2009), p. 449. See also the Commission's Green Paper COM (2002) 654.

140 See also *infra*, Art. 9 paras 139–140 and 170 *et seq.*

141 The only direct forerunner of Art. 7 (1) of the Convention was the line of Dutch case law initiated by the Hoge Raad decision in the well-known *Alnati* case: *Hoge Raad*, 13.5.1966, RCDIP (1967), p. 522, note *Struycken*. See also *Hoge Raad*, 12.1.1979, *Sewrajsingh* RCDIP (1980), note *van Rooij*, and *Rechtbank s'Gravenhage*, 17.9.1982, *CEP v. Sensor* RabelsZ (1983), p. 141, note *Basedow*, p. 147. Although the Dutch courts accepted, in principle, the applicability of foreign overriding mandatory provisions, they always refused to give effect to such provisions in the cases they had to decide. Although the direct applicability of foreign overriding provisions was not recognised elsewhere, the courts of other countries developed alternative approaches to sometimes give effect to such provisions: see *infra*, Art. 9 para. 185 *et seq.*

142 For references to the doctrine, see *Bonomi*, Le norme imperative (note 3), p. 294, note 229, as well as p. 368 *et seq.* The excessive character of these criticisms is rightly underlined by *Boschiero*, p. 110.

143 Estonia, Germany, Ireland, Luxembourg, Portugal, Slovenia and United Kingdom.

opposed to it. While the Commission, followed by some Member States, had proposed to maintain the disputed provision,[144] some Member States insisted on deleting it, following the precedent Rome II Regulation.[145] Particularly strong was the opposition of the United Kingdom, which insisted on the suppression or substantial modification of Art. 7 (1) as a condition for opting into the Regulation.[146]

128 In this context, Art. 9 (3) is the fruit of a political compromise. The new provision preserves the possibility of giving effect to the overriding mandatory provisions of a foreign state while imposing two more specific and restrictive conditions. The first such condition concerns the object of the mandatory rules in question. While the Convention posed no limitation in this regard and restricted itself to requiring that the norm be considered as an overriding mandatory provision in the legal order to which it belonged, Art. 9 (3) only permits a court to give effect to mandatory provisions which would, "render the performance of the contract unlawful". The second condition is intended to specify, in a restrictive sense, the connection required between the situation and the State that enacted a mandatory norm: whereas the Convention simply required the existence of a "close connection", without any further specification, the Regulation refers only to the norms of the country, "where the obligations arising out of the contract have to be or have been performed."

129 The new provision goes back to the compromise proposals made in the Civil Law Committee by the Dutch and Swedish delegations.[147] It is easy to recognise in its wording a sort of restatement of a rule originally formulated by the English doctrine[148] and adopted in the well-known decision of the English Court of Appeal in the *Ralli* case.[149] By virtue of this

144 See Art. 8 (3) of the Commission's Proposal.

145 As mentioned above, Art. 16 Rome I Regulation only refers to the overriding mandatory provisions of the *lex fori*.

146 This position was strongly influenced by the reactions of some stakeholders, in particular the City of London, who feared that the uncertainty engendered by Art. 8 (3) of the Commission's Proposal could undermine business confidence in the United Kingdom. For an in-depth discussion of the United Kingdom position, see *Chong* JPIL (2006), p. 27 *et seq.*; *Dickinson* JPIL (2007), p. 53 *et seq.*; *Harris*, pp. 272 *et seq.*

147 For details, see *Hellner* JPIL (2009), p. 453.

148 *Dicey*, The Conflict of Laws, 2nd ed., London, 1908, p. 553.

149 [1920] 1 K.B. 287, *Ralli Bros v. Compañia Naviera Sota y Aznar* (26 March 1920). The English company *Ralli Brothers* had chartered a ship belonging to the Spanish company *Sota y Aznar* in order to carry a cargo of jute from Calcutta to Barcelona. Under the terms of the parties' agreement, the one half of the charter had to be paid in London upon the sailing of the ship from its port of embarkation, the remainder being due upon arrival in Barcelona. After the arrival of the goods at destination, the sender refused to pay the second portion of the price and invoked a Spanish decree setting, as a matter of mandatory law, the total price of the charter in an amount inferior to the agreed upon amount. The English judges accepted this defence despite the fact that the contract was governed by English law, on the grounds that they could not assist in the violation of the laws of "friendly foreign" countries. For other cases in which this rule was applied, see *Dicey* & *Morris*, The Conflict of Laws, 13e ed. (ed. L. Collins), London, 2000, No 32–141 *et seq.*, p. 1246 *et seq.* In a distinct (although similar) line of precedents, English courts have also refused to enforce contracts which the parties had entered into with the intention of violating foreign mandatory provisions: Court of Appeal, 13.12.1924, *Foster v. Driscoll*, Law Journal, King's Bench (1929), p. 282; House of Lords, 21.10.1957, *Regazzoni v. Sethia*, 2 All ER (1957); ICLQ (1958), p. 164, note *Mann*; High

precedent, a contract, albeit valid under the law that governs it, is without effect if its performance requires the accomplishment of an act, which is considered unlawful by the law at the foreign place of performance *(lex loci solutionis)*. The similarity of Art. 9 (3) with English case law obviously facilitated the decision of the United Kingdom to ultimately opt into the Regulation.[150]

By contrast, the second sentence of Art. 9 (3) is unchanged. As under Art. 7 (1) Rome Convention, the court has discretion as to whether to give effect to the foreign overriding mandatory provision. In taking this decision, it has to consider the nature of the provision, its purpose as well as the consequences of its application or non-application. **130**

d) Overall appraisal

Art. 9 (3) has the merit of not completely excluding the possibility of giving effect to the overriding mandatory provisions of a third State.[151] In this respect, this provision is better than Art. 16 Rome I Regulation. Although we are not aware of any court decision making use of the power conferred by Art. 7 (1) Rome Convention, it is important that the principle of the potential pertinence of foreign overriding mandatory provisions be preserved, because of the impact that this principle can have particularly in promoting international harmony of decisions and international cooperation. It should also be noted that Art. 7 (1) has exerted a certain influence on some national private international law codifications[152] and that it is sometimes cited by arbitrators confronted with the question of whether to apply overriding mandatory provisions that do not belong to the *lex causae*. For these reasons, it is positive that Art. 7 (1) Rome Convention was not simply deleted, even if its preservation was possible only at the price of important concessions. **131**

Furthermore, the new provision is also applicable in those Member States, which had made a reservation against Art. 7 (1) Rome Convention. Thus, the courts of those States now also have the possibility to give effect to foreign overriding mandatory provisions. This was already the case in some of those Member States based on different approaches, such as the "indirect application" of foreign rules as a matter of fact. However, this was not possible in all those Member States. **132**

It should also be recognised that, in many cases, the solution provided for by Art. 9 (3) does permit adequate results. We mention, as an example, a contract which creates obligations that violate the antitrust laws of the place where it is to be performed. In such a case, a foreign court can give effect to the norms that render the performance of the contract unlawful.[153] **133**

Court of Justice, Chancery Div., 27.2.1959, *In re Emery's Investment Trust*, 1 Ch. (1959), p. 410. On these cases, see *Chong* JPIL (2006), p. 33 *et seq.*

150 However, a number of differences exist between Art. 9 (3) and the *Ralli* case law: see *Harris*, p. 306 *et seq.*

151 In is worth recalling that, at one stage of the negotiation, Art. 8 (3) of the Commission's Proposal was delated from the European's Parliament draft report: see *Harris*, p. 291.

152 Analogous provisions can be found, for example, in Art. 19 of the Swiss Law on Private International Law of 18 December 1987 and in Art. 3079 of the Civil Code of Québec of 1991.

153 See also *Hellner* JPIL (2009), p. 467.

134 Nonetheless, the conditions provided for in the new text clearly constitute a step backwards with respect to the Rome Convention.[154] First of all, the new conditions are not likely to substantially reduce the uncertainty connected with the effects of foreign overriding mandatory provisions. Certainly, the question will arise in the future only with respect to the rules of *lex loci solutionis* that render illicit the performance of a contractual obligation. To some extent, these restrictions limit legal uncertainty.[155] Nonetheless, several factors remain difficult for the parties to predict: this is the case for a prohibitive legal norm to qualify as an overriding mandatory provision in the legal order to which it belongs and, above all, for the result of the discretionary evaluation that Art. 9 (3) continues to demand of the court. Moreover, the reference to provisions which, "render the performance of the contract unlawful," is not easy to interpret and the determination of the place of performance can give rise to very serious difficulties, as is demonstrated by Art. 5 (1) Brussels I Regulation.

135 If uncertainty is inherent to the treatment of foreign overriding mandatory provisions, a more serious objection is that the rationale of the two conditions included in Art. 9 (3) is unclear, so that the limits that they imply are far from convincing.[156]

136 In particular, the reference to the law of the place of performance is overly restrictive. Giving effect to the overriding mandatory rules of the *lex loci solutionis* can certainly be appropriate, in particular when they render the performance of the contract unlawful. However, if one considers the possible reasons for giving effect to foreign overriding provisions, the *a priori* exclusion of provisions of this kind enacted in other foreign countries is not justified. Thus, if giving effect to a foreign provision is aimed at protecting one of the parties from a "conflict of duties", the law of the country of domicile (or habitual residence, registered office, main place of business) of that party would seem particularly relevant.[157] If the purpose is to promote international harmony and to prevent forum shopping, a court should be allowed to look into the law of the countries, where proceedings were or could have been brought by one of the parties in the case at hand. In order to facilitate the circulation of its own judgment, a court should be able to give effect to the provisions of the country (or countries), where that judgment would probably have to be enforced. Last but not least, if the seized court is prepared to assist foreign countries in pursuing specific policies, or in preventing evasion of the law, it should be allowed to give effect to the provisions of every country which has, in the case at hand, a legitimate interest in imposing compliance with its own rules. This is, in particular, the country, the law of which would have been applicable in the absence of the parties' choice. As illustrated by these examples, it would have been possible to define more broadly the range of the relevant countries, while reducing the uncertainty related to the open formulation of Art. 7 (1) Rome Convention.[158]

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154 Most commentators criticize the new rule. According to a view, however, the new rule "might not bring about such great differences": *Hellner*, JPIL (2009), p. 464.

155 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 46.

156 See *infra*, Art. 9 para. 149 *et seq.*, 154 *et seq.*

157 The compromise text proposed by The Netherlands originally also included a reference to provisions of the law of the parties' habitual residence; however, according to *Hellner*, JPIL (2009), p. 454, this reference was deleted, because this would be relevant only, "in cases of trade embargoes, economic sanctions and the like," and, "such cases were not considered sufficiently relevant to be included in the text."

158 See also the critique of *D'Avout*, p. 2167 *et seq.*

Let us take, for example, the case of a contract concluded between parties domiciled in States A and B in violation of a commercial embargo decreed by State A against State C. In the absence of a choice of law, the applicable law would be that of State A, but the parties have opted for the application of the law of State B. The contractual obligations must be performed in States B and C. These two legal orders consider the contract to be valid but the performance required of one of the parties is prohibited and punishable in State A where the debtor is domiciled. Under such circumstances, it may appear to be justified for the courts in State B to take into consideration the prohibitive norms of State A (domicile of the debtor). This should be possible for a number of reasons which the courts should be able to appreciate (i.e. in order to favour the uniformity of judgments as between States A and B, since the judges of both of the States are potentially competent; to guarantee the enforceability in State A of the judgment rendered in State B; to avoid a situation in which the debtor is confronted with an inextricable "conflict of duties" resulting from the foreign judgment condemning him to performance as opposed to the mandatory rules of his State of domicile; to assist the foreign and "friendly" State A in avoiding the violation of its prohibitive norms). However, such a possibility is excluded by Art. 9 (3) since the prohibitive norms in question are not those of the *locus solutionis*. **137**

In order to reduce the impact of the new conditions, it is submitted that Art. 9 (3) should not be constructed in an overly restrictive way. This is also justified, because this provision does not require courts to give effect to the foreign overriding rules, but only allows them to do so.[159] **138**

In light of the new conditions set by Art. 9 (3), it would be tempting to argue that the purpose of this provision is also different from that of Art. 7 (1) Rome Convention. Thus, a commentator suggests that the "main rationale" of the new rule is, "to prevent parties from having to commit unlawful acts in a foreign state."[160] In a similar sense, the observation was made, by other scholars, that Art. 9 (3) is an expression of the so-called "Machttheorie."[161] In other words, the rule would now (only) aim to protect one of the parties from what we have called "conflicting duties." If this were true, the other possible reasons for giving effect to foreign mandatory provisions, which were relevant under the Rome Convention, would not play a role anymore. **139**

Although convincing at first sight, we consider that such a reading of Art. 9 (3) is not demanded by the wording of that rule, and would be overly restrictive. It should be noted, first, that the limitation to the provisions of the law of the place of performance that renders such performance unlawful, does not necessarily imply that the debtor's interest is the only relevant consideration. In fact, such limitations can also be justified by a different approach, in particular if one assumes that the purpose of Art. 9 (3) is to assist a foreign State in preventing the evasion of its laws. In fact, since prohibiting provisions are particularly important from a country's perspective, it may appear justified, in an attempt to reduce uncertainty, to put the emphasis on those norms. And the reference to the place of performance may be justified because this connecting factor gives legitimacy to a country's assertion of its own overriding interests. This is also confirmed by the English case law on **140**

159 *Renner*, in: Calliess, Art. 9 Rome I, para. 28.

160 *Harris*, p. 328.

161 In this sense, *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 63 *et seq.*

which the recast is based *(Ralli* and others): in those decisions, English courts always stressed that the prohibiting provisions were those of "a friendly foreign country": such a factor, which would be irrelevant if only the debtor's interests were at stake, clearly illustrates that comity was (also) determinant for those decisions. The wording of Art. 9 (3) indirectly corroborates such a broader interpretation. On one hand, that rule does not require the foreign provisions at the place of performance to be effective. Now, if the purpose is the debtor's protection, only foreign rules provided with effective sanctions should be taken into consideration, as the "Machttheorie" postulates. By contrast, comity can also result in the taking into account of foreign rules which the foreign country is not in a position to actually enforce. On the other hand, if only the debtor's interests were relevant, giving effect to the foreign provision would essentially consist of exempting him from the consequences of non-performance; in that case, it would have been sufficient for Art. 9 (3) to refer to the place where the obligation in question is to be performed, and not to the place of a past performance. Finally, one should also consider that the effect of Art. 9 (3), if interpreted narrowly, would probably often overlap with substantive law rules on impossibility or frustration of contract, thus excessively reducing the practical usefulness of that provision.

2. The conditions for giving effect to a foreign mandatory provision

a) A foreign provision

141 As already mentioned, Art. 9 (3) only covers provisions enacted by a foreign country (or by a foreign supranational organization). However, it does not apply to the provisions of the law designated by the ordinary choice-of-law rules to govern the contract, because these provisions are applicable by themselves as a part of the *lex contractus*. Because of the universal scope of the Regulation (Art. 2), Art. 9 (3) also covers provisions belonging to the law of a non-Member State.

b) An overriding mandatory provision

142 As with the preceding paragraphs of Art. 9, Art. 9 (3) also refers to "overriding mandatory provisions". The definition of these provisions provided by Art. 9 (1) is also relevant for the purpose of Art. 9 (3).[162]

143 As discussed above, the qualification of a norm as being an overriding mandatory provision is subject to three conditions: 1) the provision must be mandatory; 2) it must be regarded as crucial by a country for safeguarding its public interests; 3) it must be applicable irrespective of the law otherwise applicable to the contract.[163] Since Art. 9 (3) deals with foreign provisions, these conditions must be satisfied under the foreign law of the State having enacted them.

144 The clearest cases, but probably also those least commonly occurring, are when the overriding reach of the foreign provision is expressly stated under foreign law. Failing an express statement in this sense, the court seized will have to rely on the case law of the foreign

[162] *Freitag*, IPRax (2009), p. 112.

[163] Obviously, when the foreign provision referred to by Art. 9 (3) is part of the law of a non-Member State, the law otherwise applicable to the contract is not the law determined under the Regulation, but that designated by the choice-of-law rules of the foreign State: *Roth*, in: Festschrift Gunther Kühne (2009), p. 866.

country courts. Scholarly opinions can also be relevant to that effect, at least when they are the clear expression of a majority view. In the absence of such elements, a foreign provision should not be regarded as falling under Art. 9 (3).

It is possible that the foreign country ignores the notion of an overriding mandatory provision. Even then, compliance with a domestic rule can be required in cross-border situations for public policy reasons.[164] To determine if this is indeed the case, the court seized has to be satisfied that, under the law of the foreign country, the parties to the contract cannot derogate from the foreign rule in question by including a contractual term and/or by the choice of the law of a different country as applicable to the contract. Significant indications as to the public policy relevance of a specific provision can also be deduced from the foreign country's case law on the enforceability of choice-of-forum and arbitration agreements and, in particular, on the recognition and enforcement of foreign decisions. **145**

If the provision at hand is regarded as an overriding mandatory provision (or a provision belonging to public policy) in the foreign State that has enacted it, this will not be enough for the purposes of Art. 9 (3). In fact, such a characterization does not necessarily fit the definition of an overriding provision under Art. 9 (1). In theory at least, the court seized in a Member State should still verify whether the evaluation made in the foreign country corresponds to the standards set by the Regulation, in particular whether the foreign provision could really be regarded as "crucial" for the protection of a "public interest" within the meaning of the Regulation. The compliance with such criteria should also be examined by the European Court of Justice, if seized with a preliminary question. In practice, however, it seems unlikely, and after all unnecessary, that the seized court examine these aspects.[165] If the foreign provision, because of its content or its purpose, does not reach the threshold required by Art. 9, the court seized can simply reject its application by making use of its discretion under Art. 9 (3). **146**

If a provision is not regarded as mandatory and overriding in the foreign State concerned, the court seized will not be allowed to give effect to it under Art. 9 (3). This is true even if a provision of the same kind would qualify as an overriding mandatory provision under the law of the forum: if the foreign country does not regard its own provisions as crucial, it is not for the forum court to look after that country's interests. **147**

A delicate question arises when the foreign provision, albeit not explicitly qualified as an overriding mandatory rule (or as a rule belonging to public policy) in the foreign country, would nevertheless be applicable in the case at hand before that country's courts on account of the ordinary choice-of-law rules of the foreign law. This circumstance alone should not be sufficient for the purpose of Art. 9 (3). However, the conclusion might be different if a closer examination of the content and purpose of the relevant choice-of-law rules reveals that they are based on public policy considerations. **148**

c) A provision that renders the performance unlawful

Under Art. 9 (3), only those foreign overriding provisions which "render the performance of **149**

164 This is the case for many common law countries. On the position of English law before the entry into force of the Rome Convention, see *Harris*, p. 297 *et seq.*

165 See *Harris*, p. 297.

the contract unlawful" can be given effect. Although the provision refers to norms having an impact on the lawfulness of the contract as such, this also covers norms that prohibit the performance of one or more specific obligations arising out of the contract.[166] It is not relevant whether the performance is unlawful from the beginning or becomes unlawful at a later stage.[167] The moment at which the provision was adopted or entered into force is also irrelevant, provided that the situation falls within its scope.

150 In some instances, the foreign provisions prohibiting the performance of the contractual obligations will also directly affect the validity or the enforceability of the contract as a whole. Thus, the prohibition of exporting specific kinds of goods to a country under the terms of a trade embargo frequently means that the contract is treated as null and void. But this is not necessary for the purposes of Art. 9 (3). A foreign provision can be given effect even if it prohibits (or otherwise renders unlawful) the performance of one or more specific obligations; the possible consequences of this partial unlawfulness on the contract as a whole will then depend on the *lex contractus*.

151 At first glance, the wording of Art. 9 (3) seems to rule out provisions which positively impose a specific behaviour on the parties to the contract, such as the obligation to pay damages in the event of gross negligence or intentional breach of the contract, or the obligation to pay compensation or an indemnity in the event of an anticipated termination of the contract.[168] However, since non-compliance with such duties normally also renders the contract (and its performance) unlawful, it is submitted that these rules also fall within the scope of Art. 9 (3).[169] In such a case, the place of performance will then be either the place where the specific duties in question should have been performed, or the place of performance of the main obligations under the contract.

152 Such a reading of Art. 9 (3)[170] can probably also cover provisions that grant one of the parties the right to a specific remedy, such as the rules of French law giving the subcontractor a direct action against the owner in the event of non-payment by the main contractor.[171] However, it seems that Art. 9 (3) does not cover provisions that simply impose a duty of information on one of the parties, without sanctioning non-compliance with such duty by rendering the contract unlawful and/or unenforceable. It also does not cover the provision conferring on one of the parties the right to terminate the contract.[172]

153 Art. 9 (3) does not require that the foreign overriding provision is effective, i.e. is capable of being applied in the case at hand, nor that it renders the performance of the contract

166 *Nuyts* RDC (2009), p. 562.

167 *Freitag* IPRax (2009), p. 113; *Nuyts* RDC (2009), p. 562.

168 *Contra*: *Nuyts* RDC (200), p. 563.

169 *Nuyts* RDC (2009), p. 562.

170 For a broad reading see also *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 344; *Renner*, in: Calliess, Art. 9 Rome I, para. 28. According to *Hellner* JPIL (2009), p. 461, the original idea was to include all provision "that would otherwise modify" the contract. Based on such broad understanding, he considers that Art. 9 (3) "would not exclude any internationally mandatory rule." See also the opinion of the A-G *Szpunar* in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 87 *et seq.*

171 See *supra* Art. 9 note 57.

172 *Freitag* IPRax (2009), p. 113.

impossible or more difficult. Admittedly, since the only relevant provisions are those at the place of performance, the foreign State will often be able to impose their application in practice. However, this is not a condition, nor the only reason for giving effect to such provisions. Thus, contrary to what has been suggested, Art. 9 (3) cannot be regarded as the expression of the so-called "Machttheorie".[173]

d) A provision of the law of the place of performance

Pursuant to Art. 9 (3), only overriding mandatory provisions of the law of the place of performance can be given effect, at the court's discretion.[174] As mentioned above, this limitation is intended to reduce the uncertainty resulting from the reference made by Art. 7 (1) Rome Convention to the *lois de police* of all countries, with which the situation had a close connection. **154**

Based on the wording of Art. 9 (3), the relevant law is that of, "the country where the obligations arising out of the contract have to be or have been performed". This language closely resembles that in Art. 7 (1) Brussels I*bis* Regulation (former Arts. 5 (1) Brussels I Regulation and Brussels Convention), which also refers, for jurisdictional purposes, to the place where, under the contract, the contractual obligations have been or should have been performed. Therefore, it would be tempting to borrow, for the interpretation of Art. 9 (3), the criteria developed with respect to the Brussels I Regulation. As is well known, the meaning of "place of performance" under those instruments was shaped by an important legislative reform in 2000 and by a significant number of decisions by the European Court of Justice. At first glance, a parallel interpretation of the two regulations seems desirable, both for the purpose of taking advantage of the existing case law and for ensuring a certain degree of uniformity between the two instruments. Moreover, giving effect to the overriding mandatory provisions of the Member State, the courts of which have jurisdiction under the Brussels I Regulation, would promote international harmony of decisions, while at the same time discouraging forum shopping.[175] However, a closer examination makes it clear that this apparently appealing solution should be rejected.[176] **155**

First of all, Art. 7 (1) Brussels I Regulation, as a jurisdictional rule, only refers to a place of performance in a Member State. If the place of performance is in a non-Member State, that jurisdictional ground is not pertinent. By contrast, Art. 9 (3) also refers to foreign overriding **156**

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173 As suggested by some German scholars: see *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 63 *et seq.* On the "Machttheorie", see *Martiny*, in: Münchener Kommentar, para. 39.

174 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 50: "Art. 9 of the Rome I Regulation must therefore be interpreted as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed". See also Cour d'Appel de Paris, 25.2.2015 – 12/23757, and the remarks by *Mankowski* IPRax 2016, 488.

175 The temptation of *forum shopping* is strong if, for example, the judge of the Member State of the defendant's domicile (which is competent pursuant to Art. 2 of Regulation Brussels I) refuses to apply the overriding mandatory provisions of the Member State where the goods are to be delivered or a service provided, knowing that the court of this place – which is also competent by virtue of Art. 7 (1) of Regulation Brussels I – will clearly not hesitate to apply the overriding mandatory provisions of its law.

176 *Freitag* IPRax (2009), p. 113 *et seq.*; *Magnus*, para. 101; *Nuyts* RDC (2009), p. 564; *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 343.

provisions enacted in a non-Member State, provided that the place of performance is located in that State. This is not expressly stated by that provision, but it clearly follows from the *erga omnes* reach of the Regulation's provisions as announced in Art. 2. Thus, there is in any event no guarantee that the overriding provisions referred to by Art. 9 (3) are those of a Member State having jurisdiction under the Brussels I Regulation. This reduces the value of a uniform construction of the notion of place of performance under the two Regulations.

157 Furthermore, Art. 7 (1) and its construction are largely influenced by the jurisdictional objectives of the Brussels I Regulation, in particular by the purpose of ensuring access to justice while preventing, at the same time, an excessive multiplication of the available fora. These concerns are absent in the case of Art. 9 (3). As mentioned above, this provision is in itself narrower than Art. 7 (1) Rome Convention and probably even too narrow. Therefore, there is no ground for a restrictive reading of the notion "place of performance", since this would further limit the range of the potentially relevant foreign overriding provisions.[177]

158 This is the case with respect to the selection of the relevant obligation. It is well known that Art. 7 (1) Brussels I Regulation refers, for certain contracts, to the place of performance of the obligation in dispute, whereas, for other contracts (sale of goods and provision of services), it targets the place of performance of the characteristic obligation (respectively, the delivery of goods and the provision of services). While such distinction is already questionable with respect to jurisdiction, it lacks any objective foundation in relation to overriding provisions. Thus, there is no serious reason for excluding from the scope of Art. 9 (3) a provision that prohibits, in a given country, the payment of the price or the performance of another contractual obligation, even if it is not the characteristic obligation of the contract.[178] Although the national law of a Member State cannot give determinant guidance for the interpretation of a European law rule, it is instructive that the *Ralli Brothers* decision, from which the language of Art. 9 (3) is taken, in fact concerned the obligation to pay the price in a charter party.[179] Indeed, giving effect to such norms may be considered appropriate for several reasons, such as preventing conflicting duties, assisting the foreign State in avoiding evasion of the law, or facilitating the recognition and execution of the judgment in that State.

159 Similar reasoning also applies with respect to the determination of the place of performance, another very delicate issue. Under the Brussels Convention, the European Court of Justice used to refer to the law applicable to the contract.[180] This approach is still valid under Art. 7 (1)(a) Brussels I Regulation, while concerning Art. 7 (1)(b) the Court has developed other criteria, based on that rule's jurisdictional objectives. Once again, since the jurisdictional concerns underlying the Brussels I Regulation are not relevant for the purpose of the Rome I Regulation, the case law concerning Art. 7 (1)(b) should not be automatically referred to for the interpretation of Art. 9 (3).

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177 See also the opinion of the A-G *Szpunar* in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 91 *et seq*.

178 *Martiny*, in: Münchener Kommentar, para. 116; *Plender/Wilderspin*, para. 12–027: according to these commentators, Art. 9 (3) "is also not limited to the obligation which forms the subject of the dispute."

179 In that case, the place of payment was also the place of delivery of the merchandise but it is clear that such a coincidence will not always be present.

180 *Industrie Tessili Italiana Como v. Dunlop AG*, (case 12/76 (1976)), ECR 1976, p. 1473.

How is then the place of performance to be determined for the purpose of Art. 9 (3)? In our opinion, this question should not necessarily always be answered in the same way. In fact, it seems that, depending on the reasons for giving effect to a foreign overriding provision, the criteria to be used for determining the place of performance could be different. **160**

Thus, although the language of Art. 9 (3) clearly refers first to the place where the obligation was actually performed, this criterion does not seem to be pertinent in the all too common situation (which according to one opinion, also corresponds to the main rationale of Art. 9 (3)), where the foreign mandatory provision is relied upon by the debtor in order to be exempted from liability. In such circumstances, the obligation has not yet been performed, hence the relevant place is that where the obligation is to be performed. **161**

To determine this place, the paramount criteria should be the parties' agreement.[181] Failing such agreement, it is necessary to look into the law applicable to the contract.[182] The place designated by the parties or by the default rules of the *lex contractus* is the one where the debtor has to perform its obligation: therefore, prohibiting rules in force at that place are certainly relevant from his perspective. Furthermore, the reference to the agreed place of performance or to the place pointed to by the rules of the *lex contractus* has the merit of respecting the parties' expectations. It also allows the parties to "pre-determine", by an agreement on the place of performance or, at least, on the applicable law, the range of the potentially applicable overriding provisions, thereby reducing the uncertainty created by Art. 9 (3).[183] **162**

However, when the purpose for giving effect to the foreign provision is not (only) to protect the debtor, but rather to assist a foreign country in preventing evasion of the law of the foreign country (i.e. comity), the place of actual performance can also be relevant, as spelled out by Art. 9 (3).[184] In fact, even if the unlawful act of performance has already taken place, the forum court might be willing to give effect to the foreign rules in order to assist the foreign country in restoring legality (by declaring, for instance, that the contract is null and void). The actual place of performance is then relevant, even if it does not correspond to the parties' agreement or to the default rules of the *lex contractus*. If the obligation has not yet been performed, the parties' agreement will normally be relevant, unless the place of performance was chosen with the purpose of avoiding the foreign overriding provisions. **163**

It has been held that the place of performance should be determined by simply referring to what is provided for by the foreign overriding mandatory provision itself.[185] This suggestion is not convincing. On one hand, the applicability of the foreign provision does not necessarily depend on the location of the place of performance. On the other hand, even if it is the **164**

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181 *Harris*, p. 315.

182 *Contra*: *Nuyts* RDC (2009), p. 563.

183 *Martiny*, in: Münchener Kommentar, para. 116.

184 *Freitag* IPRax (2009), p. 114. *Contra*: *Plender/Wilderspin*, para. 12–028, who refer to *Dicey*, *Morris* and *Collins*, The Conflict of Laws, 14th ed. (2007), p. 1595, state that "[i]t is not enough that […] the act is unlawful by the law of the country in which it happens to be done […] It must be 'unlawful by the law of the country in which the act has to be done,' i.e. by the law of the country in which, according to its express or implied terms, the contract is to be performed."

185 *Nuyts* RDC (2009), p. 563.

case, the reference to the notion of the foreign law would amount to applying the foreign law provision whenever it claims application and thus deprive the condition set by Art. 9 (3) of its meaning.[186] Of course, a reference to the law of the forum would also be improper.[187]

165 A particular problem arises when a contractual obligation is to be performed in several different countries. Here again, the reference to the solutions adopted under the Brussels I Regulation would be displaced. While it is normally excessive to allocate jurisdiction to the courts of all of these countries, there is no compelling reason to rule out the overriding provisions that, in one or more of these countries, render the performance unlawful.[188] Of course, the effect of such provisions would probably be limited, at least initially, to the obligations to be performed in the country concerned, while their impact on the contract as a whole can only be assessed by the *lex contractus*.[189]

166 A similar approach should also be followed, at least in some cases, when the place of performance is situated in one country, but single acts relevant for the performance must be effected in another country: for instance, the place of manufacturing or that of shipping of the goods can be relevant if these acts are prohibited by an overriding provision of the local law, even if the place of delivery is situated in a different country.[190] In certain instances, the place of final destination of the goods could also be relevant, even when, strictly speaking, it is not the place of delivery.[191]

167 Because of the disparities between Art. 9 (3) and Art. 7 (1) Brussels I Regulation identified above, it is possible that the court seized under the latter jurisdictional rule gives effect to the overriding mandatory provisions of a foreign country (a Member State or a non-Member State) where the contractual obligations (or some of them) are to be or have been performed. Similarly, a court having jurisdiction on a different ground (e.g. the courts at the defendant's domicile, under Art. 4 Brussels I Regulation) might give effect to the provisions of the law of another Member State, even if the courts of that State would not have jurisdiction under Art. 7 (1) Brussels I Regulation.

3. The court's discretion

168 When the above-mentioned conditions are satisfied, the seized court may give effect to a foreign overriding mandatory provision. As already provided for in Art. 7 (1) Rome Convention, Art. 9 (3) only confers to the court a discretional power, but does not impose a duty to do so.

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186 See also *Martiny*, in: Münchener Kommentar, para. 116.

187 *Harris*, p. 315.

188 *Freitag* IPRax (2009), p. 114; *Martiny*, in: Münchener Kommentar, para. 116.

189 *Freitag* IPRax (2009), p. 114; *Harris*, p. 316.

190 For a similar reading, see *Pfeiffer* EuZW (2008), p. 628; *Harris*, p. 316 *et seq.*; *Hellner* JPIL (2009), p. 466 (these scholars seem to consider that it should be possible to give effect to import and export restrictions, even if the place of performance in a strictly legal term is not situated in the country having enacted those rules).

191 This was the case in the well-known English cases *Foster v. Driscoll* and *Regazzoni v. Sethia* (see *supra*, note 143), as pointed out by *Harris*, p. 319. See also the decision by the German Bundesgerichtshof of 22.6. 1972, 59 BGHZ 82, in the case of the Nigerian masks,.

According to a frequently voiced opinion, the principle of sincere cooperation enshrined in Art. 4 (3) TEU might even include a duty of the EU Member States to assist each other in pursuing shared policies.[192] However, this probably goes too far. Such a cooperation duty only exists when it is stated in a specific provision[193] or when the rules enacted by another Member State reflect a policy of the European Union.[194] Nevertheless, it is true that, in the relations among the Member States, the uniformity of decisions and mutual trust are of such outstanding importance that the application of the overriding mandatory provisions enacted by another Member State should be regarded as the normal solution.[195] **169**

a) Reasons for giving effect to a foreign overriding provision

As mentioned before, a court may have several reasons for giving effect to a foreign overriding mandatory provision. Some of these reasons reflect party interests (e.g. avoiding a "conflict of duties", promoting international harmony of decisions or facilitating the recognition and enforcement of the decision), others State interests (e.g. assisting a foreign State in pursuing its policy in a certain area, or in avoiding evasion of the law). Since Art. 9 (3) does not give any indication in this regard, courts can freely exercise their discretion, provided that the other conditions set by that provision are satisfied. **170**

Admittedly, this creates the risk of diverging decisions in the EU Member States. Thus, the national courts of different Member States may be more or less inclined to giving effect to foreign overriding provisions. In order to promote uniformity, some scholars call for clarifications by the ECJ.[196] However, this wish sounds unrealistic. Under its present wording, Art. 9 (3) does not contain any indication on how and for what purposes a court's discretion should be exercised. Any attempt by the European Court of Justice to limit or to orient that discretion would lack a sound legal basis. **171**

b) Factors to be taken into account

When taking its discretional decision, the court must consider the nature and purpose of the foreign provision as well as the consequences of its application or non-application. This language has been adopted from Art. 7 (1) Rome Convention. These conditions are quite vague and do not imply any significant restriction of a court's discretion. Nevertheless, they show that the court decision should be motivated by and based on a detailed assessment of all the circumstances of the case. **172**

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192 On this question see *Fetsch*, Eingriffsnormen und EG-Vertrag (Tübingen 2002). In *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 54, the ECJ answered in the negative the different question of whether Art. 4 (3) TEU might authorise a Member State's court to give effect to overriding provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed. On this question, see also *Mankowski* IPRax (2016), 488.

193 *Martiny*, in: Münchener Kommentar, para. 32.

194 In particular, when the national provision implements an EU directive. In this case, it has even be suggested that the rules of a foreign Member State should be dealt with as if they were overriding provisions of the *lex fori*: *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 339.

195 *Bonomi* YPIL (1999), p. 246; *Renner*, in: Calliess, Art. 9 Rome I, para. 29; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 73. See also the opinion of the A-G *Szpunar* in the case *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15), para. 88.

196 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 70.

173 The reference to the nature of the foreign provision is very broad, and far from clear. Obviously, the court will have to take into account the content of the provision at hand. However, as discussed above, Art. 9 (3) only covers the norms that render the performance of the contract unlawful. In this respect, the court has no discretion. The court can also consider whether the foreign provision belongs to private or public law where such a distinction exists in the foreign legal system concerned, and look at the kind of sanctions provided for non-compliance (criminal or administrative law sanctions certainly hold more weight than simple private law sanctions).

174 Much clearer is the reference to the purpose of the rule, in other words to its underlying policy. This aspect is also relevant, under Art. 9 (1), for a rule to qualify as an overriding mandatory provision: as mentioned above, it will only be appropriate for the provision to qualify as such if it is regarded as crucial by a State for safeguarding its public interests. It is obvious that the goal of the rule is also extremely important for the decision on whether to give effect to such a rule or not under Art. 9 (3).

175 The same is true for the consequences of the rule's application or non-application. These include the consequences for the parties to the contract, but also for third parties as well as for the States concerned (the foreign State having enacted the rule, but also the forum State and the State whose law is otherwise applicable to the contract).

176 The respective roles of these factors depend on the circumstances of the case and on the reasons why the seized court is willing to give effect to a specific foreign provision. Thus, the purpose of the provision is particularly important when the reason for giving effect to it is to assist the foreign State in pursuing its policies. This objective becomes relevant only when the policy that underlies the foreign provision is somehow shared by the forum. Such a shared policy obviously exists when compliance with the foreign rule also directly furthers forum interests (or the interests of the European Union or those of the international community): e.g. a norm prohibiting arms or drug trafficking, or the abusive export of cultural goods. In this case, the argument for giving effect to the foreign provision is particularly strong. However, a shared goal may also be said to exist when the foreign provision, although not directly impacting on the forum interests, reflects policy choices that find their equivalent in the legal system of the forum (including European law): accordingly, although a State is not directly interested in ensuring compliance with foreign antitrust rules aimed at protecting free competition on a foreign market, local courts might consider it appropriate to assist the foreign State in imposing observance of those rules if they correspond to the anti-trust rules of the *lex fori*.

177 The purpose of the foreign provisions is less important when the main reason for giving effect to them is not cooperation with the foreign State, but the protection of a party's interests. Thus, in order to shelter a party from a conflict of duties, a court might be willing to give effect to foreign provisions based on an underlying policy even where no equivalent policy exists in the forum (subject to *ordre public*, of course). In other words, the consequences of ignoring the foreign rules hold more weight than the policy underlying them.

178 The consequences of a foreign norm's application or non-application also play a key role when the court's primary concern is to further international harmony of decisions. This objective is particularly important within the boundaries of the European Union, where the

choice-of-law rules are unified and the court decisions can freely circulate among the Member States. In this framework, to prevent forum shopping, it may be appropriate to give effect to the overriding mandatory provisions enacted by a foreign Member State, in which the court would also have had jurisdiction to hear the case. The nature and purpose of the foreign provisions only plays a secondary role in this respect.

c) Limits to the court's discretion

In any event, the effects of the foreign provision should not contradict the public policy of the forum. Courts will normally give due consideration to this while making use of their discretion under Art. 9 (3), so that it should not be necessary to resort to the public policy clause of Art. 21. As is generally the case, public policy also includes the fundamental principles of European law as well as crucial European policies. The overriding mandatory provisions of the law of the forum and those of European law must also be complied with. **179**

4. Giving effect to a foreign overriding provision

When the conditions set by Art. 9 (3) are fulfilled, effect can be given to a foreign overriding mandatory provision, provided that the court decides, in its own discretion, to do so. The expression "to give effect" was already used in Art. 7 (1) Rome Convention. It was preferred to "apply", because it covers both the "direct application" of the provision at hand and its "indirect application" under the law applicable to the contract.[197] According to widely held opinion, the court can choose between these two options. **180**

If the court decides to apply a foreign provision, two different laws will concurrently apply to the contract. The foreign law to which the overriding mandatory provision belongs will only control the specific issue regulated by that provision ("Sonderanküpfung"); for all other aspects, the contract will be governed by the *lex contractus*. In particular, the law applicable to the contract will determine the consequences of the unlawfulness of a contractual obligation on the contract as a whole.[198] This amounts to splitting the contract ("depéçage"), similar to what happens with respect to overriding mandatory provision of the *lex fori*. If the two laws are irreconcilable, the foreign mandatory provision will prevail as a *lex specialis*. **181**

By contrast, the court can also decide to give effect to the foreign provision as a simple fact, while applying the law applicable to the contract.[199] In this case, subject to other specific provisions of the Regulation, the contract is entirely governed by one single law, determined by virtue of the ordinary choice-of-law rules. When applying the rules of the *lex contractus*, the court can however take into account the overriding mandatory provision enacted by the third State in order to give effect to them ("indirect application", "materiellrechtliche Berücksichtigung" in German). In this case, the foreign rules, and their inobservance, are regarded only as a matter of fact, the legal consequences of which are determined by the *lex contractus*. **182**

The indirect application of the rules of a law other than the *lex contractus* is also provided **183**

[197] The admissibility of an indirect application of foreign *lois de police* was undisputed under the Rome Convention. See Report *Giuliano/Lagarde*, p. 26; *Freitag* IPRax (2009), p. 114 *et seq.*

[198] *Harris*, p. 312; *Hellner* JPIL (2009), p. 463.

[199] *Freitag* IPRax (2009), p. 115; Magnus, para. 121; *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 81.

under Art. 10 (2) of the Regulation, pursuant to which, "regard shall be had," to the law of the place of performance, "in relation to the manner of performance and the steps to be taken in the event of defective performance." A similar rule is also included in Art. 17 Rome II Regulation, according to which "account shall be taken, as a matter of fact […] of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability," to the purpose of "assessing the conduct of the person claimed to be liable."

184 As is the case under the Rome II Regulation, foreign overriding mandatory provisions can be given indirect effect in order to establish or exclude the parties' liability under the contract, or to determine the degree of liability (e.g. simple or gross negligence). Moreover, they can be relevant for assessing the validity of the contract under the *lex contractus*. They can also help to determine the parties' intent, which can be relevant with respect to the formation and the construction of the contract.

5. The impact of Art. 9 (3) on alternative ways for indirectly applying foreign overriding provisions

185 As with Art. 7 (1) Rome Convention, Art. 9 (3) is the expression of a private international law approach to the question of the relevance of foreign overriding mandatory provisions. As such, it precludes the application of national private international law rules having the same nature and scope.[200] This is probably also true for those countries where foreign overriding mandatory provisions were given effect via the notion of public policy.[201] Given the existence of a specific rule in Art. 9 (3), it seems reasonable to consider that the public policy clause of the Regulation (Art. 21) cannot be applied for the same purpose.

186 However, in some countries, the courts have adopted another approach to addressing the issue of foreign mandatory provisions based on the application of the substantive law rules of the *lex contractus*. According to this alternative methodology, the existence of a foreign mandatory provision, or the non-compliance with such a provision, are taken into account as simple facts, producing specific effects under the rules of the law applicable to the contract (so-called "Datumtheorie").[202]

- Thus, the existence under a foreign law of a rule prohibiting specific conduct, which the debtor would have to engage in in order to perform a contractual obligation, is regarded, under a number of national contract law doctrines such as impossibility, frustration or

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200 As stated by the ECJ in the decision *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 49, "the list, in Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive." Thus, it is obvious that the Belgian and Dutch courts are not allowed, in contractual disputes, to give effect to foreign mandatory provisions based, respectively, on Art. 20 (3) of the Belgian PIL Code or on Art. 7 (3) of Book 10 of the Dutch Civil Code.

201 Thus, French courts have occasionally held that international public policy was opposed to the enforcement of a contract aimed at violating the law of a foreign State: *Tribunal civil de la Seine*, 4.1.1956, *Spitzer v. Amunategui*, RCDIP (1956), p. 679, note *Batiffol* (voidness of a contract concluded in violation of the Spanish foreign exchange regulation); Cour d'appel Paris, 9.2.1966, RCDIP (1966), p. 264 (voidness of a sale of war weapons to be smuggled).

202 The *Datumtheorie* goes back to *Ehrenzweig*, Local and Moral Data in the Conflict of Laws, Buffalo Law Rev. (1966), p. 55 *et seq.* See also *Jayme*, Ausländische Rechtsregeln und Tatbestand inländischer Sachnormen, in: Gedächtnisschrift für Albert Ehrenzweig (1976), p. 35 *et seq.*

hardship, as a reason for the exemption from liability in the event of breach or as a legitimate ground for terminating or adapting the contract.[203] A key condition for such an outcome is, generally, that the foreign prohibition is effective, i.e. that the legal sanctions it provides for also have a concrete chance of being enforced.[204] Moreover, some genuine connection must exist between the situation and the country that has enacted the prohibition.[205]

– German courts have gone even further, finding that a contract concluded in breach of a foreign overriding mandatory provision is to be regarded, at least in certain circumstances, as a contract offensive to morals ("sittenwidrig"), and, as such, null and void.[206]

After the entry into force of the Rome I Regulation, the question arises as to whether the Member States' courts are still allowed to follow this approach and, thus, to give effect to a foreign mandatory provision, despite the lack of one of the conditions now set by Art. 9 (3). Some commentators had taken a negative stance, arguing that the purpose of Art. 9 (3) is to cover, exhaustively, the effects of foreign overriding provisions.[207] However, in the *Nikiforidis* case, the ECJ rejected this overly strict interpretation holding that Art. 9 (3) "does not preclude overriding provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract."[208] This ruling should be approved for several reasons: **187**

First, the scope Rome I Regulation is clearly limited to the determination of the law applicable to the contract. It is a private international law instrument; as such, it does not purport to impact on the substantive rules of contract law in force in the Member States.[209] If the substantive law rules of the law applicable under the Regulation lead to indirect effect being given to a foreign law provision, they should be applied, as is the case with all other substantive law rules belonging to the governing law. In this respect, one should also not lose **188**

203 Thus, German courts have occasionally held that the enactment of a foreign prohibition after the conclusion of the contract could be regarded as an impediment for the performance of the contractual obligations (§ 275 BGB), or as an event frustrating the purpose of the contract ("Wegfall der Geschäftsgrundlage", now § 313 BGB): see the decision by the Bundesgerichtshof of 30.11.1972, 60 BGHZ 14, 11.3. 1982, 83 BGHZ 197, and 8.2.1984, IPRax (1986), p. 154.

204 This approach is also an expression of the "Machttheorie" (see *supra*, Art. 9 para. 123).

205 This sounds similar to Art. 9 (3). However, in general, the required connection is deemed to be present not only when the prohibiting norm is in force at the place of performance of the contractual obligation, but also in other circumstances, e.g. when that norm belongs to the law at the debtor's domicile.

206 See the decisions by the Bundesgerichtshof of 21.12.1960, Borax, 34 BGHZ 169, 24.5.1962, *Borsäure*, NJW (1962), p. 1436, and 22.6.1972, "Nigerian masks", NJW (1972), p. 1572.

207 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO para. 81. See also *Harris*, p. 302 and 333. According to *Freitag* IPRax (2009), p. 115, only recourse to § 138 BGB is now excluded in Germany, whereas concepts like impossibility and frustration can still be used. For a similar solution: *Magnus*, para. 124.

208 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 51. This ruling confirms the opinion of several commentators, such as *Mankowski* IPRax (2016), 491; *Martiny*, in: Münchener Kommentar, para. 117; *Roth*, in: Festschrift für Gunther Kühne (2009), p. 875; *Renner*, in: Calliess, Art. 9 Rome I, para. 32; *Hellner* JPIL (2009), p. 469 *et seq.*

209 *Republik Griechenland v. Grigorios Nikiforidis* (C-135/15) (2016), para. 52.

sight of the fact that the law applicable to the contract under the Regulation can be that of a non-Member State: it cannot be seriously argued that the contract law rules of a non-Member State should be discarded, when (and because) they lead to the foreign mandatory provision of a third country being given effect to. If this is true for the law of a non-Member State, it should also apply, *a fortiori*, to the law of a Member State.

189 Second, it could not be argued that the purpose of Art. 9 (3) (or its "effet utile") would be undermined by the concurrent use of substantive law rules. Certainly, the purpose of that provision is to limit the uncertainty connected with the broad wording of Art. 7 (1) Rome Convention. However, the doctrine of indirect applicability was mainly used in those States which made the reservation against that provision. Therefore, it would be surprising that the "recast" of Art. 7 (1) would impact on the case law of those States that never applied that provision.

190 Last but not least, the reference to substantive law rules should still be allowed for practical reasons, i.e. in order to avoid the harsh consequences of the overly narrow conditions set by Art. 9 (3). This argument is particularly strong when a foreign mandatory provision not covered by Art. 9 (3) (for instance, because it does not belong to the law of the place of performance) makes the performance (subjectively) impossible, or creates hardship for one of the parties.

191 Since the use of the "Datumtheorie" is still possible after the entry into force of Art. 9 (3), a very delicate question arises in those countries where foreign overriding provisions were taken into account by way of specific rules or doctrines whose characterization as belonging to substantive law or to private international law is disputed. Thus, in a number of well-known decisions, English courts have held that certain foreign mandatory rules should be given effect as a matter of public policy. However, given that, in most of those cases, the disputed contract was governed by English law, "public policy" was not used (as in Art. 21 of the Regulation) as a device for rejecting foreign law, but rather as a substantive rule of English law requiring the application of a foreign provision. This is quite similar to the use that German courts have made of the notion of "Sittenwidrigkeit" within the meaning of § 138 BGB.[210] If this is true, it could be argued that this line of authorities survives the entry into force of the Regulation and can be relied upon as an alternative avenue for giving effect to foreign mandatory provisions.[211]

VII. The Impact of Overriding Mandatory Provisions on Conflicts of Jurisdiction

192 As is the case with all rules included in the Rome I Regulation, Art. 9 only deals with issues of

[210] However, the exact meaning of these authorities is very controversial: see *Harris*, p. 299 *et seq.* For a different understanding, see *Plender/Wilderspin*, para. 12–024, who consider that English public policy could also have been used if the law applicable to the contract had been a foreign law. See also *Royal Boskalis Westminster v. Mountain*, [1997] EWCA Civ. 1140.

[211] *Contra*: *Harris*, p. 302 and 333. This author considers that, "it would seem more than a little unfortunate for the United Kingdom adamantly to insist upon a very narrow provision such as Art. 9 (3) […] only then to reintroduce its pre-Convention authorities from a bygone era." We understand this position, but it should not be forgotten that the question does not only concern English case law, but also the case law of other Member States, who would have preferred a much broader provision than Art. 9 (3).

applicable law. It does not provide any indication as to the effect of overriding mandatory provisions on judicial jurisdiction nor on the recognition and enforcement of foreign decisions. In Europe, these issues are regulated by the Brussels I Regulation and by the Lugano Convention as well as, to a certain extent, by the national rules in force in the individual Member States.

1. Overriding mandatory rules and jurisdiction

a) General remarks

There is an obvious link between overriding mandatory provisions and judicial jurisdiction. **193**
Pursuant to Art. 9 (2), the overriding provisions of the *lex fori* take precedence over the ordinary choice-of-law rules of the Regulation. However, the application of the overriding provisions enacted by a Member State is not guaranteed when proceedings are initiated before a foreign country. When the court seized is that of another Member State, these provisions could be given effect under the conditions of Art. 9 (3); however, because of the discretionary nature of that paragraph, there is no guarantee that they will be. The situation is even more uncertain when the court seized is that of a non-Member State, since then the overriding provisions of a Member State will be given effect to only if this is mandated or permitted by the conflict rules in force in the country of the proceedings.[212] In such a framework, one cannot exclude the possibility that the parties may try to escape undesired overriding provisions of a given law by initiating proceedings in a foreign State or, even more effectively, by conferring exclusive jurisdiction on a court (or the courts) of such a State.

It follows that in order to ensure the effective enforcement of its overriding mandatory **194**
provisions, a State should confer jurisdiction on its courts. Failing an express legislative basis for jurisdiction, the question arises as to whether jurisdiction can be impliedly inferred from the enactment of an overriding mandatory provision. This is obviously not possible when uniform jurisdictional rules are applicable, as is the case under the Brussels I Regulation and the Lugano Convention. Insofar as the reach of a State courts' jurisdiction is still governed by national law,[213] the answer depends on the features of each single country's law.[214] In many systems, however, jurisdictional rules must be expressly stated, and cannot be simply inferred from substantive law rules.

b) Overriding mandatory provisions and choice-of-court agreements

A delicate and much debated question concerns the impact of overriding mandatory provi- **195**
sions on the enforceability of a choice-of-court agreement. The question can arise before the courts of the State that has enacted an overriding mandatory provision, when the parties have conferred jurisdiction on the court (or the courts) of a foreign State. Should the court seized decline jurisdiction (with the risk that the overriding provision will not be enforced) or should they consider that the choice-of-court agreement is unenforceable? By contrast, if the foreign selected court is seized, the parties' agreement will normally be regarded as valid.[215]

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212 Or, in the case of an "indirect" application, by the substantive rules of the *lex contractus*.

213 In particular, when the defendant is domiciled in a non-Member State (Art. 6 Brussels I Regulation).

214 See *Bureau/Muir Watt* RCDIP (2009), p. 11.

215 Unless the selected court decides to give effect to the foreign overriding mandatory provision, including its jurisdictional effects, and declines jurisdiction. However, this seems very unlikely in practice.

196 In some instances, specific jurisdictional rules exclude the validity or enforceability of such an agreement. This is the case in the area covered by exclusive or mandatory jurisdictional rules. Thus, for disputes relating to tenancies of immovable property, Art. 24 Brussels I Regulation confers exclusive jurisdiction on the courts of the Member State where the property is situated, thereby excluding choice-of-court agreements. Similarly, in the field of insurance, consumer and employment contracts, the protective provisions of Arts. 15, 19 and 23 Brussels I Regulation rule out choice-of-court agreements entered into before the dispute arises, unless they are more favourable to the weaker party. Indirectly, these provisions ensure the application of overriding mandatory provisions that might be in force in the country, the courts of which have jurisdiction.

197 According to prevailing opinion, the existence of overriding mandatory provisions cannot have any impact on the validity of a choice-of-court agreement under Art. 25 Brussels I Regulation.[216] As is well known, this provision sets a number of substantive and formal conditions for the validity of a choice-of-court agreement, but it does not refer to overriding mandatory provisions. Since the latest recast, Art. 25 (1) refers, for the substantive validity of the agreement, to the law of the State, the courts of which were selected by the parties. By contrast, no reference is made to the law of the State, the courts of which have been derogated from by the party agreement.[217] Therefore, the fact that the law of the country, whose jurisdiction is excluded, contains an overriding mandatory provision, does not affect the validity of the forum selection.

198 This conclusion is not problematic. Since Art. 25 Brussels I Regulation only governs agreements conferring jurisdiction to the court (or the courts) of a Member State, the risk of avoidance of an overriding provision is quite limited. On one hand, when the provision belongs to EU law, it will also have to be applied by the selected court. On the other, the selected court will be able to give effect to the overriding provisions of another Member State under Art. 9 (3); as mentioned above, recourse to this rule should be regarded, in such circumstances, as the normal solution.[218]

199 Much more delicate is the question of the impact of overriding mandatory provisions on the validity of choice-of-court agreements conferring jurisdiction to the courts of a non-Member State. In this case, the risk of avoidance is much higher. Before the entry into force of the 2005 Hague Choice-of-Court Convention, such agreements were governed only by the national rules of each Member State, and national courts had given different, contradictory answers to the question. Thus, the French *Cour de cassation* decided that the fact that a provision of French law is overriding does not mean that it impacts on the validity of an exclusive choice-of-court agreement conferring exclusive jurisdiction to the courts of a foreign country.[219] The opposite conclusion was arrived at by the German courts. According

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216 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 33; *Mankowski*, in: Rauscher (2011), Art. 23 Brüssel I-VO, para. 10; *Lüttringhaus* IPRax (2014), p. 151.

217 Moreover, since any question of validity of the choice-of-court agreement is now to be decided, in the first instance, by the selected court(s) under Art. 31 (2), the excluded courts will frequently even lack the opportunity to check the validity of the agreement against their overriding provisions: *Lüttringhaus*, IPRax (2014), p. 151.

218 See *supra*, Art. 9 para. 169.

219 Cour de cassation, 22.10.2008, RCDIP (2009), p. 69, with a commentary by *Bureau*/*Muir Watt*, p. 1 *et seq.*;

to the German case law, a choice-of-court agreement should be considered as unenforceable, when, under the circumstances of the case, it appears that the selected court will not apply a German overriding mandatory provision such that their decision will not be capable of being recognised in Germany.[220] A similar approach was also followed in some English cases.[221] The 2015 Hague Choice-of-Court Convention does not provide a clear-cut answer. In fact, it states in Art. 6(c) that that the court seized in violation of an exclusive choice-of-court agreement shall suspend or dismiss proceedings unless giving effect to the agreement 'would be manifestly contrary to the public policy' of the forum. However, while in certain Contracting States the breach of an overriding mandatory provision might be regarded as a manifest public policy violation, the same might not be true in other States.

Overriding mandatory provisions cannot have an automatic impact on the enforceability of choice-of-court agreements.[222] As the German and English position tends to confirm, such an effect is only justified when a detailed analysis of the circumstances of the case makes clear that, in the event of non-compliance with a country's overriding provisions, the decision to be rendered by the foreign selected court will not be capable of recognition in that country. Failing this, to strike down *a priori* the choice-of-court agreement would be overkill. Therefore, a sort of "recognition prognosis" should be effected, similar to that which is required in the case of international *lis pendens*.[223] **200**

This is a possible answer to the question. However, one should also consider that the "recognition prognosis" is particularly delicate when an overriding mandatory provision is at stake. As a matter of fact, it is possible that the decision to be rendered by the foreign selected court will be capable of recognition in the State having enacted the overriding provision. This is for several reasons: **201**

– It should be considered, first, that the parties' choice of a foreign court does not neces-

Clunet (2009), p. 599, with a note by *Jobard-Bachellier/Train*; Dalloz (2009), p. 200, with a note by *Jault-Seseke*. An overview on the debate in France is given by *Bureau/Muir Watt* RCDIP (2009), p. 15 *et seq.*

220 In their more recent decisions, German courts were confronted with cases in which choice-of-court agreements in favour of US courts would probably lead to the non-compliance with the rules of the Commercial Agents Directive, which qualify as overriding mandatory provisions according to the *Ingmar* case law (on the *Ingmar* decision, see *supra*, Art. 9 para. 41): Bundesgerichtshof, 5.9.2012, IHR (2013), p. 35; Oberlandesgericht Munich, 17.5.2006, IPRax (2007), p. 294. See also the previous decisions of the Bundesgerichtshof of 30.1.1961, NJW (1961), p. 1061; 21.12.1970, NJW (1971), p. 325; 30.5.1983, NJW (1983), p. 2772; 12.3.1984, NJW (1984), p. 2037; 15.6.1987, NJW (1987), p. 3193. Among the scholars, see *Rühl* IPRax (2007), p. 294 *et seq.*; *Antomo* IHR (2013), p. 225 *et seq.*; *Lüttringhaus* IPRax (2014), p. 151.

221 In the case *The Hollandia*, [1982] 3 All E.R. 1141, the English House of Lords held that an agreement conferring jurisdiction on the court of a State which was not party to the Hague-Visby Rules was valid, unless it was established that the chosen forum would apply a rule limiting the carrier's liability to a lower sum than that provided by those rules. In the case *Accentuate Ltd v. Asigra Inc* of 30.10.2009, [2009] EWCH 2655, the High Court of Justice held that an arbitration agreement aimed at avoiding the application of the Commercial Agents Directive was unenforceable. See also the American decisions in the Lloyd's case: *Muir Watt*, L'affaire Lloyd's: globalisation des marches et contentieux contractuel, RCDIP (2002), p. 509 *et seq.*

222 See also *Radicati di Brozolo* RCDIP (2003), p. 6 *et seq.*; *Antomo* IHR (2013), p. 232.

223 See Art. 33 (1) (a) Brussels I Regulation.

sarily lead to non-compliance with the overriding mandatory provision in force in the country, whose courts' jurisdiction has been derogated from. In fact, it cannot be *a priori* excluded that the selected court, based on its own conflict rules, will apply (or give effect to) that provision as part of the law applicable to the contract, or as foreign overriding provision under a rule similar to Art. 9 (3) or another equivalent mechanism (such as public policy or "indirect" application).[224]

- It is also possible that the foreign court, without giving effect to the overriding provision at stake, arrives at a similar substantive result by applying the rules of the *lex contractus*.[225]
- Certainly, in some instances, it may be evident from the outset that the selected foreign court will not give effect to the overriding provision in question. Even then, it cannot always be discounted that the foreign decision will not be capable of recognition and enforcement in the forum. As a matter of fact, even from the perspective of the enacting State, non-compliance with an overriding mandatory provision does not always amount to a violation of public policy.[226] Accordingly, if a country's public policy is not disturbed, there seems to be no compelling reason for that country's courts not to honour the parties' agreement conferring jurisdiction on a foreign court.

202 It is evident that a prognosis based on these factors is extremely burdensome and time-consuming for a court. Moreover, it is necessarily tainted with a great amount of uncertainty. That being so, one could wonder whether the solution adopted by the French courts is not the best one, at least for practical reasons. This implies that a choice-of-court agreement should, at least in principle, be honoured despite the existence of an overriding mandatory provision, thus giving a chance to the foreign court to give effect to that provision or, at least, to get to a similar result. If, at the end of the day, the foreign decision proves to be irreconcilable with the overriding provision, it will always be possible for the State concerned to deny it recognition and enforcement *a posteriori*.[227]

203 A similar reasoning has often led national courts to recognize the enforceability of arbitration agreements, notwithstanding the fact that the dispute in question involved the public policy or the *lois de police* of one or more States.[228] In such circumstances, national courts often reserved the right to have a "second look" on the arbitral award, to be sure that the local overriding policies were not disregarded by the arbitrators.[229] Certainly, the solution adopted in the field of arbitration cannot automatically be transposed to litigation before state

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224 See *supra* Art. 9 paras. 186 *et seq.*

225 This reasoning was followed by the American courts in the *Lloyd's* case: *Bureau/Muir Watt* RCDIP (2009), p. 12.

226 See *infra*, Art. 9 para. 210.

227 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 33.

228 This sort of reasoning led the US Supreme Court, in the landmark *Mitsubishi* case, to accept the arbitrability of disputes involving the violation of US anti-trust statutes: 473 US 614 (1985). In Switzerland, it is also uncontroversial that a dispute is capable of being settled by arbitration even if it involves public policy issues: DTF 118 II 353 (1992), *Fincantieri*. In the same vein, see the recent decision of the French Cour de cassation of 8.7.2010, *Doga* RCDIP (2010), p. 743, with a note by *Bureau/Muir-Watt*.

229 This approach was initiated by an often cited passage of the US Supreme Court in the *Mitsubishi* case: 473 US 614 (1985), footnote 19. The European Court of Justice also held that the non-compliance by arbitrators with the EU anti-trust legislation implies a public policy violation, which the Member States' courts must sanction if they are seized with an action to set aside the award: *Eco Swiss China Time Ltd v.*

courts.[230] With respect to the question at hand, however, some consistency between the solutions retained in these two areas of law is desirable, because both arbitration and choice-of-court agreements can be used by the parties as alternative means for avoiding a country's overriding provisions.

Some authors seem to consider that this solution is unsatisfactory, because, on one hand, not all foreign decisions need to be recognised and enforced in the State that has enacted an overriding provision[231] and, on the other, the non-compliance with such a provision is not always sanctioned by a denial of recognition. This would lead to "inactivating" overriding provisions.[232] However, one should consider that if the decision does not need to be recognised and enforced in the forum State, a party could in any event escape from that State's overriding provision by simply seizing a court abroad. Under such circumstances, the claim of a country to impose compliance with its own overriding provision seems in any event rather unrealistic. On the other hand, the fact that a State is not prepared to deny recognition to a foreign decision seems to indicate that its interest in the enforcement of its own policies is, after all, not so crucial. *A fortiori*, this should not lead to striking down a freely negotiated choice-of-forum agreement. **204**

Admittedly, our approach can cause some inconvenience to the parties who rely on the application of an overriding provision. That party will first be subject to the jurisdiction of the selected court and will have access to the courts of the State having enacted the overriding provision only once (and if) the selected court's decision is denied recognition. However, it is not certain that the parties' interest would be better protected by the opposite solution. One should consider that, even if the choice of court agreement is denied enforcement in the State having enacted the overriding provision, it will normally be regarded as valid in the country of the selected court. This will frequently lead to parallel proceedings and, in the end, to a denial of recognition of the decision rendered in the country of the overriding provision.[233] That being so, respecting the choice-of-court agreement is probably the most promising way to achieve harmonious solutions, in particular if the foreign court can be convinced of the opportunity to take into account the overriding mandatory provision.[234] **205**

Should the answer be different when the overriding provision is not purely national, but is based on EU law? It has been suggested that the EU law principle of effectiveness ("effet utile") would require the Member States' courts to strike down a choice-of-forum agreement **206**

Benetton International NV, (case C-126/97) (1999), ECR 1999-I, p. 3055. The same should apply at the stage of recognition and enforcement of the award.

230 *Bureau/Muir Watt* RCDIP (2009), p. 14 *et seq.*; *Rühl* IPRax (2007), p. 300 *et seq.*

231 *Thorn*, in: Rauscher (2011), Art. 9 Rom I-VO, para. 33.

232 *Bureau/Muir Watt* RCDIP 108 (2009), 1, 18, 22.

233 Thus, in the most recent cases decided by the German courts (see *supra*, note 210), the commercial agent was recognised as having the right to seize German courts notwithstanding the choice of a court in the US. Therefore, he was able to obtain a decision based on the provisions implementing the Commercial Agents Directive. However, that decision will probably have very little chance to be recognised and enforced in the US, at the domicile of the principal, because the forum selection agreement is probably regarded as perfectly valid there.

234 *Contra*: *Bureau/Muir Watt* RCDIP 108 (2009), 1, 13.

whenever it can lead to non-compliance with an overriding mandatory provision of EU law.[235] However, this approach seems overly strict. In the field of arbitration, the European Court of Justice held that, if an arbitral award fails to comply with overriding mandatory provisions of EU law (in particular, antitrust rules), a Member States' court seized with annulment proceedings should set aside the award as being contrary to the European public policy.[236] By doing so, the Court impliedly recognised that the dispute was capable of being decided by arbitration and that the validity of the arbitration agreement was not in question. *Mutatis mutandis*, we consider that, notwithstanding the existence of a EU law overriding provision, the principle of effectiveness does not necessarily require that the choice of forum in a third country is struck down, provided that non-compliance with that provision is then sanctioned at the stage of recognition and enforcement.

2. Overriding mandatory provisions and the recognition and enforcement of foreign decisions

207 Can non-compliance with a country's overriding mandatory provisions be sanctioned in that country by a denial of the recognition and enforcement of a foreign decision? The answer to this question depends on the circumstances.

208 It should be noted, first, that in the EU Member States recognition and enforcement of decisions in contractual disputes is governed by different sources. The Brussels I Regulation and the Lugano Convention are applicable when the decision was rendered, respectively, in another Member State or in an EFTA State party to the Lugano Convention. Decisions rendered in "third" States are still governed by the national recognition rules of the single Member States, subject to other specific, mostly bilateral, treaties. Notwithstanding this plurality of sources, some common points can be identified.

209 It is worth mentioning, first, that the overriding mandatory provisions cannot prevail as such over a foreign decision. The almost universal prohibition of a "révision au fond"[237] makes it impossible for the courts of the requested State to reform a foreign decision by imposing the direct application of the local provisions. Of course, if recognition is denied, it will normally be possible to initiate fresh proceedings in that State, in which the courts will be able to apply the overriding provisions of the *lex fori*.

210 In certain cases, recognition and enforcement can be denied on the ground that the foreign court lacked jurisdiction (so-called "indirect" jurisdiction). This is for instance the case when the jurisdiction of the courts in the requested State was exclusive.[238] The same also applies when the jurisdiction of the foreign court was based on a choice-of-court agreement which is considered as unenforceable in the requested State.[239] In this respect, the solution

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235 *Rühl* IPRax 2007, 298 *et seq.*

236 *Eco Swiss China Time Ltd v. Benetton International NV*, (case C-126/97), (1999), ECR 1999-I, p. 3055.

237 See Art. 52 Brussels I*bis* Regulation.

238 See Art. 45 (1) (e) Brussels I*bis* Regulation.

239 Of course, if the choice-of-court agreement is considered as enforceable, it will not be possible to invoke a lack of indirect jurisdiction to deny recognition and enforcement: *Bureau/Muir Watt* RCDIP (2009), p. 19.

given to the question of the enforceability of choice-of-court agreements[240] is also relevant for the purpose of recognition and enforcement.

When a lack of jurisdiction cannot be invoked, a denial of recognition and enforcement can be based on a violation of the public policy of the requested State.[241] In many countries, the notion of public policy not only includes fundamental rights and moral values, but also covers the essential policies of the countries. Thus, overriding interests relating to a country's social, economic or political organization are often regarded as a part of that country's public policy. **211**

It should be noted, however, that, in international situations, the notion of public policy is conceived in more and more narrow terms: "international" public policy is not equivalent to "domestic" public policy.[242] This is particularly true in the relationship among the EU Member States. Thus, it is clear under the Brussels I Regulation that the limits of the concept of public policy are fixed by EU law and can be reviewed by the European Court of Justice.[243] Therefore, it may happen that the interests promoted by certain overriding provisions are not covered by the restrictive notion of public policy.[244] Furthermore, it is widely admitted that the role of public policy is particularly limited when it comes to recognition and enforcement of foreign decisions, as opposed to the application of foreign law. As is well known, a decision can only be regarded as contrary to public policy when it leads to a result that cannot be tolerated in the requested State. Therefore, the simple fact that an overriding mandatory provision of that State was not applied (nor given effect to), does not justify, in itself, a denial of recognition. Even if the foreign court did not apply the overriding provision, it may well be that it arrived at a result which is equivalent, or at least compatible with, the fundamental interests of the requested country.[245] For all of these reasons, it is possible that non-compliance with overriding mandatory provisions is not sanctioned. **212**

Article 10: Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

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240 See *supra*, Art. 9 paras. 195 *et seq.*

241 *Bureau/Muir Watt* RCDIP 98 (2009), p. 18 *et seq.*

242 This phenomenon is even more accentuated in the field of arbitration, where there is a strong trend, at least in certain jurisdictions, to reserve the use of public policy to the violation of only universally accepted principles and values ("transnational public policy"), with the exclusion of those specific States' interests which are normally furthered by overriding mandatory provisions. See for instance BGE 132 III 389: non-compliance with a country's antitrust laws never amounts to a public policy violation. However, this very liberal trend should not automatically be extended to state courts' litigation.

243 See *supra*, Art. 9 paras. 59 and 98.

244 See *Rémy*, Exception d'ordre public et mécanisme des lois de police en droit international privé (2008), on the distinction between the public policy values and the objectives of the *lois de police*.

245 Once again, this trend is particularly strong in the field of arbitration. Thus, the French Cour de cassation held that the non-compliance with antitrust rules only amounts to a public policy violation when it is "blatant, effective and concrete", i.e. when it is self-evident ("ça crève les yeux"): see Cass. RCDIP 95 (2006), 104 with note *Bollée*; Cass. Rev. arb. 2008, with note *Loquin*.